MANITOBA DIGEST

1875—1911

OF

CASES REPORTED IN VOLUMES

TEMP. WOOD

AND

I—XXI MANITOBA REPORTS

TOGETHER WITH

A SELECTION OF MANITOBA CASES FROM THE REPORTS OF THE SUPREME AND EXCHEQUER COURTS OF CANADA AND OTHER CANADIAN LEGAL PUBLICATIONS

ALSO

TABLE OF CASES AFFIRMED, REVERSED, FOLLOWED, OVERRULED OR SPECIALLY CONSIDERED.

Compiled by Order of the Law Society of Manitoba

BY

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WINNIPEG:

STOVEL CO. LIMITED.

1913.

CHIEF JUSTICES AND JUDGES

OF THE

Court of King's Bench for Manitoba.

CHIEF JUSTICES.

THE HON. ALEXANDER MORRIS—Appointed July 2nd, 1872; appointed Lieutenant Governor of Manitoba December 1st, 1872.

THE HON. EDMUND BURKE WOOD—Appointed March 11th, 1874; died October 7th, 1882.

THE HON. LEWIS WALLBRIDGE—Appointed December 12th, 1882; died October 20th, 1887.

THE HON. SIR THOMAS WARDLAW TAYLOR—Appointed October 22nd, 1887; resigned March 31st, 1899.

THE HON. ALBERT CLEMENTS KILLAM—Appointed April 15th, 1899; appointed a Judge of the Supreme Court of Canada, August 8th, 1903.

THE HON. JOSEPH DUBUC—Appointed August 8th, 1903; resigned November 15th, 1909.

THE HON. THOMAS GRAHAM MATHERS—Appointed February 7th, 1910.

JUDGES.

THE HON. JAMES MCKEAGNEY—Appointed October 7th, 1872; died September 14th, 1879.

THE HON. LOUIS BETOURNEY—Appointed October 31st, 1872; died October 30th, 1879.

THE HON. JOSEPH DUBUC—Appointed November 13th, 1879; appointed Chief Justice, August 8th, 1903.

THE HON. JAMES ANDREWS MILLER—Appointed October 20th, 1880; resigned December 31st, 1882.

THE HON. SIR THOMAS WARDLAW TAYLOR—Appointed January 5th, 1883; appointed Chief Justice October 22nd, 1887.

THE HON. ROBERT SMITH—Appointed June 27th, 1884; died January 19th, 1885.

THE HON. ALBERT CLEMENTS KILLAM—Appointed February 3rd, 1885; appointed Chief Justice April 15th, 1899.

THE HON. JOHN FARQUHAR BAIN—Appointed November 15th, 1887; died May 12th, 1905.

THE HON. ALBERT ELSWOOD RICHARDS—Appointed May 1st, 1899; appointed to the Court of Appeal, July 23rd, 1906.

THE HON. WILLIAM EGERTON PERDUE—Appointed August 25th, 1903; appointed to the Court of Appeal July 23rd, 1906.

THE HON. THOMAS GRAHAM MATHERS—Appointed August 24th, 1905; appointed Chief Justice of the King's Bench, February 7th, 1910.

THE HON. DANIEL ALEXANDER MACDONALD—Appointed July 23rd, 1906.

THE HON. JOHN DONALD CAMERON—Appointed January 21st, 1908; appointed to the Court of Appeal April 27th, 1909.

THE HON. THOMAS LLEWELLYN METCALFE—Appointed May 22nd, 1909.

THE HON. JAMES EMILE PIERRE PRENDERGAST—Appointed February 7th, 1910.

THE HON. HUGH AMOS ROBSON—Appointed June 23rd, 1910; resigned May, 1912.

THE HON. ALEXANDER GALT—Appointed October 24th, 1912.

THE HON. JOHN PHILPOT CURRAN—Appointed October 24th, 1912.

JUDGES

OF THE

Court of Appeal.

THE HON. HECTOR MANSFIELD HOWELL, C.J.M.—Appointed July 23rd, 1906.

THE HON. ALBERT ELSWOOD RICHARDS, J.A.—Appointed July 23rd, 1906.

THE HON. WILLIAM EGERTON PERDUE, J.A.—Appointed July 23rd, 1906.

THE HON. FRANK HEDLEY PHIPPEN, J.A.—Appointed July 23rd, 1906; resigned April 15th, 1909.

THE HON. JOHN DONALD CAMERON, J.A.—Appointed April 27th, 1909.

THE HON. ALEXANDER HAGGART, J.A.—Appointed April 3rd, 1912.

Addenda.

COL.	
348.	After Drunkenness read *See* Intoxication.
585.	After Intoxication read *See* Drunkenness.
	Attachment of Debts *See* Garnishment.

Errata.

COL.							
199.	For	9	M.R.	27	read	19	M.R. 27.
160.	For	3	M.R.	358	read	1	M.R. 358.
580.	For	3	M.R.	371	read	1	M.R. 371.
753.	For	21	M.R.	416	read	12	M.R. 416.
895.	For	12	M.R.	53	read	12	M.R. 653.
899.	For	3	M.R.	368	read	1	M.R. 368.
963.	For	15	M.R.	573	read	14	M.R. 573.
974.	For	3	M.R.	350	read	1	M.R. 350.
1002.	For	4	M.R.	42	read	11	M.R. 42.

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DIGEST

OF

MANITOBA CASE LAW.

1875—1911.

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ACCIDENT INSURANCE.

1. Death by freezing—*Accident policy—Life insurance—Obvious or unnecessary danger—Appeal, notice of, must state ground relied on—Amendment.*

The defendants entered into a contract with the plaintiffs to pay $1000 within 90 days after sufficient proof that the assured, one of their members, "shall have sustained bodily injuries effected through external, violent and accidental means, and that such injuries alone shall have caused death within 90 days from the happening thereof;" and the policy contained these further provisoes: "that the insurance shall not extend to death or disability caused by an injury of which there shall be no external and visible signs * * * * nor to any case except when some injury effected as aforesaid is the proximate and sole cause of the disability or death; and no claim shall be made under this policy when death or disablement may have been caused in consequence of exposure to any obvious or unnecessary danger."

The assured was frozen to death on the prairie near Fort Macleod, to which place he was returning from one of his trips in company with the driver. While still about eight miles out the waggon broke down. The weather had turned suddenly very cold and stormy, and the assured, being too cold and numb to walk and unable to ride, it was agreed that he should remain where he was while the driver rode to Macleod for assistance, but he died before the driver returned. The assured was sufficiently warmly clothed for the weather as it was when he set out, but not for the storm which he encountered.

Held, that he met his death as the result of an injury effected through external, violent and accidental means within the meaning of the policy, and that it could not be said that he had exposed himself to any obvious or unnecessary danger; and that the plaintiffs were entitled to recover. *Sinclair* v. *Maritime Passenger Assurance Company*, 7 Jur. N. S. 367, distinguished.

The præcipe to set down an appeal to the Full Court should contain the grounds of appeal intended to be relied on; and an amendment to enable a party to set up a technical and unmeritorious defence will be refused. *N. W. Commercial Travellers' Association* v. *London Guarantee and Accident Co.*, 10 M. R. 537.

2. Intoxication—*Proviso against liability if insured came to his death while under the influence of intoxicating liquor—Onus of Proof—Condition that notice of death must be given within ten days thereafter—Tender before action, whether an admission of liability—Waiver—Impossibility of performance.*

When last seen alive, in November, 1908, the insured was under the influence of intoxicating liquor, and the probabilities were that he met his death by drowning on the same day, as nothing was seen or heard of him until his body was found in the river near-by in the following spring, greatly decomposed, but without any marks of violence.

The policy sued on contained a provision upon which the defendants relied, namely, that if the insured met his death while under the influence of intoxicating liquor the claimant should only be entitled to one tenth of the amount of the policy, and the defendants made a tender of the one tenth before action.

Held, that the burden of proof was upon the defendants, and that, as there was no evidence to show exactly when the death took place, this defence failed.

Couadeau v. *American Accident Co.*, (1894) 25 S. W. Rep. 6, followed.

The policy also contained a condition that notice of the death should be given by or on behalf of the insured within ten days thereafter.

Held, that a notice within ten days after discovery of the body was sufficient. (Cameron, J.A. dissenting.)

Baily v. *De Crespigny*, (1869) L.R. 4 Q.B., at p. 185; and *Trippe* v. *Provident*

Fund Society, (1893) 140 N.Y. App. 23, followed.

Cassel v. *Lancashire &c. Ins. Co.*, (1885) 1 T.L.R. 495, distinguished.

Held, also *per* PERDUE and CAMERON, JJ.A., that the tender of the one tenth made and pleaded by the defendants was a waiver of the defence of want of notice.

Haines v. *Canadian Railway Accident Insurance Co.*, 20 M. R. 69.

Affirmed, 44 S. C. R. 386.

ACCOMMODATION NOTE.

See PARTNERSHIP, 1.

ACCOMPLICE.

See PRINCIPAL AND AGENT, V, 2.

ACCORD AND SATISFACTION.

1. By return of goods purchased—*Promise to buy back if purchaser's circumstances should change.*

The presumption of an accord and satisfaction arising out of the return of an article by the purchaser stating his inability to pay for it and the acceptance of the article by the vendor and his keeping it for nearly four years, and trying to sell it without reference to the purchaser, will not be displaced by evidence showing, in effect, merely that the purchaser, at the time of returning the article, had stated or promised that if, in the future, his circumstances should become such as to warrant it, he would buy the article back if still in the vendor's possession. Such promise or statement should be regarded as, at most, a voluntary statement of intention and not as a condition on which the article was taken back. *Boyce* v. *Soames*, 16 M. R. 109.

2. By second contract—*Striking out jury notice—Second contract a satisfaction for damages under the first.*

Upon an application by the plaintiff to strike out a jury notice,

Held, 1. Inquiry will be made into the facts to ascertain whether the case is one which ought to be submitted to a jury.

2. If the defendant has no defence he is not entitled to a jury.

3. Plaintiffs sold goods to defendant, to be shipped upon a particular day. They were not shipped until afterwards. The defendant then wrote to the plaintiffs refusing to accept the goods unless upon extended terms of credit, to which the plaintiffs assented, and the defendant then accepted the goods. *Held*, that the defendant had waived any right to damages under the first contract, the second being a satisfaction of the breach, and there being therefore no defence the jury notice should be struck out. *Coristine* v. *Menzies*, 2 M. R. 84.

3. By subsequent agreement—*Promissory note—Evidence of presentment.*

1. The defendant purchased from the plaintiff a binder, giving notes in payment. After the first note became due defendant wrote to the plaintiff saying that he was not able to pay for the machine, and offering to pay for its use. He again wrote to the plaintiff, instructing him to sell the machine to the best possible advantage, to draw a note for the balance, and to send this new note with the old ones to C., at the town where defendant resided. Plaintiff sold the binder, and wrote to defendant, asking him to instruct a solicitor, at the place where plaintiff's agent (who had been acting in the matter) was, to settle the matter. The defendant did nothing further.

Held, In an action upon the original notes, that a plea upon equitable grounds setting up the subsequent agreement was not proved.

2. A promissory note contained the following, "Should I sell or dispose of my real estate or personal property, this note becomes due and payable forthwith." The maker mortgaged his farm for $1,000 (its value did not appear), and went to Ontario to live, leaving instructions for the sale of his horses. Besides the horses and a crop which he had sold, he possessed only a waggon, a plough and a set of harrows. It did not appear whether he had made any arrangements to continue the cultivation of the farm.

Held,—That there had been a disposition of his property within the terms of the note.

3. A promise to pay a note, made after it is due, is *prima facie* evidence of presentment. *Deering* v. *Hayden*, 3 M. R. 219.

See CONTRACT, IX, 1.
— SALE OF GOODS, VI, 3.

ACCOUNT STATED.

Account stated of money due but not payable.

A document which acknowledges a sum to be due at its date, but not payable until a future day, is evidence of an account stated. *Armitage* v. *Vivian*, 2 M. R. 360.

ACCOUNTING FOR PROCEEDS OF SALES.

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— CRIMINAL LAW, XII, 3.

ADMINISTRATION.

1. Accounts in the Master's office—*Apportionment of losses between tenant for life and remainder-men—Occupation rent—Interest, how much to be allowed the tenant for life.*

Upon reference to the Master to ascertain the amount to which a widow was entitled for income out of the trust estate which had been devised to her for her life, some of the investments having been unproductive and realised at a loss,

Held, that under such circumstance the principle adopted in *In re Earl of Chesterfield's Trusts*, 24 Ch. D. 643, does not apply, but the true principle of apportionment is that laid down in *Cox* v. *Cox*, L. R. 8 Eq. 343, viz., that neither the tenant for life nor the remainder-man is to suffer more loss in proportion to his estate and interest than the other suffers, and in accordance with this rule a calculation should be made of what principal invested at, the date from which interest was to run, at six per cent. per annum, would amount with interest to the sum actually realised, and then the difference between this principal and the amount realised should go to the tenant for life, and the rest to the remainder-men. The tenant for life cannot be compensated for the loss of income, unless there is a fund out of which such compensation can be given: *Moore* v. *Johnson*, 33 W. R. 447.

The interest realised on one of the securities exceeded six per cent., but on others it was less.

Held, that the Master was right in refusing to allow the widow more than six per cent. on all the securities; also that the tenant for life may be entitled to or allowed by way of income money which never actually came into the hands of the executors as profits or interest, when the securities of the estate are realised at a loss.

Held, also, that it was proper that the Master should not charge the tenant for life with occupation rent, although she had lived upon the lands of the estate for a number of years, because, on the taking of the accounts before him, no such charge was sought to be established by evidence, and it appeared that, during a large portion of the time of her residence on the land, her second husband was the real occupant and tenant. *Miller* v. *Dahl*, 10 M. R 97.

2. Creditor preferred—*Executor preferring creditor.*

An executor or administrator is entitle to prefer one creditor at the expense of another. He may even confess judgment to a creditor in equal degree with another suing him pending the action and plead it in bar, and that although done for the express purpose of depriving the plaintiff of his debt.

Con. Stat. c. 37, s. 96, as to preferential assignments does not apply to executors or administrators.

An assignment of all the assets of an estate for the benefit of some creditors cannot be attacked by the others. *McArthur* v. *Macdonnell*, 3 M. R. 9.

3. Discretion of Court—*Q. B. Act*, 1895, *Rule* 766

On an application by a legatee for an order under Rule 766 of the Queen's Bench Act, 1895, for administration of a testator's estate, the Court has a discretion to grant or refuse the order although more than a year has passed since the death of the testator; and, when the executors are doing their best to realize the assets and are in no default, the application should be refused. *Re O'Connor, O'Connor* v. *Fahey*, 12 M. R. 325.

4. Lord Campbell's Act—*Action for damages against resident of Province for death happening out of the jurisdiction—Necessity for administration granted by authorities of place where cause of action arose—Amendment.*

Action by plaintiff as administrator of his deceased wife to recover damages for her being burnt to death in a fire which occurred on a steamer owned and operated by the defendant company while such steamer was at Warren's Landing in the North West Territories of Canada.

The statement of defence admitted the truth of the allegation in the statement of claim that the plaintiff was the administrator of the estate and effects of his deceased wife, but such administration had only been granted in and for the Province of Manitoba, and the defendants applied for and obtained leave to amend their defence by setting up that the plaintiff had not been appointed such administrator

by or under the authority of the North West Territories of Canada wherein the plaintiff's alleged cause of action had arisen and that the plaintiff had no status or right to bring the action and the alleged cause of action was not and never had been vested in him. *Couture* v. *Dominion Fish Company*, 18 M. R. 468.

5. Priority of judgment—*Irregularities—Collateral proceeding—Priority of judgments.*

In a suit to enforce payment of a decree, that decree cannot be attacked upon any ground of irregularity not affecting the jurisdiction of the court.

In the administration of assets, a judgment obtained against the deceased is entitled to priority over simple contract and specialty creditors.

And it is not essential to the judgment that it should have been docketed.

An assignment, therefore, made by an administrator of certain assets for the benefit of certain specialty and simple contract creditors was set aside at the instance of a judgment creditor. *Frontenac Loan Co.* v. *Morice*, 3 M. R. 462.

See next case.

6. Priority of judgment—*Assignment for benefit of creditors set aside, but reference to Master as to creditors' liens.*

A decree in a mortgage suit contained no order for payment of money but directed writs of *fieri facias* to issue for the amount due.

Held, That the mortgagee was not a judgment creditor and therefore not entitled to any priority in the administration of the assets of the mortgagee. An administrator executed an assignment of certain assets for the payment of certain scheduled creditors. Upon the evidence the assignment was set aside as between the assignor and assignee, but there was a reference to the master to ascertain whether any of the creditors were entitled to any lien or charge upon the fund assigned. *Frontenac Loan Company* v. *Morice*, 4 M. R. 442.

7. Voluntary payments—*Corroboration of evidence of claimant against estate of deceased—Voluntary payments by husband for wife—Liability of husband for wife's funeral expenses.*

1. Although there is no rule of law that requires the evidence of a claimant upon the estate of a deceased person to be corroborated, yet it is a rule of prudence for the protection of the estate from unfounded claims; and, when the Master, in taking the accounts of the husband as administrator of the estate of his deceased wife, disallowed the husband's claim to certain lands that stood in her name for want of corroboration, his finding should not be disturbed.

Finch v. *Finch*, (1883) 23 Ch. D. 271, and *In re Hodgson*, (1885) 31 Ch. D. at p. 183, followed.

2. Payments for taxes, registration fees and other expenses connected with the wife's lands made in her lifetime by the husband of his own accord, and without the knowledge of the wife, were properly disallowed.

3. A husband cannot recover from his wife's estate money disbursed for the expenses of her funeral unless she has charged them by will upon her estate, or unless there is some statute making such expenses a charge upon her separate estate.

In re Sea, (1905) 1 W. L. R. 460, followed.

In re McMyn, (1886) 33 Ch. D. 575, not followed.

Re Montgomery, Lambers v. Montgomery, 20 M. R. 444.

See CONTRACT, VI, 1.
— COVENANTS, 8.
— DEVOLUTION OF ESTATES, 1, 2.
— HUSBAND AND WIFE, IV, 3.
— LIMITATION OF ACTIONS, 3.
— LORD CAMPBELL'S ACT, 1, 2.
— WILL.

ADMINISTRATOR PENDENTE LITE

1. Jurisdiction to appoint—*Surrogate Courts Act, R.S.M. 1902, c. 41, ss. 18, 39—King's Bench Act, s. 23, and Rules 27, 449—Referee in Chambers, jurisdiction of.*

When a suit is pending in the Court of King's Bench to set aside a will, that court has exclusive power, under section 23 of the King's Bench Act and sections 18 and 39 of the Surrogate Courts Act, R.S.M. 1902, c. 41, to appoint an administrator *pendente lite*, and such power may, under Rule 449 of the King's Bench Act, be exercised by a Judge in Chambers.

Notwithstanding the generality of the language used in Rule 27 of the King's Bench Act, the Referee in Chambers has no jurisdiction to make such an appointment. *Tellier* v. *Schilemans*, 16 M. R. 430.

2. When appointed.

To entitle a suitor to have an administrator *pendente lite* of an estate appointed, a case of necessity must be made out.

Horrell v. *Witts*, (1866) L. R. 1 P. & D. 103, followed.

If such case of necessity is shown as to a portion of the estate only, an appointment, limited to such portion, should be made. *Tellier* v. *Schilemans*, 17 M. R. 303.

ADMISSIONS.

See ACCIDENT INSURANCE, 2.
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ADOPTION OF WORK.

See MUNICIPALITY, II, 2.

AFFIDAVIT.

Statutory declaration—*Caveat*—*Real Property Act.*

A caveat under The Real Property Act was supported by a document beginning: "I," so and so, "make oath and say," and ending: "And I make this solemn declaration, conscientiously believing the same to be true and in pursuance of the Act respecting Extra-Judicial Oaths."

Held, that this document was neither an affidavit nor a statutory declaration. *Schultz* v. *Archibald*, 8 M. R. 284.

See APPEAL FROM ORDER, 4.
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— SECURITY FOR COSTS, VIII, 2.
— SHERIFF, 6.
— SOLICITOR'S LIEN FOR COSTS, 4.
— SUMMARY JUDGMENT, III, 2.
— TRESPASS AND TROVER, 1.
— WILL, III, 2

AFFIDAVIT OF JUSTIFICATION.

See ELECTION PETITION, II.

AFTER ACQUIRED PROPERTY.

See EQUITABLE ASSIGNMENT, 1.

AGENCY.

See NEGLIGENCE, IV, 1.

AGENCY TERMS.

See SOLICITOR AND CLIENT, II, 1.

AGREEMENT FOR LIEN ON LAND.

See CONTRACT, XII, 2.
— COVENANTS.

AGREEMENT FOR SALE OF LAND.

1. Specific performance—*Statute of Frauds*—*Authority to agent to sign offer.*

The defendant verbally expressed her willingness to sell the land in question,

which was her property, to the plaintiff for $300, but referred him to her husband who was not then living with her. The plaintiff then obtained from the husband a document signed by him giving the plaintiff an option, to hold good for one week, to purchase the land at that price. The plaintiff alleged that within the week he handed to the defendant a letter addressed to her husband containing an absolute acceptance of the offer. This letter was not produced at the trial. Plaintiff had kept no copy of it, but undertook to give the contents of it in his evidence. The offer did not contain a sufficient description of the property. The defendant and her husband both swore that the defendant had not given her husband any authority to sign the offer.

Held, that specific performance of the agreement should not be decreed. *Heath* v. *Sanford*, 17 M. R. 101.

2. Taking possession—*Contract—Statute of Frauds—Part performance—Mandamus—King's Bench Act, Rule* 879.

1. A written offer to sell land on certain terms, accompanied by an intimation that, if the purchaser takes possession, the vendor would treat that act as an acceptance of the offer, and the subsequent taking of such possession, without further communication with the vendor, together constitute a binding contract of purchase and sale of the land, which is taken out of the Statute of Frauds by that act of taking possession, such act being in itself a part performance of the contract, as well as an essential in the making of it. *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, followed.

2. If there had been no contract between the parties respecting the land taken by the defendants for their right of way, the plaintiff would have been entitled to the alternative relief claimed by way of *mandamus* to compel the defendants to proceed to have the compensation determined under the provisions of the Railway Act.

3. Relief by way of *mandamus* may now, under Rule 879 of the King's Bench Act, be obtained by an action.

Morgan v. *Metropolitan Railway Co.*, (1868) L.R. 4 C.P. 97, followed. *Carr* v. *C. N. R. Co.*, 17 M. R. 178.

See CONTRACT, II, 2; IX, 5.
— COVENANTS, 3.
— MORTGAGOR AND MORTGAGEE, IV, 1.
See REAL PROPERTY LIMITATION ACT.
— STATUTE OF FRAUDS, I.
— VENDOR AND PURCHASER, I, II. 6; III, 2; IV, 11.
— WILL, III, 6.

AGREEMENT RESPECTING COSTS.

See SOLICITOR AND CLIENT, I, 2, 3, 4.

AGREEMENT TO PAY CREDITORS.

See PARTIES TO ACTION, 7.

AGREEMENT TO STIFLE PROSECUTION.

See BONDS.

AGREEMENT UNDER SEAL.

See SALE OF GOODS, VI, 3.

ALIEN LABOUR ACT.

R.S.C. 1906, *c.* 97, *s.* 4—*Action brought with written consent of judge for violation of Act—Only the person who gets the consent can sue.*

Under section 4 of the Alien Labour Act, R.S.C. 1906, c. 97, it is only the party or parties who obtain the written consent of a Judge of the Court that can be plaintiff or plaintiffs in an action to recover the prescribed penalty for violation of the Act.

The action in this case was accordingly dismissed with costs because it was brought by Ira S. Murray, whereas the consent was given on the application of Murray Brothers. *Murray* v. *Henderson*, 19 M. R. 649.

ALIMONY.

1. Cruelty—*Legal cruelty—Condonation—Receipt by husband of income of wife's separate property—Action for arrears of annuity—Real Property Limitation Act,*

R.S.M. 1902, *c.* 100, *ss.* 18, 24—*Charge on land by agreement substituted for former agreement.*

Plaintiff and defendant married in 1887. In 1892 an action for alimony brought by plaintiff was settled by the resumption of cohabitation and by defendant agreeing to pay her $3 per week during her life in addition to maintaining her according to his station in life. The parties lived together until April, 1908, and during all that period seemed on the whole to have got along fairly well together. The defendant's conduct towards the plaintiff was, according to the findings of fact, often morose and unkind and he sometimes swore at her and he displayed none of that sympathetic consideration for his wife which a husband ought to show, but the only act of violence charged since the settlement of 1892 was one which had taken place in 1904 and had been provoked by the plaintiff who was quick-tempered and irritable and often made no attempt to control either her language or her actions.

Held, that the plaintiff had not made out a case of legal cruelty, as defined by the decided cases, entitling her to live apart from her husband.

Russell v. *Russell*, [1897] A.C. 395, followed.

Lovell v. *Lovell*, (1906) 13 O.L.R. 569, distinguished.

When a husband receives the income of his wife's separate estate and disburses it for the purposes of their joint establishment, he cannot be called on for an account, unless the wife can prove that he received it by way of loan.

Rice v. *Rice*, (1898) 31 O.R. 59, and *Edward* v. *Cheyne*, (1888) 13 A. C. 385, followed.

The agreement of 1892 made the payments of $3 per week a charge on the defendant's lands. In 1900, in order to permit him to raise a loan on the land so charged, the plaintiff gave him a quit claim deed on the understanding that another agreement of similar tenor would at once be executed and registered after the mortgage. This was done, but nothing had ever been paid under either of these agreements.

Held, that, in the absence of a plea based on section 24 of The Real Property Limitation Act, R.S.M. 1902, c. 100, the defendant was liable for the arrears of the annuity from the date of the first agreement with interest, however, for the last six years only, the whole being a charge on the lands referred to. *Willey* v. *Willey* 18 M. R. 298.

2. Desertion—*Offer to receive wife back—Bona fides.*

The defendant in an action for alimony offered to "receive the plaintiff as his wife at any time when she is prepared to come and reside with him and accept the home he is able to provide for her and conduct herself as a wife reasonably should;" but the trial Judge, being satisfied upon the evidence that desertion had been proved and that the defendant's offer was not honestly made but solely for the purpose of avoiding a judgment for alimony,

Held, following *Rae* v. *Rae*, (1899) 31 O.R. 321, that such offer, under the circumstances, was not sufficient to defeat the plaintiff's claim. *E*— v. *E*—, 15 M. R. 352.

3. Interim alimony—*King's Bench Act, Rules* 433, 601—*Practice.*

1. Under Rule 433 of the King's Bench Act, an application for interim alimony may be made as soon as the defence is filed or the time for filing one to the original statement of claim has elapsed.

2. Unless the statement of claim makes a demand for a specific sum by way of interim alimony, as contemplated by Rule 601 of the King's Bench Act, it should only be allowed from the date of the order, not from the commencement of the action: *Peterson* v. *Peterson*, (1873) 6 P.R. 150.

3. The merits of the defence set up should not be looked into or considered on an application for interim alimony.

Foden v. *Foden*, [1894] P. 307; *Campbell* v. *Campbell*, (1873) 6 P.R. 128, and *Keith* v. *Keith*, (1876) 7 P.R. 41, followed. *McArthur* v. *McArthur*, 15 M. R. 151.

4. Jurisdiction—*Construction of Statutes.*

Bill for alimony and maintenance.

Held, upon demurrer—

1. That, although, by a strict literal interpretation of Con. Stat., c. 31, s. 6, the Court would have no jurisdiction to decree alimony, yet, as to so hold would make other provisions of the statute meaningless, a more liberal interpretation, one which would give the Court the jurisdiction it was evidently intended should be given, ought to be adopted.

2. That, under Con. Stat., Man. c. 31, s.3, the Court has power to decree alimony.

3. That alimony may be decreed apart from divorce or judicial separation, although not so in England.

4. A single judge has jurisdiction to decree alimony. *Wood* v. *Wood*, 1 M. R. 317.

5. Misconduct of wife before marriage—*Condonation—Property in engagement ring and wedding presents—King's Bench Act, s.* 30.

1. Unchastity before marriage and concealment of it from the husband until the birth of a child is not sufficient to make the marriage null and void or to disentitle the wife to alimony

Swift v. *Kelly*, (1835) 3 Knapp, 293; *Moss* v. *Moss*, [1897] P. 263; *Nelligan* v. *Nelligan*, (1895) 26 O. R. 8, and *Aldrich* v. *Aldrich*, (1892) 21 O. R. 447, followed.

2. Under section 30 of the King's Bench Act, R. S. M. 1902, c. 40, a wife will be entitled to alimony if, by the law of England as it stood on the 15th day of July, 1870, she would have been entitled to a decree for the restitution of conjugal rights. By that law nothing but cruelty or adultery on the part of a wife after marriage would be a bar to an order for such restitution or entitle the husband to a judicial separation.

Scott v. *Scott*, (1864) 4 S. & T. 113, and *Russell* v. *Russell*, [1897] A. C. 395, followed.

3. Resumption of cohabitation is a necessary ingredient of condonation by the husband of any matrimonial offence committed by the wife, such as would prevent him from relying upon it as a defence to an alimony suit.

Keats v. *Keats*, (1859) 1 S. & T. 334 followed.

4. A wife abandoned by her husband is entitled to the engagement ring which he had given her before marriage, unless she had absolutely surrendered it to him; but she is not, under ordinary circumstances, entitled to demand and recover possession of wedding presents given by friends of the husband at the time of the marriage. *A.* v. *A.*, 15 M. R. 483.

6. Separation deed—*Proof of former marriage of plaintiff—Setting aside deed of wife on grounds of undue influence, lack of independent advice and mental weakness—Husband and wife—Acquiescence and delay before commencing action.*

A deed of separation executed by husband and wife, containing mutual covenants that they will thereafter live separate and apart from one another, that each will not thereafter compel the other to cohabit with, and will not disturb, trouble or molest the other and will not claim any of the property or goods of the other thereafter, unless it can be declared void for any reason such as fraud, duress, want of understanding on the part of the wife, lack of independent advice, misrepresentation or undue influence, if followed by an immediate separation, requires no other consideration to support it and is a complete defence to a subsequent action by the wife for alimony.

Hunt v. *Hunt*, (1862) 31 L. J. Ch. 161; *Flower* v. *Flower*, (1871) 25 L. T. 902; *Marshall* v. *Marshall*, (1879) 5 P. D. 19, and *Clark* v. *Clark*, (1885) 10 P. D. 188, followed.

There was no evidence of any fraud, duress, misrepresentation or undue influence inducing the plaintiff to execute the deed, and the parties had been living apart for ten years, but the trial Judge held that she was not bound by it because of some weakness of mind—her husband having had her examined twice as to her sanity although pronounced sane,—for lack of independent advice and because of her distress of mind caused by her own recent revelation to the defendant of an alleged former marriage, which the trial Judge found had not taken place. He also held that the deed was without consideration and therefore void.

Held, RICHARDS, J.A., dissenting, that there was nothing in the evidence, a summary of which will be found in the judgments, to warrant a finding that the plaintiff was not quite sane or did not understand what she was doing or that the deed was void for any of the other reasons given.

Per HOWELL, C.J.M., and PERDUE, J.A. The deed having been acted upon by both parties and not impeached by the plaintiff until after the lapse of ten years, it should not be set aside except upon the clearest proof that she was induced to sign it by some influence which made it not binding upon her and the delay was sufficiently excused.

Sibbering v. *Balcarras*, (1850) 3 De G. & Sm. 735, and *Allcard* v. *Skinner*, (1887) 36 Ch. D. 145, followed.

Per HOWELL, C.J.M. The statements which had been previously made by the plaintiff, under the circumstances set out in the judgment, to her husband and other persons, authenticated by her statutory declaration and by the recitals

in the deed, that she had been previously married to and cohabited with another man, tended so strongly to prove that her marriage to the defendant was void, that the onus was thrown upon her to give some independent evidence that the former marriage was a fiction, and should not be held to be displaced merely by her oath at the trial that such statements were false. *Ditch* v. *Ditch*, 21 M. R. 507.

See INFANT, 9.
— PRACTICE, XXVII, 1.

ALLEGATIONS OF FRAUD.

See PLEADING III, 1.
— SUMMARY JUDGMENT, I, 1.

ALLOWANCE OF SECURITY.

See SECURITY FOR COSTS, I.

ALTERATION OF INSTRUMENT.

See BANKS AND BANKING, 1.
— BILLS AND NOTES, III, 1, 2.
— PRINCIPAL AND SURETY, 4.
— VENDOR AND PURCHASER, VI, 17.

ALTERNATIVE RELIEF.

See PLEADING, XI, 3.

AMBIGUITY.

1. **Contract**—*Words—Meaning of "to" a certain date.*

The defendants purchased a quantity of wheat from the plaintiff and agreed to give him any rise in the market price to the 1st of May.

On the 30th of April the plaintiff went to defendants in order to get a settlement for his wheat.

Held, following *Nichols* v. *Ramsel*, 2 Mod. 280 ; *Kendall* v. *Kingsley*, 120 Mass. 94, and *People* v. *Walker*, 17 N. Y. 502, that the word "to" in the present case should not be held to include the day named, but that the period intended expired on the 30th of April.

The legal effect of a document cannot be altered by the subsequent conduct of the parties, but it is not unreasonable to look at that for an explanation of an ambiguous phrase: *Pollock on Contracts*, p. 431. *McCuaig* v. *Phillips*, 10 M. R. 694.

See DESCRIPTION OF LAND, 1, 2.
— EXAMINATION FOR DISCOVERY, 12.
— SLANDER.
— STATUTE OF FRAUDS, 5.

AMENDMENT.

1. **After appeal**—*Amendment of decree after rehearing.*

A bill filed to enforce a mechanic's lien was dismissed at the hearing, on the ground that the lien had ceased to exist, and upon rehearing the decree was affirmed. The question of the personal liability of the defendant, although raised by the pleadings, and therefore concluded by the decree, was not, in reality discussed at the hearing. Plaintiff having afterwards sued at law, the defendant pleaded the decree by way of estoppel. Upon a petition by the plaintiff, praying that the decree might be amended by inserting a provision that the dismissal of the bill should be without prejudice to the plaintiff's right to proceed at law,

Held, That the decree should be so amended upon terms as to costs. *Kelly* v. *McKenzie*. 2 M. R. 203.

2. **Delay in applying for.**

An application by the defendant made in good faith in chambers before the trial for leave to amend the statement of defence should not be refused although there has been great delay in making it, only partially accounted for by negotiations for settlement, when no injury can be caused to the plaintiff by the amendment that cannot be compensated for in costs.

Johnson v. *Land Corporation*, (1890) 6 M. R. 527, and *Tildesley* v. *Harper*, (1878) 10 Ch. D. 393, followed. *McPherson* v. *Edwards*, 19 M. R 337.

3. **Of Judgment**—*Amendment after judgment entered upon demurrer—Jurisdiction of referee.*

To a declaration for personal service

by the plaintiff as the servant of the defendant, the defendant pleaded various pleas. To one of these the plaintiff demurred; upon the others he joined issue. Defendant then obtained an order striking out all the pleas except the one demurred to. Plaintiff succeeded upon the demurrer. Defendant then applied in Chambers to add two pleas. The referee refused the application and the plaintiff signed judgment. The defendant appealed from the referee's order.

Held, 1. That the referee had jurisdiction to permit the pleas to be added.

2. The discretion to amend should be used to the utmost extent consistent with justice and the rights and interests of the parties.

3. An equitable plea asking for an account permitted to be added, unless the plaintiff would undertake not to set up the judgment in defence to a bill in equity.

4. Circumstances under which a bill for an account will lie, discussed. *Johnson* v. *Land Corporation of Canada*, 6 M. R. 527.

4. Limitation of actions—*Statute of Limitations — New trial — County Court action—Dispute note filed too late—Costs.*

Defendant, having instructed his solicitor to prepare and file a dispute note in a County Court action setting up the Statute of Limitations and the plea of never indebted, which the solicitor neglected to file in proper time, himself prepared and filed within the time allowed another dispute note setting up simply the plea of never indebted.

At the trial the County Court Judge struck out the dispute note filed too late, refused to allow the other one to be amended, and entered a verdict for the plaintiff.

Held, that the dispute note filed too late was irregular and was properly struck out, but that an amendment of the other dispute note, raising the Statute of Limitations, and a new trial should be allowed under the circumstances upon the defendant paying all costs to date in the court below, except those of issuing and serving the writ, and the costs of the appeal within ten days after taxation; otherwise that the appeal should be dismissed with costs and the judgment allowed to stand. *Lachapelle* v. *Lemay*, 17 M. R. 161.

5. Misjoinder of defendants—*Statute of Limitations.*

Plaintiffs issued a writ upon a note signed J. G. & Co., against J. G. and W. G. Afterwards they struck out W. G., and moved to strike out the defence of J. G. He defended on the ground that he had a partner but declined to give his name. Plaintiffs then amended by adding W. B., and went down to trial. The plaintiff's evidence showed that not W. B. but S. B. was the partner, whereupon plaintiffs moved to amend by striking out W. B. Since the commencement of the action the statute of limitations would have barred the remedy against S. B. The plaintiff's evidence as to the circumstances under which the note was made was contradictory.

Leave to amend was refused, and a non-suit entered. *Merchants Bank* v. *Good*, 6 M. R. 543.

6. Misnomer—*Amendment of defendant's name after decree—Mechanic's lien against school house—Costs.*

Plaintiff filed a mechanic's lien against lands of "The School Trustees for the Protestant School District of Bradley, No. 369, in the Province of Manitoba," and filed a bill upon such lien against the corporation using the name above set out. The bill was taken *pro confesso*. After decree and sale a petition was filed by the plaintiff to amend the style of cause throughout.

Held, 1. That the amendment should be allowed.

2. That the land, including a public school erected upon it, was liable to charge and sale under a mechanic's lien.

3. That the plaintiff should pay the costs of the petition. *Moore* v. *Protestant School District of Bradley, No.* 369, 5 M. R. 49.

7. New defences if declaration amended

Action upon a note. Upon a motion being made at the trial for a non-suit, on the ground of variance, the plaintiff asked to amend his declaration by alleging that the note was payable at the Ontario Bank, Winnipeg.

The amendment was allowed, as the defendant could not be prejudiced, but

KILLAM, J., *Held*, that the defendant had thereupon the same right to plead to the amended declaration, as he had to plead to the declaration if originally filed as amended; that he was not limited to the defences set up to the original declaration, and that the Court

had no discretion in the matter. *Cameron* v. *Perry*, 2 M. R. 231.

8. **Of pleadings**—*Transfer of land under Real Property Act, effect of—Parties to action—Estoppel.*

A transfer of land, in the form provided in the Real Property Act, made by the registered owner and without any special covenants or recitals, does not operate as an estoppel and does not vest in the transferee an equitable interest subsequently acquired by the transferor in the absence of any fraud or misrepresentation by the latter.

Noel v. *Bewley*, (1829) 3 Sim. 103, and *Re Hoffe*, (1900) 82 L. T. 556, distinguished.

In an action by such a transferee against a person who had, before the registration of the transfer, filed a caveat against the land, claiming that the transferor, Gardiner, was a trustee for him of an undivided one-third interest therein, the plaintiffs set up that, after the filing of the caveat, the defendant sold his interest to Gardiner and that they were, as transferees from Gardiner, entitled to the fee simple in the land free from any claim of the defendant. Afterwards the plaintiffs sought to amend their statement of claim by asking, as alternative relief, that they might be declared to stand in the position of Gardiner towards the defendant in respect of the money due from Gardiner to defendant and that an account might be taken as between the two latter and that the plaintiffs might be declared entitled to specific performance by defendant of his agreement with Gardiner.

Held, that such amendments should not be allowed, because plaintiffs were not entitled to any interest in the land acquired by Gardiner after his transfer to them, and also because Gardiner was not a party to the action nor was it proposed by the amendments to make him a party. *Bennett* v. *Gilmour*, 16 M. R. 304.

9. **Production of documents**—*Practice—Partnership accounts.*

At the trial in this case defendants' 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.

Mertens v. *Haigh*, 11 W. R. 792, referred to. *Douglas* v. *Mann*, 11 M. R. 546.

See Accident Insurance, 1.
— Administration, 4.
— Bills and Notes, VIII, 1.
— Bonds.
— Building Contract, 6.
— Capias, 2, 4.
— Certiorari, 2.
— Company, IV, 14.
— Contract, XII, 1.
— Criminal Law, I, 1, 2; X, 3; XIII, 3; XVII, 7.
— Election Petition, VI, 1; VII, 3, 4.
— Evidence, 13.
— Extradition, 8.
— Fraudulent Conveyance, 2, 15.
— Fraudulent Preference, III, 3.
— Garnishment, I, 7; VI, 8.
— Landlord and Tenant, I, 2.
— Limitation of Actions, 4.
— Liquor License Act, 6, 10, 14.
— Master and Servant, II.
— Mechanics' Lien, III, 1; VIII, 1.
— Misrepresentation, III, 2.
— Pleading, I, 1, 2; III, 2; VIII, 1.
— Practice, II, III, 2; X, 3; XVII, 2; XXIII, 1.
— Prohibition, I, 1.
— Real Property Act, III, 6.
— Real Property Limitation Act, 4.
— Right of Action.
— Summary Judgment, II, 4.
— Title to Land, 2.
— Vendor and Purchaser, VI, 12; VII, 11.
— Workmen's Compensation for Injuries Act, 4.

AMENDMENT OF JUDGMENT.

See COSTS.

AMOUNT IN QUESTION.

See APPEAL FROM COUNTY COURT, II — APPEAL TO PRIVY COUNCIL, 7.

ANIMAL DISEASES ACT.

See SALE OF GOODS, VI, 1.

ANIMAL FERÆ NATURÆ.

Raccoon—Liability of owner for damages done by.

A raccoon is an animal *ferae naturæ* and a person who keeps one in a town is liable in damages for any injury inflicted by it on a neighbor upon escaping from captivity, although the animal has been kept in the defendant's house for a long time and was supposed to have been tame.

Filburn v. *People's Palace, etc.*, (1890) 25 Q.B.D. 258, followed.

Andrew v. *Kilgour*, 19 M. R. 545.

ANIMALS DAMAGING CROPS.

See RAILWAYS, VI, C, 8.

ANIMALS KILLED ON RAILWAYS.

See RAILWAYS, VI, B, 1, 2, C.

ANIMALS RUNNING AT LARGE.

1. Fences—*By-law regulating—Municipal Act, R. S. M.* 1902, *c.* 116, *ss.* 643 (*b*), 644 (*d*).

1. At common law the owner of animals must keep them from trespassing on his neighbors' crops though enclosed by no fence or by an insufficient fence.

2. A by-law of a municipality passed under sub-section (b) of section 643 of The Municipal Act R. S. M., 1902, c. 116, which does not expressly permit any animals to run at large, is not sufficient to protect the owner of animals from liability for their trespasses on lands even if unenclosed by a fence of the character required by the by-law.

3. A clause in such a by-law providing that no person shall be entitled to recover damages for injuries done to his crops by trespassing cattle unless his fences are of the character required by the by-law, if enacted prior to the passage of the amendment of the Municipal Act which is now sub-section (d) of section 644, was *ultra vires* of the council of the municipality and was not ratified or legalized by such amendment.

The King v. *Nunn*, (1905) 15 M. R. 288, followed.

Watt v. *Drysdale*, 17 M. R. 15.

2. Fences—*Damages—Municipal Act, R. S. M.* 1902, *c.* 116, *ss.* 643 (*b*) *and* 644 (*d*).

Action for damages caused to plaintiff by defendant's cattle trespassing on his lands which were not fenced. Defendant relied on a by-law of the municipality, presumably passed under the powers conferred by sub-section (b) of section 643 and sub-section (d) of section 644 of the Municipal Act, R.S.M. 1902, c. 116, and declaring that "it shall be lawful for any person to permit his horses or cattle * * * to run at large in any season of the year * * * and no one shall be at liberty to claim damages against the owner of such horses or cattle running at large or doing damage *unless he shall have surrounded his lands and premises with a lawful fence as defined by by-law of this municipality.*"

At the trial there was no by-law proved which showed what should constitute a lawful fence in the municipality except one which related only to barbed wire fences.

Held, that the defence failed and the plaintiff was entitled to recover. *Dalziel* v. *Zastre*, 19 M. R. 353.

3. Fences.—*Damages—Municipal Act, R.S.M.* 1902, *c.* 116, *ss.* 643 (*b*), 644 (*d*).

The power of a municipal council, under sub-section (d) of section 644 of the Municipal Act, R.S.M. 1902, c. 116, to pass a by-law limiting the right of a land owner to recover damages for any injury done by trespassing animals to cases in which the land is enclosed by a fence of the nature, kind and height required by the by-law, should be held to be restricted

to cases in which the animals go upon the land from some adjoining land where they have a right to be, and such by-law is no protection to the owner of animals trespassing from a highway, if the council has not passed a by-law under sub-section (b) of section 643, for allowing and regulating the running at large of animals in the municipality.

Am. & Eng. Ency. vol. xii, p. 1044, and *Enc. of Law & P.*, vol. 2, p. 401, followed. *Jack* v. *Stevenson*, 19 M. R. 717.

ANNUITY.

See ALIMONY 1.
— MORTGAGOR AND MORTGAGEE, I, 5.
— WILL, III, 1, 5.

ANTE-NUPTIAL SETTLEMENT.

See FRAUDULENT CONVEYANCE, 14.

APPEAL.

See ATTACHMENT OF THE PERSON, 1.
— EVIDENCE, 3.
— PRACTICE, III.
— RECTIFICATION OF DEED, 1.

APPEAL AS TO COSTS.

See INTERPLEADER, II, 1.
— TRUSTEE AND CESTUI QUE TRUST, 2.

APPEAL FROM AWARD.

See RAILWAYS, V, 2.

APPEAL FROM COUNTY COURT.

I. ABANDONMENT OF RIGHT TO APPEAL.

Practice—*Amount in question on appeal*—*R.S.M., c. 33, s. 315, and 59 Vic., c. 3, s. 2.*

A defendant in a County Court suit against whom a writ of attachment has been issued does not lose his right to appeal from the County Court Judge's order refusing to set it aside by proceeding to the trial of the action in the County Court, by applying for a new trial after a verdict against him, by proceeding with such new trial and calling and examining witnesses, by taking out and serving the order against which he wishes to appeal, or by delay in taking out and serving the order when no objection that the appeal proceedings had been begun too late is taken by the notice of motion.

The plaintiff's claim was for $70.70, but he only recovered judgment at the first trial for $47.70 and costs. This was set aside and a new trial granted when defendant commenced the appeal proceedings. At the second trial the plaintiff had a verdict for $67.50.

Held, that the appeal was rightly brought to the Full Court under R. S. M., 1892, c. 33, s. 315 as re-enacted by 59 Vic., c. 3, s. 2. *Hutchinson* v. *Colby*, 12 M. R. 307.

II. AMOUNT IN QUESTION.

1. Jurisdiction.

In deciding whether an appeal from a County Court decision under section 315 of the County Courts Act, as re-enacted by 59 Vic., 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 his appeal.

The defendant appealed to the Full Court from a verdict against him for $39.10 and relied on the fact that the plaintiffs' claim was for a sum exceeding fifty dollars.

Held, following *Macfarlane* v. *Leclaire*, 15 Moo. P. C. 181, and *Allan* v. *Pratt*, 13 A. C. 780, that the appeal should be struck out with costs. *Massey-Harris Co.* v. *McLaren*, 11 M. R. 370.

2. Jurisdiction.

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 Vic., 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 M. R. 624.

3. County Courts Act, *R.S.M.*, 1892, *c.* 33, *s.* 315—59 *Vic. c.* 3, *s.* 2.

Held, that on an appeal from a judgment of a County Court the Judge appealed to might review the evidence with the view of determining the value of the property in question; that such value in the present case was less than $20; and that, under section 315 of The County Courts Act, as amended by 59 Vic., c. 3, s. 2, plaintiff was not entitled to appeal, and that the appeal should be dismissed with costs.

Aitken v. *Doherty*, 11 M.R. 624, followed. *Douglas* v. *Parker*, 12 M. R. 152.

III. PRACTICE IN APPEAL.

1. Certificate of judge—*Evidence "in substance."*

Accompanying an appeal book upon a County Court appeal was a certificate from the County Judge, that it contained "the evidence in substance taken at the trial."

Held, That the certificate was insufficient, and the appeal was struck out of the list. *Winnipeg Water Works Co.* v. *Winnipeg Street Railway Co.*, 6 M. R. 614.

2. Filing of evidence—*Delay in prosecution—Copy of evidence—Transmission of papers by the County Court Clerk.*

In filing a copy of the notes of evidence in the County Court for the purpose of an appeal to the Queen's Bench, it is necessary, under section 324 of the County Courts Act, that a law stamp should be affixed to the document.

It is essential under section 323 of the Act, that the Clerk of the County Court should transmit directly to the Prothonotary of the Queen's Bench, in a sealed package, all the papers and proceedings in his office relating to the suit; and, where such papers were handed by the County Court Clerk to the appellant's attorney in an unclosed envelope, and the attorney had them in his possession until the day before the hearing of the appeal, it was dismissed with costs. *Burke* v. *Brown*, 9 M. R. 305.

3. Leave to appeal—*Striking out appeal—County Courts Act, R.S.M.*, 1892, *c.* 33, *ss.* 315, 321, 326, 327—59 *Vic.* (*M*), *c.* 3, *s.* 2—*Queen's Bench Act*, 1895, *Rule* 168 (*b*).

Held, that under sections 326 and 327 of the County Courts Act, as amended by 59 Vic., c. 3, s. 2, a single Judge of the Queen's Bench has power, on a motion before him under Rule 168 (b), Queen's Bench Act, 1895, to strike out an appeal brought under section 315, to give the appellant liberty to proceed with his appeal, notwithstanding the failure to comply with any requirements of the statute and although the appeal is to the Full Court; and that such leave should be given in this case, as the appellant's failure to file the affidavit of intention to appeal required by section 317 within ten days from the decision complained of was entirely owing to the neglect of the County Court clerk in not notifying the appellant's attorney of the decision when given, and the affidavit was filed the day after the attorney was informed of the decision, and all other steps in the appeal had been regularly taken. The appellant, however, must pay the costs of the motion, as the defendant had made it in good faith and in ignorance of the special circumstances.

Held, also, that it was not necessary on entering the appeal with the Prothonotary to produce to him evidence that the appellant had furnished the security for costs of the appeal required by section 321, although it may be a reasonable and prudent thing to do. *Abell* v. *Craig*, 12 M. R. 81.

4. Time—*Mandamus.*

Proceedings in appeal from the County Court had been taken and an unsigned certificate of the County Judge filed with the Prothonotary within the proper time, under the belief that it had been properly signed. Upon the discovery of the fact, but after the time for filing the certificate, an application was made to the judge to affix his signature. He refused.

Held, that the judge was right in so refusing and an application for mandamus was dismissed. *Orr* v. *Barrett*, 6 M. R. 300.

IV. JURISDICTION

Title to land brought in question—*Property in sand and gravel on highways—Municipal Act, R. S. M., c. 100, ss. 615, 644—Costs when action fails for want of jurisdiction.*

1. A claim of a municipality for damages for the taking by a railway company of quantities of sand and gravel from alleged highways and allowances for roads in the municipality not in its actual possession or occupation, if disputed, raises a question of the title to a corporeal hereditament within the meaning of section 59 of The County Courts Act, R.S.M., c. 33, and the jurisdiction of the County Court to adjudicate on such claim is ousted when such a question of title is *bona fide* raised, notwithstanding the provisions of sections 615 and 644 of The Municipal Act, R.S.M., c. 100, giving the right of possession of such roads to the municipality and power to pass by-laws for preserving or selling timber, trees, stone or gravel on any of such roads.

2. Under the enactment substituted for section 315 of The County Courts Act by 59 Vic., c. 3, s. 2, an appeal to this Court lies from the decision of a County Court Judge on the question of jurisdiction as well as from all other decisions in actions in which the amount in question is twenty dollars or more.

Fair v. *McCrow*, (1871) 31 U.C.R. 599, and *Portman* v. *Patterson*, (1861) 21 U.C.R. 237, followed.

3. Although the action in the County Court failed for want of jurisdiction, the plaintiff should be ordered to pay the costs of it under s. 1 of c. 5 of 1 Edw. VII, and also the costs of the appeal. *Municipality of Louise* v. *C.P.R.*, 14 M. R. 1.

V. JUDGE'S FINDING OF FACTS.

1. Questions of fact—*Notes of evidence transmitted—Municipality—Liability of.*

The Court of Queen's Bench is a Court of Appeal from the County Courts upon facts as well as law, and it is impossible to infer that there was evidence to support a particular finding of the Court below, unless such appears upon the material transmitted to this Court.

Plaintiff sued a rural municipality for services as a solicitor, but no resolution or by-law of the Council employing him was produced, nor did the Council adopt or derive any benefit from his services.

Held, that he was not entitled to recover. *Curran* v. *Rural Municipality of North Norfolk*, 8 M. R. 256.

2. Application for new trial *or to reverse judgment at trial—Weight of evidence*

An application by the defendant for a new trial, or to reverse or vary the judgment of one County Court Judge in favor of the plaintiff, having been made to another County Court Judge under section 308 of The County Courts Act, R. S. M., c. 33, the latter ruled that it should not be granted unless the verdict appeared to be unreasonable or unjust, or a perusal of the evidence showed that the trial Judge must, in arriving at his decision, have omitted, through oversight, to consider some undisputed fact, or that some undisputed fact or some plain principle of law applicable to the facts and favorable to the defendant could not have been brought to his attention, and the application was dismissed. Defendant then appealed to a Judge of the Queen's Bench against this decision.

Held, that the principles thus laid down were correct, and that the appeal should be dismissed, although, in the case of an appeal under section 315 of the Act, the verdict would have to be reviewed upon the facts in so far as the Court above could do so without having the witnesses before it. *Smith* v. *Smyth*, 9 M. R. 569.

3. Conflict of evidence—*Authority of wife to pledge husband's credit.*

Where there is a conflict of testimony at the trial of an action in the County Court, and there is evidence for the plaintiff which the Judge may have believed as against the evidence for the defendant, although he gave no reason for his decision, his verdict for the plaintiff should not be set aside by a Judge of this Court on appeal because he thinks that the evidence for the plaintiff was unsatisfactory, and that the trial Judge might have decided the case on a wrong principle of law. In such a case the Full Court, on an appeal from a single Judge,

Held, that the verdict of the trial Judge should be restored. *Robinson* v. *Taylor*, 10 M. R. 33.

4. Review of Evidence—*Decision of County Court Judge on summons to vary judgment or for a new trial under section 309 of The County Courts Act, R. S. M., c. 33—Agent's commission on sale*

of land—Recovery of commission by another plaintiff in respect of same sale.

The plaintiff recovered judgment in the County Court for commission on the sale of a parcel of land for defendant at the full amount of percentage usually allowed.

Defendant applied under section 309 of The County Courts Act, R. S. M. c. 33, for a new trial, or to reverse or vary the judgment, relying on the fact that another real estate agent had recovered a verdict against him for one half the usual commission in respect of the same sale, and appealed to the Full Court from the County Court Judge's order dismissing that application.

Held, that on such an appeal the Court cannot review the original decision on the facts in the same manner as it would do on an appeal direct from the original verdict, and can only consider whether the decision of the County Court Judge on the application that was made was erroneous or not.

On such an application it is not the duty of the Judge to try the case anew, and he should not disturb the verdict he has rendered unless on reconsideration it appears to him that there has not been evidence on which a jury could have found as he did, or that his verdict has been arrived at through an oversight or misconception of the law or the evidence.

On considering the evidence and applying these principles the appeal should be dismissed.

The fact of the recovery by another plaintiff of commission in respect of the same sale was *res inter alios acta*, and was not in itself material.

Smith v. *Smyth*, (1894) 9 M. R. 569, followed.

Douglas v. *Cross*, 12 M. R. 534.

5. Review of decision—*Undisputed evidence—Accounting for securities received as collateral security.*

A creditor who has received collaterals as security for a debt is bound, after payment of the debt, to return them or account to the debtor for their face value, in the absence of evidence to show that the respective amounts of them could not be collected.

Driffil v. *McFall*, (1877) 41 U. C. R. 313, followed.

The County Court Judge disallowed certain sums of money which the defendants swore the plaintiff Bank had received on certain collateral securities held for them, because their evidence showed that these sums had first been received by defendants and they were unable to give dates and particulars of the payments to the Bank, and had no books or memoranda to support their statements, and he was of opinion that they should have given undoubted evidence of the times of receipt and payment to the Bank or in some other way brought home to the Bank conclusively the receipt and non-credit of the money, but his verdict was not based on any finding that the defendants were unworthy of belief as witnesses.

Held, that, under the circumstances, it was proper for the Court above to review the finding of the County Court Judge upon the evidence, and that, taking into consideration the Bank's duty to produce or account for the collaterals which it had failed to do, and the presumption to be drawn from such failure, the defendants had sufficiently proved the receipt of said moneys by the Bank and were entitled to judgment for the same. *Union Bank* v. *Elliott*, 14 M. R. 187.

VI. Decisions Appealable.

1. County Courts Act, R. S. M., *c.* 33, *ss.* 315, 330—*Amendment—Final order or judgment.*

An order of a County Court Judge at the trial of an action giving the plaintiff leave to amend his particulars of claim pursuant to section 330 of The County Courts Act, R. S. M., c. 33, and providing that defendant should have fifteen days to put in a dispute note to the amended claim, and that, in default of such being put in, judgment might be signed for the plaintiff for the full amount claimed, is a final order or judgment from which an appeal may be taken to the Court of Queen's Bench under section 315 of the Act as amended by 59 Vic., c. 3, s. 2. *Brenchley* v. *McLeod*, 12 M. R. 647.

2. Interlocutory order—*Setting aside order—Ex parte order—Affidavit of merits.*

Under 54 Vic. c. 2, s. 21, substituted for section 243 of the County Courts Act, 1887, there is an appeal to a Judge of the Court of Queen's Bench from any order made by a County Court Judge, final or interlocutory, and whether upon the merits in an action, or upon a mere point of practice.

A judgment by default, regularly signed, cannot be set aside *ex parte*, but only upon notice to the plaintiff and an

affidavit of merits, and this rule applies to the County Courts as well as the Court of Queen's Bench. *McKay* v. *Rumble*, 8 M. R. 86.

VII. Decisions Not Appealable.

1. Appeal from order.

No appeal will lie from an order of a County Court Judge directing the clerk to sign a judgment which without such order, he should have signed. *Barr* v. *Clark*, 5 M. R. 130.

2. Transfer to Queen's Bench.

No appeal will lie from an order made by a County Court Judge under section 86 of the Queen's Bench Act, 1895, transferring an action from that Court to the Court of Queen's Bench, after the papers and proceedings have reached the Prothonotary, notwithstanding the general and absolute right of appeal apparently given by the 315th section of the County Courts Act, and notwithstanding the opinion of the Court above that the order had been improperly made.

Harris & Sons v. *Judge*, [1892] 2 Q. B. 565, followed.

Where the Judge of the County Court has to decide in the first instance whether the facts proved bring the matter within his jurisdiction, he has jurisdiction to determine that question and, having determined it judicially, his decision cannot be treated as given without jurisdiction. *Doll* v. *Howard*, 11 M. R. 21.

Distinguished in *Emerson* v. *Forrester*, 19 M. R. 665.

VIII. Security.

1. Security by payment into court.

Appeal from the County Court. Upon opening of the appeal it was objected that no bond for security for the costs of the appeal had been given. It appeared, however, that security had been given by payment of money into Court.

The judgment of the Court was given by Killam, J.—(After an examination of the statutes, Con. Stat. c. 34, ss. 226, 227, 228; 47 Vic. c. 22, s. 23, and 50 Vic. c. 9, ss. 243, 244, 245). "In my opinion, where the necessary sum has been paid into Court, or other security given with the sanction of the County Judge, and he has certified the case to this Court, the giving of a bond is not, under the present Act, a condition precedent to the hearing of the appeal, and, as it is admitted that the money has been paid into Court with such sanction in this case, the hearing of the appeal should be proceeded with." *Gerrie* v. *Chester*, 5 M. R. 258.

2. Security for debt.

By the County Courts Act, 1887, the giving security for, or depositing in court, the amount for which judgment has been recovered, and a sum sufficient to cover the probable costs of the appeal, is a condition precedent to the right to appeal.

An objection that such conditions have not been complied with may be taken when the appeal comes on to be heard and may be supported by affidavits. *Mahon* v. *Inkster*, 6 M. R. 253.

3. Time within which security to be given—*Notice of setting down.*

This case was tried before the judge of the County Court of Marquette, who entered a verdict for the plaintiff on May 12th, 1890. The defendant applied for a reversal of the judgment, and the application was dismissed on July 3rd, 1890. The defendant served notice of his intention to appeal to the Court of Queen's Bench on July 12th, but the security was not perfected until September 10th.

Held, 1. That no notice of the setting down of the appeal need be given.

2. (Killam, J., dissenting). That section 243 of the County Courts Act, 1887, taken in connection with the other provisions of the Act relating to Appeals, requires the security to be perfected within ten days after the decision appealed from.

(Per Killam, J.) There is no definite limit of time for giving security on appeal fixed by the County Courts Act. *Multihill* v. *Lachance*, 7 M. R. 189.

See Chattel Mortgage, II, 2.
— Costs, I, 4.
— County Court, II, 1.
— Landlord and Tenant, II, 2.
— Practice, III, 2, 3; IV, 1.
— Principal and Agent, II, G.

APPEAL FROM JUDGE'S FINDING OF FACT.

See Appeal from County Court, V.
— Criminal Law, XV, 1.
— Evidence, 28.
— Extradition, 5.
— Fraudulent Preference, VI, 6.

See LICENSE TO TAKE POSSESSION OF GOODS.
— MISREPRESENTATION, IV, 1.
— NEGLIGENCE, III, 1.
— NEW TRIAL, 2.
— PRINCIPAL AND AGENT, I, 2, 5; II, C, F.
— SALE OF GOODS, IV, 2.
— STATUTE OF FRAUDS, 7.
— WEIGHTS AND MEASURES ACT, 1.

APPEAL FROM MASTER ON EVIDENCE.

Foreclosure ordered instead of sale.

In a mortgage suit the master after hearing evidence ordered a sale instead of a foreclosure, as being more beneficial for infant heirs. Upon appeal,

Held, that the evidence showed that a sale would not realize the plaintiff's claim, and foreclosure was directed.

A rule to govern appeals from the master upon questions of fact approved. *Landed Banking & Loan Co.* v. *Anderson*, 3 M. R. 270.

APPEAL FROM N. W. T.

Objections to regularity of appeal—*Value of subject matter—Fraudulent Conveyance.*

Held, 1. An objection of irregularity in the proceedings leading up to an appeal from the N. W. T. cannot be taken at the argument of the appeal.

2. In determining the value of the subject matter in dispute (upon which the right of appeal depends), the proper course is to look at the judgment as to the extent to which it affects the interest of the party prejudiced by it and seeking to relieve himself from it by appeal.

3. Upon the evidence, that a transaction attacked as fraudulent against creditors was valid. *Steele* v. *Ramsay—Bratt Claimant*, 3 M. R. 305.

APPEAL FROM ORDER.

1. Acting on order—*Preliminary objection.*

A garnishee attaching order having been issued in this case, the defendants moved to rescind the order upon the ground of irregularity and of misrepresentation.

BAIN, J., made an order amending the attaching order by reducing the amount attached from $11,000 to $3,600.

The applicants took out the order, served a copy of it upon the plaintiffs, and also a copy upon the attorneys who usually acted for the garnishees, but who had not acted for them as attorneys in connection with this case.

The applicants then applied to vary the order amending the attaching order, claiming to have it set aside altogether.

Held, that the applicants having acted upon the order could not appeal from it. *Royal City Planing Mills* v. *Woods. C. P. R. (Garnishees.)* 6 M. R. 62.

2. Acting on order—*Right of, lost by acting on order appealed from.*

Appeal from order directing the trial of an issue between a garnishing creditor and an assignee of the debtor as to their rights to a fund in court. The issue had been drawn up and delivered to the appellant and he had returned it.

Held, that, by thus acting under the order, he had abandoned his right to appeal against it.

Royal City Planing Mills Co. v. *Woods*, 6 M. R. 62, followed.

French v. *Martin*, 13 C. L. T. Occ. N. 159.

3. Compliance with part of order.

An order appealed from permitted the defendant to amend a paragraph of his defence within six days, in default of which it was to be struck out, and the defendant availed himself of the privilege of amending that paragraph.

Held, that, by compliance with such part of the order, he had not precluded himself from appealing against another part of the order. *Gowenlock* v. *Ferry*, 11 M. R. 257.

4. Leave to appeal after time elapsed—*Mistake of attorney—Evidence to set aside garnishee order—Affidavit on information and belief not sufficient.*

An appeal by the plaintiff from the order of the Chief Justice made in March, 1894, setting aside a garnishee order obtained by the plaintiff herein, (see 9 M. R. 534) was set down for hearing before the Full Court one day too late, and was therefore struck out, leaving the plaintiff to make a substantive application unde

rule 66 for an extension of time for entering the appeal.

Such an application was then made supported by the affidavit of the plaintiff's attorney, accounting for the delay through a misapprehension and mistake made in good faith, when the Court allowed the appeal to be set down within two days on payment of costs.

On the argument of the appeal it appeared that the garnishee order had been set aside on the strength of an affidavit of the partner of the defendant's attorney based on information and belief.

Held, following *Gilbert* v. *Endean*, 9 Ch. D., 259, that, as the application to set aside the garnishee order was one that affected and disposed of the rights of the parties and was not merely interlocutory, it should not be granted on the material put in, which was mere hearsay evidence, and at best of no more weight than the evidence on which the original order was made, and that the appeal should be allowed with costs. *Braun* v. *Davis. Northern Assurance Co., Garnishees*, 9 M. R. 539.

5. Notice of appeal—*Prohibition—County Court—Serving County Court Judge with notice of appeal.*

In appealing from the decision of a single Judge discharging a rule *nisi* for a writ of prohibition, it is necessary to serve the County Court Judge, as well as the plaintiff, with notice of the appeal. *Gibbins* v. *Chadwick*, 8 M. R. 213.

6. Winding-Up Act, R.S.C. 1906, c. 144, ss. 101, 131—*Leave to appeal from decision of judge under Act—Order staying proceedings in action by liquidator against contributory.*

An order of a Judge made under section 131 of the Winding-up Act, R.S.C. 1906, c. 144, staying proceedings in an action by the liquidator of a company being wound up against a contributory, does not involve future rights within the meaning of section 131 of the Act, neither could it be said that the amount involved in an appeal by a shareholder from such an order exceeded five hundred dollars, and, therefore, as it was conceded that the order was not one that was likely to affect other cases of a similar nature in the winding-up proceedings, leave should not be given, under section 101 of the Act, to appeal from it. *Re London Fence Company.* (No. 2) 21 M. R. 100.

See ATTACHMENT OF THE PERSON, 1.
— CONVICTION, 1.
— CRIMINAL LAW, XIII, 1.
— ELECTION PETITION, VI, 1.
— PRACTICE, II, 2.
— PRODUCTION OF DOCUMENTS, 7.
— SECURITY FOR COSTS, I, 2.

APPEAL FROM REFEREE.

See JURY TRIAL, I, 1.
— PRACTICE, III, 4; XX, B, 3, 7; XXVIII, 24.

APPEAL FROM SINGLE JUDGE.

See REAL PROPERTY ACT, I, 7.
— RECTIFICATION OF DEED, 1.
— SURROGATE COURT.

APPEAL FROM SUMMARY CONVICTION.

See CRIMINAL LAW, XVII, 10.
— LIQUOR LICENSE ACT, 7.
— SUMMARY CONVICTION, 2.

APPEAL FROM VERDICT OF JURY.

On weight of evidence—*Workmen's compensation for injuries.*

Although the Court, to which an appeal is made from the verdict of a jury in an action brought by a workman against his employer for injuries alleged to have been caused by the employer's negligence, feels grave doubt as to whether the evidence was such as to justify reasonable men in rendering a verdict for the plaintiff upon it and whether the jury were not influenced by sympathy irrespective of the weight of evidence, yet, in the present state of the law as laid down in the leading cases, the appeal must be dismissed if there was, in support of the verdict, any evidence that the Court could not say the jury ought not to have believed, however slight, and however contradicted by apparently more reliable testimony, it may have been. *McIntyre* v. *Holliday*, 18 M. R. 535.

APPEAL IN CRIMINAL CASES.

See CRIMINAL LAW, XVII, 1.

APPEAL PENDING

See STAYING PROCEEDINGS, I, 1, 6.
— SUMMARY JUDGMENT, III, 1.

APPEAL TO COURT OF APPEAL.

See SECURITY FOR COSTS, II, 1.

APPEAL TO PRIVY COUNCIL.

1. Decisions appealable—*Opinion of Court rendered under R.S.M., 1892, c. 28, not a judgment—Amount in controversy—Imperial Order in Council of 26th November, 1892, relating to appeals from the Court of Queen's Bench for Manitoba—Leave to Appeal.*

Held, following *Union Colliery Co.* v. *Attorney-General of British Columbia*, (1897) 27 S.C.R. 637, that the opinion of the Court (reported 13 M. R. 239,) rendered under R. S. M., 1892, c. 28, upon a constitutional question submitted by an Order of the Lieutenant-Governor in Council, was not a judgment, decree, order or sentence within the meaning of the Imperial Order in Council of 26th November, 1892, relating to appeals from the Court of Queen's Bench for Manitoba, and that such Court has no jurisdiction to grant an application for leave to appeal to His Majesty in Council under said Order from such an opinion.

Held, also, that, although it was shown that the enforcement of The Liquor Act would deprive the Province of a revenue far exceeding £300 per annum, and would prejudicially affect the very large investments of persons engaged in the liquor traffic, it could not be said that any questions respecting property or civil rights to the value of £300 were involved in the decision sought to be appealed from. *Re Liquor Act*, 13 M. R. 323.

2. Leave to appeal.

The Court of Queen's Bench for Manitoba is empowered by the Imperial Order in Council of the 26th November, 1892, to grant leave to appeal direct to the Privy Council, provided the application is made within fourteen days from the pronouncing of its order, but has no jurisdiction to entertain such an application if not made within that time: *Flint* v. *Walker*, 5 Moo. P. C. C. 179, followed. *Retemeyer* v. *Obermuller*, 2 Moo. P. C. C. 93, distinguished. *Gray* v. *Manitoba & North Western Ry.*, 11 M. R. 261.

APPEAL TO SUPREME COURT.

1. Consolidating two appeals in one.

Under section 73 of the Supreme Court Act and Rules 8 and 14 of the Supreme Court, 1907, an order may be made consolidating two appeals to the Supreme Court of Canada from the judgment of the Court of Appeal for Manitoba, upon separate appeals to the Court of Appeal from orders of a single Judge made in the same case, and giving the plaintiff leave to print one appeal case for the Supreme Court and directing that the judgment of the Court of Appeal upon both such appeals should be taken as one judgment on one appeal for the purpose of the appeal to the Supreme Court. *Emperor of Russia* v. *Proskouriakoff*, 18 M. R. 143.

2. Extending time for appeal.

In support of a summons to extend the time for perfecting security for costs upon an appeal to the Supreme Court, an affidavit was filed showing that, of the two defendants appealing, one resided in Chicago and the other near Pilot Mound; that the trespass complained of had ruined the plaintiff's credit; and "on that account the delay in obtaining the required security can be largely accounted for."

Held, That no case had been made for an extension of time.

The principles applicable to such motions discussed.

Residence of the appellant out of the jurisdiction and absence of damage, by the delay to the respondent, are matters for consideration upon such an application. *Dederick* v. *Ashdown*, 4 M. R. 349.

3. Extending time to appeal.

Time for appeal to the Supreme Court was extended where there had been only three days default; where no sittings had been lost, and where such efforts to obtain security had been made that negligence

could not be reasonably charged. *McRae* v. *Corbett*, 6 M. R. 536.

4. Final judgment—*Specially indorsed writ—Summary judgment.*

The order of a Judge in Chambers that plaintiff should be at liberty to sign final judgment in an action commenced by a writ of summons specially indorsed, although affirmed on appeal to the Full Court, is not a final judgment within the meaning of the Supreme Court Act, and no appeal to the Supreme Court will lie therefrom.

Municipality of Morris v. *London & Canadian Loan & Agency Co.*, 12 C.L.T. Occ. N. 68.

5. Leave to appeal—*Special circumstances—Supreme Court Act, s. 71—Discovery of new evidence.*

The plaintiff had judgment in his favor which was affirmed by this Court on appeal. During the reference to the Master to take the account ordered, the defendant for the first time noticed among the documents, which the plaintiff had produced before and at the trial, an affidavit which the plaintiff had made before the commencement of the action in which he had made a statement apparently at variance with his evidence at the trial. The trial Judge's attention had been called to this affidavit at the trial, but he had not referred to it in his judgment, and it was not considered on the hearing of the appeal before this Court.

Held, CAMERON, J.A. dissenting, that, although this could not be treated as a discovery of new evidence warranting a new trial, yet it was such a special circumstance that, under section 71 of the Supreme Court Act, this Court might properly grant the defendant leave to appeal to the Supreme Court, after the lapse of time allowed for an appeal as of right. *Fisher* v. *Jukes*, 20 M. R. 331.

6. Order for commitment of judgment debtor—*Final judgment—Manitoba King's Bench Rules 748, 755—"Matter or judicial proceeding"—Supreme Court Act, s. 2 (e).*

An order of committal against a judgment debtor, under the Manitoba King's Bench Rule 755, for contempt in refusing to make satisfactory answers on examination for discovery is not a "matter" or "judicial proceeding" within the meaning of sub-section (*e*) of section 2 of the Supreme Court Act, but merely an ancillary proceeding by which the judgment creditor is authorized to obtain execution of his judgment, and no appeal lies in respect thereof to the Supreme Court of Canada. *Danjou* v. *Marquis*, 3 S.C.R. 258, referred to.

Appeal quashed with costs. *Bateman* v. *Svensson*, 42 S.C.R. 146.

See PRACTICE, III, 5.
— SECURITY FOR COSTS, II, 2.

APPEAL UPON FACT.

See CRIMINAL LAW, XVII, 18.

APPOINTMENT OF SCRUTINEERS.

See LOCAL OPTION BY-LAW, II, 1.

APPORTIONMENT OF LOSSES.

See ADMINISTRATION, 1.

APPROACHES.

See RAILWAYS, IV, 1.

APPROPRIATION OF PAYMENTS.

See BILLS AND NOTES, VIII, 13.
— CHOSE IN ACTION, 1.
— COMPANY, IV, 3.
— SHERIFF, 5.
— WEIGHTS AND MEASURES ACT, 1.
— WILL, I, 1.

APPROVAL OF PLANS.

See MUNICIPALITY, I, 1.

APPROVAL OF SECURITY.

See SECURITY FOR COSTS, I, 4.

ARBITRATION AND AWARD.

1. Agreement to refer disputes—*Stay of proceedings in action—Application for stay of proceedings, time when it must be made—Common Law Procedure Act, 1854, s.* 11.

An application under section 11 of "The Common Law Procedure Act, 1854," to stay proceedings in an action for the purpose of compelling the plaintiff to carry out an agreement to submit the matters in dispute to arbitration, must, under the practice now in force in Manitoba, be made before the filing of the statement of defence. *Northern Elevator Co.* v. *McLennan*, 14 M. R. 147.

2. Award and Contemporaneous Memorandum—*Liability of agent—Signing award.*

A contract was expressed to be made between "D., of the city of Toronto, of the first part, and H., Superintendent, of the city of Winnipeg, Manitoba, of the second part." It went on to say:—

"The said party of the first part, in consideration of the agreement of the said party of the second part hereinafter contained, hereby agrees to build, construct, and set up complete in the city of Winnipeg gas plant of wrought and cast iron for a Gas Works there, as follows." Then, after a detailed statement of the articles to be supplied, "In consideration of the agreement herein set forth and stipulated to be performed by the party of the first part, the said party of the second part agrees to pay to the said party of the first part the full sum of $12,500 for such iron gas plant as hereinbefore described, to be paid as follows," and then the time and mode of payment were set out.

H. appended to his signature the words:—"Superintendent for Building Gas Works at Winnipeg for W. Merrick, of Oswego, N. Y., and others."

Held, that H. was personally liable upon the contract.

An arbitrator enclosed in an envelope his award and a memo. containing an exhaustive review of the cases bearing on the question decided by him, and showing that he had taken an erroneous view of the law. The envelope was marked "Doig v. Holley, Award, Arbitrator's fee, $100." On the memo. was endorsed:—"This memo., after perusal by the party taking up the award, is to be given to the opposite solicitor, who, after perusal, is to return it to me. W. L."

Held, that, when the grounds of the arbitrator's decision appear in some contemporaneous document delivered with the award, the Court can look at it, and will entertain an application to set aside the award as founded upon an erroneous view of the law.

Upon the argument of a rule to set aside an award, it was objected that the motion paper on which the rule was obtained, making the order of reference a rule of court, was not signed by Counsel.

Held, that the objection, if a good one, should be raised by some proceeding to set aside or discharge the rule.

It was further objected that there was no evidence proving the execution of the award. The order required that the award should be in writing.

Held, that it was not necessary that the award should be signed. *Doig* v. *Holley*, 1 M. R. 61.

3. Bias in arbitrator—*Interlocutory injunction—Evidence—Affidavit—Employment of arbitrator by party.*

Although for the purposes of an interlocutory injunction there is not required to be the clear evidence necessary to support the case at the hearing, yet there must be some evidence.

The railway commissioner being desirous of expropriating lands of the plaintiff, arbitrators were appointed, C. (one of them) being appointed by the other two. Contemporaneously with the progress of the arbitration, C. was engaged in auditing certain municipal books at the request of the municipal commissioner. For this work he was paid by the municipal commissioner, who intended to reimburse himself out of the legislative grant to the municipality. The railway commissioner was a Minister of the Crown. The municipal commissioner was a corporation sole, and also a Minister of the Crown. The moneys he disbursed were those of the municipalities and not those of the Crown. The two arbitrators who made the award, (one of them being C.,) swore that they were not influenced by C's. employment.

Held, That it did not appear that C. might have been biassed or affected in any degree by his employment; and that an interlocutory injunction restraining the taxation of costs under the award should not be granted.

An affidavit alleging "That the facts stated in the bill of complaint herein, are

true in substance and in fact and to the best of my knowledge and belief," is wholly insufficient to form the ground of an interlocutory injunction. *Rowand* v. *Railway Commissioner*, 6 M. R. 401.

4. Bias in arbitrator—*Previous opinion for one party.*

Under section 31 of The Railway Act (44 Vic. Man. c. 27,) a person appointed arbitrator (for the settlement of the value of lands taken) "shall not be disqualified by reason that he is professionally employed by either party, or that he has previously expressed an opinion as to the amount of compensation."

An objection to an arbitrator that he had previously given a valuation to one party and would naturally be biased in favor of the amount he had fixed,

Held, Untenable in view of the statute.

The section is not limited to arbitrators appointed by a judge. *Nicolson and Re Railway Commissioner*, 6 M. R. 419.

5. Bias in arbitrator—*Setting Aside—Prejudiced Arbitrator.*

The Government expropriated certain lands of R. for the right of way of the Red River Valley Railway. R. having refused the amount of compensation offered by the Government, each party appointed an arbitrator, and these two selected C. as a third arbitrator. C. had been a short time previously employed by the Government to value lands of a similar character and adjacent to those in question, and also to audit the books and accounts of a Rural Municipality, but both these employments had ceased before C's. appointment as third arbitrator. Sometime after the award was made C. was appointed to an office under the Government. An award was made giving R. the same compensation as the Government had originally offered. This award was signed by the arbitrator appointed by the Government and by C. R's arbitrator refused to sign alleging that the amount awarded was grossly inadequate. R. filed his bill to have the award set aside.

Held, (Reversing the decision of Bain, J.)

1. That C's connection with the Government, the employments having ceased before his appointment as arbitrator, could not be treated as such a disqualification as would justify the setting aside of the award.

2. That inadequacy in the amount awarded could not in itself be sufficient ground for setting aside the award, but might be evidence of misconduct on the part of the arbitrators.

3. That the amount awarded in this case could not be regarded as so grossly inadequate as to furnish evidence of corrupt and fraudulent conduct. *Rowand* v. *Martin*, 7 M. R. 160.

6. Compensation for lands injuriously affected—*Prospective value.*

The compensation allowed to owners, for lands expropriated by railways under the Manitoba statutes, must be limited to compensation for injury to land, or to an estate or interest in land.

N. owned lands on the bank of the Red River, on which he carried on an ice business. The ice was hauled from the river by teams and stored in buildings on the land. A railway expropriated a portion of the lands immediately adjoining the river, so that the railway passed between the remaining portion and the river. The arbitrators awarded compensation, in addition to the value of the land and damage to buildings, for a contrivance called an endless chain, which N. intended to use for hauling ice from the river to the storage buildings, but would be prevented from using by reason of the railway passing between the buildings and the river. This contrivance was not in use when the land was taken.

On appeal from the award,

Held, That the arbitrators should have considered the land as it stood when taken by the railway, and not have allowed any additional compensation, because the owners might, at some future time, desire to use appliances which the railway would interfere with. *Nicolson & Railway Commissioner, Re*, 7 M. R. 400.

7. Finality of award—*Jurisdiction—Enforcing award against non-resident of Province—Service of notice of motion out of jurisdiction—King's Bench Act, Rules* 201, 773—*Reservation of matter for subsequent adjudication by arbitrator.*

The respondent, who was not a resident of the Province, joined with the applicant in referring their disputes to an arbitrator residing in Winnipeg, agreed to abide by his award and afterwards submitted his case to the arbitrator. Having refused to obey the award, the applicant served him out of the jurisdiction with a notice of motion, under Rule 773 of the King's

Bench Act, to have the award made a judgment of the Court.

Held, by Prendergast, J., in the Court below, that the service was authorized both by Rule 773 and also by Rule 201 and the Court had jurisdiction to make the order asked for.

Rasch v. *Wulfert*, [1904] 1 K. B. 118, distinguished.

In making his award, the arbitrator found against the respondent in respect of his claim to be credited with the amount of a cheque for $800, but reserved the right to allow that claim in reduction of the amount, $2630.09, awarded to the applicant, provided the respondent would produce proof of same satisfactory to the arbitrator within thirty days. The respondent made no attempt to avail himself of the opportunity thus given.

Held, on appeal from Prendergast, J., that, the arbitrator having reserved the right to himself to allow the applicant a further sum at the expiration of thirty days, there was no finality in the award and it should not have been made a judgment of the Court for the full amount including the $800.

An award which is bad in part can only be held good as to the remainder of it when the bad part is clearly separable from the good.

Stone v. *Phillipps*, (1837) 4 Bing. N. C. 37, followed.

Held, however, that, if the applicant would elect to accept the award as one for a sum excluding the $800 in full of all the matters referred, the judgment already entered for $2630.09 might be reduced to $1830.09; but, if he would not, the judgment should be set aside and the motion to make the award a judgment of the Court dismissed. *Graves and Tentler, Re*, 21 M. R. 417.

8. Fire Insurance Company—*Evidence — Estoppel — Interpleader — Practice—Garnishment.*

The plaintiff, having suffered a loss by fire insured against by defendants, was sued by creditors who issued garnishing orders attaching the insurance moneys, which were also claimed by other parties. Defendants then applied, under section 13 of the Garnishment Act, R. S. M., c. 64, to pay into Court the amount which had been awarded to the plaintiff for her total loss by an arbitration between her and the defendants, which they claimed was binding. On this application the plaintiff appeared and disputed the award that had been made, and claimed the full amount of the policies. Issues were then directed to be tried between the plaintiff and the defendants, the question for decision being, whether there was any further debt due or owing from defendants to plaintiff over and above the amount fixed on the arbitration.

All the policies contained provisions enabling defendants to insist on the amount of loss being ascertained by arbitration, and the plaintiff entered into a special agreement with all the companies interested for an arbitration to settle the amount of liability. One arbitrator was chosen by each, and named in the agreement, and the two arbitrators were to choose an umpire if necessary. They did so, and an award was arrived at which was signed by the arbitrator appointed on behalf of the defendants, and the umpire.

The umpire was not a person skilled in the values of the particular goods insured, and the arbitrators availed themselves of the services of a Mr. Redmond in settling the values of the goods destroyed, and the amount of damage to be allowed upon goods not wholly destroyed.

Held, (1) That the orders for the trial of the issues had been erroneously made, and no issue should have been directed to be tried, except as between the attaching creditors and the claimants and the garnishees, and that the primary debtor should have been left to pursue the ordinary remedies to recover what was due.

(2) That by taking the issues ordered to be tried, the companies could not be said to have waived the award, and were not estopped from claiming that it was binding.

(3) That no evidence of the loss, independently of the award, should be received.

(4) That the award was not rendered invalid by the fact that Mr. Redmond's valuations were adopted, and that none of the objections urged against it were sufficient to require the Court to investigate the amount of the loss independently.

Whitmore v. *Smith*, 5 H. & N. 824, 7 H. & N. 508, followed.

Rogers v. *Commercial Union Ass. Co. Rogers* v. *London & Lancashire Ins. Co. Rogers* v. *London, Liverpool & Globe Ins. Co. Rogers* v. *Phoenix Ins. Co.*, 10 M. R. 667.

9. Irregularities — *Waiver — Time.*

Certain objections were taken to the regularity of certain expropriation proceedings. After the award the City did

not repudiate it, but proceeded to negotiate with the plaintiff upon the basis of the amount awarded, and agreed to give certain land for a portion of the money; the City afterwards paid $12,000 in pursuance of this agreement, and paid all the costs of the arbitration.

Held, that all irregularities had been waived.

The fact that the award had not been sanctioned by a Judge, as required by the statute, would form no ground of objection, for it was the duty of the City to have that done.

It did not appear that the Commissioners had been sworn. *Held*, that this would be assumed to have been done.

The award was not made within the time specified in the original order, but it recited a further order extending the time.

Held, that, the original of this further order being in possession of the defendants, the award was sufficient secondary evidence of it. *Wright* v. *Winnipeg*, 3 M. R. 349. See 4 M. R. 46.

10. Setting aside award—*"In Equity" inserted in a rule.*

F. & B. agreed to an arbitration. The following was one of the provisions: "It is distinctly agreed that each party hereto shall at once obey the award, and shall not appeal from or move against the same, or in any way resist the same; * * * * and no resort shall be had to any legal or equitable proceedings to resist or alter the same."

On an application by rule *nisi* to set aside the award for misconduct of the arbitrators, and on other grounds,

Held, by the Full Court, that although, under the provisions of the agreement, the parties were prevented from having the submission made a rule of court under C. L. P. Act, 1854, s. 17, yet, as a bill could have been filed in equity to impeach the award, the rule might be amended by adding, after the style of court, the words "In equity," after which relief could be granted. *Fisher and Brown, Re.*, 1 M. R. 116.

11. Setting aside award—*Building contract—Making award a judgment—King's Bench Act, Rules* 754-764*—Arbitrators delegating their duty to third person.*

Plaintiff's action was to recover a balance on a building contract, alleging completion. Defendant denied completion and counterclaimed against plaintiff on several grounds.

After the record had been entered for trial the parties entered into an agreement to refer to two named arbitrators and a third one to be appointed by the latter "all matters whatsoever in dispute" between them.

The arbitrators thus appointed having made their award in plaintiff's favor, he moved, under Rules 754-764 of the King's Bench Act, to have the award made a judgment of the court.

Held, dismissing the motion with costs, that the award was bad on the following grounds:—

1. It showed on its face that the work under the plaintiff's contract had not been completed, so that the plaintiff was not entitled to recover anything at all in this action.

2. From evidence taken on the hearing of the motion it was clear that the arbitrators had not taken into consideration "all matters whatsoever in dispute," but had failed to deal with a number of such matters which had been brought to their attention.

Bowes v. *Fernie*, (1838) 4 My. & Cr. 150; *Wilkinson* v. *Page*, (1841) 1 Hare, 276; and *Russell on Arbitration*, 8th ed. p. 172, followed.

3. The arbitrators had attempted to delegate to another person (unascertained) their authority to decide whether the sum of $116, part of the amount awarded, should or should not be paid: see *Tandy* v. *Tandy*, (1840) 9 Dowl. 1044. *Blakeston* v. *Wilson*, 14 M. R. 271.

12. Setting aside award—*Pleading—Prayer for general relief—King's Bench Act, Rules* 773-775—9 & 10 *Wm. III., c.* 15.

1. When the plaintiff, in answer to the defence of an award covering the amount of his claim, amends his statement of claim by setting up facts which, if true, would entitle him to ask specifically to have the award set aside, the statement of claim is good on demurrer, if it contains a prayer for general relief, although it does not ask for that specific relief.

Dictum of KILLAM, J., in *Rogers* v. *Commercial Union Ass. Co.*, (1885) 10 M. R. at pp. 675, 676, and notes at p. 625 of *Bullen & Leake*, 5th ed. followed.

2. This Court has jurisdiction over awards whether or not they are awards to which the provisions of 9 & 10 Wm. III, c. 15 apply.

Smith v. *Whitmore*, (1864) 2 De G. J. & S. 297, followed.

3. *Per* MATHERS, J. Rule 773 of the King's Bench Act provides a code of procedure only for the enforcement of awards, and Rule 774, which reads, "The former practice with respect to awards shall not be abolished, but the same shall only be followed by special leave of the Court or Judge," should be interpreted as if it read, "The former practice relating to the enforcement of awards," &c. *Johannesson* v. *Galbraith*, 16 M. R. 138.

13. Time for making award—*Award not made within the time limited—When arbitrator functus officio—Winnipeg Charter*, 1-2 *Edw. VII, c.* 77, *ss.* 802, 805, 812.

An arbitrator is *functus officio* as soon as he has made an award or as soon as the time fixed, whether by consent or otherwise, within which he shall make his award has expired.

Ruthven v. *Ruthven*, (1847) 8. U. C. R. 12, followed.

A previous arbitration to settle the same matter having failed by reason of no award having been made, Bennetto took proceedings under The Winnipeg Charter for a fresh arbitration and applied to have an arbitrator appointed by the County Court Judge to act on behalf of the City, as the City had failed to make a fresh appointment relying on the former appointment which had not been cancelled.

Held, that a new appointment was necessary and the City was not entitled to an order prohibiting the County Court Judge from proceeding to make it. *Bennetto* v. *Winnipeg*, 18 M. R. 100.

See COSTS, XIII, 4.
— DURESS, 1.
— EXPROPRIATION OF LAND, I, 3.
— FIRE INSURANCE, 5.
— MUNICIPALITY, III, 3, 4; VIII, 3.
— PUBLIC PARKS ACT.
— RAILWAYS, I, V, 2, 3, 4.
— SALE OF LAND FOR TAXES, X, 5.
— SCHOOL DISTRICTS.

ARBITRATOR'S FEES.

See COSTS, XIII, 4.

ARCHITECT'S CERTIFICATE OF COMPLETION.

See BUILDING CONTRACT, 1.

ARREST.

See FALSE IMPRISONMENT, 1, 2.
— MUNICIPALITY, II 1.

ARREST WITHOUT WARRANT.

See CRIMINAL LAW, IX, 2; XVII, 2.

ASSAULT.

Malicious prosecution — *Criminal Code*, 1892, *s.* 53.

A trespasser upon land of which another is in peaceable possession cannot be convicted of an assault under section 53 of the Criminal Code, 1892, merely because he refuses to leave upon the order or demand of the other, and the latter part of the section does not apply until there is an overt act on the part of the person in possession towards prevention or removal, and an overt act of resistance on the part of the trespasser. A verdict, therefore, against the defendant for malicious prosecution in charging the plaintiff before a magistrate with an assault, where the plaintiff had merely refused on the demand of the defendant to quit the premises upon which he was trespassing, was held to be right. *Pockett* v. *Pool*, 11 M. R. 275.

See CRIMINAL PROCEDURE, 1.
— CRIMINAL LAW, XIII, 4.

ASSAULT OCCASIONING ACTUAL BODILY HARM.

See CRIMINAL LAW, II, 1, 2.

ASSESSMENT.

See PROHIBITION, I, 8.
— SALE OF LAND FOR TAXES, III, IV, 1, 2; V, 2; VI, 1, 3; IX, 1, 3; X, 5, 8.
— TAXATION, 1.

ASSIGNEE OF PURCHASER.

See VENDOR AND PURCHASER, VII, 1.

ASSIGNMENT.

See GARNISHMENT, VI, 6.
— SET-OFF, 5.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Discretion of trustee—*Interpleader—Costs.*

An assignment for the benefit of creditors empowered the trustee to sell the estate "when and so soon as they shall deem expedient, in such manner and on such terms.....as they or he shall deem proper.....and with power for them or him to cancel or revoke any such sale, or withdraw from sale and resell without being answerable for any loss arising therefrom;" and the trustee was directed "to pay and divide the clear residue among the creditors of the debtor rateably according to the amount of their respective claims."

Held, 1. The assignment was valid.

2. An assignee for the benefit of creditors, who is himself a creditor, may render the assignment irrevocable by acting under it.

3. Plaintiff in an interpleader suit was allowed his costs although he might have brought the parties together in some garnishee proceedings; an injunction being necessary to protect his goods pending litigation. *Henry* v. *Glass*, 2 M. R. 97.

2. Lien of execution creditor for costs—*Assignment made after execution placed in sheriff's hands — Assignments Act, R. S. M.* 1902, *c.* 8, *ss.* 8, 9—*Executions Act, R. S. M.* 1902, *c.* 58, *s.* 11.

The lien of an execution creditor for his costs given by section 11 of The Executions Act, R. S. M. 1902, c. 58, when the writ of *fieri facias* is placed in the sheriff's hands, is not taken away by section 8 of The Assignments Act, R. S. M. 1902, c. 8, upon the making of an assignment for the benefit of creditors under said Act; but, on the contrary, such lien is expressly recognized in both sections 8 and 9 of the Act.

The assignee, therefore, has no right to demand possession of property seized by the sheriff without payment to him of his own and the execution creditor's costs.

Gillard v. *Milligan*, (1898) 28 O. R. 645, and *Ryan* v. *Clarkson*, (1890) 17 S. C. R. 251, followed.

Thordarson v. *Jones*, 18 M. R. 223.

3. Priority of claim of execution creditor—*Money paid to sheriff by assignor before assignment—Priority as between assignee and execution creditor—Assignments Act, R. S. M.* 1902, *c.* 8, *ss.* 8 *and* 9.

1. Moneys paid to the sheriff by an execution debtor whose goods have been seized under the execution, but have not been sold thereunder, are the property of the execution creditor, and the sheriff is not required by section 9 of the Assignments Act, R. S. M. 1902, c. 8, to pay them over to the assignee under an assignment by the execution debtor for the benefit of his creditors, unless such moneys are the proceeds of an actual sale by the sheriff.

2. The words "completely executed by payment" in section 8 of the Act, giving precedence to an assignment for the general benefit of creditors over all executions not completely executed by payment, mean executed by payment to the sheriff, not to the execution creditor, so that the assignee has no right, under that section, to any moneys collected by a sheriff under an execution against the assignor.

Clarkson v. *Severs*, (1909) 17 O. R. 592, followed.

Newton v. *Foley*, 20 M. R. 519.

4. Revocation—*Delivery.*

Whether a conveyance for the benefit of creditors has or has not ceased to be revocable depends on the character of the representation made to the creditors as to its existence, and the manner that such representation has been acted upon.

A debtor executed certain conveyances, absolute in form, to two relatives and caused them to be registered. At the same time he had prepared a document setting forth that the grantees were to hold the lands upon certain trusts for the benefit of certain scheduled creditors. This document he did not execute. All the papers were retained by the debtor and neither of the grantees saw them until after his death, when one of them executed the declaration of trust.

Held. That no trusts had been declared by the grantor.

Although registration of a deed may not necessarily imply delivery of the deed, yet the usual certificate of the registrar of the registration of the deed is by Con. Stat. Man., c. 60, s. 31, made *prima facie* evidence of the execution of the deed. *Leacock* v. *Chambers*, 3 M. R. 645.

5. Set-off—*Counterclaim—Assignments Act, R.S.M.* 1902, *c.* 8, *ss*, 6, 26—*Right of action for damages—Solicitors' lien for costs—King's Bench Act, s.* 39 (*e*), *Rule* 293.

Plaintiff sued for damages for deceit upon the sale by defendant to him of a business fraudulently represented to be of much greater value than it was. Defendant counterclaimed for the balance of the purchase money.

After the trial but before judgment plaintiff made an assignment for the benefit of his creditors under the Assignments Act, R. S. M. 1902, c. 8, and the assignee was added as a co-plaintiff.

In giving judgment the trial Judge awarded $750 damages to the plaintiff with the costs of the action, but he found also that the defendant was entitled to recover a much larger sum on his counterclaim which was not disputed. The judge also ordered a set-off and that judgment be entered for defendant for the balance and refused to allow the plaintiff's solicitor any lien for costs.

Held, on appeal, HOWELL, C. J. A., dissenting.

(1.) The plaintiff's claim against the defendant did not pass to the assignee by virtue of The Assignments Act, not being covered by any of the expressions, "real and personal estate, rights, property, credits and effects," used in section 6 of the Act, and being something which could not be reached by creditors under ordinary legal proceedings.

(2.) Such a right of action is not assignable under sub-section (*e*) of section 39 of the King's Bench Act.

Blair v. *Asselline*, (1893) 15 P. R. 211, and *McCormick* v. *Toronto Railway Co.*, (1906) 13 O. L. R. 656, followed.

McGregor v. *Campbell*, 19 M. R. 38.

6. Rights of secured creditor after valuation of his security—*Assignments Act, R. S. M.* 1902, *c.* 8, *s.* 29.

When the assignee under an assignment for the benefit of creditors, made pursuant to The Assignments Act, R. S. M. 1902, c. 8, has failed within a reasonable time to exercise his right to take over the securities held by a creditor at ten per cent. over the amount at which the creditor has, under section 29 of the Act, valued them, the creditor has the right to collect what he can from the securities and rank for dividends on the estate as a creditor for the full amount of the difference between his total claim and the valuation made, although he may have collected on the securities more than the amount of the valuation, provided he shall not receive in all more than 100 cents in the dollar. Under such circumstances the creditor cannot be required to re-value his securities. *Bank of Ottawa* v. *Newton*, 16 M. R. 242.

See ADMINISTRATION, 6.
— CHATTEL MORTGAGE, V, 4.
— DEED OF LAND, 2.
— EVIDENCE, 1.
— EXEMPTIONS, 12.
— FRAUDULENT CONVEYANCE, 1.
— FRAUDULENT PREFERENCE, I, 1; III, 1.
— ILLEGALITY, 1.
— REAL PROPERTY LIMITATION ACT, 2.
— SET-OFF, 2.
— TRUSTEES, 2.

ASSIGNMENT OF CHOSE IN ACTION.

Order to pay—*Validity of assignment—Statute of Frauds.*

McK. & McQ., being indebted to defendant, gave him an order directed to the mayor and council of the city of W., requesting them to retain $600 from money coming to them, and pay same to defendant. Shortly after McK. gave plaintiff an order on defendant in following terms: "Will you kindly agree to pay Edward Lynch the amount of money due us on order for tanks to corporation after you receive same from the chamberlain, to be paid by him to men for work on same." Defendant indorsed the order as follows: "I will agree to pay the balance of money upon the order you gave me on the city chamberlain, first deducting the amount you owe me, and the balance I will pay over to the said Edward Lynch."

Held, that the acceptance by defendant was valid, and bound the acceptor to pay. *Lynch* v. *Clougher*, 1 M. R. 293.

See BANKS AND BANKING, 5.
— CAPIAS, 6.
— CHOSE IN ACTION, 1, 3, 4.
— COMPANY, IV, 2.
— CONTRACT, IV, 2.
— EQUITABLE ASSIGNMENT, 1, 3.
— FRAUDULENT PREFERENCE, II.
— GARNISHMENT, IV, 1.
— INTERPLEADER, V, 3.
— MECHANICS' LIEN, I.
— NEGOTIABLE INSTRUMENT.
— VENDOR AND PURCHASER, III, 1; IV, 1.
— WINDING-UP, I, 1.

ASSIGNMENT OF COVENANT.

See COVENANTS, 9.
— RIGHT OF ACTION.

ASSIGNMENT OF JUDGMENT.

See REGISTERED JUDGMENT, 1.
— SUMMARY JUDGMENT, III, 1.
— WINDING-UP, IV, 7.

ASSIGNMENT OF LAND SCRIP.

See REPLEVIN, 6.

ASSIGNMENT OF MORTGAGE.

See COVENANT, 1.
— MORTGAGOR AND MORTGAGEE, VI, 2.
— SOLICITOR, 3.

ASSIGNMENT OF SALARY.

See MONEY LENDERS' ACT, 1.
— WAGES, 1.

ASSIGNMENT OF TAX SALE CERTIFICATE.

See SALE OF LAND FOR TAXES, V, 2.

ASSIGNOR AND ASSIGNEE.

See PARTIES TO ACTION, 3.

ASSUMPTION OF RISK.

See NEGLIGENCE, I, 4, 5; III, 2; V, 2; VI, 3.

ATTACHMENT OF GOODS.

1. Absconding debtor—*County Courts Act, R. S. M.* 1902, *c.* 38, *ss.* 200—206, 252, 253—*Construction of Statutes— Meaning of words "trader" and "manufacturer" in above section* 200.

1. The provisions of sections 200 to 206 of the County Courts Act, R. S. M. 1902, c. 38, respecting the rateable distribution of the proceeds of the sale of the goods of a trader amongst all his execution creditors, do not repeal by implication the earlier legislation to be found in sections 252 and 253 of the same Act, and do not apply to the case of the goods of an absconding debtor seized under a writ of attachment and afterwards sold under execution, so that in the latter case, although the debtor may be a trader, no creditor can share in the proceeds of the sale of the goods who has not sued out an attachment within the time allowed.

2. A general statute does not repeal an earlier special enactment by mere implication.

Bailey v. *Vancouver*, (1895), 25 S. C. R. 62, followed.

Quaere: Whether a baker is a manufacturer within the meaning of sub-section (*c*) of section 200.

Semble: A baker would not be deemed to be a trader within sec. 200 (*a*) merely because, as incidental to his baking business, he bought and sold candies, cakes and confectionery to a small extent.

Thomas v. *Hall*, (1874), 6 P. R. 172, followed.

Robinson v. *Graham*, 16 M. R. 69.

2. Affidavit defective—*Setting aside*—A writ of attachment was issued upon an order made upon an affidavit which omitted to state that the indebtedness was due "after making all proper and just set-offs, allowances and discounts" as required by Con. Stat. c. 37, s. 14, s-s. 1. Defendant moved to set the writ aside as irregular on account of the omission.

Held, that the omission of the words was fatal, and without those words the judge who made the order had no jurisdiction.

Also, that any judge might entertain an application to set aside the writ, it not being based on the assumption that the judge who made the order had in doing so erred in judgment or discretion. *Keeler* v. *Hazlewood*, 1 M. R. 28.

3. Affidavit defective—*Setting aside for irregularity—Term of bringing no action for damages—Costs, refusal of.*

In suing out a writ of attachment against defendant, plaintiff had omitted to state in his affidavit whether the de-

fendant was a corporation or not. The defendant, being therefore entitled *ex debito justitiæ*, to have the writ set aside,

Held, Dubuc, J., dissenting, that the Court could not impose the term of bringing no action against the plaintiff as a condition of setting the writ aside, but that costs should be refused unless defendant would consent to such term being imposed.

Ashdown v. *Dederick*, 2 M. R. 212, followed.

Per DUBUC, J.—The Court has jurisdiction to impose the term of bringing no action in a proper case, and in this case such term should be imposed. *Wilson* v. *Smith*, 9 M. R. 318.

4. Affidavit defective—*Affidavit to obtain order—Disclosure of relevant facts—Application to set aside order—Additional evidence to support order—King's Bench Act, Rules* 811, 813.

Application to set aside an order for attachment of defendant's personal property granted *ex parte* under Rule 811 of The King's Bench Act.

The affidavit on which the order had been obtained showed as the grounds of the plaintiff's belief in the fraudulent intent of defendant to delay, defeat or defraud her creditors only, (1) that the defendant had sold her real estate and that the plaintiff was informed of such sale by a person who was present at the sale, and (2) that the plaintiff had good reason to believe and verily believed that defendant was about to assign, transfer and dispose of her personal property, effects and credits with intent to delay, defeat or defraud her creditors, and that he was so informed by an auctioneer to whom the defendant applied to purchase the said goods and to pay her the proceeds over and above a certain chattel mortgage, and to whom the defendant had stated that it was her intention to leave the Province as soon as the said goods should be disposed of.

Held, that these statements in themselves did not show sufficient grounds from which to infer fraudulent intent on defendant's part.

On the application to set aside the order plaintiff filed a new affidavit setting forth a number of additional facts which, together with what had been shown before, would have been sufficient in the opinion of the Judge to found an order for an attachment, but at the same time disclosing that he held security from defendant for part of his claim and that defendant, prior to the issue of the attachment, had offered to pay a part of the debt for a release of the security.

Held, (1) that the new evidence given by plaintiff could not be considered with the view of strengthening his case; (2) that, following the practice on motions for injunctions, the non-disclosure by plaintiff of material facts suppressed or omitted either intentionally or by mistake is good cause for setting aside an order for attachment even though the plaintiff would have been entitled to the order on a full statement of the facts. *Newton* v. *Bergman*, 13 M. R. 563.

5. Foreign parties—*Form of affidavit.*

In order that the goods of a foreign defendant may be attached it is essential that the plaintiff be a resident of this Province.

Where the parties to a note both reside in a foreign country, the presumption is that the note was made there.

An affidavit for an attachment must state whether or not the defendant is a corporation. *McMaster* v. *Jones*, 6 M. R. 186.

6. Priorities—*Execution creditors.*

Three creditors issued writs of summons prior to the issue of a writ of attachment against the same defendants by another creditor. A fifth issued a writ of summons after the attachment. The three obtained executions first.

In settling the priorities,

Held, 1. Mere irregularities, which might be taken advantage of by the defendant, are not open to third parties.

2. A judgment may be attacked by a third party on the ground that it is signed as against the firm, and that the debt was the private debt of a member of the firm only.

3. The fifth creditor was entitled to share with the attaching creditor, it not being necessary for subsequent creditors to issue attachments. *Fischel* v. *Townsend*, 1 M. R. 99.

7. Tort—*Action for damages for enticing away plaintiff's wife and for criminal conversation—King's Bench Act, Rules* 815, 817.

An attaching order against the defendant's property cannot properly be made under Rules 813—858 of the King's Bench Act, R. S. M. 1902, c. 40, upon the commencement of an action for damages

for enticing away the plaintiff's wife and for criminal conversation because:

(1) There is not "a cause of action *arising from* a legal liability" within the meaning of that expression in Rule 815, as the cause of action and the legal liability arose simultaneously from the tortious act; legal liability giving rise to a subsequent cause of action is found only in contract.

(2) The plaintiff could not properly make the affidavit required by Rule 817, viz, that the defendant is legally liable to him in damages in the sum claimed in the action.

Emperor of Russia v. *Proskouriakoff*, (1908) 18 M. R. at p. 73, and *McIntyre* v. *Gibson*, (1908) 17 M. R. 423, followed.

(3) The words in Rule 817, "after making all proper and just set-offs, allowances and discounts" are not applicable in regard to torts. *Hime* v. *Coulthard*, 20 M. R. 164.

See INTERPLEADER, III.
— JURISDICTION, 9.
— PRACTICE, XX, A, 2.
— PROHIBITION, I, 2.
— SOLICITOR'S LIEN FOR COSTS, 1.
— SOUTH AFRICAN LAND WARRANT.

ATTACHMENT OF THE PERSON.

1. Evidence on application for—*Debtor's Act—Material for application—Appeal—Order other than that asked for—Reinstatement of appeal on list.*

Depositions of a debtor taken upon an examination, as to his means to satisfy a judgment, may be used against him on an application to commit under the Debtors Act. So, also, may his cross-examination upon an affidavit filed by him in answer to such an application.

The decision of a single judge upon such an application will not be readily reversed upon appeal.

An order to pay by instalments may be made upon a summons to commit.

Through misapprehension as to the hour at which the court sat, counsel appeared after his appeal had been struck out.

Held, considering the nature of the order appealed from, that the appeal would be reinstated were there reason to believe that upon full argument the order would prove to be erroneous. *McMonagle* v. *Orton*, 6 M. R. 350.

2. For non-payment of costs—*Means to pay.*

Upon an application to commit two persons for non-payment of a judgment for costs, it appeared that they were two of the members of a firm engaged in carrying out several contracts. One contract was completed and out of it a profit had been made which had not been divided, but had been used in the work under the other contracts. It was uncertain whether profit or loss would accrue from the other contracts.

Held, that the facts did not establish that the debtors had had means to pay the judgment debt. *Saul* v. *Bateman*, 6 M. R. 189.

3. For non-payment of money—*Imperial Debtors Act.*

R., as agent of S., obtained out of court a sum larger than that to which S. was entitled. An order was made for the repayment of the excess with costs. Upon an application to commit R. for default in payment,

Held, 1. That the Debtors Act, 32 & 33 Vic. (Imp.) c. 62, was in force in Manitoba.

2. That, it sufficiently appearing that R. had means to pay, an order should be made for his committal.

3. That the order might be made for non-payment of costs.

4. That the default in payment might be proved as well by R's. admission as by affidavit of the party to whom payment should have been made.

Bremner, Re, 6 M. R. 73.

See PRACTICE, XXVIII, 2.
— SOLICITOR, I, 8.

ATTORNEY.

See SOLICITOR.

ATTORNEY AND CLIENT.

See SOLICITOR AND CLIENT.

ATTORNEY GENERAL.

See PLEADING, III, 1.

ATTORNEY GENERAL, RIGHT OF, TO INTERVENE.

See LIQUOR LICENSE ACT, 8.

ATTORNMENT.

See DISTRESS FOR RENT, 3.

ATTORNMENT CLAUSE.

See MORTGAGOR AND MORTGAGEE, VI, 4.

AUCTION SALE.

See SALE OF LAND FOR TAXES, X, 3.

AUTHORITY OF AGENT.

See CHATTEL MORTGAGE, I, 1.

AUTHORITY TO ADMINISTER OATH.

See PERJURY.

AUTHORITY TO AGENT.

See AGREEMENT FOR SALE OF LAND, 1.
— COMPANY, II, 1.
— CONTRACT, XV, 8.
— ELECTION PETITION, IV, 1, 2, 5.
— MALICIOUS PROSECUTION, 2.
— MASTER AND SERVANT, IV, 4.
— PRINCIPAL AND AGENT, I.—II, B, IV, V, 3, 6.
— RECTIFICATION OF DEED, 1.
— SALE OF GOODS, VI, 1.
— SALE OF LAND FOR TAXES, X, 8.
— SHERIFF, 7.
— VENDOR AND PURCHASER, VII, 9.

AUTOMOBILE.

Negligence in driving—*Liability of driver for injury to pedestrian—Burden of proof of negligence—Motor Vehicle Act, 7 & 8 Edward VII, c. 34, ss, 38, 39—Act respecting Compensation to Families of Persons killed by Accident, R. S. M. 1902, c. 31—Contributory negligence.*

The administrator of the estate of Andrew McKay brought this action under the Act respecting Compensation to Families of Persons killed by Accident, R. S. M. 1902, c. 31, claiming damages on behalf of certain relatives of McKay who, when walking across a public street at night, was killed by being run over by an automobile driven by the defendant, as it was alleged, negligently. The lights carried by the machine at the time, although perhaps sufficient to comply with the requirements of the Motor Vehicle Act, 7 & 8 Edward VII, c. 34, s. 12, were not strong enough to enable the defendant to see clearly a person walking over the crossing in front, which was in a dense shade cast by overhanging trees, and the evidence did not satisfy the trial Judge that the horn had been sufficiently sounded, either to comply with section 13 of the Act or as careful conduct in the circumstances required. As to the speed at which the car was going, according to the defendant's witnesses, it was at least eight or nine miles an hour.

Held, that the burden of proof that the defendant was not guilty of negligence in the matter was thrown upon him by section 38 of the Motor Vehicle Act and that he had not satisfied it; also that the evidence showed negligence on his part. The fact that it was dark at the crossing and that he went over it at such a rate of speed, when his lights did not enable him to see a reasonable distance ahead, itself constituted negligence in the defendant.

The defendant urged that the deceased had been guilty of negligence in that, if he had looked to the east, he would have seen the lights on the car approaching and avoided the accident.

Held, that the principle that persons lawfully using a highway are entitled to rely on warnings required by statute is applicable under such circumstances, and that the usual rule of ordinary care does not impose on travellers the burden of being constantly on the lookout for automobiles and they have a right to presume that those who may be lawfully using the highway with themselves will exercise a proper degree of care.

Vallee v. *G. T. R. Co.*, (1901) 1 O. L. R. 224; *Pedlar* v. *C. N. R. Co.*, (1909) 18 M. R. 525, and *Hennessey* v. *Taylor*,

(1905) 76 N. E. Rep. 224, 4 Am. & Eng. Ann. Cas. 396, followed.

Verdict for plaintiff sustained. *Toronto General Trusts Corp.* v. *Dunn*, 20 M. R. 412.

AVOIDANCE OF CONTRACT.

See HALF BREED LANDS ACT, 2.

BAIL.

See CRIMINAL LAW, XVII, 3.

BAILIFF.

See COSTS, XI, 1.
— COUNTY COURT, II, 4, 7.
— FI. FA. GOODS, 1.
— GARNISHMENT, IV, 3.
— LANDLORD AND TENANT, I, 5, 8.

BAILMENT.

1. **Liability of bailee for loss**—*Bailee of chattel.*

The hirer of a chattel must restore it in as good plight as it was when received, except for that deterioration which ensues in the course of using, from ordinary wear and tear, and for any injury or loss which may have occurred without culpable negligence or misconduct on the hirer's part. He must answer, also, not only for loss and injury inflicted upon the thing by himself in person, but also for the injurious acts of those whom he voluntarily admits, so to speak, into the use of the thing.

The defendants hired from the plaintiff a team of horses. One of the defendants, having control of the horses, shot one of them, alleging that it was diseased. Before the shooting the plaintiff informed this defendant that the horse was not diseased. The defendant acted on his own opinion merely, and the evidence showed that he was wrong.

Held, That the defendants were jointly liable for the value of the horse. *Morris* v. *Armit*, 4 M. R. 152.

2. Money had and received—*Receipt only prima facie evidence of delivery—Common carrier—Delivery of money package—Proof of loss—Conditions precedent.*

This was an action for the recovery of $2000 handed to the defendants to be sent by express to the plaintiffs' agent at Wawanesa. The money package never reached the hands of the plaintiffs' agent, although he signed a receipt for it in the office of defendants at Wawanesa.

Held, nevertheless, under the peculiar circumstances detailed in the report, that the plaintiffs were entitled to recover the amount from the defendants under the common count for money had and received.

The defendants' undertaking on receipt of the money was that it should be forwarded subject to certain conditions, one of which was that defendants should not be liable for any claim of any nature whatever arising out of the receipt of the property described, unless such claim should be presented in writing within 60 days from the date of the loss or damage, in a statement to which a copy of the contract should be annexed.

Plaintiffs presented their claim in writing within the time limited, but did not show that a copy of the contract was annexed to their statement of claim.

Held, (KILLAM, J., dissenting) that the want of this copy was no bar to the plaintiffs' right to recover.

Per BAIN, J. The claim in this action was not one for either loss or damage, and therefore not of the kind referred to in the condition.

Per TAYLOR, C. J. The case of *Richardson* v. *Canada West Farmers Ins. Co.*, 16 U. C. C. P. 430, is authority to show that the annexing of the copy of the contract was not a condition precedent to the plaintiffs' right to recover.

Per KILLAM, J. The furnishing such copy was clearly a condition precedent to the plaintiffs' right to recover and, as no copy of the contract was annexed to the statement of the claim as required, the plaintiffs had failed to prove their case.

Richardson v. *Canada West Farmers' Ins. Co.*, 16 U. C. C. P. 430, distinguished.

Martin v. *Northern Pacific Express Co.*, 10 M. R. 595.

Reversed, 26 S. C. R. 135. See next case.

3. Money had and received—*Special pleas—Common carriers—Express Company—Receipt for money parcel—Condition precedent—Formal notice of claim—Pleading.*

Where an express company gave a receipt for money to be forwarded with

the condition endorsed that the company should not be liable for any claim in respect of the package unless within sixty days of loss or damage a claim should be made by written statement with a copy of the contract annexed:

Held, that the consignor was obliged to comply strictly with these terms as a condition precedent to recovery against the express company for failure to deliver the parcel to the consignee.

Richardson v. *The Canada West Farmers' Ins. Co.*, 16 U. C. C. P. 430, distinguished.

In an action to recover the value of the parcel, on the common count for money had and received, the plea of "never indebted" put in issue all material facts necessary to establish the plaintiff's right of action. *Martin* v. *Northern Pacific Express Co.*, 26 S. C. R. 135.

4. Negligence—*Involuntary bailee.*

The plaintiff, wishing to send $1,010 to his brother in Toronto, procured at the office of the defendants an envelope such as they use in forwarding money by express, enclosed bank notes to the amount of $1,010, and mailed the letter and registered it. The letter reached Toronto, but was not delivered, owing to its being defectively addressed. The officials of the Dead Letter Department at Toronto, guided by the printed matter on the outside of the envelope, enclosed the letter in one of their envelopes used for returning such letters, addressed it and sent it by registered mail to the defendants in Winnipeg. In due course it was delivered to the defendants' cashier, who received it in a protected cage or pen in which he performed his duties. After receiving the package the cashier, in ignorance of its contents, laid it unopened on the chief clerk's desk, which stood open to the public and to all the defendants' officials. The chief clerk was not at his desk when the package was placed there and said he never saw it and there was nothing to show what became of it afterwards. The defendants' Winnipeg office had never before, apparently, received a registered dead letter, or lost a registered letter.

Held, (PERDUE, J., dissenting,) that, under the circumstances, the defendants owed no duty to the plaintiff to take care of the letter and the plaintiff could not recover. *Cosentino* v. *Dominion Exp. Co.*, 16 M. R. 563.

5. Negligence—*Liability for spoiling of meat placed in cold storage.*

The defendants received at different times in their cold storage warehouse fresh meat, to be frozen and kept frozen for the plaintiffs until called for.

After a few months the meat was found so spoiled that it had to be destroyed. This action was brought to recover damages for the loss, claimed to have been caused by the negligence of the defendants.

When delivered to the defendants the meat was enclosed in wrappers which, according to the evidence, necessitated one or two more degrees of frost to freeze the meat than if there had been no wrapping, and the defendants attributed the damage to this fact and relied on a provision in the receipts given that they were not to be "responsible for any loss or damage caused * * * from any defects in the packages, barrels, *wrappers* or *coverings* in which the said goods are contained."

The trial Judge made the following findings of fact,

(1) The meat was in good and sound condition when delivered at the defendants' warehouse.

(2) The warehouse was properly constructed for the purpose of cold storage; the plant was a first-class cold storage plant of modern type and sufficient power; that it was operated with the ordinary and reasonable care which might have been expected in the carrying out of the business, and that the men in charge of the plant, while not having that higher and special knowledge which a man of scientific attainment might possess on the subject, yet had such practical and even technical knowledge as might be reasonably expected in conducting such a business in an ordinarily satisfactory manner.

(3) The real cause of the spoiling of the meat had not been disclosed by the evidence.

On these findings, the trial Judge held that the plaintiffs had failed to establish negligence on the defendants' part, and he dismissed the action with costs.

Held, on appeal, that the condition in the receipt above quoted did not relieve the defendants from the consequences of negligence, if proved; but, PERDUE J. A., dissenting, that the plaintiffs had failed to prove negligence and that the appeal should be dismissed.

PERDUE, J.A. (1) Since the meat was in good and sound condition when re-

ceived, and the defendants impliedly undertook to promptly freeze it and keep it frozen, the fact that it was found spoiled a few months afterwards speaks for itself and negligence must be presumed against the defendants: *Kearney* v. *London, Brighton, etc., Ry. Co.*, (1870) L. R. 6 Q. B. 759.

(2) The defendants in this case could not meet the plaintiffs' claim by showing merely that they had used ordinary and reasonable care; but were bound to see that the meat was at once thoroughly frozen and then to keep it in that condition and anything short of that would be negligence: *Brabant* v. *King*, [1895] A. C. 640.

(3) The evidence showed that the damage was probably caused by the defendants' failure to maintain a sufficiently low temperature to freeze the meat thoroughly. *Charrest* v. *Manitoba Cold Storage Co.*, 17 M. R. 539.

Appeal dismissed. 42 S. C. R. 253.

6. Sale of goods—*Statute of Frauds.*

When wheat or other merchandise is received in a warehouse or elevator nominally on storage for the person delivering it, but on such terms that the identical goods are so mixed up with others that they can not be returned, and the well understood course of the business is that, unless a price is agreed on, the party delivering the goods can only require an equivalent amount of the same kind and quality to be accounted for to him, the contract between the parties is really one of sale and not of bailment, whether the vendor is to receive the price in money or an equal quantity of goods or has an option to do either, as the property in the goods has passed to the warehouseman.

In such a case the Statute of Frauds offers no bar to the recovery of the price or value of the goods so stored, in case the warehouseman denies the receipt of the same.

South Australian Insurance Co. v. *Randell*, (1869) 6 Moore P. C. N. S. 341, followed. *Lawlor* v. *Nicol.* 12 M. R. 224.

See CONDITIONAL SALE, 4.
— WARRANTY, 2.

BALLOT.

See CRIMINAL LAW, XVII, 15.
— LOCAL OPTION BY-LAW, II ,1 III ,IV V, 2.

BALLOT BOX STUFFING.

Dominion Elections Act, R. S. C., c. 8—*Conviction of Deputy Returning Officer under s.* 100, *s-s.* (*c*), *although not formally appointed.*

The accused had received from the Returning Officer an appointment as Deputy signed by him with the blank for the name not filled up, as required by s. 30 of the Dominion Elections Act, R. S. C., c. 8. He acted as Deputy Returning Officer at one of the polling booths during the whole of the day of the election. He was convicted under s-s. (*c*) of s. 100 of the Act, for that he, being the Deputy Returning Officer for that district, fraudulently put into the ballot box a number of ballots that he was not authorized to put in, and a case was reserved at the trial for the opinion of the Court, as to whether the accused could under the circumstances properly be convicted of such offence.

Held, following *Rex* v. *Gordon*, 2 Leach, 581; *Rex* v. *Holland*, 5 T. R. 607, and *Rex* v. *Dobson*, 7 East, 218, that the accused, having acted in the office and having been the Deputy Returning Officer *de facto* on the day in question, was properly convicted of the offence charged. *Reg.* v. *Holman*, 10 M. R. 272.

BANKS AND BANKING

1. Alteration of cheque after acceptance—*Liability of bank on altered cheque.*

Where a bank accepts or certifies a cheque at the request of the drawer and the cheque is afterwards altered by the drawer so as to be made payable to bearer instead of to order, the bank is not liable to the drawer or his assignees on the altered cheque; such an alteration being a material one, although not one of the kind specified in section 3 of The Bills of Exchange Act (1890).

An unaccepted cheque is not in any sense an assignment of money in the hands of a banker.

There is no debt between a banker and his customer till a demand has been made for payment.

There seems to be a distinction between the liability of a bank which has certified or accepted a cheque at the request of the drawer and the liability where the acceptance is given at the request of the holder; and it is doubtful whether the

holder of such a cheque in the former case is in any different position from the holder of an unaccepted cheque.

The question of the materiality of the alteration in a bill is a question of law, and must be considered with reference to the contract itself, and not at all with reference to the surrounding circumstances. *Re Commercial Bank of Manitoba. La Banque d'Hochelaga's Case*, 10 M. R. 171.

2. Branches of bank.—Plaintiff applied for payment over, by the Bank, of money deposited by T. with it at the branch office at Winnipeg. Previous to the garnishee order being made the money had been paid over by the head office at Toronto under sequestration issued against T. in Ontario. *Held*, following *Irwin* v. *Bank of Montreal*, 38 U. C. Q. B. 375, that a bank and its branches are but one concern, and that the application must therefore be discharged with costs. *Bain* v. *Torrance*, 1 M. R. 32.

3. Customer releasing claim—*Monthly acknowledgment of correctness of balance shown by books.*

The plaintiff's claim was for damages for an alleged illegal sale at a loss of certain goods hypothecated by him for advances. He subsequently, but before action, signed, either personally or by his authorized agent, nine or ten successive monthly acknowledgments of the correctness of the balances due to him as shown by the books of the bank. These documents contained the following clause "And in consideration of the account of the undersigned being not now closed, and subject to the correction of clerical errors if any, the bank is hereby released from all claims by the undersigned in connection with the charges or credits in the said account and dealings up to said day."

Held, that, in the absence of any suggestion of fraud on the part of the bank in procuring such releases, they were sufficient in form to bar the plaintiff's action and, being founded on a sufficient consideration, were valid and binding upon him. *Graves* v. *Home Bank of Canada*, 20 M. R. 149.

4. Payment of cheque—*Joint payees—Endorsement by one—Acquiescence in payment—Monthly receipts—Partnership.*

When a partnership is entered into for the purpose of buying and selling lands, he lands acquired in the business of such partnership are, in equity, considered as personalty, and may be dealt with by one partner as freely as if they constituted the stock-in-trade of a commercial partnership.

The active partner in such business has an implied authority to borrow money on the security of mortgages acquired by the sale of partnership lands.

An amount so borrowed was advanced by a cheque made payable to the order of all the partners by name. The active partner had authority, by power of attorney, to sign his partners' names to all deeds and conveyances necessary for carrying on the business, but had no express authority to indorse cheques.

Held, that, having authority to effect the loan and receive the amount in cash he could indorse his partners' names on the cheque, and the drawees had a right to assume that he did it for partnership purposes and were justified in paying it on such indorsement.

Held, also, that, if the payment by the drawees was not warranted, the drawers having, for two years after, received monthly statements of their account with the drawees, and given receipts acknowledging the correctness of the same, they must be held to have acquiesced in the payment. *Manitoba Mortgage Co.* v. *Bank of Montreal*, 9 C. L. T., Occ. Notes, 125; 17 S. C. R. 692.

5. Purchaser without notice of claim of bank—*Bank Act, R. S. C.* 1906, *c.* 29, *ss.* 86-88—*Sale of goods by pledgor in ordinary course of business—Assignment of chose in action—Set-off.*

Goods purchased from the wholesale manufacturer thereof in the ordinary course of business without notice that he has given security thereon to a bank under sections 86 to 88 of the Bank Act, R. S. C. 1906, c. 29, will become the property of the purchaser free from any claim of the bank under such security.

National Mercantile Bank v. *Hampson*, (1880) 5 Q. B. D. 177, followed.

The defendants were held entitled to set off their claim for goods sold to the Sylvester Company as against the claim of the plaintiff upon an assignment to them by the Sylvester Company of their claim for goods sold to the defendants to the extent of such set-off as it stood at the time of receiving notice of the assignment, since there was clear evidence of an agreemen t that there should be such a set-off.

Sifton v. *Coldwell*, (1897) 11 M. R. 653, *Story's Equity Jur.* ss. 1434, 1435 and *Lundy* v. *McCulla*, (1865) 11 Gr. 368, followed.

Watson v. *Mid Wales Ry. Co.*, (1867) 36 L. J. C. P. 285, distinguished. *Bank of Montreal* v. *Tudhope*, 21 M. R. 380.

6. Refusal of cheque—*Reasonable time —Damages.*

The plaintiffs, Todd & Armstrong, carried on business in partnership and had an account with the defendants. On a Friday the bank was served with an order attaching all moneys due by the bank to the plaintiff Todd and one Poulin. On Saturday two of the plaintiff's cheques aggregating $401 were presented and refused, the bank not having by that time determined what position it should assume.

In an action for damages for such refusal the trial judge told the jury that, if they were of opinion that the bank had exceeded a reasonable time for making all necessary inquiries for their protection, the damages should be substantial but temperate. The jury found a verdict for the plaintiff for $1000.

Held, 1. That there was no misdirection.

2. That the bank had acted with proper, reasonable despatch; that this was a question for the jury; but that, as the jury had misconceived the rights of the parties, there should be a new trial.

3. That the damages were unreasonable and unjust. *Todd* v. *Union Bank of Canada*, 4 M. R. 204.

7. Sale of goods—*Bank Act, ss.* 64 & 68—*Sale of Goods Act*, 1896, *s.* 11, *s.* 12, *s-s.* 1—*Contract of Sale—Consideration—Warranty of title to goods.*

Under section 68 of The Bank Act, security may be taken from the owner of horses for an existing debt by a bill of sale of the horses which expressly states that it is taken only by way of additional security for the debt, and section 64 of the Act does not prevent the Bank from recovering on promissory notes made in its favor by a person who purchases the horses from the transferor.

Section 12, s-s. 1, of The Sale of Goods Act, 1896, does not prevent the recovery by the Bank of the price of horses sold under such circumstances; for, under sub-section (c) of section 11, a breach of the implied condition that the seller of goods has a right to sell them could be treated only as a breach of warranty and not as a ground for repudiating the contract.

Held, also, under the circumstances set out in the statement of case, that the contract of sale between the vendors of the horses and the defendant was completed, that the property in the horses had passed to him and that he was liable for the price agreed on. *Bank of Hamilton* v. *Donaldson*, 13 M. R. 378.

8. Security for debt to Bank—*Covenant to pay creditors of covenantee—Trust in favor of stranger to the deed—Relief against trustee not answering where co-defendants, the cestuis que trustent, succeed in their defence—Specific performance of agreement to pay plaintiffs' creditors.*

The plaintiff's husband had been carrying on a mercantile business and, having got into difficulties, assigned his estate to a trustee for his creditors of whom the defendant Bank was one. An arrangement was then made for the purchase of the stock in trade by the plaintiff, who applied to the Bank for assistance in making the payments. This was afforded on the plaintiff assuming the whole of the husband's indebtedness to the Bank and giving mortgages therefor upon certain real estate and the stock in trade. The Judge who heard the cause found that there was a novation, that the husband was thereby discharged and the wife accepted as the sole debtor. Subsequently the Bank pressed for further security and a new mortgage on the stock was taken, which, besides the usual proviso for redemption, seizure and sale in case of default, etc., and for application of the proceeds, and covenants for payment, contained a covenant on the part of the Bank to pay "the commercial or trade indebtedness of the mortgagor and the expenses of running the business, etc., from and out of the proceeds of the sale of said goods, chattels and stock in trade, and the proceeds of the collections of said book accounts and debts now being assigned to them, but so as that the same shall not increase the present indebtedness due from said mortgagor to said mortgagees beyond the amount now due for principal under these presents and any interest due or accruing due thereon to said mortgagees as hereinbefore provided."

This covenant of the Bank was given to enable the plaintiff to obtain credit in carrying on her business.

The plaintiff, as part of the same arrangement, kept her bank account with

the defendant Bank and deposited with it from day to day the receipts from her business, and made all payments in connection therewith by cheques against this account except petty cash items.

On or about 1st March, 1893, the plaintiff being indebted to the Bank in the sum of $5975.00 and being in default, the Bank entered upon the premises, took possession of the property and sold both land and stock in trade, having completed the transfers and received the purchase money before the filing of the bill of complaint herein. The amount thus realized was not sufficient to pay the plaintiff's indebtedness to the Bank. The plaintiff then filed this bill to set aside the land mortgages as having been taken to secure a fresh advance of money and therefore void under the Banking Act, and among other things to compel specific performance of the agreement of the defendant Bank to pay the commercial or trade debts of the plaintiff out of the money thus realized; but the Bank claimed the right of set-off.

Held, (1) That the securities taken were valid under s. 48 of the Banking Act then in force, R.S.C., c. 120

(2) That the plaintiff had no equity under the circumstances to compel the Bank to perform its covenant to pay her creditors without offering to perform the agreement on her part, and to pay her debt to the Bank.

(3) That, under the circumstances, no trust was created by the said covenant of the Bank in favor of the creditors referred to therein, such covenant having been intended to refer only to the proceeds of the plaintiff's sales and to deposits and collections of book-debts while the business was being carried on, and having been given only with a view to enable the plaintiff to keep the business going.

Gandy v. *Gandy*, 30 Ch. D. 67; *Gregory* v. *Williams*, 3 Mer. 582, referred to on this point.

The purchaser of the mortgaged land sold by the bank was made a party to the suit, and the bill claimed that the sale to him was invalid and asked that the deed to him should be set aside and a declaration made that he held merely as trustee for the Bank. He did not defend, and the bill was taken *pro confesso* against him.

Held, nevertheless, that, as the case failed against the Bank, no decree could be made against the purchaser, and the bill should be dismissed as against both defendants. *Gillies* v. *Commercial Bank of Manitoba*, 10 M. R. 460.

9. Winding up of bank—*Interest to be allowed to creditors—"Acceptance" of a bill by a Bank.*

On the application of the liquidators of the bank for the direction of the Court as to the allowance of interest to the several classes of creditors other than noteholders,

Held, that, unless there is a surplus of assets available after payment of the principal of the debts, all interest ceases after the commencement of the winding up.

If, however, there should be any funds available for the purpose, interest should be allowed as follows:

Depositors who before the winding up had been receiving interest without written agreement, and depositors entitled to interest by special agreement, should now be allowed interest at the agreed on rates, just as if the bank were not being wound up, and any dividends paid them should be applied, first in payment of the interest accrued, and then on account of principal in the ordinary way.

Depositors whose accounts did not bear interest and general creditors can only claim interest if they have made a demand in writing upon the liquidators under the statute 3 & 4 William IV., c. 42, s. 28, "with notice that interest will be claimed from the date of such demand until the time of payment," and then they are entitled to interest at six per cent. per annum.

Holders of drafts and bills of exchange issued by the bank, drawn either on its own branches, or on other banks or bankers who acted as agents of the bank, will be entitled under s. 5, s-s. 2, of The Bills of Exchange Act to treat them either as bills of exchange or promissory notes of the bank, and can claim interest at six per cent. from the time of presentment for payment to the drawees under section 57 of the Act. The fact that these holders knew that an immediate presentment for payment would be useless does not entitle them to interest from the date of the winding up. *In re East of England Banking Company*, L. R. 4 Ch. 14, and section 46 of The Bills of Exchange Act.

Holders of cheques drawn on the bank by customers, accepted or certified by the ledger keepers in the ordinary way and charged to the customers' accounts, will not be entitled to interest, unless

they have served the demand and notice under the statute 3 & 4 William IV., as in the case of other ordinary creditors.

Such an acceptance or certifying of a cheque by the bank cannot be held to be an "acceptance" of it so as to make it an accepted bill within the meaning of s. 17, s-s. 2, of The Bills of Exchange Act, especially in view of the provisions of section 90 in the case of an instrument "signed" by a corporation, the impression of the name of the bank by the rubber stamp in use for certifying cheques not being equivalent to sealing the instrument by its corporate seal.

Re Commercial Bank of Manitoba. Re claims for Interest on Debts Proved, 10 M. R. 187.

See BILLS AND NOTES.
— EQUITABLE ASSIGNMENT, 1.
— INTERPLEADER, V, 3.
— WAREHOUSE RECEIPTS.

BAR TO SUBSEQUENT ACTION.

See NEGLIGENCE, VII, 5.

BARRISTER.

See SOLICITOR.

BAWDY HOUSE.

See CRIMINAL LAW, III, 2, 3.

BENEVOLENT SOCIETY.

See LIFE INSURANCE, 1, 2, 3.

BESETTING.

See INJUNCTION, I, 6.

BILLS AND NOTES.

I. ACCEPTANCE.

1. Firm name—*Notice of accommodation.*

A bill was drawn upon M. & McQ. for goods supplied to M., McQ. & Co. There was in fact no such firm as M. & McQ., and the bill being taken to M., McQ. & Co., their manager, who had power to accept in the name of the firm, accepted in the name of M. & McQ.

Held, That the firm was not liable.

The acceptance of a bill, payable at the office of the drawer, carries with it notice that the acceptance is accommodation. *Quebec Bank* v. *Miller*, 3 M. R. 17.

2. Payable when debentures sold—*Evidence—Identity of debentures.*

The defendants accepted a bill of exchange drawn by the Town of P. payable "when the balance of debentures ($37,000) in our hands are sold by us, and proceeds received, and our claim as at this date and interest to date of payment has been paid." The defendants at that time held debentures of the Town of P. as security for certain advances and with power to sell them at a certain figure. They assumed the debentures at that figure; notified the town that the debentures had been sold; and enclosed an account crediting the town with the amount. The defendants asserted that their claim included certain other debentures of the town, which they then held as owners.

Held, 1. That evidence was admissible to identify the debentures referred to in the acceptance.

2. That the debentures had been "sold," and the proceeds had been received within the meaning of the acceptance.

3. Upon the evidence, the "claim" must be limited to the advances, and did not include the other debentures. *Ontario Bank* v. *McArthur*, 5 M. R. 381.

II. Actions on.

Promissory note—*Payable ten days after demand—Demand—Waiver of presentment—Statute of Limitations.*

Action upon a promissory note made by defendant, dated 16th May, 1883, payable "ten days after demand after date," at the Federal Bank of Canada, Winnipeg. On 29th June, 1883, and on 9th July, 1883, plaintiff went to defendant and asked him for money; on each occasion defendant paid him $75; both payments were, on their respective dates, indorsed on the back of the note by defendant and signed by the plaintiff. The plaintiff's attorney gave evidence that in June, 1883, prior to the demand of the 29th, he saw the defendant, who asked him not to make a demand for money but to wait until he could see plaintiff, and he subsequently told him he had come to some understanding with the plaintiff, or something to that effect.

The action was commenced in December, 1890.

Held, that payment of the note was demanded on 29th June, 1883, when the $75 was paid by defendant on account of the note, and the Statute of Limitations began to run on 12th July, 1883. Plaintiff's right to sue was barred in 1889.

Held, also, that there was a waiver of presentment at the Bank by the defendant. *Sparham* v. *Carley*, 8 M. R. 246.

III. Alteration.

1. Promissory note—*Recovery upon note in original condition—Variance in corporate name.*

A company being indebted to the plaintiffs, the company's manager agreed to procure and deliver to the plaintiffs a note signed by some of the officers of the company. He delivered the note sued upon. It was proved that after the note had been signed, but before its delivery, the manager altered the note by inserting the words "jointly and severally." The plaintiffs were ignorant of this fact at the time.

Held, that the note might be sued upon in its original condition.

A note was made by filling up an engraved form. Between the words "after date" and "promise to pay" the space left for the usual words "I" or "we" was very small, and the words "jointly and severally" could not have been written in the space.

Held, that in such a case the mere fact that the words "jointly and severally" are plainly interlined by being written over the place where they are intended to be read, but in the same handwriting as the rest of the note, is not sufficient notice of an alteration.

A note was made payable to The Waterous Engine Works, but was declared upon as payable to The Waterous Engine Works Company, Limited.

Held, no variance.

The word "Limited" is no part of the name of a company incorporated under the Dominion Joint Stock Company's Act. *Waterous Engine Works Co.*, v. *McLean*, 2 M. R. 279.

2. Of indorsement of promissory note—*Holder for value without notice—Partnership for non-trading purposes.*

A bank, with knowledge that the partnership is a non-trading one, has no right to discount for one of the partners for his own purposes a promissory note made in favor of the firm, although indorsed in the name of the firm, and will be liable to account to the other partners for his share of the proceeds in the absence of circumstances creating an estoppel.

Levinson v. *Lane*, (1862) 13 C. B. N. S. 278; *Fisher* v. *Linton*, (1898) 28 O. R. 322, and *Garland* v. *Jacomb*, (1873) L. R. 8 Ex. 216, followed.

2. The conversion of a special indorsement on a promissory note into an indorsement in blank by striking out the words "Pay to the order of the Home Bank of Canada," above the signatures by the firm and the individual partners on the back, was a circumstance sufficient to put the defendant bank on its inquiry as to the right of one of the partners to discount it for himself. *Pickup* v. *Northern Bank*, 18 M. R. 675.

IV. Consideration.

1. Holder in due course—*Bills of Exchange Act, R. S. C.* 1906, *c.* 119, *ss.* 53 (*b*), 54, 58—*Unfair dealing—Setting aside transaction for fraud or illegality—Recovery of money paid under protest.*

1. The mere existence of a liability of a customer to a bank on a promissory note not yet due is not a sufficient consideration, under section 53 of the Bills of Exchange Act, for the transfer by the customer to the bank of the promissory note of a third party as collateral security

so as to constitute the bank the holder in due course of such promissory note or to give the bank a better title to it than the customer had as against the maker, unless there is evidence that such note was transferred pursuant to a previous agreement to give security.

Canadian Bank of Commerce v. *Wait*, (1907) 1 Alta. 68, followed.

Currie v. *Misa*, (1875) L. R. 10 Ex. 153, and *McLean* v. *Clydesdale Banking Co.*, (1883) 9 A. C. 95, distinguished on the ground that the debts there secured were overdue at the time the collaterals were received.

2. When a promissory note has been given in respect of an indebtedness incurred, that indebtedness will not furnish a consideration for another simple contract made during the currency of the note, the original consideration having been merged in the note.

Hopkins v. *Logan*, (1839) 5 M. & W. 241; *Roscorla* v. *Thomas*, (1842) 3 Q. B. 234, and *Haye* v. *Dutton*, (1844) 7 M. & G. 815, followed.

The defendant was a young man without experience and of little business capacity and without independent advice when he was induced by one Bartlett to enter into a very disadvantageous bargain for the sale of his land, which he could not carry out. Bartlett then made false representations as to the defendant's liability to him for damages and, assisted by his own solicitor, succeeded in procuring from the defendant the promissory note for $1015 sued on in settlement of the supposed damages. He then indorsed over this note to the plaintiffs, to be held as collateral security for a note of his own which was then current.

Held, that the issue of the note was affected with fraud or illegality, within the meaning of section 58 of the Bills of Exchange Act, that the dealings between Bartlett and the defendant were unfair and should be set aside, and that the plaintiffs, not being holders in due course and having no better title to the note than Bartlett, could not recover in an action against the defendant upon it.

Evans v. *Llewellin*, (1787) 1 Cox, 333; *Clark* v. *Malpas*, (1862) 4 De G. F. & J. 401; *Baker* v. *Monk*, (1846) 4 De G. J. & S. 388; *Fry* v. *Law*, (1888) 40 Ch. D. 322; *Slator* v. *Nolan*, (1876) Ir. R. 11 Eq. 367, and *Waters* v. *Donnelly*, (1885) 9 O. R. 391, followed.

Held, also, that the defendant was entitled to recover from the plaintiffs the amount which he had paid them under protest to prevent the seizure and sale of his goods under a chattel mortgage which he had been induced to give to Bartlett to secure the note in question, and which Partlett had assigned to the plaintiffs. *Bank of British North America* v. *McComb*, 21 M. R. 58.

2. Life Insurance—*Liability on note for premium when policy voided by non-payment.*

A person who applies for and receives a policy of life insurance and gives his promissory note for the amount of the first premium, payable in three months, cannot, by refusing to pay the note and returning the policy, avoid liability for the full amount of the note, although the policy becomes void by reason of such non-payment.

Manufacturers Life Ins. Co. v. *Gordon*, (1893) 20 A. R., per Maclennan, J., at page 335, followed.

Royal Victoria Life Ins. Co. v. *Richards*, (1900) 31 O. R. 483, distinguished. *Manufacturers Life Insurance Co.* v. *Rowes*, 16 M. R. 540.

3. Partial failure of.

In an action upon a promissory note, defendant showed that it was given in part payment of a binding machine. He had, however, kept the machine, used it for two years, and had not offered to return it. He claimed, moreover, that the plaintiff had agreed to furnish him with repairs for the machine.

Held, 1. That the defective character of the machine could be no defence to an action upon the note.

2. That no action for failure to furnish the repairs could be sustained, because the contract contained certain conditions which were not performed by the defendant, and which were conditions precedent to his right to make any claim under it. *O'Donohue* v. *Swain*, 4 M. R. 476.

4. Partial failure of—*Election to affirm contract.*

The defendants bought cattle from the plaintiff, gave her the promissory notes sued on for the price and took and kept the cattle, all parties believing that the plaintiff had an absolute title to them. It was subsequently ascertained that the plaintiff had only a life interest in the cattle. After learning this fact, defendants paid a year's interest on the notes

and neither returned nor offered to return the cattle.

Held, that defendants were liable on the notes, as there was no fraud and no total failure of consideration. They were bound to repudiate the transaction at once on learning of the defect in plaintiff's title, if they wished to object, and must by their conduct be held to have elected, with knowledge of the facts, to affirm their purchases. *Primeau* v. *Mouchelin*. *Primeau* v. *Pontel*, 15 M. R. 360.

5. Release from imprisonment—*Objections at trial.*

1. Release from imprisonment in default of payment of a fine imposed on conviction for an offence against The Fires Prevention Act, R. S. M., c. 60, may be a good consideration for a promissory note to secure payment of the fine and costs.

2. When no question is raised at the trial before the County Court Judge as to the sufficiency of the proof of the presentment of a promissory note, it is not open to the defendant to raise the question at the hearing of an appeal from the verdict, as the Judge might have given an opportunity to supplement the evidence, if the question had been raised before him. *Proctor* v. *Parker*, 12 M. R. 528.

V. Construction and Operation.

1. Additional provisions in note—*Negotiable instrument.*

An instrument containing an unconditional promise to pay a sum certain on a date fixed does not lose its character of a negotiable promissory note by reason of its also containing an agreement to pay an attorney's fee if suit is brought thereon, a consent that any justice of the peace shall have jurisdiction to try such suit, a waiver of presentment for payment, notice of non-payment, etc. and of diligence in bringing suit, a consent by sureties that time of payment may be extended without notice and an accelerating clause making the whole amount due on failure to pay interest.

Such a note is, therefore, transferable by indorsement without more: per Ryan, Co. J. in *Davis* v. *Butler*, 7 W. L. R. 85.

2. Additional provisions in note—*Lien note.*

The instruments sued on in these cases contained the usual provisions of a promissory note with additional provisions to the effect that the title, ownership and property for which they were given should not pass from the payees until payment in full, that if the notes were not paid at maturity the vendors might take possession of the machinery for which they were given and sell the same at public or private sale, the proceeds less the expenses to be applied on the notes, and that such action should be without prejudice to the right of the vendors to forthwith collect the balance remaining unpaid.

Held, that the instruments could not be regarded as negotiable promissory notes, because the added provisions were matters entirely unwarranted by sub-section 3 of section 82 of The Bills of Exchange Act, 1890, as they could in no sense be treated as merely "a pledge of collateral security with authority to sell or dispose thereof;" and the statute, having set out certain additions that might be made to the simple promise to pay, impliedly excluded others.

Kirkwood v. *Smith*, [1896] 1 Q. B. 582, followed.

Merchants' Bank v. *Dunlop*, (1894) 9 M. R. 623, not followed.

Dominion Bank v. *Wiggins*, (1894) 21 A. R. 275, and *Prescott* v. *Garland*, (1897) 34 N. B. R. 291, considered. *Bank of Hamilton* v. *Gillies*. *Bank of Hamilton* v. *Murray*, 12 M. R. 495.

3. Payable upon contingency.

A note payable at a specified date, with interest from the date of the note, contained a proviso that "if the defendant should sooner dispose of or sell certain lands, mentioned and described in a memorandum on said note, which the defendant then owned, then the said note should be payable on demand at said bank."

Held, nevertheless, that the time for payment was certain and the document a good promissory note. *Elliott* v. *Beech*, 3 M. R. 213.

4. Payable on contingency—*County Court—Statement of claim.*

The defendant gave the plaintiff company two promissory notes, both dated 25th April, 1891, one payable 1st December, 1891, and the other payable 1st December, 1892. Each note contained a proviso that, "if for any good reason Massey & Co. should consider this note insecure, they have full power to declare it, and all other notes made by me in their favor, due and payable at any

time." On 25th March, 1892, the plaintiff company declared the second note due, because the first one was unpaid, and brought an action on the same in a County Court.

Held, that the plaintiff company had power to make the note payable and actionable, upon the happening of the event mentioned, before maturity by effluxion of time.

The plaintiff's statement of claim filed in the County Court contained a copy of the note, but did not set out the contingency on which the note was declared payable.

Held, that it was a sufficient statement of claim. *Massey Manufacturing Co.* v. *Perrin*, 8 M. R. 457.

5. Statement of consideration for which note given—*Condition attached to promise to pay—Executory consideration.*

Plaintiffs sued as indorsees of two promissory notes made by defendant, payable to the Watson Manufacturing Company, which stated on their face that they were given for a binder, and that the property therein should remain in the payees until payment of the note in full; also that the payees were to provide all repairs required for the binder, and any improvements that might be added to their binders before the maturity of the note.

Held, that these instruments were negotiable promissory notes, notwithstanding the special provision at the end, which should be construed as a memorandum to show that the payees had promised to provide the things mentioned as part of the consideration for the defendant's promise to pay the notes, and not as a condition attached to the absolute promise to pay.

Drury v. *Macaulay*, 16 M. & W. 146, and *Shenton* v. *James*, 5 Q. B. 199 distinguished.

Merchants Bank v. *Dunlop*, 9 M. R. 623.

Not followed, *Bank of Hamilton* v. *Gillies*, 12 M. R. 495.

VI. Execution and Delivery.

1. Delivery in blank with authority to fill up.

To a declaration upon a note, by indorsee against maker, defendant pleaded that G. & Co., being indebted to McL. & Co. delivered to them a blank note with authority to fill it up with the amount of the indebtedness and payable within two months, and when so filled up, but not otherwise, to deliver it as the note of G. & Co.; and that after payment of the indebtedness, and after more than 15 months, and after revocation of all authority by lapse of time, by the express acts of the parties and by the dissolution of the firm of G. & Co., the said McL. & Co. filled up and delivered the note to the plaintiffs.

Held, upon demurrer, that the plea was bad. *Merchants Bank* v. *Good*, 6 M. R. 339.

2. Non-endorsation by co-surety—*Pleading—"Due Notice."*

Defendant, sued as endorser, pleaded that he became a party to the note merely for the accommodation of A. and upon the condition that B. should also become an endorser as his co-surety, and that B. did not endorse.

Held, That the defendant was not liable, even at the suit of an innocent holder for value. *Awde* v. *Dixon*, 6 Ex. 869, followed.

Held, An allegation "of all which the plaintiff had due notice" imports such notice as alone will constitute a good ground of defence—notice at the time the plaintiffs received the note.

Ontario Bank v. *Gibson*, 3 M. R. 406. Affirmed, 4 M. R. 440.

Distinguished, *First National Bank* v. *McLean*, 16 M. R. 32.

3. Signature obtained by false representation—*Rights of holder in due course without notice—Bills of Exchange Act*, 1890, *c.* 33, *ss.* 29, 38.

According to findings of fact at the trial, the evidence did not clearly show that the promissory notes sued on had been signed by the defendants, and it was proved that, if they had signed them, they did so without knowing that they were promissory notes and in the belief, induced by the false representations of the agent of the payee, that the documents they signed were petitions to the Government for a road.

Held, following *Foster* v. *McKinnon*, (1869) L. R. 4 C. P. 704, and *Lewis* v. *Clay*, (1897) 77 L. T. 653, that, notwithstanding the language of sections 29 and 38 (*b*) of the Bills of Exchange Act, 1890, the defendants were not liable to the plaintiffs, although they were holders in good faith, for value and without notice of any defect or fraud, and had acquired

the notes during their currency. *Alloway* v. *Hrabi*, 14 M. R. 627.

4. Stolen cheque—*Holder in due course—Bills of Exchange Act, R.S.C.* 1906, *c.* 119, *ss.* 2, 39, 40 (2) *and* 56.

Delivery or issue, intending it to be used, of a cheque on a bank for a sum of money payable to A.B. or bearer, although signed by the drawer and complete in form, is, under sections 39, 40 (2) and sub-sections (f) and (i) of section 2 of the Bills of Exchange Act, R. S. C. 1906, c. 119, an essential element in the liability of the drawer to one who afterwards cashes it.

Defendant had signed such a cheque and left it in his desk from which it was stolen.

Held, that he was not liable upon it to the plaintiff who had cashed it.

Arnold v. *Cheque Bank*, (1876) 1 C. P. D. 584; *Baxendale* v. *Bennett*, (1878) 3 Q. B. D. 531, and *Smith* v. *Prosser*, [1907] 2 K. B. 735, followed.

Ingham v. *Primrose*, (1859) 7 C. B. N. S. 82, not followed. *McKenty* v. *Vanhorenback*, 21 M. R. 360.

VII. Form and Contents.

1. Doubtful document—*Bill of exchange or agreement—Acceptance.*

Defendants accepted two drafts, in the following words:—"We will keep the sums of $605 and $405.25, from the first estimate of McLean and Moran & Co., as requested above, provided they have done sufficient work to earn that sum."

Held, to be proper bills of exchange. *McLean* v. *Shields*, 1 M. R. 278.

2. Promise to pay—*Garnishment.*

An instrument in the following form:—

"Winnipeg, June 20th 1907."

"Received from A. B. the sum of five hundred dollars advance to be repaid at expiration of 9 months."

"C. D."

is a negotiable promissory note, and the money payable under it is not attachable by garnishment proceedings before its maturity. *Halsted* v. *Herschmann*, 18 M. R. 103.

VIII. Indorsement and Transfer.

1. After default in payment—*Holder in due course—Bills of Exchange Act*, 1890, *s.* 29—*Rescission of contract—Plea of fraud—Amendment asking for rescission—Restitutio in integrum.*

The indorsee of a promissory note made payable with interest, payable annually, who acquired the note after default in payment of one of the annual interest instalments and with knowledge of the default, is not a holder of the note in due course as defined by section 29 of the Bills of Exchange Act, 1890, and defences of fraud and misrepresentation set up by the makers of the note against the payees are available as against such indorsee. See foot note (*a*).

Jennings v. *Napanee Brush Co.*, (1884) 4 C. L. T. 595, followed.

Defendants, who had given their promissory notes for the price of a horse purchased by them, had been defrauded in the transaction, but did not acquire certain knowledge of the fraud until after the death of the horse.

Held, (1) That they were not too late in exercising their right to rescind the contract, although they took no steps to do so until they set up the plea of fraud in this action.

Doyle v. *Diamond*, (1905) 10 O. L. R. 567, followed.

(2) Defendants had a right to rescind without restitution in this case, as the horse had died without any default or neglect on their part.

Head v. *Tattersall*, (1871) L. R. 7 Ex. 7, followed.

Moore v. *Scott*, 16 M. R. 492.

(*a*) But see, now, *Union Investment Co* v. *Wells*, 39 S. C. R. 325, next case.

2. After default to pay interest—*"Overdue" bill—Notice—Holder in good faith—Bills of Exchange Act—Common Law rule.*

Where interest is made payable periodically during the currency of a promissory note, payable at a certain time after date, the note does not become overdue within the meaning of sections 56 and 70 of the "Bills of Exchange Act," merely by default in the payment of an instalment of such interest.

The doctrine of constructive notice is not applicable to bills and notes transferred for value.

Judgment appealed from reversed, Idington and Maclennan, JJ., dissenting.

Union Investment Company v. *Wells*, 39 S. C. R. 625.

3. Authority to indorse—*Holder in due course—Bills of Exchange Act, s.* 56—*Consideration.*

In consideration of the defendant Bank making fresh advances to a company of which the plaintiffs were directors and one Finch was president and managing director, Finch pledged the promissory note in question, which was a note of the Company payable to the plaintiffs and specially endorsed by them to the Bank, as collateral security to the indebtedness of the Company generally, and the Bank made the fresh advances accordingly.

Finch only had authority from the plaintiffs to get the note discounted by the Bank for the account of the Company, but the Bank had no notice of his want of authority to pledge the note as he did.

Held, RICHARDS, J. A., dissenting, (1) The promise of the Bank manager to make fresh advances and his actually making them was a good consideration for the pledge of the note, although the mere existence of the antecedent debt on current notes would not have been.

(2) The Bank was a holder in due course of the note under section 56 of the Bills of Exchange Act, notwithstanding the want of authority on the part of Finch to pledge it as he did.

Lloyds Bank v. *Cooke*, [1907] 1 K. B. 794, and *Brocklesby* v. *Temperance Per. Bldg. Soc.*, [1895] A. C. 173, followed.

(3) The note having been pledged as collateral to the general account of the Company, the Bank was entitled to hold it in accordance with the contract, notwithstanding that the fresh advances, which constituted the consideration for the contract, had been paid off. *Cox* v. *Canadian Bank of Commerce*, 21 M. R. 1.

Appeal to Supreme Court dismissed, 46 S. C. R. 564.

4. By defendant as surety—*Re-indorsement by payee above defendant's indorsement.*

Defendant being indebted to the plaintiff gave him his wife's promissory note payable to Watson Bros. or order, and indorsed by defendant.

The note being unpaid at maturity, the plaintiff, who was the only member of the firm of Watson Bros., indorsed the name of Watson Bros. above defendant's name on the note and then brought this action declaring on a note in favor of Watson Bros., who indorsed the note to defendant, who indorsed it to the plaintiff. Defendant, amongst other defences, pleaded denying the indorsement by him to the plaintiff, but did not allege that the plaintiff was identical with Watson Bros.

Held, that, although the identity appeared on the evidence, as it was not pleaded, the plaintiff's title to the note was complete and he was entitled to recover; also, that, if the identity had been pleaded, the plaintiff could have replied special circumstances that would have destroyed the *prima facie* effect of the first indorsement by him. *Peck* v. *Phippon*, 9 U. C. R. 73; *Moffat* v. *Rees*, 15 U. C. R. 527; *Morris* v. *Walker*, 15 Q. B. 589, followed. *Watson* v. *Harvey*, 10 M. R. 641.

5. By defendant as surety—*Payee's indorsement below defendant's.*

H. being indebted to plaintiff, gave him his promissory note payable to J. L. Wells & Co., and indorsed by defendant.

At the trial of an action on this note, the indorsements on it appeared in the following order: defendant, J. L. Wells & Co., and plaintiff.

Held, that the plaintiff might recover against the defendant, notwithstanding that the note showed no indorsement by the payees to the defendant and then by defendant to plaintiff, and that all the facts and circumstances attendant upon the making, issue and transference of a bill or note may be referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as makers or indorsers: *McDonald* v. *Whitfield*, 8 App. Cas. 733; *Watson* v. *Harvey*, 10 M. R. 641 *Wells* v. *McCarthy*, 10 M. R. 639.

6. By one Bank to another—*Bank cheque—Forgery—Liability as between banks for loss of money paid on forged cheque—Bills of Exchange Act, R. S. C.* 1906, *ss*, 50, 74, 133 (*c*).

One Jones, having stolen a genuine cheque on the plaintiff Bank for $6, erased the name of the payee and the amount, substituted the fictitious name of William Johnson, and raised the amount to $1000. He then indorsed the name William Johnson and deposited the cheque to his credit in the defendant Bank. The defendants refused to advance more than $25 on the cheque until they should learn that plaintiffs would pay it. They then stamped the name of their bank on the back of the cheque and put it through the clearing house in the usual

way, after which it was paid by the plaintiffs. Defendants then honored the cheques of the forger for $800 more, shortly after which the forgery was discovered.

Held, that, under the rules of the clearing house and the practice among Winnipeg bankers, the stamping of the name of the defendant bank on the back of the cheque had the legal effect of an indorsement in blank by the defendant bank and that the defendants were liable to repay the amount of the cheque to the plaintiffs, either by the direct effect of the statute, Bills of Exchange Act, 1890, s. 24 as amended, ss. 38, 55 (c) (now R. S. C. 1906, c. 119, ss. 50, 74, 133 (c)), or because of the warranty to be implied from their indorsement that the cheque was what it purported to be and that they were the lawful holders.

Bank of Ottawa v. *Harty*, (1905) 12 O. L. R. 218, followed.

Leather v. *Simpson*, (1871) L. R. 11 Eq. 398, and *Smith* v. *Mercer*, (1815) 6 Taunt. 76, distinguished.

London and *River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7, dissented from.

Held, also, that the defendants' refusal to pay out more than $25 until after they knew that plaintiffs had honored the cheque made no difference.

Union Bank v. *Dominion Bank*, 17 M. R. 68.

Affirmed, 40 S. C. R. 366.

7. By unincorporated non-trading Association.

The indorsement of a promissory note payable to the order of an unincorporated non-trading association, such as a trade union, with the name of the association and the signatures of two or more of its officers will not enable the person to whom it is delivered so indorsed to sue the maker upon it.

There is no valid method of indorsement of such a note, so as to pass a title to it under the Law Merchant, except by the signature of all the members of the association. *Cooper* v. *McDonald*, 19 M. R. 1.

8. Holder in due course—*Delivery on condition of signature by another joint maker—Contract—Rescission—Election to affirm contract.*

The defendants, thirteen in number, and one Lee, formed a syndicate for the purchase of a stallion. The vendor's agent afterwards induced the defendants to sign an agreement for the purchase and promissory notes for the price on the representation that he would get Lee to put his name also on the notes. The defendants then took possession of the horse and used him for one season and part of another when he died. Shortly after signing the notes the defendants became aware that Lee had refused to sign the notes. They did not ask then for a return of the notes or do anything to indicate that they did not intend to be bound by them. On the contrary, they acted from that time as though the syndicate was composed of themselves alone, ignored Lee in the matter and collected and retained the earnings of the horse for themselves until he died.

The vendor discounted the notes with the plaintiffs who proved that they had no notice or knowledge of any fraud or irregularity in obtaining them.

Held, that the defendants, by their course of conduct, had elected to affirm the purchase, and could not now repudiate their liability on account of any fraud or misrepresentation in obtaining their signatures.

Per DUBUC, C. J. The plaintiffs, being holders for value without notice of any fraud or irregularity, were entitled to recover against the defendants notwithstanding the defence set up that they were only to be liable on condition that Lee joined with them.

Merchants Bank v. *Good*, (1890) 6 M. R. 339, followed.

Awde v *Dixon* (1851) 6 Ex. 869; *Hogarth* v. *Latham*, (1878) 47 L. J. Q. B. 339, and *Ontario Bank* v. *Gibson* (1887) 3. M. R. 406, 4 M. R. 440, distinguished. *First National Bank* v. *McLean*, 16 M. R. 32.

9. Holder in due course—*Onus of proof where illegality set up without plea of illegality—Note of corporation.*

The plaintiffs sued the defendants on a promissory note executed in proper form, given in favor of one Yates, and indorsed by him to the plaintiffs. The defendants proved that the giving of the note to Yates was for his accommodation and entirely unauthorized, and argued that the plaintiffs were then bound to prove that they were holders in due course, under sections 30 and 88 of the Bills of Exchange Act, but there was no plea of illegality or fraud on the record.

Held, that without such plea such defence could not be maintained, and it was unnecessary for the plaintiffs to prove that they had given value or were holders in due course. *Farmers' and Mechanics' Bank* v. *Dominion Coal Co.*, 9 M. R. 542.

10. Holder in due course—*Defect in title—Burden of proof—Indorsement before maturity, presumption in favor of.*

Possession of a negotiable bill or note is *prima facie* evidence of title, and the holder is presumed to have taken it in good faith for value before maturity, in the usual course of business and without notice of any defect in the title of the transferor: *Parkin* v. *Moon*, 7 C. & P. 408, and *Lewis* v. *Parker*, 4 A. & E. 838.

Defendant gave the note in question and a number of other notes in payment for a threshing outfit bought from a company through the plaintiff as agent, and the company indorsed the note in question without recourse to the plaintiff in payment of his commission on the sale. Plaintiff at that time had no reason to suspect that the sale of the machinery would be rescinded or that the company would afterwards take back the possession of the machinery. He was unable to swear positively that he got the note before its maturity, but the presumption in his favor was not displaced by any evidence.

Held, that plaintiff was entitled to recover notwithstanding that the company afterwards retook possession of the machinery and the defendant might have had some defence to an action by the company on the note.

Smith v. *Galbraith*, 1 W. L. R. 227.

11. Illegality—*Holder in due course—Burden of proof—Bills of Exchange Act*, 1890, *ss.* 29, 30.

Action by the holder of a promissory note made by defendant payable to the order of H. or bearer which had been transferred by delivery before maturity by H. to B., by B. to D. and by D. to the plaintiff.

The County Court Judge found that the note was affected with illegality and gave judgment for defendant.

Held, *per* RICHARDS, J., on appeal to the King's Bench that it should be presumed from this verdict that the trial Judge had found that the plaintiff had failed to satisfy the onus cast on him by sections 29 and 30 of the Bills of Exchange Act 1890 of showing that he or B. or D. was a holder in due course.

See the report for a statement of the facts proved and the reasons given for dismissing the appeal.

PERDUE, J., was of opinion that the plaintiff was entitled to a verdict on the evidence. *Gibson* v. *Coates*, 1 W. L. R. 556.

12. Liability of indorser to payee—*Bills of Exchange Act, R.S.C.* 1906, *c.* 119, *s.* 131—*Holder in due course—Estoppel.*

1. Under section 131 of the Bills of Exchange Act, R.S.C. 1906, c. 119, a person who indorses a promissory note not indorsed by the payee at the time may be liable as an indorser to the payee. *Robinson* v. *Mann*, (1901) 31 S.C.R. 484, and *McDonough* v. *Cook*, (1909) 19 O.L.R. 267, followed in preference to *Jenkins* v. *Coomber*, [1898] 2 Q.B. 168, and cases following it.

Difference between above section and the corresponding section (56) of the Imperial Act pointed out.

2. Although the defendant company had made the note in question in pursuance of an agreement to assume the debt of another to the plaintiff company; yet, as there was a good and valuable consideration given for that assumption, the plaintiffs were holders in due course and the defendant company was liable upon the note.

3. The other defendants being directors of the defendant company, having indorsed the note and induced the plaintiffs to enter into and perform the agreement in consideration of which the note was given, were estopped from disputing the validity of this transaction or setting up that the defendant company had not power to give the note: Bills of Exchange Act, s. 133.

McDonough v. *Cook*, supra at pp. 272, 274, and *Lloyds Bank* v. *Cooke*, [1907] 1 K.B. 794, followed. *Knechtel Furniture Co.* v. *Ideal House Furnishers*, 19 M. R. 652.

13. Pleading—*Waiver of presentment—"Notes of mine"—Appropriation of payments.*

A note payable to the order of the defendant and indorsed "Pay to the order of McA., B. & Co." (the plaintiffs) may be declared upon as indorsed by the defendant to the plaintiffs, although the name of another indorser appears below defendant's signature; there being no

explanation of the circumstances under which this other name was signed.

Quære.—Whether under an allegation of presentment for payment and notice of dishonor the plaintiff can prove waiver of presentment and notice.

The phrase "Notes of mine" is wide enough to cover notes *indorsed* as well as *made*.

The principles of appropriation of payment discussed.

McArthur v. *McMillan*, 3 M. R. 152. Affirmed, 3 M. R. 377.

IX. Lost Bills and Notes.

See Practice, XXVIII, 15.

X. Presentment and Notice of Dishonor.

1. Impossibility of presentment—*Form and contents.*

If the place at which money is payable under a simple contract ceases to exist, it is not necessary that any demand for payment be made to enable the creditor to maintain an action.

Per Taylor, C.J.—If the place at which a promissory note is payable ceases to exist, personal presentment must be made.

A promissory note was preceded by the words, "To collaterally secure the payment of the money mentioned in an assignment of mortgage," etc.

Held, That the instrument was an agreement merely and not a promissory note. *McRobbie* v. *Torrance*, 5 M. R. 114.

2. Note left at place of payment—*Constitutional law*—3 & 4 *Anne*, *c.* 9.

If a note be at the place of payment at the time it becomes due, it is sufficiently presented.

3 & 4 Anne, c. 9, s. 1, enabling indorsees of notes to sue the maker or indorser was introduced into Manitoba by 38 Vic. (Man.), c. 12.

The Act 34 Vic. (D.), c. 5, enabling banks to discount promissory notes, &c., implied that notes were negotiable. *Merchants Bank* v. *Mulvey*, 6 M. R. 467.

3. Time for mailing notice of dishonor—*Post office box.*

The plaintiffs were the holders of a note endorsed by the defendant, payable at the plaintiff's bank on the 15th of September.

On the 13th of September a change of managers of the bank had taken place and the new manager, although the note was in the bank during the whole of the 15th, knew nothing of its existence until the afternoon of the 16th. He then caused the note to be protested and a notice addressed to the defendant put in the post office. This notice was placed in a box rented by the defendant from the post-office authorities before six o'clock on the same afternoon.

Held, That there had been sufficient presentment and notice of dishonor. *Union Bank* v. *McKilligan*, 4 M. R. 29.

4. Waiver of presentment—*Liability of maker when note not presented at place where payable—Bills of Exchange Act, R.S.C.* 1906, *c.* 119, *s.* 183—*Holder in due course—Renewal note as acknowledgment of liability on original—Liability of company on note made by officer.*

Action by indorsees of promissory note given by defendant company to the payees for value. The plaintiffs took the note during its currency as security for an advance to the payees. The note was payable at the Bank of Hamilton, Winnipeg. At its maturity the secretary-treasurer of defendant company went to the office of the payees and gave them a renewal note without inquiring for the original. The payees then negotiated the renewal note and the defendant company afterwards paid it.

The trial Judge was satisfied upon the evidence that the original note had been presented for payment before action, but he non-suited the plaintiffs on the ground that they, being shareholders in the payee company, were personally bound by the wrongful action of that company in taking the renewal note.

Held, *per* Perdue and Cameron, JJ.A. (1) That the non-suit was wrong, as there was nothing to show that the plaintiffs were not holders in due course.

(2) That the action of the defendants in giving the renewal note and subsequently paying it amounted to an acknowledgment that the original note was made with their authority and that they were liable on it.

Per Cameron, J.A. (1) That, under section 183 of the Bills of Exchange Act, presentment of the note for payment before action was not necessary, following *Merchants Bank* v. *Henderson*, (1898) 28 O.R. 360; *Freeman* v. *Canadian Guardian Co.*, (1908) 17 O.L.R. 296, and dissenting from *Warner* v. *Symon-Kaye*, (1894) 27 N.S.R., 340, and *Jones* v. *England*, (1906) 5 W. L. R. 83.

(2) That the defendants were liable on the note although it was not duly made under their by-laws, as innocent holders of negotiable securities are not bound to inquire whether certain preliminaries which ought to have been gone through have actually been gone through.

Imperial Bank v. *Farmers Trading Co.*, (1901) 13 M. R. 412, and *Re Land Credit Co.*, (1869) L.R. 4 Ch. 469, followed.

Per RICHARDS, J.A. That it was necessary to prove presentment before action and this had not been done.

Per PERDUE, J.A. That there was sufficient evidence of presentment before action.

Appeal allowed and verdict entered for plaintiffs with costs. *Robertson* v. *Northwestern Register Co.*, 19 M. R. 402.

5. When to be made as against maker—*Indorsee against maker for money paid to his use.*

Held, 1. Evidence is admissible to prove that words now appearing over an indorsement were placed there after delivery and that the true indorsement was not, therefore, restrictive.

2. A note payable at a particular place must be presented there for payment. As against an indorser, it must be so presented upon the due date. As against the maker, any subsequent presentment will suffice if he have not by the delay been damnified.

3. If a note be at the place for payment upon the due date, no further presentment is necessary.

4. An indorser suing the maker upon the note need not prove presentment and notice to himself, but if he sue for money paid to the use of the maker he must show that he was legally liable, or an express request, to pay.

5. Evidence not objected to at the trial cannot be objected to in Term.

6. The plaintiff—an indorsee of a note—may even at the trial strike out the names of prior indorsers. *Biggs* v. *Wood*, 2 M. R. 272.

6. Where payable.

Certain promissory notes were made payable at the Imperial Bank of Canada without stating any special place. The notes were dated at Brandon. The head office of the Imperial Bank was at Toronto, but it had a branch office at Brandon and the notes were presented at that office for payment.

Held, A sufficient presentment.

Commercial Bank v. *Bissett*, 7 M. R. 586.

Distinguished, *Taylor* v. *Gardiner*, 8 M. R. 310.

7. Within reasonable time—*Promissory note payable on demand with interest half yearly on dates specified—Presentment for payment—Reasonable time—Discharge of indorser—Notice of dishonor—Writ of summons, service of, not equivalent to notice of dishonor.*

A promissory note worded as follows: "On demand,.....months after date, I promise to pay to A. B., or order, the sum of.....with interest at ten per cent. payable half yearly on 30th April and 31st October," is a negotiable promissory note within the meaning of s. 82 of The Bills of Exchange Act, 1890.

Such a note was presented for payment and protested about 32 months after its date, three half yearly instalments of interest having been paid in the meantime.

Held, that there was nothing to show that it was not presented within a reasonable time.

The issue and service of the writ of summons in an action on a promissory note, is not sufficient notice of dishonor to make the indorser liable, although the writ was served on the same day that the note was dishonored.

Quære, whether the plaintiff could recover overdue instalments of interest without having given notice of dishonor on each default in payment. *Commercial Bank* v. *Allan*, 10 M. R. 330.

8. Proof of presentment of promissory note payable at a particular place when dispute note does not deny presentment—*County Courts Act, R.S.M.* 1902, *c.* 38, *ss.* 95, 114, 116, 118—*Pleading in County Court action.*

Although a promissory note is payable at a particular place, it is not necessary, in an action upon it in a County Court, to allege presentment at that place in the particulars of claim, or to prove presentment at the trial, unless the defendant has expressly set up non-presentment in his dispute note. *Teague* v. *Scoular*, 17 M. R. 593.

See ACCORD AND SATISFACTION, 3.
— BANKS AND BANKING, 9.
— CONDITIONAL SALE, 7.
— COMPANY, IV, 15.
— COUNTY COURT, II, 6.
— EVIDENCE, 21.

See FRAUDULENT CONVEYANCE, 15.
— PRACTICE, XXVI, 2.
— PROMISSORY NOTES.
— SUMMARY JUDGMENT, I, 3; II, 4.

BILLS OF LADING.

See RAILWAYS, III, 2.
— SALE OF GOODS, IV, 3.

BILLS OF SALE.

1. Change of possession—*Notice to creditor.*

If a particular creditor is aware that there has been a sale of chattels and an actual and continued change of possession following it, he cannot be prejudiced by the fact that a written bill of sale or mortgage has not been filed in accordance with the Bills of Sale Act, and the sale or mortgage may be held valid as against his claim, although the requirements of that Act are not fully complied with. *Robertson* v. *Wrenn*, 10 M. R. 378.

2. Immediate delivery—*Change of possession—Seizure of horse under execution against vendor—Claim by vendee—Interpleader issue.*

Interpleader issue respecting the right to a stallion. H. acquired the horse in question in March, 1891. During 1891 and 1892 printed notices were put up advertising the horse in which it was stated that reference for particulars was to be had to H., although there was no statement of the ownership of the animal. H. did not, himself, travel with or personally take care of the horse, but arrangements were made in his name with the persons at whose places the horse was put up, and printed forms were used on which was the heading, "D. Hope, proprietor."

On 20th June, 1892, plaintiff bought the horse from H., giving his note at 6 months for the amount of purchase money, and H. gave him an absolute receipt acknowledging payment of the whole of the purchase money, and an order for delivery of the horse. The horse was then away in the country and was not brought back to Winnipeg until 23rd June, when plaintiff presented the order to C. who took care of the horse, and told him he had bought it, he told C. to change the book containing the forms of contracts by substituting the plaintiff's name for that of H.; he gave C. charge of the horse and told him to tell everybody that the horse was his, plaintiff's.

Held, that the transaction must be treated as a real agreement for the sale of the horse to the plaintiff. The plaintiff's note was apparently accepted in payment and there was such a delivery and acceptance as satisfied the Statute of Frauds.

But, the sale was void as against the defendant, because of its not having been accompanied by an immediate delivery, and the possession of the plaintiff could not avail to give him a title which the sale did not give, as against the defendant in the issue. *Jackson* v. *Bank of Nova Scotia*, 9 M. R. 75.

3. Security for money—*Bills of Sale Act, R.S.M.* 1892, *c.* 10, *ss.* 2 and 3.

If the transaction between the bargainor and the 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 re-payment 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 M.R. 210, followed. *Boddy* v. *Ashdown*, 11 M. R. 555.

4. Statement of consideration.

The full and true consideration for which a bill of sale is given must be set out in it, with substantial accuracy, otherwise the bill is void.

G. being indebted to B., gave his note for the amount, which B. discounted at a chartered bank. As security for the discount, G. executed a chattel mortgage to the bank. At maturity B. took up the note. Afterwards he procured from G. a bill of sale of the goods. The bill recited the mortgage and an agreement to sell the goods for $100 over the mortgage. The expressed consideration was the premises and $100. The $100 was not paid or intended to be paid.

Held, 1. That the mortgage was void under the Banking Act.

2. That, although the debt upon the notes might have been a sufficient consideration for the bill of sale, yet, as that was not the consideration stated, the bill

was void. *Bathgate* v. *Merchants Bank*, 5 M. R. 210.

See FRAUDULENT CONVEYANCE, 14.

BONDS.

Successive actions on same bond—*Pleading—Amendment—Presumption in favor of seal having been affixed with authority—Agreement to stifle prosecution—Illegal consideration.*

Only one action can be brought upon a bond with a penalty; but, if the objection is not pleaded to a second action, it cannot be raised at the trial and an amendment raising it should not necessarily be allowed.

The defendants had signed the bond in question in this action at the request of one Turner, who was indebted to the plaintiff. They intended the document to be their bond and it purported to be under seal, and it was sealed when handed by Turner to the plaintiff, but they swore that there were no seals upon it when they signed it. They did not, however, say that they did not authorize Turner to complete the document and make it what it was intended to be by affixing seals.

Held, that it should be presumed that the defendants had authorized Turner to affix the seals for them, and that their defence of alteration of the bond failed.

Turner had become indebted to the plaintiff under circumstances exposing him to a criminal prosecution in respect of the debt and, at the interview between him and the plaintiff's solicitor respecting a settlement, the latter told him that he was liable to a criminal prosecution; but, outside of this, there was no evidence of a promise or agreement not to prosecute.

To induce the defendants to give the bond in question, Turner told them he was threatened with arrest but for a totally different offence.

Held, distinguishing *Jones* v. *Merionethshire*, &c., [1892] 1. Ch. 173, that there was not sufficient evidence to warrant a finding that the bond had been given for an illegal consideration, *viz.*, an agreement not to prosecute.

Semble, such a defence, if made out by the evidence, should be given effect to by the Court on appeal, although not pressed at the trial, or mentioned in the præcipe filed for the appeal.

Scott v. *Brown*, [1892] 2 Q.B. 724, and *Gedge* v. *Royal Exchange*, [1900] 2 Q.B. 220, followed. *Pease* v. *Randolph*, 21 M. R. 368.

See ELECTION PETITION, IX, 2.
— RECTIFICATION OF DEED, 1.
— VENDOR AND PURCHASER, I, 1.

BONUS ON MORTGAGE LOAN.

See MORTGAGOR AND MORTGAGEE, VI, 1.

BOYCOTT.

See CONSPIRACY IN RESTRAINT OF TRADE, 1.

BOUNDARIES, CHANGE OF.

See LOCAL OPTION, I.
— MUNICIPALITY, VIII, 1.
— SUMMARY JUDGMENT, II, 3.
— TAXATION, 3.

BOUNDARY LINES.

Survey—*Re-survey—Dominion Lands Act, s.* 129, 52 *Vic., c.* 27, *s.* 7, *[D]—Ratification—Road allowance—Dominion Lands.*

Under sub-section 2 of section 129 of the Dominion Lands Act as re-enacted by 52 Vic., c. 27, s. 7, it is necessary that the Governor-General-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, also, 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 Vic., 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 M. R. 508.

BREACH OF CONTRACT.

See CONTRACT.
— COVENANTS, 6.
— DAMAGES, 1.
— INJUNCTION, II, 1, 2.
— SALE OF GOODS, II, 3.

BREACH OF COVENANT.

See COVENANT, 2.
— PRACTICE, II, 2.
— REAL PROPERTY LIMITATION ACT, 1.

BREACH OF DUTY.

See PRINCIPAL AND AGENT, II, A; V, 4.

BREACH OF INJUNCTION.

See INJUNCTION, IV, 1.

BREACH OF PROMISE OF MARRIAGE.

Corroborative evidence.

The corroboration necessary in an action for breach of promise need not go the length of, by itself, proving the promise; it will be sufficient if it supports the plaintiff's evidence in respect of the promise, so as to make it appear reasonably probable that her testimony that the promise was given is true.

Circumstances which are as consistent with the non-existence of a promise as they are with the fact of a promise having been given, can scarcely be taken to afford the material corroboration that the Statute requires. *Waters* v. *Bellamy*, 5 M. R. 246.

See EVIDENCE, 4.

BREACH OF STATUTORY DUTY.

See NEGLIGENCE, I, 3.
— RAILWAYS, XI, 4.

BREACH OF TRUST.

Constructive notice—*Solicitor acting for both parties—Purchase for value without notice—Occupation of land, how far notice to purchaser—Redemption—Negligence.*

The defendant Hastings, being solicitor for the plaintiff Duncan MacArthur, at his request accepted the trusteeship of the land in question for the plaintiff's infant son, John R. MacArthur; but afterwards, as found by the trial Judge, fraudulently conveyed the land to the defendant Stenning, who had been his client, in satisfaction of the sum of $460 part of his then indebtedness to her. Mrs. Stenning had no notice of the plaintiff's claim and supposed that the land was vacant, although it had a house on it which, in fact, had been all the time occupied by tenants paying rent to MacArthur.

Held, 1. Notice of the plaintiff's claim should not be attributed to Mrs. Stenning on account of her solicitor's knowledge of the facts; because, in carrying out the transaction, the solicitor would naturally suppress that knowledge.

Rolland v. *Hart*, (1871) L.R. 6 Ch. 678, followed.

2. The occupation of the land by a tenant affected Mrs. Stenning with constructive notice only of that tenant's rights, and not with notice of the lessor's title or rights.

Hunt v. *Luck*, [1902] 1 Ch. 428, followed.

3. Mrs. Stenning was entitled to be treated as a purchaser for value without notice; and, having the legal estate, her claim should prevail over the prior equity of the plaintiff, but only to the extent of the amount by which she had reduced her claim against Hastings, as no new or further consideration passed from her to Hastings when she acquired the title.

4. The action of the plaintiff in conveying the land to Hastings, and not afterwards inquiring what the trustee was doing with the property, could not be considered as negligence disentitling the plaintiff to relief, in view of the fact that he continued to receive the rents.

Shropshire, &c, Co. v. *The Queen*, (1875) L. R. 7 H. L. 507, followed.

5. The plaintiff John R. MacArthur was entitled to redeem the land upon payment to Mrs. Stenning of the $460 with interest, her subsequent outlays and costs of suit.

6. The defendant Hastings should pay John R. MacArthur the amount so found due to Mrs. Stenning and the plaintiff's costs. *MacArthur* v. *Hastings*, 15 M. R. 500.

BREACH OF WARRANTY.

Measure of damages—*Sale of Goods Act, R.S.M.* 1902, *c.* 152, *s.* 52 (*d*).

Action for damages for breach of a warranty on the sale of a second-hand engine, that the engine was in a good state of repair and in good working order.

Held, that, under sub-section (d) of section 52 of The Sale of Goods Act, R.S.M. 1902, c. 152, the proper measure of damages to be allowed is the amount which at the time of the sale it would have been necessary to expend in order to remove defects which constituted the breach of the warranty, but not including cost of repairs necessitated by wear and tear or accidents after the plaintiff began to use the engine.

Cook v. *Thomas*, (1886) 6 M.R. 286, followed. *Sumner* v. *Dobbin*, 16 M. R. 151.

See CONTRACT, XII, 2.
— EVIDENCE, 15.
— PLEADING, VIII, 2.
— SALE OF GOODS, IV, 1, 4.
— WARRANTY, 1, 2.

BRIBERY.

See ELECTION PETITION, IV, 1, 2.

BRIDGE.

See CONSTITUTIONAL LAW, 1.
— EXPROPRIATION, 2.

BROKER

See PRINCIPAL AND AGENT, V, 5.

BUILDERS' AND WORKMENS' ACT.

R. S. M. 1902, c. 14, ss. 3, 4—*Employment of workmen "by the day"—Priority of claim for wages.*

A workman employed at a rate per hour is not a workman employed "by the day" within the meaning of section 3 of The Builders' and Workmen's Act, R. S. M. 1902, c. 14, and can have no direct claim against the proprietor, under section 4 of the Act, for his wages earned in the erection of a building by his employer for the proprietor. *Dunn* v. *Sedziak*, 17 M. R. 484.

Note.—The statute has since been amended substituting the words "by time" for "by the day."

BUILDING CONTRACT.

1. Architect's certificate of completion—*Condition precedent.*

The written contract between the parties provided that the plaintiffs were to erect and complete a building for defendant according to certain drawings and specifications by a fixed date and to the satisfaction of an architect named in the agreement and certified by him under his hand forthwith after completion. It also provided for payment on the certificates of the architect of 85 per cent. on the work done from time to time, and that the balance unpaid on the completion of the work should become payable within one month after the architect should have certified thereto.

The architect gave two so-called final certificates, the first of which was in part as follows: "I hereby certify that Davidson Bros. are entitled to $416.36 in full for above contract and extras, less $4.25, which amount may be held back till the items of work in the following list are done." It proceeded to specify the items covered by the $4.25, and added: "Note—I consider the guarantee in specification will cover any leak in roof."

The contractors had in the specification guaranteed the roof for five years against ordinary wear and tear. Annexed to and forming part of the certificate was a statement showing that in arriving at the sum of $416.36 a deduction of $50 had been made for "bad floor, etc."

The second and last certificate of the architect was as follows: "This is to show that by certificate given by me on

23rd January, 1900, I certified that Davidson Bros. were entitled to $416.36, from which the amount of $4.25 was deducted to cover some small items left undone. These have now been attended to, and I therefore certify that Davidson Bros. are entitled to $416.36 in full of contract and extras."

Held, that the two certificates should be read together, that being so read they showed that in respect of the floor and roof the work had not been properly completed, and did not constitute a certificate that the contract work had been completed to the satisfaction of the architect, that such a certificate was a condition precedent to the plaintiffs' right to recover, and that the verdict of the trial judge in favor of defendant should stand. *Davidson* v. *Francis*, 14 M. R. 141.

2. Completion of work by proprietor—*Who entitled to difference when cost of completion less than balance of contract price.*

After the plaintiff had done a considerable part of the work under a contract with the defendants for the building of a bridge he became unable to proceed with it, and the defendants under a clause in the contract declared it forfeited and completed the work themselves at a cost of about $4000 less than the unpaid balance of the original contract price of the whole work and took over and used the bridge.

That clause provided for an indemnity o the defendants against all loss occasioned by the default of the contractor, also that, if the damage to the defendants resulting from such default should be less than the sum due to the contractor under the contract, then the difference should be payable to the contractor. It also provided that the contractor should have no claim for payment in respect of the work done after the cancellation of this contract.

Held, notwithstanding, that the plaintiff was entitled to the full balance of the contract price less the costs and expenses incurred by the defendants in completing the work.

Ranger v. *G.W.R.*, (1854) 5 H.L. Cas. 72, followed. *Buchanan* v. *Winnipeg*. *Stewart* v. *Winnipeg*, 19 M. R. 553.

3. Delay in completion—*Penalty or liquidated damages—Provision for written notice of claim for extra time allowance—Ordering extra work after expiration of time for completion.*

The plaintiff's contract bound him to complete a building for defendant within a specified time and to pay a penalty of $20 a week in case of delay beyond the time, subject to clauses providing for an extra time allowance in case the plaintiff should be obstructed or delayed "in the prosecution or completion of the work" by the act, neglect, delay or default of the owner or the architect or of any other contractor on the house, but that "no such allowance shall be made unless a claim therefor is presented in writing to the architect within 36 hours of the occurence of such delay."

Held, (1) that plaintiff was bound by this last proviso, and was liable for the stipulated penalty, although the delay in completion was entirely owing to causes beyond his control and a large part of it took place before he commenced his work at all, as he had failed to give notice in writing to the architect of any claim for extra time allowance.

Jones v. *St. John's College*, (1870) L. R. 6 Q. B. 115, followed.

(2) As the trial Judge found that, as a matter of fact, the defendant was not responsible for any part of the time lost and he suffered from the delay damage to the extent of $20 per week, the case did not come within sub-section (c) of section 38 of the King's Bench Act, giving the Court power to relieve against agreements for liquidated damages.

(3) The allowance of $20 per week should be made only from the time named in the contract for the completion up to the 19th January, 1904, and not up to the date of the actual completion, because defendant ordered some extra work to be done which was only commenced on the 19th January, and that estopped him from claiming damages for delay beyond that date.

Holme v. *Guppy*, (1838) 3 M. & W. 387; *Westwood* v. *Secretary of State for India*, (1863) 7 L. T. 736, and *Dodd* v. *Churton*, [1897] 1 Q. B. 562, followed *Grey* v. *Stephens*, 16 M. R. 189.

4. Delay in completion—*Termination by owners of the employment of the contractor before completion—Liability of contractor for results of accident caused by his negligence.*

The contract in this case contained the usual provisions for the termination of it by the owner before completion in

the event of the contractor making default, and for payment by the contractor of a fixed amount as liquidated damages for every day's delay in completion beyond the time fixed. Upon the happening of an accident and damage to the works, for which the Court held the plaintiffs responsible, they refused to make good the damage and the defendants terminated the contract and completed the building.

By the terms of the contract the plaintiffs were not entitled to receive any further payment after their employment had been discontinued until the work was wholly finished unless the defendants should be unreasonably dilatory in completing it, and the trial Judge found that they had not been. Moreover payments were to be made "only upon the written certificate of the architect to the effect that such payments are due unless the architect is in default in issuing the same," and the trial Judge found that the architect was not in default in refusing a certificate after the damage had occurred.

The plaintiffs brought this action before the completion of the building and claimed to be entitled to recover the full amount earned by them up to the time their employment was terminated.

Held, that their action was premature and should be dismissed with costs.

The defendants in their counterclaim sought to charge against the plaintiff $100 per day as liquidated damages for delay in completion from the time fixed, 1st April, 1907, but they had not terminated the contract until 21st September following and the work was not completed by them until the following spring.

Held, (1) That the defendants had precluded themselves from recovering anything under the penalty clause by ordering several complete changes in the character of portions of the building, by ordering a number of important extras after the time fixed for completion, by paying the progress estimates given by the architect up to the time of the cancellation of the contract and by great delays on the part of the architect in furnishing drawings and specifications of the work.

Findlay v. *Stevens*, (1910) 20 O.L.R. 334; *Dodd* v. *Churton*, [1897] 1 Q.B. 562, and *Roberts* v. *Bury Commissioners*, (1870) L. R. 5 C.P. 310, followed.

(2) That the defendants could not recover anything by reason of the plaintiff having left the floors of the building out of level, as the defendants had chosen to complete the building without restoring the level, although they could have recovered the expense of it if they had restored the level as they might have done.

(3) That the defendants were entitled to recover under their counterclaim any excess of the cost of completing the building according to the original plans and specifications over and above the balance unpaid of the original contract price plus the cost of extra work done by the plaintiffs, and also the expense incurred by the defendants in repairing and restoring an adjoining building belonging to a different owner which had been seriously damaged in consequence of the accident.

(4) A contractor for the erection and completion of a building is liable to make good any injury that happens to it during the progress of construction, although the cause of that injury was some defective design or errors on the part of the architect in preparing the specifications for the work, unless these causes have been expressly excepted by the contract.

Thorn v. *Mayor of London*, (1876) 1 A.C. 120; *Bottoms* v. *Mayor of York*, (1892) *Hudson on Building Contracts*, vol. II, p. 220, and *Hydraulic Engineering Co.* v. *Spencer*, (1886) 2 T.L.R. 554, followed.

Per MATHERS C.J., in the Court below. In the absence of any provision that, in the event of the owners exercising their power to forfeit the contract, the liquidated damages for delay were still to run till the date of the actual completion, they could not recover such damages for any time beyond the date of the forfeiture: 3 *Halsbury's Laws of England*, s. 514.

Yeadon Water Works Co. v. *Binns*, (1895) 72 L.T. 538, followed.

Neither would the defendants be entitled to unliquidated damages for delay beyond that date: *Hudson on Building, Contracts*, vol. I, p. 543. *Grace* v. *Osler* 21 M. R. 641.

5. Substantial completion—*Deviations from specifications—Performance of contract must be exact—Provision inconsistent with lien—Costs.*

Where work is to be done in a specified manner and to be paid for on completion, and it is done in a different manner, or so defectively as to justify an allowance for the defects, and the party for whom it is done refuses to acquiesce in the variations or defects or to accept the work, but simply takes the position that the work-

man must perform it according to the express stipulations and perfectly, and interposes no obstacle to this being done, the workman cannot recover anything before this is done.

At the hearing of a suit to realize a mechanic's lien for the balance of the contract price of the erection of a dwelling house, the Judge found that there were defects and variations in the construction requiring a deduction of $40 from the total sum of $1400, and made a decree in favor of the plaintiff for payment of the balance of the contract price with a deduction of the $40.

The evidence, however, showed that the defendant had not acquiesced in the changes and had complained of the defects.

Held, by the Full Court on rehearing, that under such circumstances the plaintiffs could only recover that portion of the price which was to be paid as the work progressed.

The contract contained a provision that, if the defendant should fail to pay the balance of the price, $1000, on the completion of the building, the plaintiffs were "to become the sole owners of the property until the said $1000 be paid."

Held, that this was not inconsistent with a lien for that part of the contract price which was payable as the work progressed.

The plaintiffs having recovered only $110 by the suit, for which they might have sued in the County Court, and the defendant having disputed the whole claim throughout and raised a number of untenable objections, the Court allowed no costs to either party up to and including the decree, but gave the defendant the costs of the rehearing to be set off against the plaintiff's verdict. *Brydon* v. *Lutes*, 9 M. R. 463.

6. Substantial completion—*Unimportant defects—Waiver of strict performance—Amendment.*

Action to recover balance of contract price of erection of a dwelling for defendant. Objection was made to plaintiff's right to recover on account of the following defects:

1. The specifications required that the walls should be "beam filled or built in between the joists on the inside," whereas the plaintiff had only put in one row of bricks above the inner side of the foundation wall between the joists to the floor above, thus leaving an empty air space between the bricks and the outer wooden wall of the house.

2. Want of quarter round in the kitchen and bath room.

3. Want of collar ties to the rafters.

The defendant had been in occupation of the house for nearly two years without specifically mentioning the 2nd and 3rd defects, to supply which would have cost only about $7, and, when examined for discovery before the trial, had not mentioned them. They were raised for the first time at the trial. He had, however, always objected to the beam filling as not being in accordance with the specifications, and as causing the freezing of his water pipes, and had often complained about the work as a whole.

Per HOWELL, C. J. A. and PERDUE, J. A. The manner in which the beam filling was done sufficiently complied with the contract, and the defendant should be held to have waived the requirements as to the quarter round and collar ties. The plaintiff should be allowed to amend if necessary so as to set up such waiver.

Per RICHARDS, J.A. The beam filling or building in between the joists above the foundation required by the specification meant such a building in as would fill up the spaces from the wooden walls to the inner line of the foundation, and, as the plaintiff had refused to do the work in that manner, he should not recover.

Forman v. *Liddesdale*, [1900] A. C. 190, referred to.

Per PHIPPEN, J.A. (Expressing no opinion as to the sufficiency of the beam filling.) As it was admitted that the plaintiff had not put in the quarter round or the collar ties, and it was not claimed either by the pleadings or the evidence that the defendant had waived the strict performance of the contract or entered into any new agreement with the plaintiff in regard to the work, the plaintiff could not recover, notwithstanding there had been substantial completion of the work in all other respects.

Brydon v. *Lutes*, (1891) 9 M. R. 463; and *Oldershaw* v. *Garner*, (1876) 38 U.C.R. 37, followed.

No amendment of the statement of claim should be allowed, as none was asked for either at the trial or on the hearing of the appeal and there was no evidence directed to any issue of waiver or estoppel.

The Court being equally divided, the appeal from the verdict of Cameron, J., in favor of the plaintiff was dismissed without costs. *Davis* v. *O'Brien*, 18 M. R. 79.

7. Substantial completion of work—*Trifling omissions.*

The plaintiffs contracted to "put in a complete job of steam heating" for the sum of $660. According to the findings of fact, they did the work in a satisfactory manner and within a reasonable time. They had omitted, however, to provide floor and ceiling plates around the pipes. These plates were shown to cost about ten cents each and about $4 for all.

Held, following *Lucas* v. *Godwin*, (1873) 3 Bing. N. C., 744, and *Stavers* v. *Curling*, (1836) 3 Scott, 755, that the omission of these plates should be considered as so trifling that the plaintiffs should not thereby be deprived of the whole consideration of a contract substantially completed, and that the plaintiffs were entitled to recover. *Adams* v. *McGreevy*, 17 M. R. 115.

See Arbitration and Award, 11.
— Covenants, 4.
— Mechanics' Lien, V, 2.
— Municipality, II, 3.
— Principal and Agent, III, 2.
— Sale of Goods, VI, 6.

BUILDINGS.

See Municipality, I, 2, 6.
— Negligence, IV, 1.

BURDEN OF PROOF.

See Accident Insurance, 2.
— Automobile.
— Bills and Notes, VIII, 10, 11.
— Chose in Action, 1.
— Conviction, 4.
— County Court, II, 4.
— Election Petition, X, 1, 2.
— Evidence, 27.
— Fi. Fa. Goods, 4.
— Fixtures, 6.
— Fraudulent Conveyance, 2, 3, 11, 14
— Fraudulent Judgment, 3, 4.
— Garnishment, V, 7.
— Husband and Wife, I, 4; III, 2.
— Infant, 3.
See Libel, 1.
— Liquor License Act, 4.
— Malicious Prosecution, 5.
— Master and Servant, IV, 1.
— Negligence, V, 1.
— Partnership, 3.
— Payment by Cheque.
— Pleading, I, 2.
— Practice, XX, C.
— Railways, VIII, 3.
— Real Property Act, II, 5, 6, 9.
— Real Property Limitation Act, 6.
— Sale of Goods, II, 1.
— Sale of Land for Taxes, IV, 3; V, 2; VIII, 3.
— Vendor and Purchaser, VI, 5.
— Weights and Measures Act, 1.
— Will, III, 4.

BUSINESS TAX.

See Taxation, 1, 2.

BY-LAW.

See Corporation, 2.
— Criminal Law, X, 4.
— Judicial District Boards, 1.
— Municipality, I.

BY-LAW AUTHORIZING ARBITRATION.

See Expropriation of Land, 3.

BY-LAW OF MUNICIPALITY.

See Criminal Law, X, 4.
— Local Option By-law, I, 2.
— Mandamus, 1.
— Municipality, III, 3; V, 1, 2; VI, 2; VII, 1.
— Nuisance, 1, 5.
— Railways, VIII, 3.

CANADIAN PACIFIC RAILWAY LANDS.

1. Exemption from taxation—*Meaning of words "grant from the Crown" in clause* 16 *of the contract between the Govern-*

ment of Canada and the Railway Company set out in 44 Vic., c. 1—Meaning of words "taxation by the Dominion" in same clause —Time of vesting of land grant in the Company.

The words "grant from the Crown" in clause 16 of the contract between the Government of Canada and the promoters of the Canadian Pacific Railway, ratified by Act of Parliament, 44 Vic., c. 1, mean the letters patent conveying the land, and the twenty years' exemption from taxation provided for in that clause do not begin to run, in respect of any particular parcel, till the date of the letters patent.

The words "taxation by the Dominion" in the same clause do not include taxation by school corporations created by the Government of the Northwest Territories under powers of legislation conferred upon it by various Acts of Parliament prior to the statute referred to, and, consequently, the Railway Company is not exempted by said clause from taxation of its lands by such a school corporation until such lands shall be included in a Province hereafter to be created.

Under the contract referred to and the Company's charter of incorporation and the ratifying Act, 44 Vic., c. 1, it was not intended that it should take any vested interest in any specific lands until actual formal conveyance from the Crown by letters patent in the usual course. *Rural Municipality of North Cypress* v. *C. P. R.*, *Rural Municipality of Argyle* v. *C. P. R.*, *Springdale School District* v. *C. P. R.*, 14 M. R. 382.

See next case for decision on appeal to the Supreme Court.

Assessment and taxation — *Constitutional law—Exemptions from taxation—Land subsidies of the Canadian Pacific Railway—Extension of boundaries of Manitoba — Construction of Statutes—B. N. A. Acts* 1867 *and* 1871—*33 V., c. 3 (D.) —43 V., c. 25 (D.)—44 V., c. 14 (D.)—44 V., cc. 1 and 6 (3rd Sess.), (Man.)—Construction of Contract—Grant in præsenti —Cause of action—Jurisdiction—Waiver.*

The land subsidy of the Canadian Pacific Railway Company authorized by the Act, 44 Vic., c. 1 (D.), is not a grant in *præsenti* and, consequently, the period of twenty years of exemption from taxation of such lands, provided by the sixteenth section of the contract for the construction of the Canadian Pacific Railway, begins from the date of the actual issue of letters patent of grant from the Crown, from time to time, after they have been earned, selected, surveyed, allotted and accepted by the Canadian Pacific Railway Company.

The exemption was from taxation "by the Dominion, or any Province hereafter to be established or any municipal corporation therein."

Held, that when, in 1881, a portion of the North-West Territories in which this exemption attached was added to Manitoba the latter was a province "thereafter established" and such added territory continued to be subject to the said exemption from taxation.

The limitations in respect of legislation affecting the territory so added to Manitoba, by virtue of the Dominion Act, 44 Vic., c., 14, upon the terms and conditions assented to by the Manitoba Acts, 44 Vic., (3rd Sess.), cc. 1 and 6, are constitutional limitations of the powers of the Legislature of Manitoba in respect of such added territory and embrace the previous legislation of the Parliament of Canada relating to the Canadian Pacific Railway and the land subsidy in aid of its construction.

Taxation of any kind attempted to be laid upon any part of such land subsidy by the North-West Council, the North-West Legislative Assembly or any municipal or school corporation therein is Dominion taxation within the meaning of the sixteenth clause of the Canadian Pacific Railway contract providing for exemption from taxation.

Per Taschereau, C.J.—In the case of the Springdale School District, as the whole cause of action arose in the North-West Territories, the Court of King's Bench for Manitoba had no jurisdiction to entertain the action or to render the judgment appealed from in that case and such want of jurisdiction could not be waived. *Rural Municipality of North Cypress* v. *C. P. R. Rural Municipality of Argyle* v. *C. P. R. C. P. R.* v. *Springdale School District, No. 23, of the North-West Territories*, 35 S.C.R. 550.

2. License to hold lands—*Ultra vires.*

The Canadian Pacific Railway Company has power, without taking out the license required by the statutes of this Province, to take, hold, acquire, dispose of, sell, or contract to sell or grant, the lands situated in the territory added to Manitoba in 1881, which have been granted and are to be granted to the Company as part of

its subsidy for the construction and operation of its railway, under 44 Vic., c. 1. (D. 1891).

49 Vic., c. 11. (M. 1886), and 53 Vic., c. 23 (M. 1890), are *ultra vires* in so far as they affect the C. P. R. Co., in respect of any of the above mentioned lands. *Canadian Pacific Railway Company Re*, 7 M. R. 389.

3. Sale of land for taxes—*"Sold or occupied"—Constitutional law.*

By reason of the legislation extending the limits of the Province, the Legislative Assembly is bound to regard Dominion legislation with reference to the Canadian Pacific Railway Company.

By statute the lands of the Company were to be free from taxation for a certain period unless "sold or occupied." The Company made an agreement for sale of certain of the lands upon certain conditions. The conditions not having been performed, the Company cancelled the agreement, as by its terms it was entitled to do. There never was any actual occupation of the land.

Held, That the land had never been sold or occupied, and that it was, therefore, not subject to municipal taxation. *C. P. R.* v. *Burnett*, 5 M. R. 395.

See SALE OF LAND FOR TAXES, X, 2.

CANCELLATION OF AGREEMENT.

See VENDOR AND PURCHASER, VII, 7.

CANCELLATION OF CONTRACT.

See CONTRACT, II, 2; V, 2.
— JURISDICTION, 4.
— REGISTERED JUDGMENT, 5.
— VENDOR AND PURCHASER, II; VI, 12; VII, 2.

CANCELLATION OF CROWN PATENT.

See CROWN PATENT, 1.

CAPIAS.

1. Application for ca. re.—*Sufficiency of affidavit.*

Held, The statute Con. Stat. Man., c. 37, s. 73, does not require that any particular words should be contained in the affidavit used on an application for a *ca. re.*, but only that such facts and circumstances be shown as will satisfy a judge that the case is one proper for a writ to issue. *O'Connor* v. *Kyle*, 2 M. R. 220.

2. Deputy prothonotary, powers of—*Signing and sealing writs—Defects in capias—Amendment—Intention to defraud.*

Held, 1. Writs must be both signed and sealed.

2. The authority of the deputy prothonotary with respect to the signing of writs is co-extensive with that of the prothonotary.

3. Writs may be signed by the deputy prothonotary in his own name.

4. Deviations, in a writ of *capias*, from the form prescribed, do not vitiate the writ, unless they affect the substance or are calculated to mislead.

5. It is not necessary to state the cause of action in a writ of *capias*.

6. The omission of the words "to wit" is unimportant.

7. The writ should show against whom it is issued and that distinctly and in terms. An amendment, however, was permitted, the writ taken as a whole not being capable of misconstruction.

8. An intention to defraud creditors may be inferred from a purpose to leave the Province without showing any consideration for creditors or any desire to pay off the indebtedness—at all events where it does not appear that the intended departure was with the expectation of the more quickly paying off debts.

9. A judge in chambers has jurisdiction to order the discharge of a defendant arrested under a *ca. re.*, either upon the merits or upon technical grounds. He has no power to set aside a writ upon the ground that the judge should not have been satisfied with the material upon which it was granted.

10. An application in chambers for a discharge is no bar to a subsequent application to the court to set aside the order. *Green* v. *Hammond*, 3 M. R. 97

3. Evidence on application for discharge—*Construction of statutes.*

On an application for the discharge of the defendant, who had been arrested under a writ of *ca. sa.*, plaintiff proposed to read in opposition to the motion, (1.) The cross-examination of the defendant upon his affidavit filed in support of the application; (2.) his examination as a judgment debtor; and (3.) certain affidavits.

Held, by the Full Court, reversing the order of Wallbridge, C.J.

That the evidence tendered should have been received.

Quære; Would depositions of the defendant taken at the trial of another action be admissible.

A statute prescribed that upon an application the judge, "upon hearing read" certain material, might make an order,

Held, that the statute did not exclude the use of material other than that specifically mentioned. *Keeler* v. *Hazelwood*, 2 M. R. 149.

4. Cause of action doubtful—*Misnomer.*

The affidavit upon which a *capias* issued disclosed a good cause of action, but examination upon it rendered success very doubtful. Upon a motion to set aside the writ,

Held, That the Court should not interfere unless it was very clear that the plaintiff must fail.

The affidavit gave the defendant's name as "J. Berkwin Johnson." His proper name was "Berkwin Johnson," but he had been sued and had pleaded as "J. B. Johnson," and admitted that he frequently used the "J" as a distinguishing letter. In the order and writ the name was "J. B. Johnson."

Held, That the order and writ were defective, but might be amended upon payment of costs. *Anderson* v. *Johnson*, 6 M. R. 113.

5. Discharge of Prisoner — *Action upon County Court Judgment.*

1. A *capias* will not be set aside on the ground that the plaintiff has no cause of action, unless that fact clearly appears.

2. Where the debt is sworn at $135, bail ordered at $200 is not excessive.

3. *Semble.* An action will lie upon a County Court judgment. *Boyd* v. *Irwin*, 3 M. R. 90.

6. Name of defendant not in full—*Part of cause of action assigned to plaintiff by another creditor.*

The defendant was arrested under a writ of *capias*. In the writ and in the affidavits to hold to bail, the defendant was called Daniel F. Freeman. His true name was Daniel Foster Freeman.

Held, Sufficient.

The Court will not interfere on the ground of the cause of action being insufficiently stated, unless it is very clear that the plaintiff has no cause of action.

The statute provides that no writ of *capias* shall be issued for a cause of action less than $100. The debt owing by defendant to plaintiff was under $100, and the plaintiff procured an assignment to himself of a debt owing by defendant to another creditor, the two together amounting to more than $100. On the joint indebtedness he obtained a writ of *capias*.

Held, Unobjectionable. *Bryan* v. *Freeman*, 7 M. R. 57.

CAPITAL OR INCOME.

See WILL, I, 3; II, 1, 2; III, 1.

CARNAL KNOWLEDGE.

See CRIMINAL LAW, IV, 1, 2.

CARRIERS.

Liens and Charges.

Connecting Lines—*Contract with First Carrier—Right of Last Carrier to Freight—Lien for Freight.*]

When goods are carried by several successive carriers, under a contract made with the first to carry the goods the whole distance, the intermediate and last carriers are, in the absence of special conditions, the agents of the first, and there is no privity between them and the consignor or consignee, and therefore they cannot claim freight either by implied contract or lien, beyond the amount contracted for by the first carrier.

The last carrier may, as agent for the first with whom the contract was made, collect the freight due to the first, either under contract or by asserting a lien on the goods.

The plaintiff shipped goods at St. John's, Quebec, by the Grand Trunk Railway Co., consigned to himself at St. Norbert, Manitoba, taking a bill of lading showing the mode of transportation by several connecting lines to Winnipeg, and paid the freight in advance. When the plaintiff demanded the goods at Winnipeg, the defendants, who were the last of the carriers, claimed a lien thereon for charges paid by them to intermediate carriers from whom they had received them, and for freight for carriage by their own line.

Held, that they were not entitled to the amounts claimed. *Trottier* v. *Red River Transportation Co.*, T. W., 255.

CASE RESERVED.

See CRIMINAL LAW, XIV, 4; XVII, 1.

CASE STATED BY MAGISTRATE.

See CRIMINAL LAW, XVII, 10.

CAUSE OF ACTION.

See ADMINISTRATION, 4.
— COUNTERCLAIM, 2.
— COUNTY COURT, I, 8.
— JURISDICTION, 1, 7, 8.
— LORD CAMPBELL'S ACT.
— PLEADING, XI, 6.

CAVEAT.

See AFFIDAVIT.
— CONDITIONAL SALE, 5.
— HOMESTEAD, 1.
— REAL PROPERTY ACT, I, III, 1.

CAVEAT EMPTOR.

See MISREPRESENTATION, IV, 1.
— SALE OF GOODS, VI, 1.

CERTIFICATE OF BAPTISM.

See TITLE TO LAND, 4.

CERTIFICATE OF CONVICTION.

See LIQUOR LICENSE ACT, 6.

CERTIFICATE OF JUDGMENT.

See PLEADING, IV, 1.
— REGISTERED JUDGMENT, 4, 8.

CERTIFICATE OF STATE OF CAUSE.

See PRACTICE, V, 1.

CERTIFICATE OF TITLE.

See MORTGAGOR AND MORTGAGEE, 1, 3.
— REAL PROPERTY ACT, IV, 2; V, 2, 4.
— VENDOR AND PURCHASER, VI, 9.

CERTIORARI.

1. Jurisdiction of Judge in Chambers—*Conviction for breach of a municipal by-law.*

A Judge in Chambers has jurisdiction to order the issue of a writ of *certiorari* to bring up the record of a conviction for a breach of a municipal by-law, if the application is made when neither the Court of Appeal nor the Full Court of King's Bench is sitting. But all further proceedings after the return of the writ must be taken in one or other of these courts.

Reg. v. *Beale*, (1896) 11 M.R. 448; *Reg.* v. *Crothers*, (1897) 11 M.R. 567, and *In re Dupas*, (1899) 12 M.R. 654, referred to. *Re Hunter*, 16 M. R. 489.

2. Practice in—*County Judge or magistrates—Amendment of notice.*

S., having been convicted before magistrates, took proceedings to appeal to the County Judge and procured the papers to be sent to his clerk. Afterwards and before any proceeding by the judge, he had the papers returned to the convicting justices. Upon notice to the justices of an application for a *certiorari* to be directed to them he moved for the writ.

Held, 1. That the return of the papers to the justices was irregular and that the

certiorari should go to the County Judge, he being the legal custodian of the papers sent to him for the purpose of the appeal.

2. That the notice for a *certiorari* to be directed to the convicting justices could not be amended.

It was then contended that the statute 13 Geo. 11, c. 18, s. 5, entitles the convicting justices only to the six days notice, and that the County Court Judge was not entitled to any notice of motion for the writ and that the notice to the justices might be treated as a nullity and the order made for the writ to go directed to the County Court Judge. But:

Held, that, although the justices only may be entitled to the statutory notice, yet, where the records of the conviction have passed into the custody of another officer not entitled to notice, the justices ought to have notice of the motion for the writ proposed to be directed to such officer, and that a new motion must be made for *certiorari* to the County Judge and notice thereof given to the justices. Present application dismissed without costs.

It is not necessary that the affidavits by which objections are raised should be sworn and filed before service of the notice on the magistrates. The notice must show who the party moving is.

The practice of arguing the validity of the conviction upon the application for the *certiorari* does not apply, except when the parties consent.

The pendency of an appeal to the County Judge does not interfere with *certiorari*; unless, at all events, the question of jurisdiction is raised upon the appeal. *Reg.* v. *Starkey*, 6 M. R. 588.

3. Summary Conviction—*Proceeding without summons—Waiver.*

A statute providing that there should be "no appeal" against a conviction, *Held*, Not to take away the right of *certiorari*.

Unless dispensed with by statute or waived, there must be some previous summons or notice, to the party charged, of the hearing of the charge against him.

This may be waived by appearing, pleading and defending. But asking an adjournment for the purpose of procuring evidence is not necessarily a waiver. *Reg.* v. *Vrooman*, 3 M. R. 509.

See Constitutional Law, 4.
— Conviction, 1, 5.
— Costs, XIII, 20.
See Criminal Law, I, 1; XII, 1; XIII, 3, 7.
— Liquor License Act, 4, 7.
— Nul Tiel Record, 1.
— Practice, XXVIII, 3.
— Prohibition, III, 2.
— Summary Conviction.

CHALLENGING JUROR.

See Criminal Law, XIV, 1.
— Jury Trial, I, 2.

CHAMPERTY.

See Half-Breed Lands Act, 2.

CHANGE OF POSSESSION.

See Fraudulent Conveyance, 14.
— Sale of Goods, I, 1, 2.

CHARACTER—EVIDENCE AS TO.

See Evidence, 5.
— False Imprisonment, 3.

CHARGE ON LAND.

See Church Lands Act, 1.
— Conditional Sale, 5.
— Contract, XV, 5.
— Description of Land, 1.
— Dominion Lands Act, 2, 3.
— Estoppel, 4.
— Exemptions, 10.
— Fraudulent Conveyance, 5.
— Infant, 7.
— Registry Act, 3.
— Will, I, 1.

CHARGING ORDER

1. Election—*Deposit by candidate.*

The deposit of $200 made by M., a candidate at an election for the Legislature of Manitoba, was paid into court by the Clerk of the Executive Council under a garnishing order issued in a suit

against M. This order was afterwards set aside. Afterwards H., who had a judgment against M., applied for a charging order under the provisions of 1 & 2 Vic. c. 110, s. 14.

Held, that the money was not within the purview of the statute, and could not be charged. *Howe* v. *Martin*, 8 M. R. 533.

2. Style of matter—*Notice of reading affidavit.*

A solicitor's petition for a charging order should be intituled in the matter of the Act.

The petition or notice must show upon what material it is grounded. *Wishart* v. *Bonneau*. 5 M. R. 132.

See GARNISHMENT, V, 5.
— PRACTICE, XXVIII, 30.
— SOLICITOR'S LIEN FOR COSTS.

CHATTEL MORTGAGE.

I. AFFIDAVITS.

1. Authority of agent to make—*Word "him" omitted.*

A chattel mortgage is good though not executed by the mortgagee, and though the word "him" be omitted at the conclusion of the affidavit of *bona fides*.

Held, that the manager of the branch of an incorporated Bank to which a chattel mortgage is made for a debt due the Bank at that branch is an agent authorized to make the affidavit of *bona fides*, under 34 Vic., c. 17. *Ontario Bank* v. *Miner*, T. W., 167.

2. Blank in affidavit of bona fides.

The affidavit of *bona fides* attached to a chattel mortgage contained the following: "the mortgagor in the foregoing bill of sale by way of mortgage is justly and truly indebted to me this deponent Alexander McIntyre, the mortgagee therein named, in the sum of———dollars mentioned therein."

Held, insufficient. *McIntyre* v. *Union Bank*, 2 M. R. 305.

3. Jurat to affidavit—*Bills of Sale and Chattel Mortgage Act, R.S.M.* 1902, *c.* 11, *s.* 5—*Meaning of word "sworn."*

1. The affidavit of *bona fides* on a chattel mortgage is sufficient, although it purports to be the joint affidavit of two mortgagees and the jurat does not show that they were severally sworn: *Moyer* v. *Davidson*, (1858) 7 U.C.C.P. 521.

2. The insertion in the affidavit of a clause reading, "That I am the duly authorized agent of the mortgagee," was an apparent mistake and did not vitiate it, although it was the affidavit of the mortgagees themselves.

3. The fact that it is stated in the jurat that the affidavit has been "sworn," whereas the deponents affirmed, is not a fatal objection, as by the Interpretation Act the expressions "swear" and "sworn" respectively include "affirm solemnly" and "affirmed solemnly."

4. The Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, s. 5, does not require that the occupation of the mortgagee should be stated in the affidavit of *bona fides*. *Brodie* v. *Ruttan*, (1858) 16 U.C.R. 207, followed. *Dyck* v. *Graening*, 17 M. R. 158.

4. Affidavit of execution—*Bills of Sale Act—Affidavit sworn before mortgagee as Commissioner.*

Under The Bills of Sale Act, R.S.M., c. 10, a mortgage is not rendered invalid or void by reason of the affidavit of execution being sworn before the mortgagee himself, he being a Commissioner for taking affidavits in The Queen's Bench.

Seal v. *Claridge*, (1881) 7 Q.B.D. 516, distinguished. *Inch* v. *Simon*, 12 M. R. 1

5. Signature to jurat—*Affidavit of execution.*

A chattel mortgage is invalid and of no effect as against the execution creditors of the mortgagor, where the jurat on the affidavit of execution filed with the mortgage has not been signed by the commissioner before whom it was sworn, although the mortgage was executed in duplicate and the witness had signed and sworn to the affidavits of execution on both originals, and the commissioner had signed the jurat on one of the originals, omitting by inadvertence to sign the other, and both had been sent to the clerk of the County Court for him to file one, and return the other certified, the clerk having retained the one with the defective affidavit.

The signature of a person having authority to administer the oath is an essential part of an affidavit. *Inman* v. *Rae*. *Ramsay, Claimant*, 10 M. R. 411.

6. Affidavit for renewal—*Words having same meaning as those in form prescribed—Ownership of offspring of mares covered by mortgage—Removal of chattels out of division—Subsequent purchaser—Bills of Sale and Chattel Mortgage Act, R.S.M.* 1902, *c.* 11, *ss.* 20, 29.

1. The legal estate in the offspring of mares comprised in a chattel mortgage covering them and also "the increase" from them is in the mortgagee, and title to such offspring cannot be acquired by one who purchases them in good faith for value although he receives delivery from the mortgagor before the mortgagee attempts to get possession.

Dillaree v. *Doyle*, (1878) 43 U.C.R. 442, and *Temple* v. *Nicholson*, (1881) Cassels Sup. Ct. Dig. 114, followed.

2. Section 20 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, is sufficiently complied with by the use of the expression "kept on foot," in the mortgagee's affidavit for renewal of a chattel mortgage, instead of the words "kept alive" used in that section, as the two expressions mean the same thing.

Emerson v. *Bannerman*, (1891) 19 S. C. R. 1, followed.

3. The "subsequent purchaser" mentioned in section 29 of the Act, against whom a chattel mortgage will cease to be valid upon goods removed out of the division where it is registered, unless a certified copy is registered in the division to which the goods have been removed within six months after the removal, must be one who purchased after the expiration of such period of six months.

Hulbert v. *Peterson*, (1905) 36 S. C. R. 324, followed. *Roper* v. *Scott*. *Wallace* v. *Scott*. *Galbraith* v. *Scott*, 16 M. R. 594.

II. On Growing Crops.

1. Priority—*Mortgage of crops to be grown.*

A chattel mortgage covering growing crops or crops to be grown does not come within the provisions of The Bills of Sale Act, R.S.M., c. 10, so as to need filing under the Act to preserve its validity.

Such a mortgage cannot prevail over a prior execution in the hands of the sheriff against the goods of the mortgagor. *Clifford* v. *Logan*, 9 M. R. 423.

2. Affidavit of bona fides—*Forms—Deviation from prescribed forms—Interpretation Act, R. S. M., c.* 78, *s.* 8, *s-s* (uu)—*Action against sheriff—Evidence—Judgment, proof of—Right of action for price of goods when property not passed—Appeal from County Court—Motion to strike out necessary—Q. B. Act*, 1895, *Rule* 168, (*b*), (*d*)—*Seed grain mortgage.*

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 of seed at that 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 Vic., c. 1, s. 2, "that the same is taken to secure the purchase 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, Taylor, C. J., dissenting, 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, therefore, 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, unanimously, 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; *Atkinson on Sheriffs*, 6th ed. 304, followed; *McLean* v. *Hannon*, 3 S. C. R. 706, and *Crowe* v. *Adams*, 21 S. C. R. 342, distinguished.

Held, also, DUBUC, J., dissenting, that notwithstanding section 8, sub-sec. (*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 M. R., at p. 295.

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 M. R. 460.

3. Seed grain—*Affidavit of bona fides—Landlord and Tenant—Distress for rent—Bills of Sale and Chattel Mortgage Act, R. S. M.* 1902, *c.* 11, *ss.* 12, 39.

1. Under a lease for a year, dated 6th April, reserving as rent one-third of the crops and providing that the lessee should thresh the grain and draw it to the elevator or cars to be stored and shipped as might be agreed between the parties in the name of the lessor, but fixing no time when that was to be done, there is no rent due until the end of the year and a distress by the landlord in November following is illegal.

2. A distress for rent is unlawful if the tenant is not in possession at the time: *Bell on Landlord and Tenant*, *p.* 271.

3. A chattel mortgage will not be held void, under section 12 of The Bills of Sale and Chattel Mortgage Act, R. S. M. 1902, c. 11, because the affidavit of *bona fides* made by an agent stated that he had "a knowledge of all the facts connected with the said mortgage," instead of saying, in the words of the section, that he was "aware of all the circumstances."

Emerson v. *Bannerman*, (1891) 19 S. C. R. 1, and *Rogers* v. *Carroll* (1899) 30 O. R. 328 followed.

4. It is no objection to a mortgage on growing crops to secure the price of seed grain supplied that the grain had not been sold to the mortgagor by the mortgagee himself, but was purchased by him for the mortgagor from a third party.

Kirchhoffer v. *Clement*, (1896) 11 M. R. 460, followed.

5. Under section 39 of the Act, it is a fatal objection to a mortgage on growing crops or crops to be grown, if it is taken for anything beyond the price of the seed grain furnished and interest thereon. *Meighen* v. *Armstrong*, 16 M. R. 5.

III. POSSESSION UNDER.

1. Void chattel mortgage—*Exemptions a personal privilege.*

Held, 1. Independently of 46 & 47 Vic., c. 30, (which is not retrospective), a writ of execution against goods binds from its delivery to the sheriff, except as against the title of any person acquired *bona fide* and for a valuable consideration before the actual seizure, provided such person had not, at the time he acquired such title, notice that the writ, or any other writ by virtue of which the goods might be seized or attached, had been delivered to, and remained unexecuted in the hands of, the sheriff.

2. A chattel mortgagee whose mortgage was prior to an execution, but was void as against it for non-compliance with the Act, cannot, by taking possession after the delivery of the writ to the sheriff, claim to be a purchaser for value without notice of the writ.

3. Exemption from seizure under execution is a privilege that can be claimed by the debtor only. *Young* v. *Short*, 3 M. R. 302.

2. Change of possession—*Bills of Sale Act, R.S.M., c.* 10, *s.* 2—*Sale of Goods Act*, 1896, (*M.*) *ss.* 4, 18, 33—*Sale of unascertained or future goods by description—Affidavit of bona fides.*

The defendant in February, 1898, while visiting the camp of one Ryan, who was then engaged in cutting cordwood on a certain limit, entered into a verbal contract with Ryan by which the latter was to deliver about 85 cords of wood on the station grounds at Molson on the C. P. R., at a point indicated by defendant, in payment of a debt. During the following month Ryan hauled out and piled about 85 cords of the wood in the place indicated and notified the defendant thereof. He also hauled out and piled in different

parts of the same grounds about 1,500 cords besides.

The plaintiff, to whom also Ryan was indebted, obtained from him a chattel mortgage, dated 7th April, 1898, covering the wood delivered for defendant and a large quantity of other wood piled at the same station. This mortgage was registered in the proper office on the 14th of the same month.

A few days after, the defendant went to Molson, accepted the 85 cords in question, and had it shipped away, when the plaintiff replevied all he could find of it.

Held, (1) DUBUC, J., dissenting, that the facts brought the case within rule 5 of section 18 of The Sale of Goods Act, 1896, and that there had been a contract for the sale of unascertained or future goods by description, and a sufficient appropriation afterwards made by the vendor of goods of that description and in a deliverable shape with the assent of the buyer to pass the property as soon as delivered at the station grounds, and that such was the result notwithstanding the value exceeded $50, as section 4 of the Act only provides that such a contract shall not be enforceable by action and replaces section 17 of the Statute of Frauds.

(2) That acceptance of the wood by defendant sufficient to satisfy section 33 of The Sale of Goods Act, was not a condition precedent to the passing of the property.

(3) KILLAM, J., dissenting, that the facts, although showing an immediate delivery by Ryan to defendant within the meaning of section 2 of The Bills of Sale Act, R. S. M., c. 10, did not warrant the conclusion that there had been the actual change of possession necessary to satisfy that statute, which must be such a change as is open and reasonably sufficient to afford public notice thereof, as expressly provided in the corresponding Ontario Act, and therefore that the plaintiff's chattel mortgage was entitled to prevail over defendant's title.

Held, also, *per* DUBUC, J., following *Marthinson* v. *Patterson*, (1892) 19 A. R. 188, and *Martin* v. *Sampson*, (1896) 24 A. R. 1, that an error in the statement of the indebtedness in the affidavit of *bona fides* sworn to by the plaintiff and attached to the chattel mortgage was not, in the absence of fraud, fatal to its validity. *Bernhart* v. *McCutcheon*, 12 M. R. 394.

IV. PURCHASER WITH NOTICE OF.

1. Chattel mortgage not renewed.

Defendant held a chattel mortgage upon some oxen. It was filed but after the lapse of two years not refiled. Plaintiff after that period bought the oxen with notice that the mortgage was not paid.

Held, That as against the plaintiff the mortgage was valid and effectual.

King v. *Kuhn*, 4 M. R. 413.
Overruled. *Roff* v. *Krecker*, 8 M. R. 230.

2. Mortgagee in good faith—*Where mortgage to be filed—Where goods "situate."*

A second chattel mortgage made in good faith, and for valuable consideration, takes priority over a prior unfiled chattel mortgage, even if the second mortgagee has actual notice of the prior mortgage.

If a mortgage is taken for a fair consideration, and not for a collusive purpose, the grantee is a mortgagee "in good faith" within the meaning of the statute, and notice of a prior unfiled mortgage is not material.

King v. *Kuhn*, 4 M. R. 413, overruled.

A chattel mortgage must be filed with the Clerk of the County Court in the Judicial Division in which the mortgagor resides, and in which the chattels are ordinarily kept and used by him. The fact that the chattels are temporarily in another Judicial Division at the time the mortgage is made cannot make the filing of the mortgage in that Division effectual.

H. had his residence and domicile in the Judicial Division of Manchester, where he usually kept the horses in question. He mortgaged these horses to K. The mortgage was executed and filed in another Judicial Division. The horses were, in fact, for a temporary purpose in the other Division when the mortgage was executed.

Held, that the Division in which the horses could be said to be "situated," was that of their owner's residence and domicile at which they were themselves usually kept, and that their being, by accident, and for a merely temporary purpose, in another Division when the mortgage was executed, did not render it proper to file it there. *Roff* v. *Krecker*, 8 M. R. 230.

V. MISCELLANEOUS CASES.

1. After acquired goods—*Purchase of business and property subject to liabilities*

of vendor—Estoppel in pais—Description of goods covered by chattel mortgage.

The plaintiff Company in May, 1907, in pursuance of a previous agreement purchased the business, plant and stock in trade of Lyone Bros., subject to their debts and liabilities. One of these was a loan of $4,000 from the defendants secured by a chattel mortgage of all the plant and stock in trade of Lyone Bros. This chattel mortgage contained a provision that it should cover all after-acquired goods and chattels brought upon the premises owned or occupied by the plaintiff Company or used in connection with their business during the currency of the mortgage.

The plaintiff Company had been incorporated prior to the date of the chattel mortgage and Lyone Bros. were the principal promoters and became its president and vice-president respectively, being in fact the controlling shareholders. $2104.64 of the money lent by the defendants to Lyone Bros. was handed over to the plaintiff Company and by it applied towards payment of the debts of Lyone Bros. The plaintiff Company paid an instalment of the interest due to defendants on the $4,000 loan.

Held, (1) That the provision in the chattel mortgage as to the after-acquired goods was as binding upon the plaintiff Company as purchasers of the mortgaged property with notice of it as it would be upon the executors or administrators of the mortgagors, and that defendants had a good valid lien and charge upon all after-acquired goods brought upon the premises in question by the plaintiff Company.

Mitchell v. *Winslow*, 2 Story, 630, followed.

(2) That the plaintiff Company was under the circumstances estopped from disputing such lien and charge: *Pickard* v. *Sears*, (1837) 6 A. & E. 469; *Freeman* v. *Cooke*, (1848) 18 L. J. Ex. 119, and defendants were entitled to show in evidence the facts constituting such estoppel although it had not been pleaded, as an estoppel *in pais* need not be pleaded to make it obligatory: *Freeman* v. *Cooke*, *supra*.

(3) The mortgage was not void as to the after-acquired goods because of the generality and vagueness of the description.

Lazarus v. *Andrade*, (1880) 5 C. P. D. 318, followed. *Imperial Brewers* v. *Gelin*, 18 M. R. 283.

2. Consideration—*Debt represented by notes not held by mortgagee.*

A. executed a chattel mortgage to F., the consideration being stated as $912.20. It appeared that of this amount $612.20 was made up of notes given by A. to F., but then under discount in the Merchants Bank, and not due, and the sum of $300 advanced in cash. The notes were subsequently taken up by F., and he produced them at the trial. The usual mortgagee's affidavit was indorsed upon the mortgage, stating that the mortgagor was justly and truly indebted to the mortgagee in the amount mentioned in the mortgage.

Held, by the Full Court (TAYLOR, J. dissenting), affirming the decision of WALLBRIDGE, C. J., that the mortgage was valid. *Fish* v. *Higgins*, 2 M. R. 65.

3. Good in Part and bad in Part—*Signature to jurat—Future advances—Possession—Mortgages not within Act—Landlord and tenant—Distress as against sheriff.*

The plaintiffs claimed certain horses under a chattel mortgage which was expressed to be void upon (1) repayment of $608.60, already advanced, (2) repayment of further sums to be advanced for the purpose of certain farming operations, (3) "and if the mortgagors do cultivate all the broken land upon all the said sections during the present season, and reap and thresh all the grain produced therefrom in a proper and workmanlike manner and after the course of good husbandry, and do deliver for the benefit of the mortgagees at V, not later than the 31st day of March next, one half of all the grain arising from said sections 23 and 25; and if the mortgagors shall fall plough the said portions of all the said sections in a proper manner during the present season." No time was fixed for repayment. The mortgage was executed on the 12th May, 1883, and not filed until the 19th of the same month. The signature of the justice of the peace before whom affidavit of execution was sworn was placed *over* the jurat.

Held, 1. That the mortgage, although void as to the $608.60 because of the delay in registration, might nevertheless be good as to its other provisions.

2. That the position of the signature of the justice of the peace did not vitiate the mortgage.

3. As to the future advances the mortgage would be invalid under the Act because the time of repayment was not stated to be within two years.

4. Possession taken by the mortgagees with knowledge of an execution in the sheriff's hands will not uphold an otherwise invalid chattel mortgage.

5. The mortgage, so far as it related to the delivery of one half of the crop and the fall ploughing, was not within the statute at all and was therefore valid without registration.

A lease provided as part of the rent that the lessors should fall plough the land. For default, the landlords on the 1st of December, distrained certain horses. A sheriff under an execution against the tenants seized the horses. In an action against the sheriff by the landlords,

Held, that proof of their possession under the lease was not sufficient. Evidence should have been given that the period for fall ploughing had expired. *Mowat* v. *Clement*, 3 M. R. 585.

4. Lien note—*Assignment for creditors—Exemptions.*

The owner of manufactured articles, which were in his possession free from any lien for the unpaid portion of the purchase money, was induced to sign a lien note in favor of the defendant, the manufacturer, containing a description of the goods and statement that the property in them was to remain in the defendant until paid for in full and that on default the defendant might enter and retake them.

Held, in the absence of evidence to prove that defendant had obtained the lien note by fraud or misrepresentation, that it might be treated as a chattel mortgage on the articles for the debt secured by it as against the person who had signed it.

The defendant had not put on the articles his name or any other distinguishing name so as to comply with section 2 of The Lien Notes Act, R. S. M., c. 87.

Held, notwithstanding, that the lien note was valid as against the maker of it, as the provisions of that section are only for the protection of *bona fide* purchasers or mortgagees without notice of the claim of the lien holder.

The lien note was not registered under The Bills of Sale and Chattel Mortgage Act, 63 & 64 Vic., c. 31, and the maker of it, before maturity of the debt, became insolvent and made an assignment to the plaintiff under The Assignments Act, R. S. M., c. 7, for the benefit of his creditors.

Held, that, for want of such registration, the lien note, being an instrument intended to operate as a mortgage of goods which remained in the debtor's possession until the assignment, was null and void as against his creditors, including the plaintiff as his assignee by virtue of paragraph (*a*) of section 2 of The Bills of Sale and Chattel Mortgage Act.

It was doubtful upon the wording of the assignment whether the debtor had reserved any exemptions to which he would be entitled under sub-section (*f*) of section 43 of the Executions Act, R. S. M., c. 53, viz.: "The tools * * * * and necessaries used by the judgment debtor in the practice of his trade, profession or occupation, to the value of five hundred dollars," within which description the articles came, and it was not shown that the debtor had ever claimed any of them from the assignee or asked to have any of them set aside as exempt, or that he had not got out of other articles of his estate all his exemptions under that sub-section; and the articles were not shown to have depreciated in value.

Held, that defendant could not claim the benefit of any such exemption even if it was reserved by the debtor in the assignment. *Cox* v. *Schack*, 14 M. R. 174.

5. Mistake in mortgagor's name—*Addition of deponent in affidavit.*

Abram V. Becksted executed a chattel mortgage in which his name appeared as Abram B. Becksted. He signed his name correctly.

Held, that the mortgage was void as against creditors.

In an affidavit of *bona fides* of a chattel mortgage the addition of the deponent was stated to be a trader. He was not in fact a trader.

Held, not to vitiate the mortgage. *Van Whort* v. *Smith*, 4 M. R. 421.

6. Mortgagor selling the goods—*Pleading.*

The plaintiffs gave to one of the defendants a chattel mortgage upon his stock in trade. It contained a covenant that in case the mortgagor should "attempt to sell or dispose of, or in any way part with the possession of the goods or any of them or to remove the same or any part thereof out of the store and premises * * * without the consent of the mortgagee * * * to such sale, removal or disposal first had and obtained in writing, it shall be lawful for the mortgagee to take possession," &c. The plaintiffs remained in possession and continued to make sales in the usual course of business.

Shortly afterwards the defendants obtained judgment against the plaintiffs and under *fi. fa.* goods caused the same goods to be seized and sold. The *fi. fa.* was afterwards set aside as having been issued in breach of an agreement.

In an action in trespass and trover the defendants pleaded not guilty, and not possessed.

Held, 1. That, under the plea of not possessed the defendants might set up the chattel mortgage and the breach of the covenant not to sell.

2. That the covenant not to sell was absolute and not subject to the implied exception, "save in the usual course of business."

3. Trespass may be justified upon any valid ground, and that, although some invalid reason may have been given at the time of the trespass.

Quære, If a mortgagee rightfully seize, but unlawfully sell, the mortgaged goods is he a trespasser *ab initio?*

A chattel mortgage provided that upon certain contingencies the mortgagee might seize the goods, and upon, from and after the seizure the mortgagee might sell, &c., and from and out of the proceeds pay and reimburse himself, "all such sums and sum of money as may then be due by virtue of these presents."

Held, that, the mortgagee having rightfully seized the goods, might lawfully sell them, although the mortgage money might not have been payable. Although not payable it was nevertheless "due."

Dederick v. *Ashdown*, 4 M. R. 139. In appeal 15 S. C. R. 227.

See FRAUDULENT PREFERENCE, I, 1; III, 5; VI, 2, 4, 5.
— SHERIFF, 3, 6.

CHATTELS REAL.

See REAL PROPERTY ACT, V. 8.

CHEQUES.

Indorser of Cheque diverted from its original purpose.

H., being indebted to the defendant in the sum of $500, procured him to indorse his (H's) cheque for $1,000, upon a bank at N., out of the proceeds of which the debt was to be paid. H. and the defendant went to a bank at W. to get the cash for the cheque. H., alone, went into the manager's room and, on his return, informed defendant that the cheque had been left with the manager, who would send it for collection to N. H. in fact retained the cheque and afterwards transferred it to plaintiff for value.

Held, that defendant was liable upon the cheque. *Arnold* v. *Caldwell*, 1 M. R. 81.

See BANKS AND BANKING, I, 4, 9.
— BILLS AND NOTES, VIII, 6.
— PLEADING, XI, 11.

CHOSE IN ACTION.

1. Assignment of book debts without writing—*Limitation of actions—Appropriation of payments—Weights and Measures Act, R. S. C., c. 104—Burden of proof of illegality—Objections not raised at trial—Voluntary payment for goods supplied in violation of the Weights and Measures Act—Recovering back same—Burden of proof that purchaser was not aware of the illegality.*

1. To constitute an equitable assignment of a chose in action neither writing nor any particular form of words is required, but any words or acts from which it is to be inferred that there was an intention to pass the beneficial interest are sufficient.

2. When a defendant seeks to avoid payment of an account for lime furnished to him on the ground that it was sold to him by measure and that the measure used was not stamped as required by The Weights and Measures Act, R. S. C., c. 104, the onus is on him to prove that the measure was not properly stamped.

Hanbury v. *Chambers*, (1894) 10 M. R. 167, followed.

3. Section 21 of that Act does not render it illegal for parties to agree upon a sale by some authorized measure, and then that the quantities should be ascertained by authorized weights; and, when lime is ordered by the bushel and supplied by weight, the sale would not be illegal or void if the purchaser knew that such was being done, and the onus is on him to prove that he did not know of it.

After the passing of the Act, 61. Vic., c. 30, s. 2 (D. 1898), a bushel of lime was to be determined by weighing, unless a

bushel by measure should have been specially agreed upon.

Held, that, as to certain lime furnished by measure after the passing of the Act of 1898, the plaintiff was entitled to recover for it on the ground that the defendant had not raised at the trial the objection that there had been no agreement for a determination by measure.

The defendant had voluntarily made certain payments on account of certain other sales of lime which were admitted to have been illegal, but he gave no evidence to show that, when he made the payments, he was ignorant of the illegality.

Held, that he could not recover back the amount of such payments. *Hughes* v. *Chambers*, 14 M. R. 163.

2. Assignment of—*Money received by defendant for the use of plaintiff.*

A directed B, his debtor, in writing to pay the money to C, and directed C to pay the money when collected to his creditor D. C undertook to do so and received the money from B, and informed D that he had collected a sum of money for him, although the sum he mentioned was not the full amount which he had actually collected.

Held, that there was a complete assignment in equity by A to D of the money actually collected from B by C, and that D could recover the full amount in an action directly against C.

Morrell v. *Wootten*, (1852) 16 Beav. 197, and *Lilly* v. *Hayes*, (1836) 5 A. & E. 548, followed.

Williams v. *Everett*, (1811) 14 East, 582, distinguished. *Waterloo Manufacturing Co.* v. *Kirk*, 21 M. R. 457.

3. Assignment of—*Notice to debtors—Right of assignee to moneys collected by assignor and handed over to another creditor—Estoppel by conduct—Duty of assignee to notify other creditors of the assignment.*

The plaintiffs had an assignment from one Thomas of all his book debts, notes and other choses in action as security for their claim, but did not notify the debtors or any of the other creditors of Thomas although they knew there were such creditors. They allowed Thomas to collect the accounts and pay over the proceeds to them. The defendants, not knowing of the assignment, and having a large claim against Thomas, induced him to allow them to receive the proceeds of the collections of some of the debts and a number of the promissory notes covered by the assignment, and the plaintiffs brought this action to recover these moneys and notes including some received after notice of the plaintiffs' claim.

Held, that the defendants were equitable assignees of all such moneys and notes as they had reduced into possession before receiving notice of the assignment and were entitled to retain them, but that the plaintiffs were entitled to judgment for all collections of book debts made by the defendants after receipt of such notice.

Held, also, that there was no estoppel against the plaintiffs by reason of their failure to notify the defendants of their assignment.

Troughton v. *Gitley*, (1766) Amb., 630, and subsequent cases in which it was followed, distinguished. *Bank of British North America* v. *Wood*, 19 M. R. 633.

4. Assignment of — *Prior equitable claim—Estoppel—Costs.*

The plaintiffs authorized the defendant McLaws to purchase in his own name, but as trustee for them, certain shares in a company from the defendant Walker, the price being payable by instalments as provided for in an agreement between McLaws and Walker. They furnished the money to McLaws to make the payments, and did not disclose to Walker their interest in the shares.

Afterwards McLaws procured from the defendant Smith a loan of $2830, giving as security an assignment of all his interest in the agreement with Walker respecting the said shares and handing over the original agreement to Walker. Smith had at that time no knowledge of the plaintiffs' interest in the shares.

Held, that the plaintiffs were estopped from setting up their prior equitable title as against Smith and could only get the shares from Walker on payment to Smith of the amount he had lent to McLaws on the security referred to with interest.

Quebec Bank v. *Taggart*, (1896) 27 O. R. 162, and *Goodwin* v. *Robarts*, (1876) 1 A.C. 476, followed.

Plaintiffs had before action offered to pay Smith the amount of the said loan, but he demanded other sums which McLaws owed him. There was no actual tender by the plaintiffs, but such a tender, if made, would have been refused by Smith, and on that ground the trial Judge refused to give him costs as against the plaintiffs. *Wellband* v. *Walker*, 20 M. R. 510.

5. Assignment of—*Right of assignee to sue in his own name—Assignments Act, R. S. M., c. 1, s. 3.*

A person to whom debts and choses in action have been assigned by an instrument in writing may, under The Assignments Act, R. S. M., c. 1, s. 3, bring an action thereon in his own name against the debtor, although they have been transferred to him only for the purpose of joining a number of claims in one suit, and he has no beneficial interest in them.

Wood v. *McAlpine*, (1877) 1 A. R. 234, distinguished. *Mussen* v. *Great Northwest Central Ry. Co.* 12 M. R. 514.

See BANKS AND BANKING, 5.

CHURCH BUILDING—OWNERSHIP OF.

See CRIMINAL LAW, X, 1.

CHURCH LANDS ACT.

1. Death of judge after hearing and before judgment—*Sale of church property—Con. Stat. Man., c. 50—Purchaser raising obstacle to completion of title—Personal order against trustees for repayment of purchase money—Lien—Misrepresentation.*

After witnesses had been examined and the cause heard, but before judgment, the judge died. The cause was ordered to be set down for argument before the Full Court.

Trustees of a church made an agreement for the purchase of three lots. In the agreement they were described as "Trustees of the F. C. Church, Winnipeg," but there was no provision in it as to the appointment of successors in the trust, nor were any trusts set out. The same trustees made a verbal contract for the sale of an adjoining lot. All the lots were intended to be used as a site for a church.

Held, that the provisions of C. S. M., c. 50, applied to the property and that the trustees could not sell save in accordance with the provisions of that Act.

After the trustees had contracted to sell and after the purchaser had rescinded the contract because of non-compliance with the Act, the trustees applied for legislation confirming the sale. This application was opposed by the purchaser.

Held, that the purchaser was nevertheless entitled to insist upon the objection.

After the contract and after payment of part of the purchase money, the purchaser rescinded upon the ground above mentioned and also because of a misrepresentation made to her by one of the trustees. The other trustees were unaware of the misrepresentation. They did not receive any portion of the purchase money. It was applied in the erection of a church upon other land.

Held, that the purchaser was entitled to a personal order for repayment against the offending trustee, and to a lien upon both properties, but not to a personal order against the innocent trustees.

Weight of evidence upon question of misrepresentation discussed. *Cummins* v. *Trustees of the Congregational Church*, 4 M. R. 374.

2. Sale of Church Lands.

On a sale of Church lands under R. S. M., c. 20, the congregation or religious body must be notified, not only of the fact that a sale has been made, but also of the time at which the Court will be applied to, to sanction the execution of the deed. *Re Methodist Church, Manitou*, 8 M. R. 136.

CIVIL ACTION PENDING.

See SOLICITOR, 6.

CIVIL OR CRIMINAL MATTER.

See PRACTICE, XXVIII, 3.

CIVIL OR CRIMINAL PROCEEDINGS.

See MAGISTRATE.
— QUO WARRANTO, 2.

CLOSING UP STREET.

See MUNICIPALITY, I, 5; V, 2.

CLOUD UPON TITLE.

See SALE OF LAND FOR TAXES, IX, 2.
— TITLE TO LAND, 1, 3.

COLLATERAL AGREEMENT.

See SALE OF GOODS, VI, 3.

COLLATERAL SECURITY.

See PLEDGE.

COLLATERAL VERBAL AGREEMENT.

See COMPANY, IV, 11.
— CONDITIONAL SALE, 1.
— CONTRACT, VI, 2; XV, 3.
— EVIDENCE, 16, 17, 18, 21, 22.
— VENDOR AND PURCHASER, VI, 1.

COLLUSIVE SETTLEMENT OF SUIT.

See SOLICITOR AND CLIENT, III, 1.

COLOR OF RIGHT.

See LANDLORD AND TENANT, III, 1.

COMMISSION ON SALE OF LAND.

See APPEAL FROM COUNTY COURT, V, 3.
— CONTRACT, V, 3.
— INTERPLEADER, IX, 2.
— PRINCIPAL AND AGENT, II.

COMMON CARRIER.

See BAILMENT, 2.
— INTERPLEADER, I, 1, 2.
— NEGLIGENCE, VI, 4.
— PLEADING, XI, 6, 8.
— RAILWAYS, II, 1, 2, 3; III.

COMMON COUNTS.

See PLEADING, XI, 4.

COMMON GAMING HOUSE.

See CONSTITUTIONAL LAW, 3.
— CRIMINAL LAW, XIII, 3.

COMMON LAW.

See RAILWAYS, XI, 2.

COMPANY.

I. LIABILITY IN RESPECT OF SHARES.
II. POWERS OF MANAGER.
III. SEAL OF COMPANY.
IV. MISCELLANEOUS CASES.

I. LIABILITY IN RESPECT OF SHARES.

1. Agreement to take shares — *Withdrawal before notice of allotment— Notice of withdrawal given to agent of company.*

1. An agreement to take shares in a company, although accompanied by the giving of a promissory note in part payment, is nothing more than an application for the shares and is not binding on the applicant until acceptance by the company and notice thereof given to him; and, if the applicant gives notice of withdrawal of his application before notice of acceptance reaches him, he will be released from any obligation under his agreement or under the promissory note in the hands of the company or in the hands of any person having no better right to it than the company would have had.

2. Notice of such withdrawal, if given to the general agent of the company who procured the subscriptions, will be sufficient notice to the company. *Kruger* v. *Harwood*, 16 M. R. 433.

2. Agreement to take shares—*Liability of shareholders for amount of unpaid stock.*

The defendant signed the following memorandum, which was written upon a page of a book, kept as a minute book of the meetings of various persons who intended forming a company:

"We, the undersigned, do hereby agree to pay for the amount of stock after our respective names, and we further agree and bind ourselves to abide by the by-laws, rules, and regulations of the association."

The defendant did not sign the petition for letters patent, nor any memorandum of association, but paid $10 on account of his subscription for a share.

In an action by the plaintiff, a creditor of the company, for unpaid calls,

Held, that the defendant was not liable. *Allan* v. *Gordon*, 1 M. R. 132.

3. Agreement with company after subscription for shares—*Payment otherwise than in cash—Manitoba Joint Stock Companies Act, R. S. M.* 1902, *c.* 30, *ss.* 46, 51, 61—*Set-off of debts in winding up.*

1. After a person has subscribed in the ordinary manner for shares in a company incorporated by letters patent under The Manitoba Joint Stock Companies Act, R. S. M. 1902, c. 30, and they have been allotted to him, it is not competent for the Company to release him from his liability to pay for the shares in cash by entering into an agreement, even under seal, to issue to him fully paid and non-assessable shares in consideration of his covenants to do something in the future.

When such an agreement included, with such covenants, a transfer of assets of doubtful value, but the circumstances surrounding the agreement were such as to make it a fraud upon the company, it was held void and that the subscribers for the shares should be settled upon the list of contributories in the winding-up of the company for the full amount of their shares.

Elkington's case, (1867) L. R. 2 Ch. 511, and *Pellatt's case*. (1867) L. R. 2 Ch. 527, followed.

Chapman's Case. [1895] 1 Ch. 771, *Hood* v. *Eden*, (1905) 36 S. C. R. 476; *Re Hess*, (1894) 23 S. C. R. 644, and *Re Wragg*, [1897] 1 Ch. 796, distinguished.

3. The validity of such an agreement may be inquired into on the application before the Judge to settle the list. It is not necessary to bring an independent suit to set it aside.

Re Eddystone Marine Insurance Co., [1893] 3 Ch. 9, and *Re Wragg*, *supra*, followed.

4. Subscribers for shares in the company are not entitled in the winding-up to set-off, against their liability to pay up the shares, claims for goods supplied to the company under such an agreement.

In re London Celluloid Co., (1888) 39 Ch. D. 190; *Maritime Bank* v. *Troop*, (1888) 16 S. C. R. 456; *McNeill's Case*, (1905) 10 O. L. R. 219, and *In re Paraguassu Steam Tramroad Co., Black & Co's. Case*, (1872) L. R. 8 Ch. 254, followed.

Jones & Moore Electric Company, Re and Jones & Moore's Case, 18 M. R. 549.

Appealed to Supreme Court, but settled prior to argument.

4. Allotment of promotion stock—*Declaration of dividend impairing capital—Manitoba Joint Stock Companies Act, R. S. M.* 1902, *c.* 30, *s.* 32.

1. An allotment of $3000 promotion stock in a company incorporated under The Manitoba Joint Stock Companies Act, R. S. M. 1902, c. 30, as fully paid stock, made after incorporation in favor of one of the incorporators, whose original subscription was for $4000, for the alleged consideration of a transfer of good will, will not, in a proceeding under the Dominion Winding Up Act, be any defence against an application by the liquidator to place such subscriber on the list of contributories for the full amount not actually paid in cash.

In re Jones & Moore Electric Co., (1909) 18 M. R. 549, followed.

2. The declaration of a dividend when the company is insolvent, contrary to section 32 of the Act, and the application of such dividend in payment of shares in full cannot be allowed to stand, and, in the winding up, the shareholders are entitled to no credit in respect thereof. *Re Northern Constructions, Limited*, 19 M. R. 528.

5. For calls on stock—*Allotment—Manitoba Joint Stock Companies Act, R. S. M.* 1902, *c.* 30, *ss.* 27, 53—*Certificate of indebtedness under section* 53 *of the Act as evidence—Validity of acts of board of directors when some of their number disqualified—Election of directors without balloting.*

1. Subscribers for shares in the stock of a company who have already paid one call cannot be heard to deny the allotment of their shares.

2. The production of a certificate of indebtedness for unpaid calls on stock in a company incorporated by letters patent under The Manitoba Joint Stock Companies Act, R. S. M. 1902, c. 30, made in accordance with section 53 of the Act, is *prima facie* evidence of notice of the call

as well as of the other matters referred to in that section.

3. The presence on the board of directors of such a company of three who were not qualified, by reason of being in arrears in respect of unpaid calls at the time of their election, is not sufficient to invalidate the acts of the board if done by a legal quorum of properly qualified directors.

Scadding v. *Lorant*, (1851) 3 H.L.C. 443; *Bank of Liverpool* v. *Bigelow*, (1878) 12 N.S.R. 236, and *Munster* v. *Cammel Co.*, (1882) 21 Ch. D. 183, followed.

4. Although the Act requires that the election of directors shall be by ballot, an election by unanimous vote without balloting will be valid if no more than the necessary number are nominated. *Morden Woolen Mills Co.* v. *Heckels*, 17 M. R. 557.

II. Powers of Manager.

1. Authority to pledge goods—*Goods with warehouseman—Passing of property—Registration of bill of sale.*

When goods are held by a warehouseman, an assignment or order for delivery does not pass the property until the warehouseman has assented to hold the goods as the agent of the purchaser.

Registration of a bill of sale is unnecessary when the goods are in the hands of a warehouseman who becomes the agent of the transferee and agrees to hold the goods for him.

Upon Appeal —

Held, 1. That the authority of a manager of a company, carrying on the business of the manufacture and sale of farm utensils, to pledge the goods of the company, for a present debt and future advances, will not be assumed, but must be proved.

2. And that a statute, providing that every contract, &c., made, &c., on behalf of the company by any officer, &c., of the company, in general accordance with his powers as such officer under the by-laws of the company, shall be binding upon the company, does not obviate the necessity of proof that the contract is one in general accordance with the powers of the officer. *Jones* v. *Henderson*, 3 M. R. 433.

2. Authority to sell land—*Powers of general manager—Contract not under seal—Commencing business contrary to requirement of statute—First directors—Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, ss. 22, 26, 31, 64.*

1. A company incorporated by letters patent under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, for the purpose of buying and dealing in land, will, by the combined effect of sections 26, 31 and 64 of the Act, be bound by a contract for the sale of land signed on its behalf by one of the persons named in the letters patent as the provisional directors of the company representing himself, with the acquiescence and knowledge of the other directors, to be the general manager, although no proceedings, subsequent to the issue of the letters patent, had been taken to organize the company, no by-laws had been adopted and no directors elected, if the purchaser deals with the company in ignorance of the absence of these formalities.

Allen v. *Ontario & Rainy River Ry. Co.*, (1899) 29 O.R. 510, followed.

2. The Act speaks only of first directors and contains nothing to indicate that their authority is only temporary or limited, and, therefore, though called provisional in the letters patent, the persons named were, under section 26 of the Act, directors of the company with all the powers and duties set out in sections 31, 64 and other sections of the Act.

Johnstone v. *Wade*, (1908) 11 O.W.R. 602, followed.

Monarch Life v. *Brophy*, [1907] 14 O.L.R. 1, distinguished.

3. Under section 64 of the Act, the contract need not be under seal, nor was it necessary to prove that it was made in pursuance of any by-law or special resolution or order.

Thompson v. *Brantford Electric Ry. Co.*, (1898) 25 A.R. 340, and *Mahoney* v. *East Holyford*, (1875) L.R. 7 H.L. 809, followed.

4. It makes no difference in such a case that the company had commenced business in violation of section 22 of the Act, ten per cent. of the authorized capital not having been subscribed, nor ten per cent. of the subscribed capital paid up, for that provision should be held to be directory and not mandatory, as far as concerns dealings with strangers ignorant that it had not been complied with.

Maxwell on Statutes, 556; *Masten on Company Law*, 564; Dictum of Lord Hatherley in *Mahoney* v. *East Holyford*, *supra*, at p. 894, followed.

Pierce v. *Jersey Waterworks Co.*, (1870) L.R. 5 Ex. 209, distinguished. *Muldowan* v. *German Canadian Land Co.*, 19 M. R. 667.

III. Seal of Company.

1. Employment of chief engineer—*Necessity for seal.*

To a declaration alleging a contract of hiring by the plaintiff with the defendant Company as their chief engineer, the defendants pleaded that they did not make any contract with the plaintiff under their corporate seal, as required by law.

Held, on demurrer, that the plea was bad, for, as the employment of a chief engineer was a matter of necessity, the contract might lawfully be made without seal. *Murdoch* v. *Manitoba S. W. Col. Railway Co.*, T. W., 334.

2. Employment of provisional engineer—*Corporation—Contract under seal—Hire of servant or employee.*

Plaintiff, a civil engineer, was engaged by defendants as provisional engineer at $300 per month. The employment commenced on 9th of Augus , 1882, he was dismissed on 16th of December, 1883 and paid up to that date. He sued for wrongful dismissal and claimed wages up to 9th of February, the earliest period at which his service could have been terminated by a month's notice.

Held, that, as the plaintiff was an important official, his engagement was not binding upon the corporation, not being under its corporate seal. *Armstrong v. Portage, Westbourne and N. W. Ry. Co.*, 1 M. R. 344.

See the next case.

3. Employment of chief engineer—*Contract—Usual expenses, what included in.*

The plaintiff was engaged by the president of the defendant railway company to act as chief engineer of the railway at a salary of $250 per month besides his "usual expenses," and served in that capacity for about nineteen months.

Held, that he was entitled to recover at the rate agreed on for his services, although there was no contract under seal.

Bernardin v. *North Dufferin*, (1891) 19 S. C. R. 581, followed.

Held, also, that the plaintiff's board while at his headquarters was not included in the "usual expenses" which he was to receive in addition to his salary, but sums paid out for board while away from his usual quarters on the company's work would be so included. *Forrest* v. *Great Northwest Central Ry. Co.*, 12 M. R. 472.

4. Pleading—"*Permanent*" *official.*

By resolution the defendants appointed the plaintiff their "permanent land commissioner," at a certain salary. The secretary of the company wrote a letter to the plaintiff informing him of the appointment and at his request affixed the corporate seal to the letter.

The plaintiff sued in assumpsit for wrongful dismissal.

Held, that by his pleading he was estopped from setting up the hiring as under seal.

Quære, As to the meaning of the word "permanent."

Quære, Whether as a matter of law the hiring was under seal.

Upon the evidence,—

Held, that the original agreement had been superseded and terminated by a subsequent agreement. *Belch* v. *Manitoba & North-Western Ry. Co.*, 4 M. R. 198.

IV. Miscellaneous Cases.

1. Agreement prior to charter—*Ratification.*

Prior to the granting of the defendant's charter, S., who afterwards became its manager, made a verbal agreement with the plaintiff with reference to the land of the plaintiff. Subsequently and after a charter a written agreement was prepared. The parties to it were the plaintiff of the one part and B. and D. (who were shareholders in the company) of the other part. It was signed, "Dominion City Brick Company, Aubrey Smith, manager", but the company's name appeared in no other part of the document. *Held*, that the company was not bound by the verbal agreement, because made previous to its charter, and therefore incapable of ratification. 2. That the company was no party to, and was not liable under, the written agreement. *Waddell* v. *Dominion City Brick Company*, 5 M. R. 119.

2. Assignment of chose in action—*Trading corporation acting as trustee—Assignments Act, R. S. M., c. 7, s. 3—Objection by debtor to assignment.*

A trading corporation created by Letters Patent under The Manitoba Joint Stock Companies Act has power to take an assignment of a chose in action and hold and collect it by suit for the benefit of the assignor: *In re Rockwood, &c., Agricultural Society*, (1899) 12 M.R.

655; *The Queen* v. *Reed*, (1880) 5 Q.B.D. 483, and *Ashbury Railway Carriage Co.* v. *Riche*, (1875) L.R. 7 H.L. 653, distinguished.

A debtor, who has no interest in an assignment of the claim against him and is in no way prejudiced by it, cannot raise any objection to the competency of the assignee to take the assignment and to sue upon the claim: *Walker* v. *Bradford Old Bank*, (1884) 12 Q.B.D. 511, followed. *Stobart* v. *Forbes*, 13 M. R. 184.

3. Costs of procuring Act of incorporation—*Liability of company for—Appropriation of payments — Marshalling of assets.*

1. A company incorporated by a special Act is not liable for the expenses of procuring its incorporation in the absence of a provision in the Act that it shall be so liable, unless after incorporation it agrees to pay such expenses; and solicitors have no equitable claim against a company for the costs of procuring such an Act on the ground that the company has taken the benefit of their services.

In re English and Colonial Produce Co., [1906] 2 Ch. 435, followed.

2. Where, however, the company has made a payment on account to its solicitors, they may be permitted to appropriate such payment to their claim for pre-incorporation costs, as was done in the above cited case.

The Company, which was in process of winding up, was a mutual hail insurance company and the Act permitted the directors to make assessments annually to cover only losses by hail during the crop season and the expenses for the year, and no assessment could be made to pay any part of the solicitors' bill, part of which was for work done for the Company after incorporation. There was, however, a reserve fund accumulated under the Act which might "be applied by the directors to pay off such liabilities of the Company as may no' be provided for out of the ordinary receipts for the same or any succeeding year."

Held, that those creditors for the payment of whose claims an assessment could be made should be compelled, in the first place, to have recourse to that method of payment so as to leave the reserve fund available as far as possible to pay such portion of the solicitors' bill as the Company was liable for, that the assessment already made should stand, the proceeds to be applied first in payment of the claims against the Company other than the costs in question, and that any remaining debts, including the amount found due on taxation to the solicitors for services subsequent to the incorporation, should rank *pro rata* on the reserve fund, after payment of the receiver's costs. *Crown Mutual Hail Ins. Co., Re*, 18 M. R. 51.

4. Dissolution of company—*Action against bankrupt—Practice—Procedure—Garnishee order—Pleading.*

A company claiming that it is absolutely defunct cannot be heard to make an application to the Court, and its receiver has no *locus standi* to be heard on that ground.

Proceedings in bankruptcy and even a discharge under the insolvency laws of another country are not necessarily a bar to an action against the insolvent, and if they are a bar they should be pleaded. They cannot be set up on an application to stay proceedings in the action.

Where it was alleged that the right to moneys attached in the hands of a garnishee and owing to a foreign company had passed to a receiver of the company by virtue of a winding-up order made in the foreign country by the Court having jurisdiction there before the date of the attaching order,

Held, that the question of the validity of the attaching order as against the receiver or other creditors should not be determined on a chamber application to set the order aside, but in some more formal proceeding. *Brand* v. *Green*, 12 M. R. 337.

5. Inspection of Company by order of Court—*Appointment of inspector to investigate affairs of company—Manitoba Joint Stock Companies Act, R. S. M. 1902, s. 81 added by 4 & 5 Edward VII. c. 5, s. 1—Objects for which appointment made—Mismanagement of company—Winding-up company.*

The object of section 81, added to The Manitoba Joint Stock Companies Act, R. S. M. 1902, c. 30, by 4 & 5 Edward VII, c. 5, providing for the appointment by a Judge, if he deems it necessary, of an inspector to examine and report on the affairs of a joint stock company incorporated under the Act, on the application of shareholders, is simply that facts and circumstances not otherwise open may be disclosed to those concerned.

In re The Grosvenor Hotel Co., (1897) 76 L. T. 337, followed.

A Judge, therefore, should not make such an order unless it is made to appear that there is reason on substantial grounds to believe that material information regarding the affairs or management of the company is being concealed or withheld from shareholders whose interests entitle them to the disclosure, and it is not sufficient to adduce facts merely tending to show mismanagement by the directors. *Re Town Topics Company*, 20 M. R. 574.

6. Issuing shares at a discount—*Manitoba Joint Stock Companies Act, sections* 30 & 33.

Under The Manitoba Joint Stock Companies Act, R. S. M., c. 25, ss. 30 & 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 *bona fide* and the discount is not greater than has been fixed by a resolution passed at a previous general meeting (if any).

This decision, 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 our Act and the English Joint Stock Companies Act, under which *Ex parte Daniell*, 22 Beav. 16, 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. *North West Electric Co.*, 11 M. R. 629.

Reversed, 29 S. C. R. 33. See next case.

7. Issuing shares at a discount—*Directors—By-law—Ultra vires—Calls for unpaid balances—Contributories—Trustees—Powers—Contract—Fraud—Breach of trust—Statute, construction of—C. S. M., c.* 9, *Div.* 7—*R. S. M. c.*25, *ss*. 30, 33.

The directors of a joint stock company incorporated in Manitoba have no powers under the provisions of The Manitoba Joint Stock Companies Incorporation Act to make allotments of the capital stock of the company at a rate per share below the face value, and any by-law or resolution of the directors assuming to make such allotment without the sanction of a general meeting of shareholders of the company is invalid.

A by-law or resolution of the directors of a joint stock company which operates unequally towards the interests of any class of the shareholders is invalid and *ultra vires* of the company's powers.

Where shares in the capital stock of a joint stock company have been illegally issued below par the holder of the shares is not thereby relieved from liability for calls for the unpaid balance of their par value.

Judgment of the Court of Queen's Bench for Manitoba (11 M. R. 629) reversed, TASCHEREAU, J., dissenting.

North West Electric Co. v. *Walsh*, 29 S. C. R. 33.

8. Liability of Directors for wages—*Manitoba Joint Stock Companies Act, R.S.M.* 1902, *c.* 30, *ss.* 27, 33.

1. Persons who accept transfers of shares in a company incorporated under the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, and are elected and act as directors of the company, cannot escape the liability for wages of employees imposed upon directors by section 33 of the Act by showing that they do not hold the shares absolutely in their own right, but only as security or in trust, notwithstanding that, under section 27 of the Act, such persons are not legally qualified to be directors.

2. The provisions of section 33 are remedial and not penal in their nature, being only the withholding from directors, in respect of wages, of the freedom which the statute would otherwise give them from personal liability for all debts of the company. *Macdonald* v. *Drake*, 16 M. R. 220.

9. Liability of promoters for return of money paid for unallotted shares.

The plaintiff subscribed for stock on the terms of a letter written to him by the secretary of a committee of promoters of a projected Company, and paid half the amount of his subscription. The money was forwarded by the committee to the incorporators of the Company, which was incorporated under the laws of Minnesota. No stock having been allotted to the plaintiff, he brought an action against the committee for the amount paid, declaring upon the common *indebi-*

tatus counts. A non-suit was entered at the trial.

Held (WOOD, C. J., dissenting), that the non-suit was right. *Breden* v. *Lyon*, T. W., 50.

10. Lien on shares for debt due to Company—*Power to make by-law providing for lien—Estoppel—Waiver.*

A company incorporated under The Manitoba Joint Stock Companies Act, R. S. M. 1902, c. 30, has, by virtue of section 41 of the Act, power to make a by-law providing that a lien shall exist upon the shares of any stockholder for any debt or liability to the company; and, if such by-law has been passed, the company may maintain such lien as against an execution creditor of a stockholder whose shares have been seized by the sheriff under execution.

Child v. *Hudson's Bay Co.*, (1723) 2 P. Wms. 207, and *Societe Canadienne Francaise* v. *Daveluy*, (1891) 20 S. C. R. 449, followed.

The shares in question, which were not fully paid up, stood in the name of the defendant's wife, but plaintiff on 1st of May, 1907, recovered judgment against the defendant, his wife and the company declaring that the said shares were the absolute property of the defendant Mitchell and available under execution in satisfaction of the plaintiff's judgment. At that time a note given to the company for the balance due on the shares was held by the bank in which it had been discounted; but, before the time of the seizure of the shares by the sheriff, that note had fallen due and had been taken up by the company.

Held, that, at the time of the recovery of the last mentioned judgment, there was no debt due from Mitchell or his wife to the company for which the company could then have set up a lien, and it was not estopped by the judgment from setting up the lien as soon as it had taken up the note.

Held, also, that the right to the lien had not been waived or lost by the taking and discounting of a promissory note for the debt for which the lien was claimed. *Montgomery* v. *Mitchell*, 18 M. R. 37.

11. Misnomer — *Pleading — Collateral agreement.*

Held, that misnomer of a plaintiff corporation is not a ground for non-suit. The defendant must object, by application in chambers, to compel the plaintiff to amend.

Held, that, where defendants move for a non-suit upon the ground of misnomer, the fact of incorporation of the plaintiff company is admitted.

Semble, that the question whether the plaintiff corporation does, or does not, exist must be raised by plea.

Held, that, where there is a written but unsealed agreement between a corporation and an individual, parol evidence cannot be given of a verbal collateral contract (of the nature of that set out in the pleadings) made at the same time by the corporation. *Great North Western Telegraph Co.* v. *McLaren*, 3 M. R. 358.

12. Right of action—*Suit by shareholder on behalf of himself and all other shareholders—Refusal of company to take proceedings—Demurrer.*

Demurrer to plaintiff's bill, filed on behalf of himself and all other shareholders of the H. B. R. Company against Lloyd's Banking Company, The West Cumberland Iron Company, and the H. B. R. Company, praying to have it declared that certain bonds of the Company, purporting to have been issued by the Company and deposited with The West Cumberland Company by the president of the H. B. R. Company as security for the payment of certain acceptances of the H. B. R. Company and afterwards delivered by The West Cumberland Company to Lloyd's Banking Company, were not a charge upon the property and assets of the H. B. R. Company or their land grant, because it was *ultra vires* of the Company to issue them, and because their issue was not authorized by the Company, and that Lloyd's Banking Company were not lawful holders of the bonds, and that they might be ordered to deliver them up, and be restrained from disposing of them.

The bill alleged that the plaintiff had been a shareholder since before 1886, and was recognized by the railway company as such; that he had repeatedly called upon the directors and officers of the railway company to take proceedings to prevent the sale of the bonds, and to have it declared that they were not properly issued, but the Company and its directors and officers had refused to take any such proceedings.

Held, that the demurrer should be allowed because the suit should have been brought by the railway company, and the plaintiff did not allege any sufficient

reason why it had not been so brought and could not himself maintain the suit. *Foss* v. *Harbottle*, 2 Hare, 491, and *Gray* v. *Lewis*, L. R. 8 Ch. 1035, followed. *Gillespie* v. *Lloyd*, 11 C. L. T. Occ. N. 121.

13. "Shareholder"—*What constitutes*—*Manitoba Joint Stock Companies Act, amendment of* 1905—*Appointment of inspector.*

A shareholder in a company need not be the actual holder of a stock certificate.

Under a provision added to The Manitoba Joint Stock Companies Act by chapter 5 of the statutes of 1905, "not less than one-fifth in value of the shareholders of the company" may apply for the appointment of an inspector:—

Held, that two men who owned shares, standing in the name of a trust company as bare trustees, were "shareholders" within the meaning of the enactment. *Re Kootenay Valley Fruit Lands Co.*, 18 W. L. R. 145.

14. Street Railway Company—*Corporate powers — Municipality — Use of streets for poles and wires carrying electric current—Agreement to keep power houses within city limits — Forfeiture — Waiver — Injunction — Estoppel — Meaning and scope of words "operation, conduct and management" of a street railway — Parties to action — Pleading — Amendment.*

It was a term of the agreement between the plaintiffs and the Winnipeg Electric Street Railway Company that the Company would place and keep within the city limits all their engines, machinery, power houses, etc., for their street railway system, and the agreement further provided that, in so far as its terms and conditions related to the *operation*, conduct and management of the railway system, the same and the fulfilment of same should be conditions precedent to the continued enjoyment of the privileges and rights of the Company. In 1904, the above named Company amalgamated, under the name of the defendants, with the Winnipeg General Power Company which had, under its charter powers, constructed a hydro-electric plant at Lac du Bonnet on the Winnipeg River and a line of poles and wires for the transmission of the electric current to the City. The Power Company's Act of Incorporation gave it the right to erect poles and wires in the streets of the City for the purpose of conveying electric current for lighting, heating or supplying motive power *with the consent of the council*. No such consent was ever given or asked for, but after the amalgamation the defendants discontinued the use of their steam power plant in the City, and operated their street railway system by power derived from the alternating current brought into the City from the power plant at Lac du Bonnet and changed at a transforming station in the City into the direct current used for propelling the cars.

Held, RICHARDS, J.A., dissenting, that there had been no breach of the term of the agreement first above referred to, that there was nothing in the agreement requiring the defendants to generate their own power for the purpose of operating their cars, that they would have the right to purchase power for that purpose from any other company, and that the power used in propelling the cars was in fact generated within the City limits.

Per MATHERS, J., in the Court below. There was a distinct breach of the agreement for which an action for damages would lie, but the keeping of the power houses within the City was not a condition or term relating to the "operation, conduct and management" of the railway system, and therefore there was no forfeiture of the rights and privileges of the defendants. Moreover, if the agreement had fully provided for such forfeiture, the City had waived it by afterwards passing by-laws fixing schedules for the running of the cars, by calling on the Company to proceed at once with the construction and operation of new lines, which were accordingly built and subsequently operated at great expense to the Company, and by accepting five per cent of the gross earnings of the Company payable under the agreement, all these things having been done after the plaintiffs had full knowledge of the alleged breach of the agreement.

The defendants through the amalgamation with the Power Company had also acquired the right to develop electric energy outside the City and to distribute it in the City through poles and wires for lighting and commercial power purposes, but only with the consent of the City council; and their own Act of Incorporation empowered them to furnish light and power and use the streets for those purposes, but only when authorized by a by-law of the City.

Held, (1) As no such consent had been given or by-law passed, the plaintiffs were

entitled to an injunction to prevent the defendants from erecting, maintaining or re-erecting poles or wires on the streets, lanes or highways of the City for the transmission of electric energy for any purpose other than for their street railway and requiring the defendants, upon due notice, to remove all such poles and wires now used by them for any such other purpose.

(2) The City was not estopped from applying for the injunction by having applied for, taken and paid for power transmitted with its knowledge, over the poles and wires objected to, from the plant outside the City without its consent and against its protest.

(3) The issue by the City engineer of a permit for the erection of the poles and wires objected to, intended only to authorize the use of them for electric lighting purposes, did not obviate the necessity of the consent of the City being obtained for the transmission of current for power purposes. Such a permit amounted to no more than a license to erect the poles and wires which might be revoked at any time.

The Manitoba Electric and Gas Light Company, incorporated in 1880 by special Act of the Legislature, had power to use the streets of the City for carrying on the business of electric and gas lighting within the City with the authority of the Council and upon obtaining permits from the City engineer. It carried on this business with the necessary authority until 1898, when it conveyed by deed its systems of gas and electric light works and also "all franchises, rights, powers, assets, plant and appliances" to the Winnipeg Electric Street Railway Co.

The Gas Company's Act gave it power to alienate "any of its personal property, lands, tenements, *rights* and *franchises* or interest therein as it might see fit."

The defendants had also, in 1900, acquired by deed from the Northwest Electric Company, which had been incorporated by letters patent under The Joint Stock Companies Act, its system of electric lighting and power works which it had been operating in the City under conditions similar to those of the Gas Company, and also all its "franchises, rights, powers," &c.

Held, that neither the Gas Company nor the Electric Company had power to alienate its corporate powers, and that the defendants had not, by said deeds, acquired any right to erect or maintain poles and wires in the streets of the City for purposes of electric lighting, heating or power, unless authorized to do so by by-law of the City, although those companies, which were now defunct, had formerly acquired and exercised such rights.

Held, also, that the Attorney General was not a necessary party to the action.

Fenelon Falls v. *Victoria Ry. Co.*, 29 Gr. 4, followed.

Wallasey Local Board v. *Gracey*,(1887) 36 Ch. D. 593, distinguished.

The ratification by Act of the Legislature of the by-law of the City providing for the agreement between it and the Company gave the terms of the by-law the force of a statute, and thereafter the plaintiffs could not by any action of theirs lose their right to insist upon the Company complying with the terms of the statute and the by-law, or give the defendants any additional rights by estoppel, waiver or acquiescence.

Pembroke v. *Canada Central Ry. Co.*, (1883) 3 O. R. 503; *Port Arthur* v. *Fort William*, (1898) 25 A. R. 522, and *Toronto* v. *Toronto Ry. Co.*, (1906) 12 O. L. R. 534, distinguished.

The parties being unable to agree on settling the minutes of the judgment to be entered, the matter was afterwards brought before the Court, when counsel for defendants for the first time pointed out that the relief granted went beyond that asked for by the statement of claim.

Held, that the statement of claim should not be amended at this stage, although asked for by the plaintiffs, but that, under all the circumstances, the judgment should stand. *City of Winnipeg* v. *Winnipeg Electric Railway Co.*, 20 M. R. 337.

Reversed, appeal of defendants allowed; cross appeal of plaintiffs dismissed, and action dismissed. [1912] A. C. 355.

15. Trading Company—*Liability on promissory note signed by managing director — The Manitoba Joint Stock Companies Act, R. S. M., c. 25, s. 62.*

The defendant Company was incorporated by Letters Patent under The Manitoba Joint Stock Companies Act, R. S. M., c. 25, for the purpose of carrying on a trading business, and plaintiffs sued as indorsee of three promissory notes given by the managing director of the Company in its name to one Crighton for tea ordered from him but never delivered.

There was no by-law, resolution or other act expressly defining the powers or duties of the managing director, but the evidence showed that the course of business of the Company was such that he had frequently given similar promissory notes which had been paid by the Company's cheques without objection on the part of the other directors or the auditors.

Held, that the notes sued on had been made in general accordance with the powers of the managing director within the meaning of section 62 of the Act and were binding on the Company. *Imperial Bank* v. *Farmers' Trading Co.*, 13 M. R. 112.

See Bills and Notes, X, 4.
— Conditional Sale, 7.
— Contempt of Court, 2.
— Corporation, 5.
— Costs, XIII, 11.
— Examination of Judgment Debtor, 3.
— Malicious Prosecution, 2.
— Master and Servant, IV, 1, 2, 4.
— Practice, II, 3, 4.
— Production of Documents, 11.
— Real Property Act, I, 2.
— Scire Facias.
— Security for Costs, IV, 1, 2.
— Summary Conviction.
— Winding-up, I, 3; II, 2; IV, 1, 3, 5, 8.

COMPENSATION FOR LAND INJURIOUSLY AFFECTED.

See Municipality, I, 5; VIII, 2.
— Railways, XI, 1.

COMPENSATION IN RESPECT OF DEATH.

See Lord Campbell's Act, 3.

COMPLETION OF CONTRACT.

See Mechanic's Lien, I; III; VII, 1, 2; X, 1.

COMPUTATION OF TIME.

See Time, 1, 2.
— Winding-up, I, 3

CONCEALED FRAUD.

See Misrepresentation, III, 3.

CONCEALMENT OF GOODS.

See Criminal Law, XVII, 6.

CONDITION.

See Accident Insurance, 2.
— Fire Insurance, 1.
— Railways, VIII, 1.

CONDITION PRECEDENT.

See Building Contract, 1.
— Bailment, 2.
— Contract, IX, 1.
— Crown Lands, 2.
— Fire Insurance, 1, 5.
— Half Breed Lands Act, 3.
— Pleading, XI, 4.
— Sale of Goods, IV, 1.
— Summary Judgment, II, 2.

CONDITION PROTECTING PURCHASERS.

See Mortgagor and Mortgagee, IV, 1.

CONDITIONAL APPROVAL.

See Municipality, I, 1.

CONDITIONAL LIABILITY.

See Garnishment, V, 2.

CONDITIONAL SALE.

1. Collateral verbal agreement—*Lien note—Verbal agreement at time of sale to give lien note afterwards—Priority as between chattel mortgage and lien note—The Sale of Goods Act, R.S.M.* 1902, *c.* 152, *s.* 26.

A lien note given for the price of chattels sold on credit, with the verbal stipulation that the title to and property in the goods should not pass until payment of the price in full, should, under sub-section (b) of section 26 of The Sale of Goods Act, R.S.M. 1902, c. 152, be signed before or at the time of the delivery of the chattels, or so soon thereafter as to form part of one transaction; otherwise the purchaser, by making a subsequent sale or mortgage of the chattels to a third party without notice of the lien, may confer a title to the chattels on such third party which will, under sub-section (a) of the same section, cut out that of the original vendor even although he has meantime procured such lien note to be signed by his vendee. *Collom* v. *McGrath*, 15 M. R. 96.

2. Dealer disposing of horses in the ordinary course of his business—*Sale of Goods Act, R.S.M. 1902, c. 152, s. 26—Lien notes.*

When a person makes a conditional sale of a team of horses and delivers them to one whom he knows to be a dealer in horses and to be buying them for the purpose of re-selling them at a profit, although he takes an agreement in the form usually called a lien note on the horses to secure the price, he thereby clothes the purchaser with implied authority to sell the horses and to transfer a good title free from the lien to a *bona fide* purchaser who has no notice or knowledge of the existence of the lien. Such sub-purchaser, therefore, is not bound to give up the horses to the holder of the lien note, though it be not paid; and, if he does, he cannot recover afterwards in an action for breach of warranty of title against one who has not been guilty of fraud.

The decisions in the cases of grantors of bills of sale and chattel mortgages who remain in possession of the goods and sell them in the ordinary course of their business, as in *National Mercantile Bank* v. *Hampson*, (1889) 5 Q.B.D. 177; *Walker* v. *Clay*, (1880) 49 L.J.Q.B 560,. and *Dedrick* v. *Ashdown*, (1888) 15 S.C.R. 227, apply also in the case of claims under lien notes. The reason for applying the doctrine of implied authority in the latter case is stronger than in the former, because lien notes are not registered and a purchaser of horses has no means of ascertaining whether they are incumbered or not.

When the implied authority to sell exists, a good title may be transferred independently of sub-section (a) of section 26 of the Sale of Goods Act, R.S.M. 1902, c. 152; and sub-section (b) of the same section, which only excepts goods purchased under lien notes from the operation of sub-section (a), does not prevent the application of the principle referred to. *Brett* v. *Foorsen*, 17 M. R. 241.

3. Dealer disposing of horses in the ordinary course of his business—*Evidence—New trial—Lien note.*

The plaintiff's claim was for damages for the seizure by the defendants of a team of horses which he bought from one Brett. The defendants had sold the horses to one Foorsen taking a lien note for the purchase money. The plaintiff purchased without any notice or knowledge of the existence of this lien note and gave full value.

The trial Judge found that the defendants, when they sold to Foorsen, knew that his business was that of a horse dealer and that he would re-sell in the ordinary course of his business and, in all likelihood, to an innocent purchaser, and, following *Brett* v. *Foorsen*, 17 M.R. 241, gave plaintiff a verdict.

Held, on appeal, that this verdict must be set aside because the plaintiff had failed to give any evidence of his title to the horses other than that he had purchased for value from Brett and had given no evidence of the sale to Foorsen or of the sale by Foorsen to Brett.

Plaintiff allowed a new trial on payment of costs of the former trial and of the appeal. *Pelekaise* v. *McLean*, 18 M. R. 421.

4. Lien Notes Act, R. S. M. 1892, c. 87, s. 2, construction of—*Construction of bailment—Right of possession—Chattels other than manufactured goods.*

A promissory note given for the price of a horse provided that the title, ownership, right of property and right of possession in the property for which the note was given should remain in the vendor or holder of the note, until the note should be fully paid.

Held, that this instrument was neither a receipt note, nor a hire receipt, nor an order for chattels within the meaning of The Lien Notes Act, R. S. M., c. 87, s. 2, and that an endorsee of the note was entitled to the horse as against an innocent purchaser for value.

Semble. The above mentioned statute does not make all receipt notes, hire receipts and orders for chattels mentioned in it, except those taken for manufactured goods having the manufacturer's name or some other distinguishing name painted or printed thereon, invalid and void as against purchasers in good faith. *Sutherland* v. *Mannix*, 8 M. R. 541.

5. Lien Notes Act, R. S. M. 1902, c. 99, ss. 4, 7, construction of—*Charge on land created by agreement separate from order for chattel—Caveat.*

Section 4 of The Lien Notes Act, R. S. M. 1902, c. 99, does not forbid the registration of a separate document creating a charge on the land of the person signing it for a named sum of money or of a caveat founded on such document, although it is really given to secure the purchase money of a chattel bought by him under a conditional sale agreement simultaneously entered into, if the document registered does not contain as a portion thereof and has not annexed thereto or indorsed thereon any order, contract or agreement for the purchase or delivery of any chattel; and section 7 of the Act only makes void an instrument, the registration of which is forbidden by section 4. *Smith* v. *American-Abell Engine & Thresher Co.*, 17 M. R. 5.

6. Principal and agent—*Sale of goods—Judgment unsatisfied no bar to plaintiff's claim against third party.*

In an action of replevin to recover from defendant a drill and a gang plough purchased by him from one Reid, it appeared that Reid had a place of business at Neepawa, and was acting as agent for plaintiff in the sale of the drill, but the plough had been bought by him from the plaintiff for the purpose of reselling

The property in both articles was by agreement between the plaintiff and Reid to remain in the plaintiff until payment was made in full, and the names of the makers were painted or stamped on the articles so as to satisfy the provisions of The Lien Notes Act. Reid had accepted a horse valued at $75 in part payment for the drill, and another horse valued at $40 in part payment for the plough. No part of the consideration for the sale of either article ever reached the plaintiff, and the sales had not been ratified by him.

The defendant was aware that Reid was only a machine agent, and he knew when he bought the drill that the real owner of it was the plaintiff; but he claimed that he did not know that any person but Reid had any ownership in the plough.

The facts showed, however, in the opinion of the Judge who tried the case, that the defendant was not a *bona fide* purchaser in the ordinary course of business, but that the circumstances put him upon inquiry as to the ownership of the plough.

Held, that the plaintiff was entitled to recover both the plough and the drill.

The plaintiff had recovered judgment against Reid for the amount of a certain note, which included the price of the plough, but the judgment was wholly unsatisfied.

Held, that this was no bar to the plaintiff's claim to recover the plough from the defendant. *Wesbrook* v. *Willoughby*, 10 M. R. 690.

7. Purchaser without notice—*Powers of Joint Stock Company—Promissory note of Company—Authority of Manager of Company to sign note.*

Plaintiff sold a buggy to the Gold Seal Oyster Company, which was incorporated under The Manitoba Joint Stock Companies Act, for the purpose of carrying on (amongst other things) a retail business in the sale of oysters, fish and poultry in the City of Winnipeg The sale was a conditional one, and the plaintiff took a note for the amount of the purchase money signed "Gold Seal Oyster Co. T. H. Jones, Sec.-Treas." The buggy was used in the business of the Company for the delivery of goods and soliciting of orders, although it was sometimes used by the manager of the Company for pleasure driving. The note contained the provision that the property in the buggy and the right of possession should not pass from the plaintiff until payment of the amount in full.

The defendant afterwards purchased the buggy from Jones, the manager of the Company. He did not know that plaintiff had any claim on it.

Held, (1), That the purchase of the buggy and the giving of the note for it, were within the corporate powers of the Company. (2) That in the absence of evidence to the contrary it should be presumed that the manager of the Company had authority to purchase the buggy and to sign the note therefor. (3) And that the defence of purchase for value

without notice could not prevail against the plaintiff's title. *Boyce* v. *McDonald*, 9 M. R. 297.

See CONTRACT, III, 1, 2.
— FIXTURES, 2, 3.
— REPLEVIN, 5.
— SALE OF GOODS, VI, 4.
— WARRANTY, 2.

CONDITIONS OF INSURANCE.

See PRINCIPAL AND SURETY, 3.

CONDUCT MONEY.

See EXAMINATION OF JUDGMENT DEBTOR, 2.

CONFESSING JUDGMENT.

See FRAUDULENT JUDGMENT, 1.

CONFESSIONS.

See CRIMINAL LAW, VI, 1, 2
— EXTRADITION, 2.

CONFIDENTIAL COMMUNICATIONS.

See SCANDALOUS MATTER.

CONFLICT OF EVIDENCE.

See APPEAL FROM COUNTY COURT, V. 3.

CONFLICT OF LAWS

1. Foreign bankrupt—*Assets in Manitoba of foreign bankrupt—Garnishment—Queen's Bench Act*, 1895, *Rule* 196 (*h*).

A debt owing by a resident of this Province to a foreign corporation, though payable at its place of business in a foreign state, is nevertheless an asset of such corporation in Manitoba within the meaning of Rule 196 (*h*) of The Queen's Bench Act, 1895, as added to by 61 Vic., c. 13, so as to give the Court jurisdiction to entertain an action which could not otherwise be brought in this Province.

Blackwood v. *The Queen*, (1882) 8 A. C. 82; *The Commissioner of Stamps* v. *Hope*, [1891] A. C. 476; and *In re Maudslay*, [1900] 1 Ch. 602, followed.

But when proceedings in bankruptcy had been commenced against the foreign corporation and a temporary receiver of all its assets appointed before the commencement of the action here, in which a garnishing order had been made attaching such debt, it was held that such debt had ceased to be an asset in Manitoba such as would confer jurisdiction on the Court in the action under the above mentioned Rule and that the action should be dismissed with costs.

It is an established principle of English law that the attachment or assignment by involuntary proceedings under the bankruptcy laws of a foreign country in which a bankrupt is domiciled affects or transfers the title to his purely personal property in England unless the rights of citizens under some special statute are prejudicially affected; and such principle should be adopted here.

In re Oriental Inland Steam Co., (1874) L. R. 9 Ch. 557; *Sill* v. *Worswick*, (1791) 1 H. Bl. 665, followed.

Held, also, that, at the commencement of the action, the company had not assets in Manitoba which might be rendered liable to any judgment to be recovered, because the debt attached was not one which the defendant could properly at that time, and without violating the rights of others, deal with: *Roberts* v. *Death*, (1881) 8 Q. B. D. 319; *Badeley* v. *The Consolidated Bank*, (1888) 38 Ch. D. 238, and *Bertrand* v. *Heaman*, (1895) 11 M. R., at p. 208, followed. *Brand* v. *Green*, 13 M. R. 101.

Distinguished, *Bank of Nova Scotia* v. *Booth*, 19 M. R. 471.

2. Lex loci contractus—*Rescinding order for leave to appear—Note payable in "legal tender money"—Place of payment.*

Held, that, upon new material, it is competent for one judge to set aside the order of another.

2. That the words "payable in legal tender money," in a note, convey no meaning beyond or otherwise than would have been given to the note if these words had been omitted.

3. Where a note is payable at a particular place, but does not contain the

words "and not otherwise or elsewhere," the *lex loci contractus*, and not the *lex loci solutionis*, prevails. *North-Western National Bank* v. *Jarvis*, 2 M. R. 53.

3. Lex loci solutionis — *Railway — Pleading — International law.*

To a declaration in contract against a railway company for loss of baggage, the company, as to $100 of the claim, pleaded that the baggage was carried under a contract whereby "the baggage liability is limited to wearing apparel not exceeding $100 in value." Replication that the contract was made in the State of Maine, that by the law of that State plaintiff (for reasons assigned), was not bound by the limitations.

Upon demurrer the replication was *held* bad.

A contract made in one country to be performed in another is governed by the law of the latter jurisdiction.

Semble, where there is a contract with a corporation for carriage through several States, with distinct laws, the law of the State where the corporation has its seat and principal office prevails. *Brown* v. *C. P. R.*, 4 M. L. 396.

See Foreign Judgment, 8.
— Life Insurance, 4, 5.
— Lord Campbell's Act, 2.

CONSENSUS AD IDEM.

See Contract, IX, 2.

CONSENT ORDER.

See Practice, XXVIII, 4.

CONSIDERATION.

See Banks and Banking, 7.
— Bills and Notes, IV, 2, 3, 4, 5.
— Bills of Sale, 4.
— Chattel Mortgage, V, 2.
— Contract, IV, 1, 2; VI, 2; VIII, 1; XV, 8.
— Distress for Rent, 1.
— Estoppel, 4.
— Fraudulent Conveyance, 22.
— Solicitor and Client, I, 2.

CONSOLIDATION OF ACTIONS.

See Warranty, 5.

CONSPIRACY.

See Trade Unions.

CONSPIRACY IN RESTRAINT OF TRADE

1. Agreement to boycott plaintiff in his business.

Plaintiff and defendants were members of a corporation known as "The Winnipeg Grain and Produce Exchange," and dealt in grain both on their own account and for others on commission.

The defendants and other members of the Exchange, having come to the conclusion that the plaintiff was using his position as a member to assist other dealers not members to carry on dealings in grain with members in violation of the rules of the Exchange as to commission, agreed amongst themselves that they would neither sell to nor buy grain from the plaintiff; and the defendants afterwards carried out this agreement, thereby causing loss and damage to the plaintiff in his business as a grain dealer. The defendants in so combining were not actuated by any malicious feeling towards the plaintiff, but solely by the desire to serve the business interests of themselves and the members of the Exchange generally, and in the protection of the market created under the rules of the Exchange. They had not attempted to coerce the plaintiff by violence or threats or to induce him or others to break any contract, nor had they tried to induce others to refrain from dealing with the plaintiff.

Held, that the acts of the defendants were no more than a lawful exercise of their rights, and that there was no conspiracy to do any illegal act or for any illegal object or to use any means that would be unlawful if used by an individual, and that, in the absence of any evidence of malicious or improper motive, the combination and the pursuit of its objects did not affect any legal right of the plaintiff or operate to do him any legal injury. A combination such as the defendants had entered into, although resulting in damage to some person or

persons, is actionable only in cases where its object is unlawful, or where, if lawful, such object is attained by unlawful means.

The Mogul Steamship Co. v. *McGregor*, [1892] A. C. 25, and *Allen* v. *Flood*, [1898] A. C. 1, followed. *Gibbins* v. *Metcalfe*, 15 M. R. 569.

2. Criminal combination—*Criminal Code, ss.* 496, 498—*Grain Exchange Rules and Regulations—Evidence.*

1. Section 496 of the Criminal Code, R.S.C. 1906, *c.* 146, must be read along with section 498, and, notwithstanding the absence of the word "unduly" from subsection (b) of section 498 and its presence in sub-sections (a), (c) and (d), it is only such combinations as contemplate the doing of unlawful acts that are punishable criminally under section 498 (b), although they may to a limited extent restrain or injure trade or commerce in relation to a commodity which is a subject of trade or commerce, and the statute condemns only those restraints which are not justified by any personal interests of the combining parties, but are mere malicious restraints unconnected with any of their business relations.

Gibbins v. *Metcalfe*, (1905) 15 M.R. 583; *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. 25; *Hopkins* v. *United States*, (1898) 171 U.S.R. 594, and *United States* v. *Joint Traffic Association*, (1898) *ib.* 568, followed.

2. Regulations made by the members of a grain exchange intended, and primarily operating, for the proper carrying on of their trade and for the reasonable benefit of the members are not a crime or an illegal conspiracy, even though indirectly, to some extent, they do restrain trade.

Swaine v. *Wilson*, (1889) 24 Q.B.D. 252, followed.

3. None of the by-laws, rules and regulations following, adopted and enforced by the members of a grain exchange, although more or less in restraint of trade or commerce in wheat, can be said to be undue restraints so as to render the members punishable under the Code.

a. A by-law prohibiting the members from charging, on the purchase or selling of grain, less than one cent. per bushel as commission.

b. A by-law prohibiting members from employing agents to buy grain at points where the volume of business was not sufficient to enable them to pay a salary of $50 per month.

c. A regulation forbidding members from buying track wheat at country points during the market hours on the Exchange (9.30 a.m. to 1.15 p.m.)

d. An agreement amongst the elevator companies that, during a portion of each year towards the close of navigation, they would not have more than 5000 bushels of purchased wheat in any one interior elevator at any one time.

e. An agreement between elevator companies for the pooling of receipts at certain points where, from a variety of causes, there was more elevator capacity than the trade required and the companies found it necessary, in order to cut down expenses and avoid raising the elevator charges, to adopt that agreement.

4. The above mentioned regulations and acts complained of by the Crown, taken in connection with their surrounding conditions, made on the whole for a more stable market at the fullest values than if totally unregulated competition had prevailed, and so were for the public good.

5. The trial Judge properly rejected as evidence the books of elevator companies with which the accused did not appear to be connected. *Rex* v. *Gage*, 18 M. R. 175.

3. Criminal combination — *Illegal contract—Criminal Code, s.* 498 *(b), (d)—Meaning of word "unduly."*

1. An agreement between two junk dealers, although they controlled nearly the whole trade in junk over a large territory, whereby they fixed the prices at which they would buy and sell junk for a year and agreed to divide equally between them the profits and losses of the business transacted by both during that period, would not be void at common law as being in undue restraint of trade or unduly preventing competition.

Collins v. *Locke*, (1879) 4 A. C. 674; *Mogul Steamship Co.* v. *McGregor*, [1892] A. C. 25; *Nordenfelt* v. *Maxim Nordenfelt & Co.*, [1894] A. C. 535; *Elliman* v. *Carrington*, [1901] 2 Ch. 275, and *Rex* v. *Gage*, (1908) 18 M. R. 175, followed.

2. An agreement to be punishable as a crime under sub-section *(b)* of section 498 of the Criminal Code as in restraint of trade, or under sub-section *(d)* as unduly preventing or lessening competition, must be such an agreement as the courts would, independently of the statute, declare illegal as being in unreasonable restraint of trade or competition on grounds of public policy and therefore unenforceable between the parties; and,

if it is not such an agreement, it will be enforceable notwithstanding anything in that section.

Urmston v. *Whitelegg*, (1890) 63 L.T. N.S. 455; *Rex* v. *Clarke*, (1907) 14 Can. Cr. Cas. 46; *Wampole* v. *Karn*, (1906) 11 O.L.R. 619, and *Rex* v. *Elliott*, (1905) 9 O.L.R. 648, distinguished.

Shragge v. *Weidman*, 20 M. R. 178. Appealed to Supreme Court, which Court (46 S.C.R.1) overruled the Court of Appeal in Manitoba and restored the judgment of MATHERS, C.J. K.B., (20 M. R. 181) who held, following *Rex* v. *Clark*, 14 Can. Cr. Cas. 46; *Wampole* v. *Karn*, 11 O.L.R. 619, and *Rex* v. *Elliott*, 9 O.L.R. 648, that the agreement was in direct violation of sub-section (*d*) of section 498 of the Criminal Code as unduly preventing competition and, therefore, one which could not be enforced by action between the parties.

CONSPIRACY TO INJURE.

See TRADE UNIONS, 1, 2.

CONSTABLE.

See FALSE IMPRISONMENT, 1, 2.

CONSTITUTIONAL LAW

1. Act to authorize building of bridge over navigable river—*Mandamus to purchase bridge—Bridge company—Local charter—Navigable river—Jurisdiction of Legislative Assembly.*

By an Act of the Legislature of Manitoba, 45 Vic., c. 41, the Brandon Bridge Company was incorporated and empowered to build a bridge across the Assiniboine River; and, by another Act, 45 Vic., c. 35, incorporating the City of Brandon, power was given to the Mayor and Council to purchase any bridge built, or being built, within the city.

On an application by an adjoining land owner for a *mandamus* to compel the city to purchase the bridge,

Held, 1. The Act authorizing the building of the bridge was *ultra vires* of the Local Legislature.

2. That the title of the Bridge Company was not such as would be forced upon an unwilling purchaser. *Re Brandon Bridge*, 2 M. R. 14.

2. Act respecting evidence in questions affecting land in Province—*Parliament of Canada—Public document, proof of by certified copy.*

1. Certain provisions of an Act of the Dominion Parliament (46 Vic.,c. 17, s. 2, s-s. 4) for the reception in evidence of certified copies of documents and records in the Dominion Lands Office are *ultra vires*, so far as they can be considered to apply to suits merely for the cancellation as clouds upon title of conveyances (not being letters patent from the Crown) registered under the Lands Registration Act.

2. By the Imperial statute 14 & 15 Vic., c. 99, s. 14, certain provision is made for the proof of books and documents of a public nature by the production of an examined copy, "provided it purport to be signed and certified as a true copy * * * by the officer to whose custody the original is entrusted."

A copy of a book, within this statute, certified by "A. Russell, Acting Surveyor-General," the original of which was proved to be in the Department of the Interior, in the Dominion Lands office, at Ottawa,—

Held, not sufficient evidence without proof that A. Russell was the officer to whose custody the original had been entrusted. *McKilligan* v. *Machar*, 3 M. R. 418.

3. Act to punish keeping of a gambling house—*Ultra vires—Criminal law—British North America Act*, s. 91, s-s. 27.

A "gambling house" is the same thing as a "common gaming house."

Keeping a gambling house is an offence against the general criminal law, consequently it can be dealt with only by the Parliament of Canada, and cannot be made an offence by a Provincial Act, or by a municipal by-law, passed under the authority of such an Act.

Reg. v. *Wason*, 17 A. R. 221, considered and commented on. *Reg.* v. *Shaw*, 7 M. R. 518.

4. Game laws—*Ultra vires.*

The Provincial Statute 46 & 47 Vic., c. 19, as amended by 47 Vic., c. 10, s. 25, s-s. (g), regulating the killing and possession of game at certain seasons of the year, is *intra vires*, being within those clauses of the B. N. A. Act relating to "Property and Civil Rights," and "Matters of a merely local or private nature."

The provision that convictions for offences against the statute should not be removable by *certiorari* is also *intra vires*. *Queen* v. *Robertson*, 3 M. R. 613.

5. Act respecting interest on overdue taxes—*Retrospective statutes.*

By the Act of 1886: "In cities a rate of ¾ per cent. at the end of each month shall be added upon overdue taxes, the same to commence on the 1st day of January, from and after the year in which the rate shall have been levied."

By the Act of 1888 (May) the provision of 1886 was repealed, and the following substituted: "Upon all taxes remaining due and unpaid on the 31st December, there shall be added a rate of ¾ per cent. per month at the beginning of each month thereafter."

Certain taxes having been due for the years 1885, 1886 and 1887,

Held, 1. That the statutes were not retrospective; that no percentage could be added to the 1885 taxes; that none could be added under the 1886 statute after its repeal in May, 1888; and none under the 1888 statute until after the following 31st of December.

2. That viewing the whole statute the percentage was in reality interest and so *ultra vires* of the Legislature. (Affirming TAYLOR, C.J., KILLAM, J., dissenting.)

BAIN, J., founded his opinion on the fact that the interest exceeded 6 per cent. per annum. *Schultz* v. *Winnipeg*, 6 M. R. 35.

But see *Morden* v. *South Dufferin*, 19 S. C. R. 205.

6. Interest upon taxes.

A Provincial statute provided that all parties paying taxes prior to a certain date should be entitled to a reduction of ten per cent., and that there should be added to all taxes unpaid upon a certain later date a sum of ten per cent.

Held, 1. (Following *Schultz* v. *Winnipeg*, 6 Man. R. 35.) That viewing the whole statute the amount to be added was in reality interest, and as the provision was *ultra vires* interest at six per cent. could not be charged.

2. That the provision as to rebate was *intra vires*. *Morden* v. *South Dufferin*, 6 M. R. 515.

Reversed, 19 S. C. R. 204. See next cases.

7. Interest on overdue taxes—*B. N. A. Act, ss.* 91 & 92 — *interest* — *Legislative authority over*—*Municipal Act*—*49 V., c. 52, s. 626, 50 V., c. 10, s. 43 (Man.)*—*Taxation*—*Penalty for not paying taxes*—*Additional rate.*

The Municipal Act of Manitoba provides that persons paying taxes before December 1st in cities and December 31st in rural municipalities shall be allowed 10 per cent. discount; that from that date until March 1st the taxes shall be payable at par, and after March 1st 10 per cent. on the original amount of the tax shall be added.

Held, reversing the judgment of the Court below, 6 M. R. 515, GWYNNE, J. dissenting, that the 10 per cent. added on March 1st is only an additional rate or tax imposed as a penalty for nonpayment which the Local Legislature, under its authority to legislate with respect to municipal institutions, had power to impose, and it was not "interest" within the meaning of sec. 91 of the B. N. A. Act. *Ross* v. *Torrance*, 2 Legal News 186, overruled.

Lynch v. *Canada North-West Land Company*, *Morden* v. *South Dufferin*, *Barber* v. *Gibbins*, 19 S. C. R. 204.

8. Laws in force in Manitoba—*Issue of patent on false representation.*

Held, 1. Where a patent is issued in error, through the false and fraudulent representations of the patentee, he may be declared to be a trustee of the land for the party legally entitled thereto.

2. The laws in force in Manitoba have been as follows:

Up to 11th April, 1862, the law of England, at the date of the Hudson's Bay Company's Charter.

On 11th April, 1862, the law of England at the date of Her Majesty's accession was introduced.

On 7th January, 1864, the law of England, as it stood at that date, was declared to be the law of Assiniboia. *Keating* v. *Moises*, 2 M. R. 47.

Not followed, *Sinclair* v. *Mulligan*, 5 M. R. 17.

9. Laws in force in Assiniboia—*Evidence.*

The laws as to the transfer of property prior to the incorporation of this territory with Canada were the laws which existed in England at the date of the Charter of the Hudson's Bay Co., 2nd May, 1670, so far as such laws were applicable to the condition of the country. The Statute of Uses was in force. The Statute of

Enrollments (27 Hen. VIII, c. 16) was not. The Statute of Frauds was not in force, not having been passed until after the date of the charter.

A mere verbal bargain and sale of lands, therefore, was sufficient to pass the title both at law and at equity.

Article 53 of the enactments of the Council of Assiniboia of the 11th April, 1862, did not affect the laws of property, but applied only to the regulation of the proceedings of the Court.

An agreement for the transfer of land assumed from the actions of the parties apart from any direct evidence of its existence. *Sinclair* v. *Mulligan*, 3 M. R. 481.

In appeal, 5 M. R. 19. See next case.

10. Laws in force in Assiniboia.

The laws of England as they existed at the date of the charter of the Hudson's Bay Company, so far as applicable, formed the body of laws in force in this Territory up to the Assiniboia Ordinance of 11th April, 1862.

Per TAYLOR, C.J. (Affirming KILLAM, J.) The Ordinances of 11th April, 1862, and 7th January, 1864, were limited to regulating the proceedings of the Court, and did not introduce the general laws of England, (DUBUC, J., *dubitante*). (*Keating* v. *Moises*, 2 47, not followed.)

Per TAYLOR, C. J. Persons entitled, under the H. B. Co. to estates less than estates in fee simple, are entitled to have such titles confirmed; but are not as of right entitled to a grant from the Crown of a larger estate. *Sinclair* v. *Mulligan*, 5 M. R. 17.

11. Powers of Provincial Legislature—*Appellate jurisdiction of Supreme Court of Canada—Manitoba Act, R.S.M., c.* 110, *s.* 36, *limiting right of appeal—Ultra vires—British North America Act*, 1867, *s.* 101.

By s. 101 of the British North America Act, 1867, the Parliament of Canada was authorized to establish the Supreme Court of Canada, the existing statute being R.S.C. 1906, s. 139, ss. 35 and 36 of which define its appellate jurisdiction in respect of any final judgment of the highest Court of final resort now or hereafter established in any Province of Canada.

The Manitoba Mechanics' and Wage Earners' Lien Act (R.S.M. 1902, c. 110, s. 36) applies to the suit under appeal and enacts that in suits relating to liens the judgment of the Manitoba Court of King's Bench shall be final and that no appeal shall lie therefrom:—

Held, that the Provincial Act could not circumscribe the appellate jurisdiction granted by the Dominion Act. *Crown Grain Co.* v. *Day*, [1908] A. C. 504.

12. The Liquor Act, 63 & 64 Vic., c. 22 (M.)—*Prohibitory Liquor Legislation—Powers of Provincial Legislatures—Ultra vires—British North America Act, ss.* 91 *and* 92.

Reference under chapter 28 of the Revised Statutes of Manitoba by order of the Lieutenant-Governor-in-Council for the opinion of the Full Court on the constitutionality of The Liquor Act, chapter 22 of 63 and 64 Victoria (M.)

Held, that the Act as a whole was beyond the powers of a Provincial Legislature, as not falling within any of the classes of subjects assigned to Provincial Legislatures by section 92 of the B. N. A. Act, 1867.

Such legislation cannot fall within the class "Property and Civil Rights," property and civil rights being affected only incidentally to the main purpose of the statute.

It cannot fall within the class "Matters of a merely local or private nature within the Province," because of its directly extending to and affecting interests much wider than those of a merely local or private nature.

Per KILLAM, C. J.—The evils at which the Act is directed are intemperance and its results. The remedy is to suppress traffic in certain liquors within the Province except for certain purposes and thereby to restrict consumption. The evils desired to be cured and the general nature of the remedies are the same as in The Canada Temperance Act, and upon the authority of *Russell* v. *The Queen*, (1882) 7 A. C. 829, such legislation does not fall within the class "Property and Civil Rights."

Per KILLAM, C. J.—Such legislation by a Provincial Legislature, if permissible at all, must be so as coming within the class, "Matters of a merely local or private nature in the Province." The subject matter of this legislation may, to some extent, come within the powers of the Dominion Parliament or of the Local Legislatures. Whether a particular enactment on the subject so comes depends on the character of the legislation. This Act, as a whole, is not within the legis-

lative powers of the Province, because it is not confined to dealing with the subject in its local application.

Attorney-General for Ontario v. *Attorney-General for the Dominion*, [1896] A. C. 348, commented on and distinguished. *Re The Liquor Act*, 13 M. R. 239.

Reversed, [1902] A. C. 73.

13. Public Schools Act—*Denominational schools—Right or privilege by practice—Powers of Provincial Legislature to make laws relating to Education—Ultra vires.*

The territory now constituting the Province of Manitoba was admitted into the Canadian Confederation by virtue of The Manitoba Act, 33 Vic., c. 3, (D. 1870) and an Order-in-Council issued in pursuance thereof. Prior to the passage of said Act there were in the territory a number of effective schools for children. These schools were all denominational schools, some being controlled by the Roman Catholic Church, and others by various Protestant denominations. These schools were supported by the various churches, and by voluntary contributions. There were no public schools in the sense of State schools, and no taxes were levied to support such schools.

Section 22 of The Manitoba Act provides that "In and for the Province the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions:—(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools which any class of persons have by law or practice in the Province at the Union." The corresponding provisions of the British North America Act are identical, except that the words "or practice" are omitted from the sub-section.

The Legislature of the new Province in the year 1871 established a system of public schools, by which there was one Board of Education divided into two sections—a Protestant section and a Roman Catholic section. The school sections throughout the Province were divided into Protestant and Catholic. The Protestant schools were under the control of the Protestant section of the Board, and the Roman Catholic schools under the control of the Roman Catholic section of the Board. Taxes were levied for the support of the Protestant schools on the property of Protestants alone, and for the support of Roman Catholic schools on the property of Roman Catholics alone. The grant made annually by the Legislature was apportioned between the two classes of schools. This system under various statutes was retained until the year 1890. In 1890 The Public Schools Act, 53 Vic., c. 38 (M) was passed, by which all previous statutes relating to education were repealed and a system of non-sectarian schools was established, for the support of which all ratepayers, both Roman Catholic and Protestant, were alike taxed. Upon an application to quash two assessment by-laws of the City of Winnipeg, passed in pursuance of The Public Schools Act, on the ground that "by the said by-laws the amounts to be levied for school purposes for the Protestant and Catholic schools are united, and one rate levied upon Protestants and Roman Catholics alike for the whole sum,"

Held, affirming the decision of KILLAM, J., (DUBUC, J., dissenting),

(1) That The Public Schools Act was *intra vires* of the Legislature of Manitoba.

(2) That the Parliament of Canada intended, by inserting the words "or practice" in the Manitoba Act, that whatever any class of persons was at the time of the Union, with the assent of, or at least without objection from, the other members of the community, in the habit or custom of doing in reference to denominational schools should continue, and should not be affected by Provincial legislation.

(3) That any right or privilege which the Roman Catholics had at the time of the Union, with respect to denominational schools, was not taken away or affected by the Act, and can be exercised as fully now as before the Act.

(4) That the schools established by The Public Schools Act are not denominational schools, but in the strictest sense public non-sectarian schools. *Ex parte Renaud*, 1 Pugs. N. B. R. 273, discussed and approved.

Per DUBUC, J. Having regard to the history of the controversy regarding denominational schools in Canada and the legislation relating thereto, the Parliament of Canada, in inserting the words "or practice" in sub-section 1 of section 22 of The Manitoba Act, had only one manifest purpose, that is, to protect in their right and privilege as to denominational schools the Catholics or Protestants who might, in the future, find themselves in the minority in this Province, and to

give a legal *status* to such schools, and therefore The Public Schools Act was *ultra vires* of the Provincial Legislature, and the by-laws should be quashed. *Barrett* v. *Winnipeg*, 7 M. R. 273.

Reversed, 19 S. C. R. 374.

Restored, [1892] A. C. 445.

14. Public Schools Act—*Denominational schools—Right of Church of England thereto—Right or privilege by practice—Powers of Manitoba Legislature to make laws relating to Education—Ultra vires—Waiver of public right.*

The territory now constituting the Province of Manitoba was admitted into the Canadian Confederation by virtue of the Manitoba Act 33 Vic., c. 3, (D. 1870) and an Order-in-Council issued in pursuance thereof. Prior to the passage of said Act there were in the Territory a number of effective schools for children. These schools were all denominational schools, some being controlled by the Church of England, some by the Roman Catholic Church and others by the Presbyterian Church. These schools were not public schools in the sense of State schools, and no taxes were levied to support such schools. Section 22 of the Manitoba Act provides that,

"In and for the Province, the said Legislature may exclusively make laws in relation to education, subject and according to the following provisions:

1. Nothing in any such law shall prejudicially affect any right or privilege with respect to denominational schools, which any class of persons have by law or practice in the Province at the Union.

2. An appeal shall lie to the Governor-General in Council from any Act or decision of the Legislature of the Province, or of any Provincial authority, affecting any right or privilege of the Protestant or Roman Catholic minority of the Queen's subjects in relation to education."

The Legislature of the new Province in the year 1871 established a system of public schools by which there was one Board of Education divided into two sections, a Protestant section and a Roman Catholic section. The school sections throughout the Province were divided into Protestant and Roman Catholic. The Protestant schools were under the control of the Protestant section of the Board, and the Roman Catholic schools under the control of the Roman Catholic section of the Board. Taxes were levied for the support of the Protestant schools on the property of Protestants alone, and for the support of Roman Catholic schools on the property of Roman Catholics alone.

The grant made annually by the Legislature was apportioned between the two classes of schools. This system under various statutes was retained until the year 1890. In 1890 The Public Schools Act, 53 Vic., c. 38 (M.) was passed by which all previous statutes relating to education were repealed and a system of non-sectarian schools was established, for the support of which all ratepayers were alike taxed.

Upon an application by a ratepayer who was a member of the Church of England, to quash a by-law of the City of Winnipeg levying a rate for schools upon all religious denominations alike,

Held, that the members of the Church of England are a class of persons who had at the time of the union of Manitoba with Canada a right or privilege with respect to denominational schools by law or practice which has been prejudicially affected by The Public Schools Act and that they have equal rights to such schools with Roman Catholics.

Held, also, that the fact of the applicant having acquiesced for a number of years in a system of schools by which he with other members of the Church of England was taxed for schools common to all Protestants did not operate as a waiver of this right.

Held, also, that The Public Schools Act is *ultra vires*.

Barrett v. *The City of Winnipeg*, 19 S. C. R. 374, reversing the decision of this Court reported at 7 M. R. 273, followed. *Logan* v. *Winnipeg*, 8 M. R. 3.

Reversed, [1892] A. C. 445.

15. Act authorizing construction of railway crossing over Dominion railway—*Manitoba Statutes*, 1888 *c.* 5.

Chapter 5 of the Statutes of Manitoba, 1888, authorizing the Railway Commissioner of that Province to construct a railway known as the Portage Extension of the Red River Valley Railway from Winnipeg to Portage la Prairie, is *intra vires* of the Provincial Legislature and valid and effectual so as to confer authority on the said Railway Commissioner to construct such a railway across the line of the Canadian Pacific Railway, the Railway Committee of the Privy Council for Canada first approving of the mode and place of crossing and giving their directions as to the matters mentioned in

sections 174, 175 and 176 of the Dominion Railway Act, 51 Vic., c. 29.

Decision of the Supreme Court of Canada, 1889. *In re Province of Manitoba and Canadian Pacific Ry. Co.*, 9 C. L. T. Occ. N. 126.

16. Powers of Provincial Legislature—*B.N.A. Act*, 1867, *ss.* 91 *and* 92—*Shops Regulation Act, R. S. M.* 1902, *c.* 156—*Municipal Act, R. S. M.* 1902, *c.* 116, *s.* 527—*Winnipeg Charter*, 1902, *c.* 77, *s.* 931—*Ultra vires—By-law requiring closing of shops at certain hours—Unreasonableness and uncertainty as grounds of objection to by-law.*

Rule *nisi* to quash the conviction of defendant for breach of a by-law of the City of Winnipeg requiring all shops with certain exceptions to be closed after six o'clock p.m., except on certain days. The by-law in question was passed in July, 1900, under the Shops Regulation Act, R. S. M. (1892), c. 140, which is now chapter 156 of the R. S. M. 1902, which came into force on 6th March, 1903. In March, 1902, The Winnipeg Charter, being chapter 77 of the Statutes of that year, came into force and the new Municipal Act, c. 116 of the R. S. M. 1902, contains a clause, (2a), providing that the City of Winnipeg is not included in the expression "Municipality," when the same occurs in this Act.

Section 15 of The Shops Regulation Act provides that any by-law passed by a municipal council under the Act shall be deemed to have been passed under and by authority of the Municipal Act and as if the preceding sections of the Act had formed part of the Municipal Act, and that the preceding sections of the Act and the Municipal Act should be read and construed together as if forming one Act.

Section 931 of the Winnipeg Charter provides that all inconsistent Acts are repealed in so far as they affect the City of Winnipeg, but all rights, powers and privileges held by the City, and not specifically abrogated by the Act, shall remain in full force, virtue and effect in the same manner as if the Act had not been passed; and section 527 of the Municipal Act, R. S. M. 1902, c. 116, provides that the City of Winnipeg shall retain and enjoy all rights, powers and privileges which were preserved to it by section 931 of the Charter.

It was contended on behalf of the defendant that the present Shops Regulation Act does not apply to the City of Winnipeg by reason of its being incorporated as above in the present Municipal Act, which Act is expressly excluded by section 2 (a) from operation in Winnipeg.

Held, without deciding whether the present Shops Regulation Act applies to the City or not, that the joint effect of section 931 of The Winnipeg Charter and section 527 of The Municipal Act, and of sections 14 and 16 of The Interpretation Act, R. S. M. 1902, c. 89, is to retain and keep in force the by-law in question.

Held, also, that, as the by-law in question was in strict accordance with the powers conferred by the Legislature in the Act under which it was passed, its provisions could not be held to be unreasonable, uncertain or oppressive, so as to render it invalid or unenforceable. *Brigden* v. *Union Colliery Co.*, [1899] A. C. 580; *Re Boylan*, 15 O. R. 13, and *Simmons* v. *Mallings*, 13 T. L. R. 447, followed.

Held, also, that the provisions of the Shops Regulation Act are *intra vires* of the Provincial Legislature, under s. 92 of the British North America Act, 1867, as dealing with a matter of a merely local and private nature in the Province, and not interfering with the Regulation of Trade and Commerce, assigned to the Dominion Parliament by section 91, to as great an extent as the legislation in question in *Attorney Gen. of Ontario* v. *Attorney Gen. of Canada*, (1896) A. C. 348, and *Attorney Gen. of Manitoba* v. *Manitoba License Holders' Association*, [1902] A. C. 77. *Stark* v. *Schuster*, 14 M. R. 672.

17. Act authorizing unequal taxation—*Exceptional tax—Resident and non-resident land owners—Exemptions—Ultra vires.*

The Hudson's Bay Co. was incorporated by Royal Charter, and had its head office at London, England, but had in Rupert's Land and the North-West Territory many trading posts. One of the conditions of the surrender of its rights to the Crown, upon the formation of the Dominion of Canada, contained the following words: "No exceptional tax is to be placed on the Company's land, trade or servants." This condition was confirmed in an Imperial Order-in-Council, which had the force of an Imperial Act by The British North America Act, s. 146. By 41 Vic., c. 13 (Man.), a tax of one cent per acre was imposed on all

lands of residents of the Province, and a tax of five cents per acre on the lands of all non-residents. By the 30th section "non-resident" was defined to mean any person or corporation not residing permanently, or not having his or their chief place of business, in the Province.

Held, that the 41 Vic., c. 13, was *ultra vires*, (1) because it transgressed the fundamental principle of taxation by taxing unequally the lands of non-resident and resident owners; (2) because the tax upon the Company's land was an exceptional tax within the meaning of the above condition of surrender.

Semble, that, but for the 30th section, the Company might have been held to have a double domicile and to be a resident within the meaning of the Act; but—

Held, that it was plainly a non-resident within the Act by virtue of the 30th section.

Semble, that the imposition of a specific tax per acre on all lands, instead of a rate upon their value, was unobjectionable, considering the state of the Province when the Act was passed, even though owners of improved lands thus obtained a slight advantage.

Held, that the exemption from taxation of public lands held in trust for the Crown was unobjectionable; but that an exemption of 640 acres of the lands of every resident owner was repugnant to the principles of taxation. *Hudson's Bay Co.* v. *Attorney-General*, T. W., 209.

See C. P. R. Lands, 1, 2, 3.
— Criminal Law, XIV, 4.
— Crown Lands, 2.
— Foreign Court, 2.
— Injunction, I, 2.
— Law Stamps.
— Manitoba Evidence Act.
— Prohibition of Sale of Liquor.
— Winding-up, I, 3.

CONSTRUCTION OF CONTRACT.

See Married Woman, 2.
— Mortgagor and Mortgagee, IV, 1.
— Principal and Agent, II, H.
— Principal and Surety, 3.
— Sale of Goods, V, 1.
— Sale of Land for Taxes, X, 2.
— Vendor and Purchaser, II, 1, 4; VII, 5.

CONSTRUCTION OF STATUTES.

See Statutes, Construction of.

CONSTRUCTIVE NOTICE

Knowledge of solicitor when imputed to client—*Priority of equitable claims—Loss of priority by negligence.*

The knowledge of a solicitor that a vendor of land holds it only as trustee will not be imputed to his client the purchaser merely because the client employs a clerk in the solicitor's office to prepare the necessary transfer and search the title, when the solicitor is not actually informed of the transaction and the clerk knows nothing of the trust.

Brown v. *Sweet*, (1880) 7 A. R. 725, followed.

The plaintiffs purchased a lot of land from the City of Winnipeg and took the agreement of sale in Valle's name.

Held, that it was gross negligence in them not to file a caveat in the Land Titles office or notify the City that Valle was a trustee for them, and that by such negligence they had lost their priority as against a purchaser who had bought from Valle without notice of the trust. *N. W. Construction Co.* v. *Valle*, 16 M. R. 201.

See Breach of Trust.
— Fraudulent Preference, III, 1, 6.
— Mortgagor and Mortgagee, V, 3.
— Municipality, IV, 7.
— Partnership, 10.
— Principal and Agent, V. 2.
— Principal and Surety, 4.
— Registration of Deed.
— Vendor and Purchaser, VII, 2.
— Way of Necessity.

CONTAGIOUS DISEASE.

See Sale of Goods, VI, 1.

CONTEMPT OF COURT

1. Chief Justice sitting in County Court—*Persona designata.*

By 42 Vic., c. 1, s. 4 (Man.), it was enacted that the County Courts should be held by the Chief Justice, or by one of

the Puisne Judges of the Court of Queen's Bench, until otherwise provided by law. The Chief Justice, sitting in a County Court pursuant to this enactment, rendered a decision respecting which the defendant published a libellous article in his newspaper.

Held, that the Chief Justice, when sitting in the County Court, was performing a judicial act incident to the office of Chief Justice, and was not merely a Judge of the County Court, and that the defendant was liable to be committed for contempt of Court for his libellous publication.

Remarks on the extent to which judicial acts may be criticized. *Reg.* v. *Rowe*, T. W., 309.

2. Injunction, disobedience of—*Notice of injunction by telephone and telegraph—Agents of party enjoined—Liability of company for contempt committed by its officer.*

The defendant, as returning officer at an election of a member of the Provincial Legislature, had deposited his return with the Canadian Northern Express Co. at Neepawa, for transmission to the Clerk of the Executive Council at Winnipeg. Later in the same day a Judge of this Court made an interim injunction order restraining the defendant, his servants and agents from making the return. The defendant was served with the order in sufficient time before the actual delivery to enable him to instruct the Express Company by telegraph or telephone not to deliver the return, but made no effort to do so, saying that he supposed he could not stop the delivery.

Held, that the defendant was bound to the utmost diligence in carrying out the order and was guilty of contempt of court, for which he was ordered to pay the costs of the motion.

Harding v. *Tingley*, (1864) 12 W. R. 684, followed.

The officer of the Express Company whose duty it was to attend to the delivery of parcels was notified of the issue of the injunction both by telephone and telegraph the day it was issued, but nevertheless delivered the return the next morning shortly before the order itself was served upon him.

Held, that the Express Company was guilty of a serious contempt of court and could not excuse itself by showing that the disobedience was an act of its officer done without instructions or even in breach of duty.

Stancomb v. *Trowbridge Urban Council*, [1910] 2 Ch. 190, and *Rantzen* v. *Rothschilds*, (1865) 13 L.T. 399, followed. *Davis* v. *Barlow*, 21 M. R. 265.

3. Publication of articles reflecting on decision and conduct of Revising Officer under Election Act.

The publication of newspaper articles reflecting on the conduct of a Revising Officer acting under the Election Act in such a way that they might have been made the subject of proceedings for libel, but not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of the law, does not constitute a contempt of court punishable by summary proceedings.

Skipworth's Case, (1873) L. R. 9 Q. B. at p. 233; *Hunt* v. *Clarke*, (1889) 58 L. J. Q. B. 490, and *Queen* v. *Payne*, [1896] 1 Q. B. 577, followed. *Rex* v. *Bonnar*, No. 2, 14 M. R. 481.

4. Refusal of witness to answer question on preliminary investigation before magistrate—*Materiality of question—Committal to gaol for refusal to answer—Habeas Corpus—Criminal Code, s.* 585.

1. Under section 585 of the Criminal Code a magistrate would not be justified in committing a witness to gaol for refusal to answer a question unless it were in some way relevant to the issue, as that section only applies when the refusal is made "without offering any just excuse," and the form of the warrant of commitment referred to in that section contains the words, "now refuses to answer certain questions *concerning the premises* now put to him."

2. If B. is charged with making an alteration of a document received from A., the question put to A., on his examination as a witness on the trial of B., as to the person from whom he, A., had received this document, would not be material if the document is produced; but, if it cannot be found, proof of its contents would have to be given, and that might involve, as a part of the claim, information as to the source from which A. had obtained the document, and it could not be held that the question was not in some way material. *Re Ayotte*, 15 M. R. 156.

5. Release on payment of costs—*Purging contempt.*

A prisoner committed to gaol for contempt of court in not producing a book which he had been ordered to produce cannot purge his contempt by showing either that the book has been burnt by some other person without his knowledge or connivance, or that he left it in a certain place and was afterwards unable to find or trace it.

Under such circumstances a prisoner should not be released unless he pays all the costs occasioned by his misconduct in connection with the lost book, although an application for release without such payment might be entertained if it were shown that, by reason of poverty, such costs could not be paid.

In re M., (1877) 46 L.J. Ch. 24, followed. *Monkman* v. *Sinnott*, (1884) 3 M.R. 170, distinguished. *Cotter* v. *Osborne*, 17 M. R. 248.

See EXAMINATION OF JUDGMENT DEBTOR, 1.
— PARLIAMENTARY ELECTIONS, 3.
— PRACTICE, XXVIII, 2.
— SOLICITOR, 8.

CONTINGENCY.

See MUNICIPALITY, I, 5.

CONTINUING CAUSE OF ACTION.

See MUNICIPALITY, IV, 1.

CONTRACT.

I. ACCEPTANCE OF OFFER.

1. Option to purchase land—*Specific performance.*

If the holder of an option to purchase land, instead of accepting the offer himself within the time limited, tenders another person as purchaser and asks the vendor to sign a contract of sale to such other person, the vendor is not bound to sell to such other person, and the holder of the option, if he has delayed accepting it on his own behalf until after the time limited, cannot have specific performance against the vendor. *Vanderlip* v. *Peterson*, 16 M. R. 341.

2. Reasonable time—*Sale of binder — Acceptance.*

In October, 1889, the defendant gave to plaintiffs' agent an order for a binder for which he agreed to pay $190 by two promissory notes. The order contained a proviso as follows "This order is not binding on the Patterson & Bro. Co., (Limited) until received and ratified by them at Winnipeg." The plaintiffs entered the order in their books at Winnipeg as being accepted but did not communicate their acceptance to the defendant until August, 1890, when they wrote him that a binder was ready for him. Before receiving this letter the defendant had bought another binder and refused to accept one from plaintiffs or to give the notes. In an action for damages for non-acceptance,

Held, that the defendant was not liable as the plaintiffs did not communicate their acceptance of the order to him within a reasonable time, and he was entitled to assume that they did not intend to accept. *Patterson* v. *Delorme*, 7 M. R. 594.

II. CANCELLATION.

1. By new verbal agreement—*Statute of Frauds.*

1. If the parties to a written contract enter verbally into a new agreement to be substituted for it, such new agreement, although, by reason of the Statute of Frauds, it cannot be enforced, will have the effect of discharging and cancelling the written contract.

Goss v. *Lord Nugent*, (1833) 5 B. & Ad. 65; *Morgan* v. *Bain*, (1874) L. R. 10 C. P. 15, and *Ogle* v. *Lord Vane*, (1868) L. R. 3 Q. B. 272, followed.

2. In such case neither party can enforce the new agreement or recover damages as for a breach of the written contract.

3. Any money or other consideration, however, that may have been paid or given under the substituted agreement by one of the parties to the other may be recovered back or its value sued for by such party. *Clements* v. *Fairchild Co.*, 15 M. R. 478.

2. Damages for breach of contract—*Agreement for sale of land.*

1. A person who goes into possession of land under an agreement of purchase by instalments is liable for damages for breach of contract if he fails to make the payments stipulated for, even when the vendor has cancelled the agreement for such default in pursuance of one of its provisions, but the vendor could bring no action upon the covenant for payment after such cancellation.

Fraser v. *Ryan*, (1987) 24 A. R. 444, and *Icely* v. *Grew*, (1836) 6 N. & M. 467, followed.

2. In such a case the damages allowed should include (1) the value of any crop taken off the land by the purchaser after the cancellation, and (2) the amount of any diminution of the value of the land for which the defendant is responsible, as for example, the cost of summer fallowing again a number of acres which were well summer fallowed when the defendant took possession and of which work he had the benefit. *Harvey* v. *Wiens*, 16 M. R. 230.

III. Conditional Sale.

1. Rescission of contract—*Expense of repairs to engine re-taken on default in payment—Expense of resuming possession—Warranty.*

Defendants in March, 1896, gave a written order to plaintiffs for a threshing engine and separator which were delivered in the following August. The order provided for a conditional sale of the machines for the sum of $2,875, for which, on the usual terms, promissory notes payable at intervals were to be given and that the property in them should remain in the plaintiffs until full payment of the price agreed on, and contained the following warranty: "The above machinery is warranted, with proper usage, to do as good work and to be of as good materials and as durable, with proper care, as any of the same class made in Canada . . . . . If the machinery cannot be made to fill the warranty, it is to be immediately returned by the purchaser to the place where received, free of charge, and another substituted therefor which shall fill the warranty or the money and notes returned. Continued possession shall be evidence of satisfaction."

The agreement further provided that, on default of payment, the plaintiffs might resume possession of the goods sold and sell the same and apply the proceeds, after paying the expenses of taking possession and of such sale, towards payment of the amount remaining unpaid and proceed for the balance by suit or otherwise.

There were some weak or defective parts in the machines and plaintiffs, on being notified, sent experts to remedy the defects. They put the machine in somewhat better shape, but delays were incurred and defendants claimed that the machines never worked properly. Defendants, however, used the machines during the threshing seasons of 1896 and 1897 and for part of the season of 1898, when, on one of the pieces breaking, the machine was left in a field where it remained unprotected until June, 1900. They had paid about $1,200 of the purchase money when plaintiffs resumed possession of the machines at a cost of $40, made repairs to them at a cost of $465.35, and then entered into a conditional re-sale of them to a Mr. Weaver for the sum of $2,000, no part of which had been received by the plaintiffs at the time of bringing the present action to recover the amount still due by defendants on their original purchase, which was $1,677.09.

Held, (1) That the defendants, having failed to return the machinery after trial, having used it during three seasons and paid nearly $1,200 on account, were barred, under the terms of the agreement, from claiming that the machinery was not good and that payment therefor should not be enforced.

(2) That the agreement was not rescinded by plaintiffs re-taking possession and re-selling.

Sawyer v. *Pringle*, (1891) 18 A. R. 218, distinguished.

Watson Manufacturing Co. v. *Sample*, (1899) 12 M. R. 373, followed.

(3) The plaintiffs had a right, under the circumstances, to charge the cost of the repairs and of resuming possession against

the proceeds of the re-sale, as it was shown that such repairs had enhanced the value of the machinery, in the state in which it was when the plaintiffs re-took it, by more than their cost.

A vendor re-taking possession under the terms of such an agreement and in circumstances like those of this case may be deemed in the position of a mortgagee in possession, and such cases as *Shepard* v *Jones*, (1882) 21 Ch. D. 469, and *Henderson* v. *Astwood*, [1894] A. C. 150, would apply.

(4) That the defendants were not entitled to be credited in this action with anything on account of the proceeds of the conditional sale to Weaver, as nothing had yet been received by the plaintiffs on that account. *Quære*, whether, if the sale to Weaver had been an absolute sale on credit, the defendants would not have been so entitled?

If the sale to Weaver should be carried out and the money paid to the plaintiffs, defendants would then have their recourse for the amount coming to them out of the proceeds.

(5) The plaintiffs were not entitled to charge the cost of the repairs to the machinery as against the defendants in this action or to deduct the amount from certain sums they had collected in cash on collaterals and by the sale of certain parts of the machinery, which sums must be credited in this action, and must look to the proceeds of the sale of the remainder of the machinery to recoup themselves for the repairs, but they were entitled to deduct from such credit the amount expended by them in re-taking possession of the machinery under the terms of the contract. *Abell Engine and Machine Works Co.* v. *McGuire*, 13 M. R. 454.

2. Vendor re-taking possession.

The defendants signed a contract under seal, agreeing to purchase from the plaintiffs certain machinery on credit, on the terms that the property in the machines should not pass from the vendors to the proposed purchasers until full payment of the price and any obligation given therefor, and the plaintiffs accepted the order and furnished the machinery as agreed. The defendants after a trial of the machinery rejected it and refused to give the promissory notes provided for in the contract. The plaintiffs then resumed possession of and sold the machinery and credited the proceeds on the original purchase money. They then filed a bill to realize the balance of the purchase money out of the land described in the order upon which the defendants had given a charge for the indebtedness. The judge who heard the cause found on the facts that the defendants were not warranted in rejecting the machinery.

Held, that the plaintiffs had themselves rescinded the contract, and that their remedy was limited to a claim for damages for refusing to accept and pay for the machinery and that they could not sue for the price of the same, whether they kept or sold the machinery, and that they had no longer any lien or charge on defendant's lands for their claim. *McLean* v. *Dunn*, 4 Bing. 772, distinguished; *Sawyer* v. *Pringle*, 20 O.R. 111, 18 A. R. 218, followed. *Sawyer* v. *Baskerville*, 10 M. R. 652.

IV. Consideration.

1. Agreement in restraint of trade.

The defendant, while in the employment of the plaintiffs at a monthly salary, signed, at the request of the plaintiffs, an agreement not under seal that he would not, within one year after the termination of his employment with the Company, engage or be interested in any business or work within Canada or Great Britain in competition with the business of the Company. The defendant expected to be appointed manager of the business at Winnipeg with an increase of salary and had reason to believe that a refusal to sign the agreement would be followed by dismissal, but no promises were made to him prior to signing nor was he told that he would be dismissed if he would not sign. It was, however, a condition that he should sign the agreement before having placed in his hands a new price book issued for use in the plaintiffs' business. He was made temporary manager at Winnipeg shortly after signing, but without any increase of salary or any terms or conditions.

Held, that there was no sufficient consideration for the signing of the agreement by defendant and that it was not binding upon him. *Copeland-Chatterson Co.* v. *Hickok*, 16 M. R. 610.

2. Novation—*Agreement with A to pay A's debt to B—Equitable assignment of chose in action.*

The defendant's wife having sued him for alimony, they met by arrangement in the office of the wife's solicitor and in his

presence agreed to become reconciled and to resume cohabitation and to settle the suit, and the defendant, as a part of the settlement, agreed to pay directly to the wife's solicitor her costs of the action, which were than fixed at the sum of $50. This action was brought by the solicitor in a county court to enforce payment of that sum.

The particulars of the claim were stated thus: "The plaintiffs claim from the defendant the sum of $50, being the amount of the costs of suit of defendant's wife against the defendant which the defendant agreed to pay as one of the terms of settlement between the said parties."

Held, that the plaintiffs could not recover in an action in that form, as the plaintiffs in such an action would be strangers to the contract: *Gandy* v. *Gandy*, (1885) 30 Ch. D. 57, *Leake on Contracts*, p. 292; neither could the plaintiffs sue as *cestuis que trustent* claiming a beneficial interest under the agreement, for the evidence did not show that the $50 was to be paid to the defendant's wife as trustee for the plaintiffs: *In re Empress Engineering Co.*, (1880) 16 Ch. D. 125; but that there was, under the circumstances, an equitable assignment of the wife's claim for costs to the solicitors, which was assented to by the three parties all present together and which enabled the plaintiffs, by an amendment of their particulars of claim, to maintain an action in their own name for the costs in question. *Andrews* v. *Moodie*, 17 M. R. 1.

V. Construction of.

1. Agreement by agent not to sell, canvass for, or be interested in the sale of, goods of others in competition with the principal.

An agreement by an agent with his principal not to sell, canvass for, or be interested in the sale of, goods of other persons in competition with the principal is not violated by entering into an agreement with a rival manufacturer accepting an agency for the latter, until the agent has actually sold, or canvassed for, or been interested in the sale of, some of the goods of the latter. *Graham* v. *J. I. Case Threshing Machine Co.*, 9 M. R. 27.

2. Cancellation of permit if land sold or leased—*Subsequent lease of part of land covered by permit.*

The defendant paid for a permit to cut hay in 1908, on a parcel of land, across which was printed the following:—"This permit becomes cancelled by the sale or lease of the land." Subsequently the plaintiff obtained a lease of half the same parcel.

Held, that the defendant's permit gave him an actual interest in the land, that the provision for cancellation should be most strictly construed and that, as *the land* had not been leased but only a part of it, the permit was not cancelled, and the defendant had a right to the hay cut in that year on the whole of the land including some that had been cut by the plaintiff under his lease. *Decock* v. *Barrager*, 19 M. R. 34.

See *Sharpe* v. *Dundas*, 21 M. R. 194.

3. Condition requiring production of purchaser willing to sign a written agreement to buy land —*Commission on sale of land—Refusal of owner to sell.*

The defendant agreed for a good consideration that, if the plaintiff would, within a time fixed, produce to him a *bona fide* purchaser willing to enter into an agreement to purchase certain lands at named prices and ready and willing to pay one quarter of the purchase money in cash and who had signed an offer in writing therefor, then he, the defendant, would pay to the plaintiff twenty-five per cent. commission on such purchase price, in case the defendant refused to make the sale.

On the 13th of March and within the limited time an agent of the plaintiff received from A. M. Lewis an offer in writing to purchase the lands in question on the terms and at the prices mentioned in the defendant's agreement, coupled however with the statement that, if not accepted before ten o'clock A. M. on the 16th of March, the offer would be withdrawn. The agent at once wrote to the plaintiff informing him of the offer and its condition and urging haste in communicating it to the defendant, but without disclosing the name of the purchaser. The plaintiff, who lived in Winnipeg, received the letter on the morning of the 14th, and made every effort by telegram and letter to induce the defendant, who lived in Gretna, to accept the offer, informing him fully of the terms of the offer and its condition, but not giving the name of the purchaser, which the plaintiff did not then know himself.

Defendant wrote by first mail to his solicitor in Winnipeg instructing him to see the plaintiff and make inquiries, and communicate the result by telephone in the evening of the 15th. The solicitor met the plaintiff in the afternoon of the 15th and ascertained all particulars including the name of the purchaser, and spoke to the defendant over the long distance telephone between six and seven o'clock in the evening, when he received instructions to accept the offer; but through some mischance the plaintiff was not informed of this in time to allow him to notify Mr. Lewis of the acceptance before ten o'clock on the 16th and the offer was withdrawn at that hour.

Plaintiff sued for the twenty-five per cent. commission, contending that he had produced a purchaser in accordance with the agreement, and that, under the circumstances, it should be held that defendant had refused to make the sale.

Held, that plaintiff could not recover.

Per HOWELL, C. J. The plaintiff did not produce a *bona fide* purchaser willing to enter into such an agreement as was referred to. An offer, which had to be accepted in less than two days after defendant received it, was not an offer contemplated by the agreement.

Per PHIPPEN, J. A. The plaintiff had to produce a purchaser, and neither his telegram nor his letter did this. The earliest production was when the name was mentioned to defendant's solicitor, and the solicitor was entitled to a reasonable time to communicate the name to his client. *Rogers* v. *Braun*, 16 M. R. 580.

4. "Deemed to be", meaning of—*Sale and transfer of right to cut timber—Priority as between unpaid vendor and bank holding security from purchaser on logs cut—Bills of Sale and Chattel Mortgage Act—Bank Act, ss. 88, 89—Vendor's lien on goods—Cancellation of contract, effect of.*

By the agreement in question, the plaintiffs sold to one McCutcheon their interest in a certain timber berth for $19,000 payable by instalments. It made use of language implying the transfer of the property in the logs as soon as cut, but contained this proviso, "That in each and every year during the currency of this agreement all logs, lumber, laths, timber, &c, shall be deemed to be the property of the (vendors) unless and until the (purchaser) shall have paid all arrears of principal and interest which may be due hereunder and the (purchaser) hereby covenants with the (vendors) not to sell, assign or transfer any such logs, lumber, timber &c., until all arrears due as of such date are fully paid and satisfied."

Pursuant to another clause in the agreement, the plaintiffs on 4th February, 1908, gave notice terminating the agreement, and forfeiting McCutcheon's payments previously made for default in payment of the instalment due on 1st January, 1908. The logs in question had been cut before that date and were removed from the limit by McCutcheon's assignees who on 31st March, 1908, gave the defendants a security under section 88 of the Bank Act for advances.

Held, (1) The effect of the agreement was to vest the property in the logs in the purchaser as soon as cut, subject to a right of the plaintiffs, on default in any payment, to deal with the logs as if the property therein had become re-vested in them, and that the words "shall be *deemed to be*" were not equivalent to "shall be" when taken along with the rest of the document.

(2) The logs in question having been in the possession and ownership of McCutcheon's assignees until 1st. May, 1908, when the plaintiffs first attempted to take possession of them, the Bills of Sale and Chattel Mortgage Act prevented the plaintiffs from acquiring any title to them by virtue of the agreement as against the claim of the defendants.

(3) The claim of the Bank was valid under sub-section 2 of section 89 of the Bank Act as against any lien of the unpaid vendors, it being proved that the Bank had no knowledge of any such lien at the time when the security was taken.

(4) The plaintiffs had, in fact, under the circumstances, no vendor's lien on the logs in question after they had been removed from the limit.

(5) As the clause in the agreement providing for cancellation of it made no mention of any logs, the consequence of the cancellation was that the logs cut prior to that time remained the property of McCutcheon's assignees wholly unaffected by the cancellation. *Mutchenbacker* v. *Dominion Bank*, 21 M. R. 320.

5. "Money or other property", meaning of—*Whether real estate included—Ejusdem generis rule.*

The defendants had executed agreements authorizing the plaintiffs in the

event which happened "to take possession of any *money or other property*" which the plaintiffs might find belonging to the defendants, and "to sell such *goods or property*" and take such other proceedings as the plaintiffs might deem best, for recovering the amount of the payment made under guarantee bonds issued for the defendants and expenses, &c.

The agreements also contained the following: "The undersigned agrees to do and execute any deed or thing that the company may deem to be necessary in order to give the company the rights and powers herein expressed or intended to be given." The agreements were on printed forms prepared by the plaintiffs.

Held, that the plaintiffs were not entitled, under the agreements, to a lien on any real estate of the defendants for the amount of their claim, and that the words used should not be construed to include land, the rule of *ejusdem generis* being applicable in this case. *London Guarantee & Accident Co.* v. *George*, 16 M. R. 132.

VI. Evidence.

1. Claim against estate of deceased person—*Corroboration—Executors and administrators.*

The plaintiff sued the executors of one Reid for services rendered in taking care of a child of Reid, after his death. She had been engaged by Reid as a nurse to attend him in his last illness, and her evidence was that Reid, previous to his death, asked her to continue in the house and to look after his wife and child, and deceased had said "If anything happens, will you promise that you will stop with her." There was no corroboration of the plaintiff's testimony as to the promises made her by the deceased.

Held, allowing an appeal from the verdict of a County Court in plaintiff's favor, that the contract as alleged was open to two constructions: (1) that the plaintiff was to stay with Mrs. Reid if anything happened to the testator, (2) that she was to take care of the child, and, the plaintiff having contended that Reid meant she was to stay with the child and take care of it, each may have intended a different thing, and consequently no contract was clearly proved; also that corroboration of the plaintiff's evidence was necessary in this case. *Simpkin* v. *Paton*, 18 M. R. 132.

2. Collateral verbal agreement—*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 plaintiffs' 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 of and contradictory to the written contract; and, if subsequent to the signing of the order, no consideration for the plaintiffs entering into it had been proved; and that the plaintiffs' verdict should be upheld.

Lindley v. *Lacey*, 17 C.B.N.S. 578; *Morgan* v. *Griffith*, L. R. 6 Ex. 70; *Erskine* v. *Adeane*, L. R. 8 Ch. 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 M. R. 597.

Distinguished, *Jones* v. *Green*, 14 M. R. 61.

VII. Misrepresentation.

1. Of contents of agreement signed by defendant without reading it—*Consensus ad idem.*

Defendant, negotiating with plaintiffs' agent for the purchase of a stacker, was asked to sign an order for one. The agent filled up a form of order and defendant said to him: "Now, if there is anything in this order that binds me to keep the stacker if it does not give satisfaction, I won't sign it," to which the agent replied that there was not, that he could take the stacker out and keep it ten days, and if it did not give satisfaction he need not settle for it, but could bring it in and leave it on the agent's platform at Boissevain. Defendant then signed the order without reading it, as he was in a hurry to catch a train.

By the terms of the order only one day's trial of the machine was allowed, and the buyer, if it did not give satisfac-

tion, was to return it to the plaintiffs at Carberry.

There was a printed direction at the top of the order to give the purchaser a duplicate, but none was given to him.

On receipt of the machine defendant tried it and, not finding it to work satisfactorily, returned it within ten days to the agent at Boissevain.

At the trial the agent admitted that, at the time the order was signed, he thought it provided for a ten days' trial.

Held, that there was no such *consensus ad idem* between the parties as is necessary to create a binding contract and that the verdict of the County Court Judge in favor of defendant in an action by plaintiffs for the price of the machine should be sustained, and the plaintiff's appeal dismissed with costs.

Foster v. *McKinnon*, (1869) L. R. 4 C. P. 704; *Smith* v. *Hughes*, (1871) L. R. 6 Q. B. 597, and *Murray* v. *Jenkins*, (1898) 28 S.C.R. 565, followed.

Saults v. *Eaket*, (1897) 11 M. R. 597, distinguished. *Jones Stacker Co.* v. *Green*, 14 M. R. 61.

2. Equitable relief in County Court Action—*Rescission—County Courts Act, R.S.M.*, 1902, *c.* 38, *s.* 61.

1. Without a rescission of a contract there can be no recovery of amounts paid under it by one party on the ground of alleged misrepresentation by the other party inducing the contract.

2. County Courts in this Province have no jurisdiction to cancel contracts on the ground of fraud, as sub-section (*b*) of section 61 of the County Courts Act, R.S.M. 1902, c. 38, which confers equitable jurisdiction when the subject of the action is "an equitable claim and demand of debt, account or breach of contract, or covenant or money demand, whether payable in money or otherwise," does not apply to an action for the cancellation of a contract. *Yasne* v. *Kronsen*, 17 M. R. 301.

3. Mutual mistake—*Innocent misrepresentation—Rescission of contract—Damages—Costs when fraud charged.*

Plaintiff entered into a contract for the purchase of land from the defendant after the latter had personally shown him what he honestly thought was the land he owned. After payment of certain instalments of the purchase money and certain sums of money for taxes and otherwise in connection with the land, plaintiff bought an outfit of horses, implements, lumber, &c., and took them out to the railway station nearest the land intending to take possession and commence farming operations. He then discovered that the property which he had bought was not the one which had been shown to him, but was greatly inferior to it in value. He then brought this action in which he charged the defendant with fraudulent misrepresentation as to the locality of the property.

Held, (1) Plaintiff was entitled to have the contract rescinded and to repayment of all moneys paid by him under it with interest at five per cent. per annum.

Adam v. *Newbigging*, (1888) 13 A.C. 308, followed.

(2) Plaintiff was not entitled to damages, as defendant's misrepresentation had not been fraudulently made.

(3) Appearances having justified the charge of fraud, though this was not proved, costs should be allowed. *Hopkins* v. *Fuller*, 15 M. R. 282.

VIII. Performance of.

1. Consideration—*Failure to complete contract—Threshers' Lien Act, R.S.M.* 1902, *c.* 167.

The plaintiff was employed to thresh the defendant's crops of wheat, oats, and barley at prices agreed upon. He threshed all the wheat (over 2500 bushels), but left 458 bushels of barley and 10 to 15 acres of oats unthreshed.

Held, that the promise of each party was the consideration for the promise of the other and that payment by the defendant was not intended to be conditional upon the threshing of all the crops, so that plaintiff had not, by leaving some of the work undone, forfeited his right to be paid for what he had done, or lost his right to seize under the Threshers' Lien Act, R.S.M. 1902, c. 167, a sufficient quantity of the grain he had threshed from which to realize the amount of his claim.

Bettini v. *Gye*, (1876) 1 Q. B. D. 187, followed. *Hollingsworth* v. *Lacharite*, 19 M. R. 379.

2. Entire agreement—*Non-performance by plaintiff of the whole agreement, on his part—Liability of defendant conditional on plaintiff's performance of whole agreement.*

Plaintiff agreed with defendant, the president of a company, to provide,

within a limited time, $5,000, which he was to use for the purchase of supplies, and was to arrange for further funds necessary to carry on the business of the company; he was to pay debts owing by the company and to give defendant a mortgage for $7,000. Defendant, on the other hand, undertook to have all the stock in the company transferred to the plaintiff, not later than 1st December, 1899, and, in case of his failure to do so, to pay back any moneys advanced by plaintiff for paying off debts of the company, and for the purpose of carrying on the company's business. The stock not having been transferred, the plaintiff sued to recover back moneys advanced by him.

Held, that the agreement on the plaintiff's part was an entire one, and he had not performed those parts of it which were to be performed by him before the transfer of the stock.

The liability of defendant to procure a transfer of the stock on 1st December, and to repay advances in default of his procuring such transfer, was conditional upon the plaintiff having duly performed those parts of the agreement to be performed by him before that date. *Woods* v. *Matheson*, 8 M. R. 158.

3. Non-payment of instalments of contract price.

The plaintiff agreed with the defendants to excavate and curb six water tanks, payment to be made weekly to the extent of fifty per cent. of the value of the work done, on estimates to be made by the defendants' engineer. The weekly payments having fallen in arrear, the plaintiff stopped work, and the defendants, taking the material and tools left by him, completed it at their own expense.

Held, (McKEAGNEY J., dissenting), that the plaintiff was not entitled to recover anything, either on a special count on the agreement, or on the common counts, though he might recover damages in trespass or trover for the material and tools used by the defendants. *Clarke* v. *Winnipeg*, T. W. 56.

4. Prevented by fire—*Acceptance of insurance money on property destroyed, effect of—Interest—Pleading.*

The plaintiffs were prevented from completing their contract to put an elevator into the defendants' building by a fire which destroyed the building and the partly completed elevator. The defendants were not in any way responsible for the fire.

The second instalment of the contract price was to be paid when the "machine" was in place, but the "machine" had not been put in its place, although its parts had been assembled in the building.

Held, that the plaintiffs could not recover such second instalment or anything further under the contract.

Fairchild v. *Rustin*, (1907) 39 S.C.R. 274, and *Ross* v. *Moon*, (1907) 17 M.R. 24, followed.

The plaintiffs claimed in the alternative that they were entitled to recover the whole price of the elevator *quantum meruit*, because the defendants had insured it for its full value and had collected and received the full amount of the insurance, having included the value of the elevator in their proofs of loss sent in to the insurance companies, and should, therefore, be deemed to have accepted it.

It appeared, however, that the defendants had left the placing of the insurance upon their property in the hands of their agent and had not instructed him to insure the elevator, and were not aware, when their proofs of loss were made, that the elevator had been so included, and that their total loss was much in excess of the total insurance.

Held, that the defendants, having paid $1,400 on the elevator, had an insurable interest in it and a right to receive the insurance money, and that what they had done in connection with the insurance did not constitute an acceptance of the elevator.

Interest is not recoverable unless a case for its allowance is made by the statement of claim; but, if such case is made, interest may be allowed under the prayer for general relief. *Fensom* v. *Bulman*, 17 M. R. 307.

IX. Rectification of.

1. Accord and satisfaction—*Construction of contract—Condition precedent—Reconveyance.*

The defendant being indebted to the plaintiffs and other parties, who afterwards transferred their claims to the plaintiffs, and being possessed of a certain mining location supposed to contain gold, at a meeting between him and these creditors, held in Winnipeg in July, 1896, a verbal agreement was made providing that the creditors should expend at least $1,000 in development of the property

which was to be conveyed to two of them as trustees as soon as a written contract would be executed by all parties; that in case it should be shown by such development that the location was valuable or likely to prove valuable, of which fact the creditors were to be the sole judges, they would procure from the Government of Ontario a charter incorporating the defendant, the creditors and such others as should become shareholders as a body corporate for the purpose of developing and operating the location; that upon the formation of the company the trustees would convey the property to it for a consideration of one half the capital stock of the company fully paid up, one half of which was to be issued to the defendant and the other half to the creditors; also that the trustees would reconvey the property to the defendant, if the agreement should not be carried into effect by the formation of the company within one year from its date; and that, if the mine should prove valuable and be accepted and a company formed, the creditors would accept their half interest in the mine in full of their claims against the defendant, which were then to be treated as discharged.

The written contract afterwards drawn up and signed by all parties contained the following clause: "And it is also agreed that, in the event of the mine proving valuable and being accepted and a company formed, that the parties of the second part"—the creditors— "shall from the proceeds of their half interest in the mine pay the present old indebtedness, amounting to about $7,000, of the party of the first part to them." See the statement for the facts in connection with the insertion of this clause.

The creditors expended a considerable amount of money in the work of developing the mine; and in February, 1897, applied for a charter of incorporation, and in April following a company was formed pursuant to the agreement for the working of the mine, but the evidence showed in the opinion of the Court that the creditors had never been satisfied that the mining location was valuable or likely to prove valuable, and had organized the company at the time they did to avoid the operation of anticipated legislation in the Province of Ontario.

The defendant claimed that the creditors had decided that the property was valuable or likely to prove so, that the incorporation of the company by them was conclusive upon this point and that, under the agreement as drawn or as it should be made to read, his indebtedness was satisfied.

Held, that the creditors were not concluded by the formation of the company from showing that they had not decided to accept the mine; also that, although by one of its clauses the only condition precedent to the duty of the trustees to transfer to the company directly expressed was that the company should be formed, the instrument should be read as a whole, and that this clause should be construed to mean the formation after the creditors had come to the necessary decision as to the mine being valuable, which was of the essence of the whole contract.

Held, also, that there was no case for the rectification or reformation of the instrument made by the evidence. The defendant knew of the terms of the inserted clause, and the only mistake which he at all suggested was in his own interpretation of it, a mistake wholly unilateral and unknown to the creditors, and one which, as far as the evidence disclosed, was not due to any fraud, artifice or misrepresentation of the creditors or any of them. Until the execution of the written document no one was bound; and, although one of its terms differs from what had been verbally agreed upon, it does not follow that in executing the document the parties intended to adhere to their informal verbal understanding, rather than to the terms expressed in the document. The creditors accepted and executed the instrument as settled and signed by the defendant; there was nothing to show that they had done so under any mistake as to its terms or as to its meaning, or had any reason to suspect any mistake on the part of the defendant; and without notice of any mistake they expended their money.

The defendant also contended that a reconveyance of the property should have been tendered to him before the commencement of this action, as more than a year had elapsed from the time that the agreement was made, which plaintiffs claimed had not been carried into effect.

Held, that, as there was no satisfaction of the debts, such reconveyance could not be a condition precedent to the right to recover, but at most the defendant might have asked the Court to stay proceedings until reconveyance which was practically the relief given by the judgment appealed

from, which directed that it should not be enforced until the property had been reconveyed to the defendant. *Whitla* v. *Phair*, 12 M. R. 122.

2. Consensus ad idem—*Evidence to vary written contract.*

The defendants signed an agreement to purchase a flour mill from the plaintiff for $13,000, payable $1000 cash and the balance in quarterly instalments. The agreement contained a clause providing that, upon any default being made in payment, the whole purchase money should become due and payable at once. This clause was not asked for by any of the parties, but found its way into the agreement simply because it happened to be in the printed form used by the solicitor who prepared it and acted for both sides. The defendants were foreigners who understood English very imperfectly and the trial Judge found as facts that they were entirely ignorant of the existence in the agreement of the clause referred to, that it was not explained to them either by the solicitor or by any other person in a manner that they could understand and that the plaintiff, who spoke the defendants' language, had undertaken to explain the agreement to them and that they had depended on him to do so.

Held, that the defendants were not bound by the clause in question and the plaintiff could only recover the amount of the overdue instalment. *Streimer* v. *Nagel*, 19 M. R. 714.

3. Evidence to rectify agreement—*Mistake — Reforming an agreement — Agreement to guarantee notes.*

The defendants had acted as the agents of the plaintiffs at Portage la Prairie for the sale of agricultural implements under a formal contract in a printed form with certain additions and alterations in writing. One of the printed clauses provided that the defendants "agreed to guarantee" payment of all notes taken in settlement for machinery, and the claim in this action was against the defendants as guarantors of the payment of one of the promissory notes taken by them under this agreement. The chief defence set up was that such clause of the contract should not have been inserted in it, being contrary to the actual agreement between the parties, and that the contract should be rectified by striking it out.

In giving the reasons for his verdict in favor of the defendants, which involved rectifying the contract between the parties in accordance with the defendants' contention, the Judge of the County Court appealed from appeared to have merely contrasted the weight of the evidence as upon an ordinary issue, and not to have fully appreciated the rule of law, that in asking the Court to reform or rectify an instrument purporting to contain the agreement of the parties the evidence to vary the language must be of the clearest and most satisfactory character, and overwhelmingly against the document, to enable the Court to disregard its plain terms.

Held, that, under these circumstances, the judgment should have been set aside, or a new trial granted to enable the defendants to offer further evidence of the circumstances, but for the other objection to the plaintiffs' recovery.

The other defence raised by defendants was that no demand had ever been made upon them to sign any guaranty of any particular note.

Held, that the proper construction of the agreement was that it provided for the execution of some further instrument, and was not one of present guaranty of the notes to be given *in futuro*, and as this was not an action for neglect or refusal to enter into a guaranty, the plaintiffs were not entitled to a verdict or to have the judgment in favor of the defendants set aside to enable them to change the form of the claim. *Sylvester* v. *Porter*, 11 M. R. 98.

4. Interest—*Effect of taking judgment for claim—Partnership.*

The defendant Preston, in October, 1889, contracted with one Charlebois to build certain fences and gates along the line of the G. N. W. Central Railway, and, after associating the defendant Musson with him, they sublet the contract to the plaintiffs by a written agreement which provided for payment to the plaintiffs as follows: "Estimates for the said work shall be made monthly by the company's engineer * * * * * , and * * * * * * shall be paid forthwith upon same being paid to said Preston and Musson by said company."

Charlebois was the contractor for the whole of the railway work being done by the company, and the evidence showed that the word "company" in the above provision was used by mistake for Charlebois.

After payment of two estimates for part of the plaintiffs' work difficulties arose, and the company's engineer, who also acted as engineer for Charlebois, to prevent the bringing of an action, withheld further estimates; but in September, 1891, after litigation between Charlebois and the company had commenced, Preston accepted a judgment against the company for the balance due to him by Charlebois upon his fencing contract. This judgment, however, was not paid until 1898, and then it was paid without interest.

Held, that the plaintiffs were not entitled to interest on their claim before action, as it was not payable by virtue of a written instrument at a time certain within the meaning of the Act 3 & 4 Wm. 4, c. 42, s. 28.

London, Chatham & Dover Ry. Co. v. *South-Eastern Ry. Co.*, [1892] 1 Ch. 120, followed.

Per BAIN, J. (1) That the agreement between the plaintiffs and defendants should be treated as if Charlebois had been mentioned in it instead of the company and should be rectified, if necessary.

(2) That, by accepting the judgment against the company, Preston had put it out of his power to insist on getting an estimate from the engineer for his work, and it should be considered as between Preston and the plaintiffs that he was then paid the balance due on the contract, and the plaintiffs could then have brought their action (*Otway* v. *Holdips*, (1689) 2 Mod. 266; *Pilbrow* v. *Pilbrow* (1848) 5 C. B. 439,) without waiting till Preston was actually paid.

(3) That the defendant Musson was bound by Preston's action in accepting the judgment just as he would have been by a payment made by Charlebois to Preston. *Sinclair* v. *Preston*, 13 M. R. 228.

Appeal dismissed, 31 S.C.R. 408.

Leave to appeal to Privy Council refused.

5. Mutual mistake—*Omission of provision by mistake—Agreement of sale of land.*

A clause giving the purchaser of land under an agreement the right to pay off the whole or any part of the purchase money at any time was omitted from it by pure inadvertence in the office of the solicitor who prepared it and without the knowledge or concurrence of either party. That clause was in the preliminary written option signed by the vendor.

Held, that the mistake was mutual and that the purchaser was entitled to have the agreement reformed by the insertion of the omitted clause. *Heath* v. *McLeneghen*, 5 W. L. R. 358.

X. REPUDIATION OF.

1. Election to treat contract as ended except for the purpose of an action for breach.

If B repudiates his agreement to lease property from A for a term to commence at a future date, A may treat the contract as at an end except for the purpose of bringing an action for the breach of contract and he may remain in possession during the whole of the term agreed on and then bring such action.

Johnstone v. *Milling*, (1886) 16 Q.B.D., per Lord Esher at p. 467, followed. *Arden Hotel Company* v. *Mills*, 20 M. R. 14.

2. Quantum meruit—*Rescission.*

Plaintiff agreed to serve defendant for five years, and defendant agreed at the end of that period to convey to him 240 acres, 50 of which he would break in the preceding summer. Pending the term the defendant intimated that he would only convey 160 acres all unbroken.

Held, that plaintiff was entitled to treat this as a repudiation of the contract, and to sue upon *quantum meruit* for work and labor. *Festing* v. *Hunt*, 6 M. R. 381

3. Remedies in such case—*Rescission—Refusal to perform.*

A refusal by the promisor to perform the contract unless the promisee will do something which he is not bound to do may be treated as an absolute refusal to perform it, and the promisee may at once rescind the contract and sue for damages.

Freeth v. *Burr*, (1874) L. R. 9 C. P. 208; *Withers* v. *Reynolds*, (1831) 2 B. & Ad. 882, and *Mersey Steel and Iron Co.* v. *Naylor*, (1884) 9 A. C. 434, followed.

When the promisee has thus rescinded a contract of sale of ascertained goods and afterwards put it out of his power to perform it by otherwise disposing of some of the goods, subsequent negotiations on his part to induce the promisor to take other similar goods on the same terms, or offers to settle the dispute for the sake of avoiding litigation, will not necessarily be considered as doing away with the effect of the previous rescission. *McCowan* v. *McKay*, 13 M. R. 590.

XI. Rescission of.

1. Right of some only, of a number of joint contractors, to rescind—*Intoxication.*

Although a person, who has been induced to enter into a contract of purchase as one of a partnership or syndicate, proves such fraud or misrepresentation on the part of the vendor that he would, if alone concerned, have been entitled to rescind the contract, yet he is not in a position to do so unless all the members of the partnership or syndicate are seeking such rescission. The only remedy such person could have, unless the other persons interested join, would be by cross-action or counter-claim for damages.

Morrison v. *Earls*, (1884) 5 O. R. 434, followed.

Drunkenness is not a ground for setting aside a contract, unless the person was so intoxicated as not to know what he was doing.

Vivian v. *Scoble*, (1884) 1 M. R. 125, followed. *McLaren* v. *McMillan*, 16 M. R. 604.

2. Suing on quantum meruit—*One action by two persons, not partners, for different claims.*

The plaintiffs, husband and wife, brought this action in the County Court for the value of their services under contract made by the defendant with the husband, to pay him $425 for the services for a year of both husband and wife. Plaintiffs were, as they claimed, wrongfully dismissed and sued before the end of the year for a proportionate part of the $425, giving credit for certain payments.

Plaintiffs had a verdict and defendant appealed. On the argument of the appeal, plaintiffs' counsel admitted that under the circumstances they could not sue on the contract, but claimed that they were entitled to recover on a *quantum meruit*.

Held, that the husband and wife could not join in one action their separate claims for their work and labour done for the defendant, even if the dismissal was wrongful. *Crambie* v. *McEwan*, 9 M. R. 419.

XII. Sale of Goods.

1. Sale of several articles together, some only being supplied—*New contract subject to terms of old one—Sale of Goods Act, R. S. M. 1902, c, 152, s. 16—Implied warranty—Interest.*

Action for the price of an engine, thresher, and other articles of machinery supplied by plaintiffs to defendants in pursuance of a written contract.

This contract called for the furnishing at the same time of a number of parts and attachments necessary to the effective use of the machinery in addition to those actually supplied. The statement of claim was founded upon the original contract, but the evidence showed that the defendants had made a new bargain with the plaintiffs under which they accepted the machinery actually delivered on the plaintiffs promising to pay the freight and allow for the articles not delivered.

The trial Judge found that the machinery accepted was reasonably fit for the purposes for which it was sold, although this had been disputed by the defendants.

Held, that the plaintiffs should be allowed to amend the statement of claim by setting up the new contract and compliance therewith and should then have judgment for the contract price less the freight and the cost of the articles not delivered.

Defendants contended that the written agreement was superseded by the new arrangement and that the plaintiffs could only rely upon an implied agreement to pay what the goods received were worth, subject to the implied condition, under sub-section (a) of section 16 of the Sale of Goods Act, R. S. M. 1902, c. 152, that they were reasonably fit for the purposes for which they were sold.

The original agreement, however, contained a proviso that "in the event of changes being made in machinery or terms mentioned in this contract . . . or any changes whatever, such changes are in no way to supersede or invalidate this contract, but it is to remain valid, binding and in full force in all its clauses except in so far as relates to the specific changes."

Held, that full effect must be given to this proviso, and that all the provisions of the original contract, except those modified by the new bargain, remained in full force.

The original agreement made provision for the giving of promissory notes by the defendants for instalments extending over several years, and that two of such notes were to bear interest at seven per cent. per annum until due, also that if such notes were not given the whole purchase price should be due and payable

forthwith, but there was no provision for interest in that event.

Held, that, as the notes had not been given, the plaintiffs were only entitled to interest at the statutory rate of five per cent per annum. *Ross* v *Moon*, 17 M R. 21.

2. Sale of a number of machines together—*Delivery of some, but not all—Acceptance of part performance — Acquiescence — Breach of Warranty — Agreement for lien on land.*

The plaintiffs agreed to deliver and the defendant agreed to purchase from the plaintiffs one 18-horse power traction engine, one 40 x 60 Advance separator complete, one caboose and one tank and pump with hose, the machinery being warranted to be complete and ready to work, the price to be $1400 to be secured by promissory notes payable in three successive years. The agreement, which was in writing, also provided that the defendant would deliver to the plaintiffs, at the time of the delivery of the said machinery as therein provided or upon demand, a mortgage on certain lands to secure the purchase money, and that the plaintiffs should have a specific lien and charge on the said lands for the same. The plaintiffs failed to supply the caboose or the tank, but relied on the acceptance by the defendant of the remaining articles, his giving of the notes provided for, his making of payments on account thereof and other acts and conduct showing that he treated the agreement as binding upon him. The plaintiffs claimed under the original agreement and did not ask for an amendment of their statement of claim setting up any new or substituted contract to pay for the articles retained as upon a *quantum meruit*.

Held, *per* DUBUC, C. J., (1) The failure to furnish the caboose and tank should not be a bar to recovery in the action, because the defendant failed to comply with the provisions of the agreement that he should give written notice in case he could not make the machinery operate well and should return it within ten days in such event, and also because his subsequent conduct in making payments on the notes and his correspondence showed that he considered the contract to be still subsisting.

(2) The failure to furnish some parts of the machinery should, under the circumstances, be treated as a breach of warranty only, entitling the defendant to have a proper reduction of the contract price of the whole, but not to a rescission or cancellation of the agreement.

(3) The plaintiffs were entitled to the lien on the land provided for by the agreement for the amount overdue on the notes, with costs, less the value of the articles not delivered.

Hinchcliffe v. *Barwick*, (1879) 5 Ex. D. 177, and *Hamilton* v. *Northey Manufacturing Co.*, (1900) 31 O. R. 468, followed.

On appeal from this judgment,

Held, *per* RICHARDS, J., that it should be affirmed.

Per PERDUE, J. The plaintiffs' failure to deliver some substantial parts of the machinery cannot be treated as merely a breach of warranty, but must be considered as a failure to perform the contract on their part disentitling them to recover anything except upon a new or substituted contract, to be inferred from the acts and conduct of the parties, to pay for the machinery actually delivered what it was actually worth: *Pollock on Contracts*, 7th Ed. 265; *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673, and *Hart* v. *Mills*, (1846) 15 M. & W. 85.

The plaintiffs, having refrained from amending their claim by setting up any such new contract, doubtless because by so doing they would lose the benefit of the lien on the land provided for in the subsisting agreement, had failed to establish the claim set up and the appeal should be allowed and the action dismissed with costs.

The Court being equally divided, the judgment of DUBUC, C. J., was affirmed. *Fairchild Co.* v *Rustin*, 17 M. R. 194.

Defendant appealed to the Supreme Court, when the judgment appealed from was reversed, the Court holding that the right of the plaintiffs to enforce the lien depended upon the interpretation of the whole contract; that the provision as to the lien only became operative in the case of a complete delivery pursuant to the contract, and that the alternative words "or upon demand" must be taken as meaning upon a demand made after such complete delivery. 39 S.C.R. 274.

3. Shipment—*Place of weighing grain sold—Costs.*

A contract for the sale of a car load of wheat to be shipped in the first half of October is fulfilled if the grain is loaded on a car on or before the 15th of that month, although the bill of lading is not

signed until the 17th and is not received by the purchaser until the 19th. Shipment means simply putting on board.

Bowes v. *Shand*, (1877) 2 A. C. 455, followed.

The car of wheat in question was shipped from a station of the C. N. R. and was, in the regular course of the traffic over that railway, sent to Port Arthur and the wheat was weighed there and not at Fort William where wheat sent over the C. P. R. is generally weighed; and it appeared that the insertion in the contract of the words "Fort William weight" was inadvertently made by the defendants' manager who had prepared it, and that it really made no difference to the defendants whether the wheat was weighed at one of those places rather than the other.

Held, that plaintiff was entitled to recover although the weighing had not been at Fort William.

When defendants' manager received the shipping bill, he objected to the delay as the price of wheat had declined, but offered to pay within $5 of the amount demanded by the plaintiff.

Held, that plaintiff should not have incurred the risk of litigation for so small a sum, and should be deprived of costs on that account. *Perry* v. *Manitoba Milling Co.*, 15 M. R. 523.

XIII. Uncertainty of Terms.

1. Specific performance —*Shares* —*Certainty.*

Defendant N. agreed with the plaintiff as follows: "I hereby agree to sell to you 1,850 shares in the Qu'Appelle Valley F. Co.'s stock for the sum of $15,000, you to pay $10,000 to the Bank of Commerce, payments of the $15,000 to be made as follows: $5,000 by endorsed note at four months, $5,000 by note at one year's date, $5,000 by note at two years' date, at seven per cent., the last named notes to be secured by a portion of the stock.

Defendant N. had at this time 2,050 shares under pledge to the Bank of C. and there was little doubt that the 1,850 agreed to be sold were understood to be portion of these 2,050.

Almost immediately after making this agreement N. sold the shares to his co-defendants.

Upon a bill for specific performance,

Held, 1. That the contract was too indefinite in not sufficiently showing what particular shares were to be sold.

2. And was uncertain as to the endorsement of the notes.

3. And in not providing what portion of the shares was to form the security for the notes.

4. The shares could not be transferred without the sanction of the directors; and the Court will not direct a transfer when it has no power to enforce its complete execution.

5. Parol evidence to explain any of these points or show the understanding of the parties would be inadmissible. *Bell* v. *Northwood*, 3 M. R. 514.

2. Terms to be Fixed by a Third Party.

The defendant gave to the plaintiff the following letter: "Dear Sir.—If you lend to T. B. R. of this city the sum of $4,000, on lot 85, in block 4. * * * I will guarantee to take the property at any time for the amount of the mortgage."

Held, 1. That the contract was not uncertain because the terms of the loan were not agreed to. If the plaintiff and T. B. R. agreed upon the terms without collusion as against the defendant he would be bound.

2. The contract was not lacking in mutuality because the time of performance was left to the option of the plaintiff.

3. The Statute of Frauds does not prevent the proof, by parol, of the performance of a condition precedent. *McCaffrey* v. *Gerrie*, 3 M. R. 559.

XIV. Warranty.

1. Fitness of machinery—*Waiver*—*Sale of Goods Act, R.S.M.* 1902, *c.* 152, *s.* 16—*Notice.*

The defendant by agreement in writing dated 21st August, 1909, agreed to buy from the plaintiffs a threshing machine and other articles for $1065 and to pay for same in two instalments, $535 on 1st November, 1909, and $530 and interest on 1st November, 1910.

Shortly after the date of the contract certain threshing machinery was delivered to defendant in presumed compliance with the contract.

Defendant paid the first instalment and gave his note for the other instalment, but claimed at the trial that he had done so under protest, because the machinery was not satisfactory; and he defended this action for the amount of the note alleging breach of the warranty or condition that the machine would do as good

work as any of the same size sold in Canada and that he had given the notices required by the terms of the agreement. The agreement contained the provisions set out fully in the judgment. The defendant sought at the trial, though not pleaded, to invoke the aid of section 16 of The Sale of Goods Act R.S.M. 1902, c. 152, on the subject of implied conditions of warranties.

Held, following *Sawyer & Massey Co.* v. *Ritchie*, (1910) 43 S.C.R. 614, that the clauses of the agreement excluded the provisions of the Sale of Goods Act as to implied conditions, and that the purchaser's remedies for breach of warranty as to the working capacity of the machinery entirely depended on his having observed the terms of the warranty, so that if the defendant neglected to observe these both his defence to the claim on the note and his counterclaim for damages for breach of the warranty would fail.

The notices relied on by defendant were as follows: He complained over the telephone to the plaintiffs' local agent. Menzies, who sent to plaintiffs at Winnipeg a telegram reading thus, "Send Badgley; J. M. Ferguson separator laid up." Badgley was an expert in such machinery employed by plaintiffs.

Held, that, as the alleged notice contained no information as to wherein the machinery failed to satisfy the warranty, it was not a sufficient notice to comply with the contract, and that there was nothing from which to infer a waiver as in *American Abell* v. *Scott*, (1907) 6 W.L.R. 550.

Held, also, that the provision in the contract excluding waiver would apply in this case.

Sawyer & Massey Co. v. *Ferguson*, 20 M. R. 451.

2. Foreign Judgment—*Jurisdiction of foreign court—Sale of Goods Act, R.S.M. 1902, c. 152, s. 16 (a)—Implied condition of sale.*

1. When a contract for the sale of an engine contains a printed form of warranty as to the fitness of the engine with the provision that the agent of the vendors may not "add to, abridge or change" that warranty in any manner, the purchaser is not precluded from insisting on the fulfilment of any other warranty specially given in writing by the agent.

2. If the vendors accept and fill an order for an engine with a provision specially written by their agent in it that the engine is to be satisfactory to the purchasers, they thereby waive any limitations of the authority of their agent as to giving warranties that may be embodied in the printed part of the order.

3. As the plaintiffs' agent knew that the engine was required by the defendants to drive a particular separator, and that the defendants relied on his skill and judgment as to its fitness for that purpose, and as the engine was an article of a description which it was in the course of the plaintiffs' business to supply, there was, apart from any representations of the agent, an implied condition (under sub-section (*a*) of section 16 of the Sale of Goods Act, R.S.M. 1902, c. 152) that it would be reasonably fit to drive the separator.

Chanter v. *Hopkins*, (1838) 4 M. & W. 399, distinguished.

This action was brought to recover the amount of a judgment of an Ontario Court against defendants in respect of notes given for an engine. These notes contained a provision that, in case of default, the makers, who were residents of Manitoba, might be sued in Ontario upon them.

Quære, whether such a consent to the jurisdiction of a foreign court would not be recognized by international as well as by municipal law: *Copin* v. *Adamson*, (1874) L.R. 9 Ex. 345.

As, however, the defendants succeeded upon a defence to the original cause of action which they were entitled to raise in this action on the authority of *Hickey* v. *Legresley*, [1905) 15 M. R. 304, it became unnecessary to decide this question. *New Hamburg Manufacturing Company* v. *Shields*, 16 M. R. 212.

XV. Miscellaneous Cases.

1. Agreement to enter into an agreement for purchase of land—*Description—Recovery of money paid on account.*

1. An agreement to purchase one of a number of parcels of land sufficiently described to be selected by the purchaser is not void for uncertainty of description and, after the selection has been made, the purchaser will be bound by the agreement.

2. There is, however, no binding contract when the writing signed appears to be only an agreement to enter into a formal contract for purchase of the land to be prepared in the future, although it

sets forth the terms agreed on as the basis of such formal contract.

Frost v. *Moulton*, (1856) 21 Beav. 596, followed.

3. Where such formal contract submitted to the purchaser was not in accordance with the preliminary agreement which he had signed, but he had kept it a long time and tried to deal with the land as his own and had not objected to the terms of the contract or to the nature of the plaintiffs' equitable title, it was held that he was not entitled to recover back money which he had paid on account of the purchase.

Semble. The defendant may yet be entitled to the return of the money, if the plaintiffs do not within a reasonable time get in the title contemplated by the preliminary agreement and prepare and tender a formal agreement as provided for, but not if he rests his defence solely on the ground that the agreement he signed is vague and uncertain and insufficient under the Statute of Frauds. *Anglo Canadian Land Co.* v. *Gordon*, 19 M. R. 201.

2. Agreement of contractor with proprietor to pay fixed wages to workmen.

The plaintiffs, as part of their contract for the performance of certain work for the defendants, agreed to pay the workmen employed wages at certain minimum rates fixed by what was known as "the fair wage schedule," but the defendants agreed to pay for the work from time to time, as the work should progress, the amounts certified to be due by the City Engineer. The plaintiffs sued for the amount of one of these certificates.

Held, that the defendants could not keep back out of such amount anything by reason of the plaintiffs having failed to pay their workmen according to the "the fair wage schedule."

Semble, the defendants' engineer might, on ascertaining the fact, have been justified in withholding the progress estimate, in which event it might have been difficult for the plaintiff to recover without first paying the wages on the basis of the fair wage schedule.

Held, however, that the defendants were entitled to nominal damages on their counterclaim for the plaintiffs' breach of contract in not paying the wages agreed on, with costs incident to the counterclaim. *Kelly* v. *Winnipeg*, 18 M. R. 269.

3. Collateral agreement as to security for payment.

The defendant entered into an agreement under seal with A., whereby the defendant for a certain remuneration agreed to cut cordwood on certain lands and haul and deliver it at a certain place. The remuneration not having been paid, the defendant claimed to hold the wood under a collateral parol agreement by which it was stipulated that, in case of default, the defendant should be entitled to such security. In replevin by a purchaser from A. of the wood.

Held, that evidence of the parol agreement was not admissible, (DUBUC, J., dissenting.) *McMillan* v. *Byers*, 4 M. R. 76.

Reversed 15 S.C.R. 195. See next case.

4. Collateral verbal agreement—*Admissibility of evidence of—Work and labor—Security—Lien.*

By an agreement in writing B. contracted to cut for A. a quantity of wood and haul and deliver the same at a time and to a place mentioned, A. to pay for the same on delivery. The agreement made no provision for securing to B. the payment of his labor, but when it was drawn up there was a verbal agreement between the parties that in default of payment by A. the wood could be held by B. as security and be sold for the amount of his claim.

Held, reversing the judgment of the court below, HENRY, J., dissenting, that evidence of this verbal agreement was admissible on the trial of an action of replevin for the wood by an assignee of A., and that its effect was to give B. a lien on the wood for the amount due him. *McMillan* v. *Byers*, 15 S.C.R. 194.

5. Construction of statute—*Retrospective legislation—Implied covenant—Lien on land—Statute of Limitations.*

The plaintiffs claimed a lien on certain lands of defendants for the balance of the price of an engine sold to them in 1885, under a written contract signed by the defendants under seal, by which they agreed to purchase the engine for a certain price and to give their promissory notes therefor, and that the notes should be a charge on the lands in question. After the making of the contract, the parties agreed to substitute a second-hand engine at a lower price for the one described in the contract. There was no covenant or express promise to pay the money in the

contract, and the claim on the notes was barred by the Statute of Limitations. The plaintiff company was not licensed under the Foreign Corporations Act, R. S. M., c. 24, s. 13, to take, hold or acquire any real estate in this Province.

Held, (1) That this statute had no retrospective effect and could not be construed so as to prevent the plaintiffs from realizing a charge on lands which they had acquired before it was passed.

(2) That, the contract being under seal and showing an intention to enter into an arrangement to pay the purchase money of the engine, the plaintiffs' right of action for the money would not be barred until the expiration of ten years from the time it first accrued, notwithstanding that the remedy on the notes was barred.

The promissory notes referred to, being put in evidence, appeared by the indorsements to have been held by a bank at maturity, and defendants claimed that the right of action was not in the plaintiffs, but they had not raised this defence by their pleadings or at the trial.

Held, that effect should not be given to it now, as plaintiffs might have been able to show that the notes had only been indorsed for collection, or had been taken up since by them. *Waterous Engine Works Co.* v. *Wilson*, 11 M. R. 287.

Distinguished *Abell Engine Co.* v. *Harms*, 16 M. R. 547.

6. Construction of Covenants — *Whether dependent or independent.—Sale of land.*

The plaintiff's claim was for payment of the balance of the purchase money of land under an agreement of sale in the usual form in which the purchaser covenanted that he would well and truly pay . . . the said sum of money together with the interest thereon on the days and times mentioned, and the vendor covenanted that in consideration of the purchaser's covenant and on payment, etc., he would convey and assure or cause to be conveyed and assured to the purchaser, his heirs and assigns, by a good and sufficient deed in fee simple, etc., the said piece or parcel of land freed and discharged from all incumbrances.

Held, following *Macarthur* v. *Leckie*, (1893) 9 M. R. 110, that the two covenants were independent and that the defendant was bound to pay the purchase money before he could call on the plaintiff to convey the property, and that it was not necessary for the plaintiff to prove the tender of a conveyance or to allege that he was ready and willing to convey, although it appeared that the property was subject to two mortgages.

With the plaintiff's consent, the defendant's purchase money was ordered to be paid into Court so that the incumbrances could be discharged out of it and only the balance paid to the plaintiff. *Sword* v. *Tedder*, 13 M. R. 572. *See* COVENANTS.

7. Drunkenness.

Drunkenness is not a ground for setting aside a contract, if it caused excitement only and did not rise to that degree which may be called excessive drunkenness. *Vivian* v. *Scoble*, 1 M. R. 125.

8. Guaranty—*Counter-bond of guaranty —Authority of manager for Canada of English Insurance Company to bind the company by indorsement on bond—Consideration.*

Plaintiffs had given a bond to the Municipal Commissioner dated 1st May, 1904, to insure the faithfulness and honesty of the defendant Cornish as treasurer of the Rural Municipality of Brokenhead for a term of three years in the sum of $3000, and the premium for the three years' insurance was paid in advance.

On March 3rd, 1905, the Company gave notice, in accordance with a provision of the bond, cancelling the guarantee at the expiration of three months, whereby the liability of the Company was confined to any defalcations of Cornish prior to 3rd June, 1905.

This action necessitated the vacating by Cornish of his position as treasurer; but, on it being intimated to the Council that the Company would re-instate Cornish on the bond if they got a satisfactory counter security bond, the other defendants agreed to give such security, and the Council voted to re-appoint Cornish.

The manager of the Company for Canada, Mr. Alexander, then had prepared a form of counter security bond for the defendants to sign, and, after it was returned to him signed, he sent to the Municipal Commissioner a document signed by himself purporting to be an indorsement on the original bond reinstating Cornish for a guarantee of $3000 dating from 3rd June, 1905, to 1st May, 1907.

The defendants were not asked to secure the Company by their counter bond against past defalcations and did not know that there were any such, and the wording of their counter bond did not clearly show that it was intended to secure the Company against past defalcations of Cornish.

Shortly afterwards the Company was obliged to pay the amount of its original bond to the Municipal Commissioner in respect of defalcations of Cornish committed prior to 3rd June, 1905. They then sued defendants upon the counter bond.

Held, that, under all the circumstances, defendants were not liable, as their bond should be held to have relation only to the liability of the Company under its re-instating contract, and not to that under the cancelled bond.

Held, also, that, as there was no evidence that Mr. Alexander had authority from the Company to make the indorsement he gave, the plaintiffs had failed to establish that they had continued the guarantee bond previously in existence, and consequently there was a total absence of consideration for the defendants' counter bond, and for that reason also they were not liable upon it. *London Guarantee and Accident Co.* v. *Cornish*, 17 M. R. 148.

9. Hiring and service—*Quantum meruit—Leaving service before expiration of term.*

The plaintiff's claim was for four months' wages. He swore that the hiring was by the month at $17 per month, but defendant stated that the hiring was for a definite period of eight months for $130, no time having been fixed for payment, and his account was corroborated by a witness who was present when the bargain was made.

Plaintiff left the service of defendant after four months without his consent and without any valid reason or excuse.

Held, following *Smith* v. *Hughes*, (1871) L. R. 6 Q. B. 597, that the plaintiff was bound by his bargain, even if he had misunderstood the legal effect of it, and could not recover anything for his services without fully completing his contract.

Cutter v. *Powell*, (1795) 2 Smith's L. C. 1, and *Britain* v. *Rossiter*, (1879) 11 Q. B. D. 123, followed. *Knox* v. *Munro*, 13 M. R. 16.

10. Intention ascertainable only from words and acts of contracting party.

If a man's words or acts, judged by a reasonable standard, manifest an intention to agree in regard to any matter, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject.

The defendants, in authorizing a Mr. Bristow to employ a contractor to perform certain repairs to their building, supposed that he was the local agent of their architect Stone of Montreal to whom they had complained of certain defects in his plans necessitating such repairs, and supposed that Stone had recognized his liability for such defects and had authorized Bristow to have the repairs made. Stone had not, however, given any such instructions to Bristow and Bristow had in fact ceased to be in Stone's employment some weeks before the defendants arranged with him about the repairs.

Bristow employed the plaintiff who in good faith did the work without any notice or knowledge of what was in the minds of the defendants' officers.

Held, that the defendants were liable to the plaintiff for the cost of the work. *Watson* v. *Manitoba Free Press Co.*, 18 M. R. 309.

11. Order for chattels given under seal—*Covenant to give mortgage on land in statutory form to secure purchase money—Nature of relief to which covenantee entitled—Right of offerer to withdraw from purchase before acceptance—Vendor's remedies when purchaser refuses to complete purchase—Right of action for price of goods when property in them has not passed to the purchaser.*

1. An order for the supply of goods executed under seal is not revocable before acceptance as an ordinary order might be: *Xenos* v. *Wickham*, (1866) L.R. 2.H.L. 296, and *Waterous* v. *Pratt*, (1899) 30 O.R. at 541; and, if the goods have been supplied, the vendor may sue for the price which the purchaser has covenanted to pay, notwithstanding the purchaser has attempted to cancel the order, returned the goods and refuses to carry out the purchase. In such a case the vendor is not restricted to an action for damages for the breach of contract.

Waterous Engine Works v. *Wilson*, (1896) 11 M.R. 287, and *Sawyer* v. *Robertson*, (1900) 1 O.L.R. 297, followed.

When the contract provides that, if the purchaser should refuse to accept the goods or give the notes stipulated for, the whole purchase money shall become due and payable forthwith, the purchaser may be sued for the whole price in either of said events, notwithstanding that the property in the goods has not passed to him by reason of a provision that the ownership of, and title to, the goods should remain in the vendor until the purchase price be fully paid.

The contract in this case further provided that, for the purpose of securing payment of the price of the machinery, the defendants would deliver to the plaintiffs a mortgage on certain land in the statutory form.

Held, that it should be declared that the plaintiffs have an equitable mortgage on the land to secure the money and that, as the whole amount was now due and payable, the plaintiffs should have the ordinary judgment for foreclosure or sale, as they may elect, with the usual inquiries, taking of accounts &c., as in the case of an ordinary mortgage with the statutory covenants, giving the defendants the statutory time, twelve months, to redeem; but that they were not entitled to a decree containing the usual provisions for the sale of the land by the more summary process to satisfy their lien or charge; and it was not necessary to require the actual execution of a mortgage by the defendants in order to give the plaintiffs full relief. *Gaar Scott Co.* v. *Ottoson*, 21 M. R. 462.

12. Penalty or liquidated damages. A contract for the sale of 1500 tons of coal to be paid for in car load lots as ordered within a fixed period contained the following provision: "And for *the insuring of the more effectual performance of this agreement*, the purchasers further agree to pay to the vendors * * * * the sum of one dollar *as a penalty by way of liquidated damages* for every ton of the said full amount not ordered and paid for by them on the first day of April, 1907."

Held, that the contract should be construed as providing for the payment of $1 per ton as a penalty only and that, as the plaintiffs had suffered no damages from the refusal of the defendants to take the whole 1500 tons, they could recover nothing.

Willson v. *Love*, [1896] 1 Q. B. 626, *Hudson on Building Contracts*, 519; *Joyce on Damages*, par. 1298, 1300, 1301; *Mayne on Damages*, 155; 19 *Am. and Eng. Enc.* 402., followed. *Brock* v. *Royal Lumber Co.*, 17 M. R. 351.

13. Promise to devise interest in land — *Part performance — Statute of Frauds, s.* 4—*Will—Lapse of devise to party who predeceased testator—Acceptance of offer by conduct—Representation influencing conduct.*

The plaintiff was an illegitimate daughter of D. C. Kinsey who lived in Winnipeg with her mother until the plaintiff was about six years old, when the parents separated, the plaintiff going abroad with her mother, who died in 1897.

In 1899, correspondence ensued between the plaintiff and her father which resulted in the plaintiff returning to live with her father in Winnipeg until his death in 1903, leaving no will except one made in 1881 by which he had left all his property to David Young, his heirs, executors, administrators and assigns. David Young died in 1887. It did not appear that Kinsey had any relatives living except the plaintiff.

Upon the facts proved in evidence and fully set out, the trial Judge found that there was a definite offer by Kinsey in writing that, if plaintiff would come to him and live with him as his daughter, he would keep her and leave all his property by will to her, that the offer was accepted in writing, though not in formal terms and also by acts and conduct, that plaintiff had fully performed her part of the contract, and that the fact that Kinsey had not made the promised will should be attributed to mere negligence and procrastination.

Held, that plaintiff was entitled to the assistance of the Court by way of specific performance of the agreement, notwithstanding the want of mutuality, which is not material after the one party has performed completely all he had undertaken to do.

Fry on Specific Performance, pars. 465, 468; *Fitzgerald* v. *Fitzgerald*, (1873) 20 Gr. 410; *McDonald* v. *McKinnon*, (1878) 26 Gr. 12, and *Roberts* v. *Hall*, (1877) 1 O.R. 388, followed.

Complete performance by one party entitles him to enforce a contract against the opposite party notwithstanding the Statute of Frauds: *McDonald* v. *McKinnon*, (1878), 26 Gr. 12; *Halleran* v. *Moon*, (1881) 28 Gr. 319; *Ridley* v. *Ridley*, (1865) 34 Beav. 478, and *Loffus* v. *Maw*, (1862) 3 Giff. 592.

Maddison v. *Alderson*, (1883) 8 A.C. 467; *Walker* v. *Boughner*, (1889) 18 O.R. 448; *Cross* v. *Cleary*, (1898) 29 O.R. 542, and *McGugan* v. *Smith*, (1892) 21 S.C.R. 263, distinguished, the last three cases on the ground that, in each of them, the deceased with whom the agreement was alleged to have been made had clearly shown his intention in regard to it by subsequently making a will contrary to the terms thereof.

The two executors named in Kinsey's will of 1881 also predeceased the testator, and the defendants, the National Trust Company, had taken out letters of administration of the estate of Kinsey with that will annexed. The executors for the will of David Young were also made parties defendant in this action.

Held, following *Jarman on Wills*, pp. 307, 308, and *Williams on Executors*, pp. 1072, 1074, that the bequest and devise to David Young lapsed on his death in the lifetime of the testator.

Order for judgment giving the whole estate to the plaintiff. *Kinsey* v. *National Trust*, 15 M. R. 33.

14. Restraint of trade—*Specific delivery of chattels—Specific performance of covenant, and of an express trust—Affirmative and negative covenants.*

Specific performance of a covenant to act as the agent of another will not be enforced.

A covenant not to "handle" a certain class of goods during a specified term of years is void, as being in undue restraint of trade, there being no limitation of territory. The language was also held to be too vague and uncertain to enable the Court to order an injunction against the defendant in the terms of the covenant.

Where there is an affirmative covenant in an agreement and the parties have themselves settled and set out in the contract what the defendant is not to do, no further negative covenants will be implied from the affirmative one.

Order made for the delivery over by the defendant to the plaintiff of certain orders for pictures taken by defendant as agent of the plaintiff from customers under the circumstances set out in the statement, and for the taking of an account of the dealings between the parties. *Bentley* v *Bentley*, 12 M. R. 436.

15. Sale of crop of hay to grow during ensuing season—*Subsequent sale of land to a third party with knowledge of purchaser's right to hay—Breach of contract—Sale of Goods Act, R.S.M. 1902, c. 152, s. 2 (h)—Interest in land.*

In March, 1910, the defendant sold to the plaintiff the crop of wild hay to grow during the ensuing season on a certain quarter section of land and received payment therefor in full. She shortly afterwards sold and conveyed the land by transfer under The Real Property Act to one Savage without any reservation, though she informed Savage of the prior sale of the hay to the plaintiff. Savage obtained a clear certificate of title to the property before the hay was ready to cut, and he prevented the plaintiff from getting any of it.

Held, that, whether or not the plaintiff could have any right of action against Savage, the defendant, having by her own act disabled herself from performing the contract with the plaintiff, was liable to the plaintiff in damages for the breach of it: *Leake on Contracts*, 5th ed. p. 617.

Held, also, that, as the thing sold does not come under the definition of the word "goods" given in the Sale of Goods Act, the right given to the plaintiff was an interest in land similar to that discussed in *Decock* v. *Barrager*, (1909) 19 M.R. 34; and the case of *Fredkin* v. *Glines*, (1908) 18 M.R. 249, did not apply. *Sharpe* v. *Dundas*, 21 M. R. 194.

16. Signature by person unable to read—*Verbal agreement—Sale of Goods Act, R.S.M. 1902, c. 152, s. 20, Rule 4.*

When a man capable of reading and understanding a document, and having an opportunity to do so, affixes his signature to it, though without reading it, he should be held bound by its contents. But that rule does not apply when a man incapable of reading a document is induced to sign it by a representation that it is an entirely different document.

The plaintiff's agent, in negotiating the sale to the defendant of a second hand threshing outfit, assured him that the separator was in first class condition and would do first class work and, if not, he should be at liberty to return it. The defendant agreed to take it upon these terms and, not being able to read English, signed the usual order form upon being assured by the agent that it was a paper showing the bargain made.

Held, that the defendant was not bound by anything contained in the order which was an addition to or inconsistent with the verbal agreement made between

the plaintiff's agent and himself, and that he had a right to return the machines when he found that they were not as represented, and to have the promissory notes he had given delivered up and cancelled as, under Rule 4 of section 20 of the Sale of Goods Act, R.S.M. 1902, c. 152, the property in the goods had not passed to the defendant. *American Abell Engine Co.* v. *Tourond*, 19 M. R. 660.

See AGREEMENT FOR SALE OF LAND, 2.
— AMBIGUITY.
— ARBITRATION AND AWARD, 2.
— BILLS AND NOTES, VIII, 8.
— BUILDING CONTRACT, 1, 3, 7.
— COMPANY, II, 1; IV, 1.
— CORPORATION, 3.
— DISTRESS FOR RENT, 1.
— EVIDENCE.
— ILLEGALITY, 4.
— MISREPRESENTATION, III, 4.
— MUNICIPALITY, VI, 1.
— NEGLIGENCE, VII, 6, 7.
— PLEADING, XI, 5, 8, 17.
— PRINCIPAL AND AGENT, III, 2.
— RAILWAYS, V, 1.
— TRIAL.
— VENDOR AND PURCHASER, I; VI; VII, 6, 10.
— WINDING-UP, IV, 1.

CONTRACT FOR WORK AND MATERIALS.

See SALE OF GOODS, VI, 6.
— WARRANTY, 4.

CONTRACT OR TORT.

See PLEADING, XI; 6.

CONTRACT UNDER SEAL.

See PARTIES TO ACTION, 5.

CONTRACTOR AND SUB-CONTRACTOR.

See NEGLIGENCE, VII, 5.
— PARTIES TO ACTION, 10.

CONTRIBUTION.

See PRINCIPAL AND SURETY, 1.

CONTRIBUTORIES.

See EXAMINATION OF JUDGMENT DEBTOR, 3.
See WINDING-UP, IV, 1, 8.

CONTRIBUTORY NEGLIGENCE.

See AUTOMOBILE.
— HOTEL KEEPER.
— LORD CAMPBELL'S ACT, 3.
— MUNICIPALITY, III, 1.
— NEGLIGENCE, I; V, 1, 3; VI, 5.
— RAILWAYS, IV, 3; VII, 1; VIII.

CONVERSION.

See WILL, II, 1, 2.

CONVEYANCE ABSOLUTE IN FORM BUT GIVEN AS SECURITY.

Evidence—*Intention, character of evidence of.*

To induce a court to declare a deed, absolute on its face, to have been intended to operate as a mortgage only, the evidence of such intention must be of the clearest, most conclusive and unquestionable character. *McMicken* v. *Ontario Bank*, 20 S. C. R. 548.

See INDEMNITY, 4.
— MORTGAGOR AND MORTGAGEE, IV, 2, 3.

CONVEYANCE OF LAND SUBJECT TO MORTGAGE.

See INDEMNITY, 4.

CONVEYANCING PRACTICE.

See VENDOR AND PURCHASER, VIII, 3.

CONVICTION

1. Certiorari—*Appeal from order granting—Necessary material—Verifying order—Sufficient return to writ of certiorari—Return by two Justices when conviction by three—Conviction of receiving stolen goods—Sufficiency of evidence—Agreement to pay damages and not to appeal—Costs against private prosecutor.*

On an appeal against an order made in Chambers granting a writ of *certiorari*, a *præcipe* setting down the appeal was filed with the Prothonotary, but the proceedings in Chambers, the affidavits and other documents upon which the order was made were not brought into Term, nor was the order, or a copy of it, verified in any way.

Held, that an objection that the papers and proceedings were not properly before the Court was fatal, and the appeal dismissed, with costs.

A return to a writ of *certiorari* made by one or two of several convicting Justices, provided they, having the record in their custody, can return it, is a sufficient return.

L. was convicted before three Justices of the Peace of receiving stolen goods, viz., one bedstead, knowing the same to be stolen. The bedstead was of about the value of $1.25. He took it openly, and in the day time, from a room occupied by himself until then. This room was opposite one in which the prosecutor was at the time. He asked one G., to assist him in taking it to pieces for the purpose of removing it. It was left at the door, outside, before it was placed on the waggon in which it was removed. The prosecutor assisted in loading some of the things to be removed, when the bedstead was in the waggon, at the bottom of the load, but it did not appear whether he saw it. When questioned about it afterwards by the prosecutor, L. admitted having it in his possession, but claimed that it was his property. When convicted, and threatened with imprisonment, he was induced, in consideration of not being sent to gaol, to agree in writing to return the bedstead within forty-eight hours, to pay all costs of the Court, and $50 damages, and not to appeal against the conviction. He returned the bedstead within the time agreed upon.

On motion to quash the conviction:

Held, that the conviction must be quashed, there being no evidence of any felonious intent on the part of L. in anything he did.

Held, also, that the whole proceedings, arrest, trial and conviction, were a gross abuse of criminal process, for the purpose of obtaining an undue advantage in a most trivial matter.

The private prosecutor was ordered to pay the costs.

The conduct of the Justices in being parties to such an outrageous agreement commented on.

Reg. v. *Young*, 5 O. R., 400, and *Reg.* v. *Kennedy*, 10 O. R., 398, approved. *Reg.* v. *Lacoursiere*, 8 M. R. 302.

2. Habeas corpus—*Rule nisi.*

A rule to quash a conviction may, in the first instance, be to show cause why a writ of *habeas corpus* should not issue, "and why, in the event of the rule being made absolute, the prisoner should not be discharged out of custody without the issuing of the said writ, and without his being brought before the Court."

The rule may at the same time ask for a writ of *certiorari* as well as of *habeas corpus*.

A warrant of commitment which recites a conviction must show upon the face of the recited conviction that the offence was one over which the committing magistrate had jurisdiction.

Where, therefore, the conviction was for obtaining $12 by false pretences, and by statute the convicting magistrate could only convict and pass sentence in case the prisoner pleaded guilty, and the conviction did not show that the prisoner had so pleaded.

Held, that the conviction ought to be quashed. *Reg.* v. *Collins*, 5 M. R. 136.

3. Masters and Servants Act.

A conviction under The Masters and Servants Act was quashed on the ground, *inter alia*, that the complaint was made more than a year after the cause of it arose, the Act requiring such complaints to be made within six months from the offence charged. *Merritt* v. *Rossiter*, T. W., 1.

4. Selling liquor without license—*Onus of proof.*

1. The prosecution need not prove the absence of a license. The onus is on the prisoner to prove its existence.

2. A commitment must agree substantially with the conviction. Formal var-

iances are not fatal. Thus where the defect in the conviction was in reciting that the defendant was adjudged to pay a fine, and in default to be imprisoned and kept *at hard labor* (hard labor not having been awarded), but the operative part made no reference to hard labor,

Held, to be unobjectionable upon *habeas corpus*.

3. A conviction adjudged imprisonment in default of payment of the fine and costs "and charges of conveying her to the common gaol, amounting to the further sum of———dollars." *Held*, invalid, and the prisoner was discharged. *Reg.* v. *Bryant*, 3 M. R. 1.

5. Veterinary Surgeon—*Questions raised upon Certiorari—Waiver of irregularities by appearance—Imposition of unwarranted costs.*

A. B. was convicted of practising as a veterinary surgeon without the proper qualification.

Held, that the conviction was good, although it did not allege any particular act done.

An objection of *res judicata* cannot be urged upon *certiorari* if not taken before the magistrate.

The absence of a formal adjournment of the proceedings before a magistrate may be waived by subsequent appearance.

A conviction stated the offence to have been committed in the County of Norfolk. The information charged the offence as in the Municipality of North Cypress in the County of Norfolk in the Province of Manitoba. By statute the Municipality of North Cypress was in the County of Norfolk. In the absence of any affidavit denying that the magistrate had jurisdiction,

Held, that an objection that no offence within the Province had been shewn was untenable.

Costs unwarranted by statute having been imposed.

Held, that the conviction was bad. *Re Bibby*, 6 M. R. 472.

See Ballot Box Stuffing.
— Certiorari, 1, 3.
— Criminal Law, XII, 1, 3; XIII, 3; XVII, 13.
— Criminal Procedure, 2.
— Liquor License Act.
— Municipality, VII, 4.
— Practice, XXVIII, 3.

CORPORATION

1. Alteration of boundaries of school district—*Liability for debt.*

The boundaries of the defendant school district had been changed several times since the issue, in 1881, of the debentures sued on in this action, leaving only a fraction of its original territory, and its name had also been changed from the "Protestant School District of Donore" to the "School District of Donore, number 118," under the Public Schools Act of 1890.

Held, that defendant was liable for the debentures in question and the interest thereon, notwithstanding these changes. *Canada Permanent Loan & Savings Co.* v. *Donore*, 11 M. R. 120.

2. Borrowing money without a by-law—*Town Corporations Act, C.S.M. c. 10—Municipal loan—Corporate seal.*

The defendants were incorporated under the Manitoba Town Corporations Act, C. S. M. c. 10. Section 377 of that Act provided that town loans, whether by issue of debentures or otherwise, should only be made on a by-law of the council to that effect.

The defendants being indebted to the Ontario Bank, which was pressing for payment, the town council passed a resolution referring the matter to the Finance Committee with power to act. As the plaintiffs held in their hands for sale a large amount of the debentures of the town, the Committee arranged to give the Bank an order on the plaintiffs for the amount of the debt. The order was accordingly prepared and signed by the mayor and secretary-treasurer, sealed with the seal of the corporation, and sent to the Bank Manager. The action of the Committee was duly reported to the town council, and the report was adopted. The plaintiffs afterwards accepted the order, and paid the amount to the Bank. They then brought this action to recover the amount of the order from the defendants.

Held, that the transaction was in the nature of a loan of money, and that the plaintiffs could not recover without proof of a by-law having been passed, signed and published in accordance with the provisions of sections 208, 213 and 211 of the said Act, and, no such proof having been given, that the plaintiffs must be non-suited.

Bernardine v. *North Dufferin*, 19 S.C.R. 581, distinguished. *Macarthur* v. *Portage la Prairie*, 9 M. R. 588.

3. Contract not under seal.

While the defendant's Municipal Council was in session it verbally contracted with the plaintiff for the construction by him of a bridge on a travelled road. During the work some payments were made upon account, and after its completion a resolution was passed accepting the bridge and directing payment. The council afterwards repaired the bridge and it was used by the public. There was no by-law authorizing the construction of the road or the contract accepting or dealing with the bridge.

In an action for the money,

Held, that, the contract not being under seal nor it or the work authorized or adopted by by-law, the plaintiff could not succeed. *Bernardine* v. *North Dufferin*, 6 M. R. 88.

Reversed, 19 S.C.R. 581. See next case.

4. Contract not under seal—*Performance — Adoption — Municipality — By-law—Manitoba Municipal Act*, 1884, *s.* 111.

A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. RITCHIE, C.J., and STRONG, J., dissenting.

In sec. 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. RITCHIE, C.J., and STRONG, J., dissenting. *Bernardine* v. *North Dufferin*, 19 S.C.R. 581.

5. Employment of counsel by City—*Acceptance of services—Liability of corporation on executed contract—Winnipeg Charter, ss.* 472, 258, 833.

1. The employment of counsel to conduct an inquiry into any matter connected with the good government of the City of Winnipeg, or with the conduct of any part of its public business, is not one of the matters which, under section 472 of the City Charter, may be dealt with otherwise than by by-law, although the Council, by section 833, may, by resolution, authorize the Judge of the County Court to make such inquiry.

2. The employment of the plaintiff, a barrister, to conduct such an inquiry having been by resolution of the Council only, he could not recover in an action against the City for the amount of his bill of costs, in the absence of some formal acceptance of his work by the Council, although he had completed it according to his instructions.

Waterous v. *Palmerston*, (1892) 21 S.C.R. 556, followed.

Clarke v. *Cuckfield Union*, (1852) 21 L.J.Q.B. 349; *Lawford* v. *Billericay*, [1903] 1 K.B. 772, and *Bernardine* v. *North Dufferin*, (1891) 19 S.C.R. 581, distinguished.

3. The Council could not, under section 258 of the Charter, delegate its powers to a committee of the council without a by-law.

4. *Per* HOWELL, C. J. M., and CAMERON J. A. There would have been no liability in this case even if the work had been formally accepted by the Council unless such acceptance were by by-law.

Hunt v. *Wimbledon*, (1878) 4 C.P.D. 48, and *Young* v. *Leamington*, (1883) 8 A.C. 517, followed. *Manning* v. *Winnipeg*, 21 M. R. 203.

6. Employment of time keeper without seal—*Corporation—Employment—Seal.*

Held, a timekeeper is not such a "superior officer" that his employment by a corporation must be under seal. *Gordon* v. *Toronto, Manitoba and North West Land Co*, 2 M. R. 318.

7. Power to borrow—*Power to mortgage real estate—Ultra vires—Construction of statutes.*

An agricultural society incorporated under The Agricultural Societies' Act, 55 Vic., c. 2, (M. 1892), has no implied power to borrow money or to mortgage real estate belonging to it, notwithstanding the provisions of section 9 of the Act prohibiting a sale, mortgage, lease or other disposition of any real property of the society unless authorized at a general meeting of the society; and the district registrar was right in declining to register a mortgage of such a society given to

secure a loan of money to erect buildings on its real estate.

Brice on Ultra Vires, p. 122; *Fisher on Mortgages*, p. 136; *The Queen* v. *Sir Charles Reed*, (1880) 5 Q. B. D. 583, and *Blackburn Building Society v. Cunliffe*, (1882) 22 Ch. D. 61, followed.

Bickford v. *The Grand Junction Railway Co.*, (1877) 1 S.C.R. 696, distinguished.

Held, further, that the statute of 1899, c. 24, s. 33, empowering the Municipality of Rockwood to guarantee a loan to the society, "to be effected or procured for the purpose of erecting buildings and the improvement of the grounds of the said society," could not be construed as giving the society any power which it had not before, for a misapprehension of the law by the Legislature has not the effect of making that the law which the Legislature had erroneously assumed it to be: *North-West Electric Co.* v. *Walsh*, (1898) 29 S.C.R. 33.

Re Rockwood Electoral Division Agricultural Society, 12 M. R. 655.

Distinguished, *Stobart* v. *Forbes*, 13 M. R. 184.

See Criminal Law, IX, 1.
— Expropriation, 2.
— Garnishment, V, 3.
— Libel, 2.
— Malicious Prosecution, 3.
— Principal and Agent, V, 1.
— Summary Conviction.

CORRUPT PRACTICES.

See Election Petition, IV.

COSTS.

I. Appeal from Taxation.

1. Carrying in objections before Master — *Chamber order — Attending to settle—Attending to hear judgment—Instructions to defend.*

On an appeal from a taxation of costs on the equity side of the Court, it is not necessary that the applicant should have carried in his objections before the Master; but, in the event of his succeeding on the ground not taken before the Master, he may be ordered to pay costs.

The costs of settling a Chamber order allowing an appeal from the Referee as to the amount of security for costs, are simply the costs of an ordinary attendance for the order.

On the equity side of the Court, no fee is allowed to counsel or solicitor for attending to hear judgment. The fee with brief covers this.

Only one fee is allowed for instructions to defend, irrespective of the number of defendants. No such fee is taxable as instructions for answer.

It was sought to tax a fee to agents in Toronto, for revising and settling an affidavit of documents, on the ground that the head office of the defendant bank was there. The usual charges for preparing the affidavit had been allowed the solicitors in Winnipeg.

Held, that this item should not be allowed.

Earl of Shrewsbury v. *Trappes*, 8 Jur. N. S. 586, distinguished.

Letters and telegrams sent for the convenience of witnesses out of the jurisdiction, beyond the necessary cost of procuring their attendance, are not taxable.

Where the Master allowed a brief to one of the defendants at the hearing but, on appeal from the taxation, the defendant claimed an increased allowance,

Held, that it was a matter peculiarly within the province of the Master to determine, and that his ruling should not be disturbed.

The Master allowed only $100 for counsel for defendant B., although B. had obtained a judge's *fiat* for $150. $100 was the full fee charged in the bill of costs, and there was no evidence that a larger fee was paid.

Held, that the Master was justified in allowing only the fee of $100.

To be allowed the costs of a witness attending at a trial, but not called or examined, it is necessary to show four things: (1) That he was a necessary and

material witness. (2) That he was in attendance. (3) What he was brought to depose to. (4) The reason why he was not examined. *McMicken* v. *Ontario Bank*, 8 M. R. 513.

2. Certificate.

Held, there can be no appeal from taxation until a certificate has been issued. *Union Bank* v. *Douglass*, 3 M. R. 48.

3. Counsel fees.

Under the then present circumstances of the Province, (1889) the Court exercised a control over the *quantum* of counsel fees taxed by the Master. *O'Connor* v. *Brown*, 5 M. R. 263.

4. In County Court action—*Witness fees—Counsel fees—County Courts Act—Transcript of judgment—Effect of.*

There is an appeal to the Court of Queen's Bench from the decision of a County Court judge on taxation of costs if a question of legal principle is involved.

A defendant in a replevin suit in a County Court took a veterinary surgeon to the plaintiff's residence, in order to examine the animal in question, for the purpose of giving evidence at the trial. The defendant succeeded in the action, and on taxation of costs the County Court clerk made an allowance to the veterinary surgeon for his time and expenses, and to the defendant for his expenses accompanying him. This was affirmed by the County Court judge on revision of taxation.

Held, that this allowance was improper.

No counsel fee can be allowed in a County Court to any person except a duly qualified barrister or attorney, and if the objection is taken the onus is on the person claiming, to prove his title to the fee.

Schedule C of the County Courts Act, 1887, provides that "the costs must be strictly taxed according to the very letter and spirit of the tariff, and before taxation of witness fees the fees must be actually paid, unless the judge otherwise orders." On taxation the County Court clerk allowed certain witness fees, which had not been actually paid. On revision of taxation by the County Court judge he made an order allowing them.

Held, that the County Court Judge had jurisdiction to make the order.

Semble, where judgment has been obtained in a County Court and a transcript has been obtained and filed in another County Court or in the Court of Queen's Bench, it still remains a judgment of the original County Court. *Tait* v. *Burns*, 8 M. R. 19.

5. Evidence on—*Taxation of costs of demurrer—Costs of application to reply and demur—Counsel fees—Discretion of Master to increase—Tariff—Interpretation of—Reference of counsel fees to Judge—Effect of omitting to refer—Appeal as to counsel fees.*

Upon a taxation of costs before the Master, no evidence was produced upon a large number of items, but the parties relied merely on the oral statements of the respective attorneys, and the entries in the books of the Court and of the clerk in Chambers.

On appeal from the Master's taxation,

Held, that a Judge should not interfere when he has not before him the statements on which the parties chose to rely, or any proper evidence of the state of facts presented to the Master.

Held, also, that no evidence not before the Master should be used on the appeal.

A plaintiff applied for and obtained leave to reply and demur, and by the order the costs of the application were made costs in the cause. Plaintiff succeeded on the demurrer, and the defendant afterwards obtained leave to file certain pleas on payment of the costs of the demurrer.

Held, that the costs of the application to reply and demur were not part of the costs of the demurrer.

The Master for over ten years, and his predecessor before that, having interpreted the proviso for taxing increased counsel fees under item nine of the heading "Counsel Fees" in the tariff of February, 1875, as applying to all previous counsel fees in the tariff, as well as fees at trials, and this practice having been approved by the late Chief Justice Wood,

Held, that, the application of the proviso being somewhat ambiguous, a Judge should not interfere with an interpretation supported by such long practice and such high authority.

The rules as to counsel fees provide that: "Where any fee is subject to be increased in the discretion of the Master, either party to the taxation may, during its progress, require that such item shall be referred by the Master to a Judge, whose decision shall be final."

Held, that, if the parties choose to allow the taxation to be closed without insisting on such a reference, they should

be taken as electing to be bound by the Master's judgment, and a Judge will not interfere on an appeal from the taxation. *Livingstone* v. *Rowand*, 8 M. R. 298.

II. Disclaimer in Mortgage Action.

1. Defendant not entitled to costs.

One of two defendants in a mortgage case who was entitled to a one half-interest in the equity of redemption, filed a disclaimer as follows:—"After the service of the bill of complaint herein upon me, I offered to quit claim any right or interest that I had in the matters in question in this suit to the plaintiff, and the plaintiff refused to accept said offer, and I disclaim all right, title and interest, legal and equitable, in any of the said lands and premises, and I claim to be hence dismissed with my costs of suit incurred subsequently to said offer."

Held, upon a hearing upon bill and answer, that the disclaiming defendant was not entitled to costs. *Manitoba Investment Association* v. *Moore*, 4 M. R. 41.

2. Defendant ordered to pay.

To a foreclosure bill alleging that the defendant C. was the assignee of the equity of redemption, and was entitled to redeem, the defendant C. filed a disclaimer and asked to be dismissed with costs.

Held, upon a hearing on bill and answer, that the defendant C. should pay the costs occasioned by the disclaimer. *Wilton* v. *Wilton*, 4 M. R. 227.

III. Of Former Action Unpaid.

1. Stay of proceedings—*Appearance.*

A defendant is not entitled to a stay of proceedings until the costs of a former action for the same cause of action are paid, when more than a year has elapsed since the entering of appearance in the former action, and no further proceedings have been taken therein, and the plaintiff is consequently out of Court.

Semble, an application for a stay of proceedings, until the costs of a former action are paid, cannot be made until the defendant has appeared. *Ewart* v. *Hanover*. 8 M. R. 216.

2. Staying proceedings—*Declaration of right—Queen's Bench Act*, 1895, *s.* 38, *s-s.* 5.

The plaintiff had, before the Queen's Bench Act, 1895, came into force, brought an action to recover the value of land claimed to have been sold for taxes when none were in arrear, in which action defendants had recovered judgment for their costs by demurrer to the declaration.

Plaintiff then brought this action claiming, under sub-section 5 of section 38 of the Queen's Bench Act, 1895, a declaration of right to compensation and damages. He had not paid the costs of the former action.

Held, following *Cobbett* v. *Warner*, L. R. 2 Q. B. 108, that the relief sought was substantially the same as in the former action, and that proceedings should be stayed until the costs of it were paid. *Clemons* v. *St. Andrews*, 11 M. R. 245.

IV. Of Injunction Motion.

1. Dismissing Bill.

Pending a motion for injunction the plaintiff took out a *præcipe* order to dismiss his bill.

Held, that the defendant's costs of the injunction motion were properly taxable under this order. *Jenkins* v. *Ryan*, 5 M. R. 112.

2. When refused.

Upon a motion to continue an injunction, which was refused, no order was made as to costs. Afterwards the plaintiff's bill was dismissed with costs.

Held, that the costs of the motion were taxable as costs in the cause. *Frontenac Loan Co.* v. *Morice*, 4 M. R. 439.

V. Of Proceedings against Overholding Tenant.

1. Scale of.

The costs of proceedings under the statute with reference to overholding tenants should be taxed according to the scale of proceedings upon the trial of an action in ejectment. *City of Winnipeg* v. *Guiler*, 3 M. R. 23.

2. Scale of—*Landlords and Tenants Act, R.S.M.* 1902, *c.* 93—*Summary proceedings for ejectment.*

The costs of a summary proceeding under the Landlords and Tenants Act, R.S.M. 1902, c. 93, to eject a tenant, are the costs of an action in the King's Bench and taxable on the same scale. *West Winnipeg Development Company, Landlord*, and *Smith, Tenant*, 20 M. R. 274.

VI. Scale of.

1. Amount sued for not ascertained in any way—*Superior scale.*

Plaintiff sued defendants for goods supplied, amounting to $224. There was no evidence that the articles were made or supplied at an agreed price or to show that the amount claimed was ascertained by the act of the parties.

Held, plaintiff entitled to superior scale costs. The mere rendering an account with prices stated is not ascertaining the amount by the act of the parties. *Montgomery* v. *McDonald*, 1 M. R. 232.

2. Judgment by default—*Defendant abroad.*

Upon judgment by default no judge's certificate for costs is necessary or proper. *Monkman* v. *Prittie*, 3 M. R. 684.

See also: Verdict for Amount within Jurisdiction of County Court, XI below.

VII. Separate Defences.

1. By same solicitors.

The bill alleged a partnership between the plaintiffs and the defendants A. and B.; that A. in fraud of the plaintiffs sold out the partnership property to the defendants D., E. and F.; and that the defendants, the O. Bank, had upon deposit some of the moneys of the firm. The prayer was for a rescission of the sale, a dissolution of the firm and the usual accounts.

D., E. and F. answered jointly and were held entitled to a separate bill of costs.

A., B. and the bank answered separately through the same solicitors, and were represented at the hearing by separate counsel. They were held entitled to one bill, in which might be charged the separate answers and counsel fees, and any services which related exclusively to the defence of any one defendant. *McDonald* v. *Cunningham*, 3 M. R. 39.

2. Taxation.

Held, 1. That no general rule can be laid down upon the question as to the taxation of separate bills of costs to defendants appearing by separate solicitors.

2. At the present day the Court is much more inclined than formerly to insist upon parties having the same, or a common, interest joining in their defences.

3. The rule as to joining in defences is not limited to the cases of trustee and *cestui que trust*, mortgagor and mortgagee, assignor and assignee.

4. Residences widely separated may be a reason for answering separately, but not for representation by separate counsel.

5. The question may be raised, as well upon taxation under interlocutory orders, as after decree.

A number of persons joined together and purchased property in the name of a trustee, who executed to the plaintiff a mortgage upon it to secure money borrowed. Some of the purchasers joined in a bond to the mortgagee to secure the repayment. In a suit for sale under the mortgage and for a personal order against the bondsmen, an order was made postponing the hearing and ordering the plaintiff to pay to the defendants the costs of the day. Under this order the taxing officer gave one bill of costs to A. B. and C., three defendants who had not signed the bond; one bill to D. and E., who had executed the bond; and no bill at all to F., an assignee of one of the purchasers against whom no relief was prayed other than the sale, and who had answered consenting to a sale. Upon appeal,

Held, (Affirming Dubuc, J.), That the officer had exercised a proper discretion as to A. B. C. D. and E., but that as to F., the order having directed his costs to be paid, he should have a bill taxed to him, but as he should not have answered or appeared it should be the smallest possible. *Balfour* v. *Drummond*, 5 M. R. 1.

3. Set-off of costs—*Severing defendants.*

The costs of an interlocutory proceeding were awarded to the defendants. Upon taxation one bill only was allowed to the defendants S. and M. From the taxation S. appealed, but was unsuccessful and was ordered to pay the costs to the plaintiff, but no direction was then made as to set-off.

Afterwards the costs under both orders were taxed. The Master made no apportionment between S. and M. of the costs payable to them. The plaintiff applied to set off the costs payable by S., against S.'s share of the costs payable to S. and M.

Order made without costs. *Balfour* v. *Drummond* 5 M. R. 242.

VIII. Separate Issues.

1. Action against administrator—*Plene administravit.*

To an action upon covenant and in debt against an administrator, the defendant pleaded as to $5,000, payment, and to the whole declaration certain outstanding judgments and *plene administravit praeter.*

The plaintiff succeeded upon the plea of payment and the defendant succeeded upon the other plea.

Held, (Killam, J., dissenting) affirming the decision of Taylor, J., that the plaintiff was entitled to the general costs of the action and the defendant to the costs of the issue upon which he was successful. *McArthur* v. *Macdonnell,* 3 M. R. 629.

2. Apportionment of costs when defendant succeeds on one issue.

Action for damages for trespass on the plaintiff's land or, in the alternative, for a *mandamus* directing the defendants to place matters in train to assess the compensation due to the plaintiff for the lands taken for the purposes of the defendants' railway. At the trial, the Judge held that there had been no trespass but that the plaintiff was entitled to the *mandamus* asked for.

Held, that the plaintiff was entitled to the general costs of the action, notwithstanding the finding against him on the issue of trespass. *Calvert* v. *C. N. R.,* 18 M. R. 307.

3. General verdict—*Postea for plaintiff—Costs of issues found for unsuccessful party—Costs of plaintiff entering record after defendant has entered one.*

When there is a general verdict for the plaintiff and the *postea* is for the plaintiff on the whole record, the taxing officer cannot go behind this and allow costs to the defendant for any issue upon which he may have succeeded. His only remedy is to apply to the Judge who tried the cause to amend the *postea.*

Where a defendant has entered a record and given notice of trial, the plaintiff is not entitled to the costs of also entering a record, but where the plaintiff had done so and his record had been used at the trial and the verdict entered upon it, it was held too late to object to the costs being allowed him. *Pion* v. *Romieux,* 7 M. R. 591.

IX. Solicitor Paid by Salary.

1. Right to costs from opposite party.

The defendants' attorney was a salaried officer of the Company, but by the agreement was entitled to any costs which could be taxed against opposing litigants.

Held, that the defendants were entitled to tax the usual costs against the plaintiff. *Harvey* v. *C. P. R.,* 3 M. R. 43.

2. Right to costs from opposite party.

The defendant's solicitor was a salaried officer of the corporation. The only agreement was a by-law by which the solicitor was appointed and his salary fixed. No reference was made as to costs which could be taxed against opposing litigants and evidence of the practice was excluded.

Held, that the defendants were entitled to tax the usual costs against the plaintiff. *McLennan* v. *Winnipeg,* 3 M. R. 82.

X. Under 7 & 8 Edward VII, c. 12.

1. Counterclaim—*King's Bench Act, s. 2, s-s. (c) as amended by s. 17 of c. 12 of 7 & 8 Edw. VII.*

For the purpose of the taxation of costs, a counterclaim was, before the amendment of sub-section (c) of section 2 of the King's Bench Act, made by s. 17 of c. 12 of 7 & 8 Edward VII, providing that the word "action" should include suit, set-off and counterclaim, always treated as a cross-action: *Emerson* v. *Guerin,* 12 P.R. 399, and that amendment has made no change in this respect, but was passed to make it clear that the new rule limiting the amount of costs that might be taxed, introduced by section 1 of the same statute, should apply to set-offs and counterclaims as well as to actions.

The plaintiffs, therefore, who became entitled to the costs of their action and of the defendant's counterclaim, were not limited to $300 (outside of disbursements) on both bills, but only on each separately. *Les Soeurs de la Charite* v. *Forrest,* 20 M. R. 301.

2. Hearing on further directions after reference and report—*Amendment of judgment—King's Bench Act, Rules 638, 639—Taxation—Discretion of trial*

Judge to make special order allowing full taxable costs.

At the trial of this action before MATHERS, C.J., K.B., a reference to the Master was ordered, the plaintiff was given costs up to and including the trial, further directions and costs of the reference were reserved, and the plaintiff was refused an order under section 1 of chapter 12 of 7 and 8 Edward VII, allowing him to tax full costs notwithstanding the statutory limit of $300. At the hearing on further directions before another Judge, judgment was ordered to be entered for the plaintiff for a large amount and he was awarded the subsequent costs, but no application was made for an order as to costs under said section.

Held, that, after such judgment had been drawn up and entered, the Judge before whom the action was originally tried could not make an order for the allowance under said section of costs of the reference in excess of the $300 limit which the plaintiff had already taxed under the first judgment, and that the plaintiff would have to abide by the final judgment he had entered unless he could have it amended under Rules 638 or 639 of the King's Bench Act.

Quære, whether the "trial Judge" spoken of in said section, for the purposes of such an application, is not the Judge who presided at the hearing on further directions. *Buchanan* v. *Winnipeg*, 21 M. R. 101.

3. Injunction—*Interlocutory motion or application.*

A motion for an interim injunction is an interlocutory motion or application and, although an appeal from an order granting it is taken to the Court of Appeal and there allowed with costs, such costs and all other costs of the action payable by the opposite party are limited to $300 and actual disbursements by section 1 of the Act 7 & 8 Edw. VII, c. 12.

Section 2 of the Act only applies to appeals to the Court of Appeal from the final disposition of an action or proceeding in the Court of King's Bench and therefore does not apply to an appeal from an order granting an interim injunction. *Traders Bank* v. *Wright*, 17 M. R. 695.

4. Reference to Master and further directions.

The limitation of costs provided for by section 1 of chapter 12 of 7 & 8 Edward VII applies to all costs up to and inclusive of the final determination of the action in the Court of King's Bench, and, although there has been an expensive trial followed by a reference to the Master and a hearing on further directions, the costs of all of which were given to the plaintiff and, as ordinarily taxable, would largely exceed said limit, the taxing officer could not, without such a certificate from the trial Judge as that section requires, allow the plaintiff in all more than $300 and disbursements. *Buchanan* v. *City of Winnipeg*, 21 M. R. 714.

XI. VERDICT FOR AMOUNT WITHIN JURISDICTION OF COUNTY COURT.

1. Action in King's Bench against County Court bailiff for wrongful seizure of goods—*County Courts Act, R.S.M.* 1902, *c.* 38, *s.* 43—*Order granting costs on the King's Bench scale.*

Section 43 of The County Courts Act, R.S.M. 1902, c. 38, allowing an action to be brought in the King's Bench against a County Court bailiff for (amongst other torts), wrongful seizure of goods under an execution, no matter what the amount claimed, and only depriving the plaintiff of costs in case he recovers less than $10 damages, having been, with immaterial changes, in every County Courts Act since the first (1879), is not affected by the granting to the County Courts in 1891 of jurisdiction in claims against bailiffs for torts, so that such an action can, and may properly, be brought in the King's Bench and, if the amount of damages recovered is not less than $10, although within the jurisdiction of the County Court, the trial Judge has a discretion, under chapter 12 of the statutes of 1908, to allow the plaintiff costs on the King's Bench scale and to certify to prevent the defendant from setting off any costs, which discretion will not be interfered with by the Court of Appeal.

Shillinglaw v. *Whillier*, 18 M. R. 149 followed.

Campbell v. *Joyce*, 15 W. L. R. 29, 291.

2. Certificate against set-off of costs.

Section 133, sub-section 2, of the Administration of Justice Act of 1885, as amended by 49 Vic., c. 35, s. 17, requires that a Judge must find, before he is warranted in giving a certificate to prevent a set-off of costs, that "the plaintiff had reasonable ground for believing that he had the right of withdrawing the case

from the County Court and bringing it in the Court of Queen's Bench, or that the defendant without just cause defended the same."

Held, that, for the purpose of either alternative, the onus is upon the plaintiff to bring out in evidence any fact upon which the certificate may be based, and that something more than the fact of the recovering of some sum is necessary to show that the defendant without just reason defended the action.

Without determining whether it could be said that the defendant without just reason defended, if the circumstances were such that he was without just reason for defending further than by paying money into Court,

Held, that, when the claim is unliquidated, the defendant cannot be taken to have defended without just reason, because he did not pay money into Court. *Ward* v. *Braun*, 7 M. R. 229.

3. Certificate against set-off of costs.

Where an action is brought in the Queen's Bench on a cause of action clearly within the jurisdiction of the County Court, a certificate to prevent a set-off of full Queen's Bench costs will be refused. *Macdonald* v. *Harrison*, 8 M. R. 153.

4. Construction of statutes—*Statutes relating to procedure as affecting pending litigation—Increase of jurisdiction of lower court after commencement of action in higher—Certificate for costs on King's Bench scale—King's Bench Act, Rule* 933.

A statute increasing the amount that may be sued for in a County Court is one relating to procedure and applies to pending litigation, so that a plaintiff who has recovered a verdict in a King's Bench action for an amount then within the jurisdiction of the County Court is not entitled to tax King's Bench costs without getting from the Judge a certificate under Rule 933 of the King's Bench Act, although the amount of the verdict exceeds the amount that could have been sued for in the County Court when the action was commenced.

Todd v. *Union Bank*, (1890) 6 M. R. 457, followed.

Under such circumstances, however, such certificate should be given preventing, also, any set-off of costs by the defendant. *Rosenberg* v. *Tymchorak*, 18 M. R. 319.

5. Defendant abroad—*County Court scale.*

Where upon the face of the record the action appears to be one within the competence of the County Court, the plaintiff is not, merely because the defendant resided without the Province, entitled to Queen's Bench costs. Such absence may be ground for obtaining a judge's certificate for Queen's Bench costs, but without such certificate only County Court costs can be taxed. *Cochrane Manufacturing Co.* v. *Harmer*, 3 M. R. 449.

6. Interlocutory judgment for $450, followed by verdict for $77 more—*Q. B. costs—When allowed.*

Where a plaintiff obtained an interlocutory judgment for $450, as to which the defendant did not defend the action, and afterwards a verdict for $77 more,

Held, that the plaintiff was entitled to full Queen's Bench costs.

Pion v. *Romieux*, 7 M. R. 591, commented on. *Smart* v. *Moir*, 8 M. R. 203.

7. Jurisdiction of Judge to allow counsel fee on application made after trial.

The plaintiff recovered an amount within the jurisdiction of the County Court and the trial Judge certified to prevent a set-off of costs, thus allowing the plaintiff County Court costs. The taxation of these was adjourned to permit an application to the Judge for a fiat for a counsel fee.

Held, that the authority which the County Court Judge could exercise in a like case had become vested in the trial Judge in this court, that the latter was not *functus officio* after giving his certificate at the trial and had jurisdiction to grant a fiat for a counsel fee. *Montgomery* v. *Hellyer*, 14 C. L. T. Occ. N. 356.

8. Practice.

On an application for a direction to the Master as to the scale on which the costs of an action in the Queen's Bench under the former practice should be taxed, so far as the record showed the action appeared to be within the jurisdiction of the County Court and no certificate for costs on the Queen's Bench scale had been granted by the trial Judge, but plaintiff contended that the evidence showed that the action was really one for the balance of an unsettled account exceeding in the

whole $400, and therefore beyond the jurisdiction of a County Court.

Held, that, in the absence of such a certificate, the record alone and not the evidence should be looked at, and that, under section 62 of the A. J. Act, R. S. M., c. 1, only County Court costs should be allowed to the plaintiff, and the defendant was entitled to set off the difference in his costs of defence between the Queen's Bench and County Court scales.

Miller v. *Beaver Mutual Fire Ins. Co.* (1864), 15 U. C. C. P. 75, followed. *Allan* v. *Clougher*, 12 M. R. 327.

9. Question of title to land—*Sale of growing wild hay—Breach of implied warranty of title—Action brought in King's Bench—Jurisdiction of County Court.*

Action in the King's Bench for damages for breach of an implied warranty of title on sale to the plaintiff of growing wild hay which was held to be personal and not real property. The statement of claim alleged that the defendants did not own the land or the hay. This was admitted in the statement of defence.

Held, that the title to the land was not brought in question and that, as the amount of damages recovered was only $305, the County Court had jurisdiction and the plaintiff was not entitled to a fiat for costs on the King's Bench scale. *Fredkin* v. *Glines*, 11 W. L. R. 318.

10. Scale of costs.

Action brought in the Queen's Bench for $225, for goods sold and delivered.

Held, that the action might have been brought in the County Court, and that the plaintiff was not entitled, therefore, to tax Queen's Bench costs. *Parker* v. *Nunn*, 2 M. R. 30.

XII. Witness Fees.

1. Attendance of official to produce documents which might have been proved by certified copies.

Since The Franchise Act, 1898, provides that the voters' lists used at an election of a member of the House of Commons may be proved by the production of certified copies, it is unnecessary to procure the attendance of the Clerk of the Crown in Chancery from Ottawa to produce the lists at the trial of an election petition, and the costs occasioned by procuring his attendance will not be allowed to the successful petitioner as against the respondent, but instead thereof only what the certified copies of the necessary parts of the li ts, if procured, would have cost. *Re Lisgar Election*, 14 M. R. 268.

2. Expenses of qualifying witnesses to give evidence—*King's Bench Act, Rules* 4, 963, 964.

The successful party in an action cannot have taxed to him under Rules 963 and 964 of the King's Bench Act, R.S.M. 1902, c. 40, as party and party costs, the expenses incurred in qualifying witnesses to give evidence at the trial.

Sub-section (*s*) of section 39 of the Act, which provides that, when there is any conflict between the rules of equity and common law, the former shall prevail, refers to matters of substantive law and not to matters of mere practice, and the equity rule formerly in force in England under which such expenses might have been allowed is not in force here, for by Rule 4 all practice inconsistent with the Act was abolished and, as to all matters not provided for, the practice is, as far as may be, to be regulated by analogy to the Act and Rules. *Barry* v. *Stuart*, 18 M. R. 614.

XIII. Miscellaneous Cases.

1. Action for account in equity—*Trustees—Mortgage.*

Plaintiff, being second mortgagee of certain property on which the defendants had the first mortgage, filed a bill to compel them to account for the surplus proceeds of the property which they had sold under their mortgage. Defendants admitted a surplus of $28 and offered to pay it; but the plaintiff, contending that the solicitor's costs of the sale proceedings were excessive, refused to accept this. At the hearing of the cause a decree was made with a reference to the Master to take an account, when the Master reported that the surplus payable by the defendants was $64.16, having taxed down the bill of solicitor's costs. The matter then came before the Court for the determination of the costs of the suit.

Held, that the plaintiff was liable for defendants' costs up to and including the hearing and decree, and that no subsequent costs should be allowed to either party. *Charles* v. *Jones*, 35 Ch. D. 544, followed. *Giles* v. *Hamilton Provident & Loan Society*, 10 M. R. 567.

2. Action for defamation—*Verdict for $1 damages—King's Bench Act, Rule 931 (a)—Libel Act, R.S.M., 1902, c. 97, s. 13, as amended by 9 Edw. VII., c. 30., s. 2.—7 & 8 Edw. VII, c. 12, s. 3.*

The statute 7 & 8 Edw. VII, c. 12, by section 3, in effect repeals both sub-section (a) of Rule 931 of the King's Bench Act and section 13 of The Libel Act, R.S.M. 1902, c. 97, as to the right of a plaintiff in an action of slander to costs whether he recovers substantial or only nominal damages, so that the ordering of costs is in the absolute discretion of the trial Judge.

Section 2 of chapter 30 of 9 Edw. VII, amending section 13 of The Libel Act, was passed inadvertently and without giving to section 3 of c. 12 of 7 and 8 Edw. VII. the effect it has upon a proper construction being placed upon it.

Garnett v. *Bradley*, (1878) A.C. 944, followed. *Shillinglaw* v. *Whillier*, 19 M. R. 149.

3. Answer instead of demurrer.

A bill prayed foreclosure and ejectment. The answer attacked the mortgage and claimed title in defendants. At the hearing defendants submitted to foreclosure, but contended that ejectment ought not, upon the frame of the bill, to be decreed and plaintiff did not press for it.

Held, that the plaintiff should have the costs of a simple foreclosure merely.

If a defendant answers when he might have demurred and the case goes to a hearing, no costs will be given to either party. *Eden* v. *Eden*, 6 M. R. 596.

4. Arbitration under Railway Act—*Taxation of costs—Railway Act, R.S.C. 1906, c. 37, s. 2, s-s. (5), s. 199—Arbitrator's fees—Counsel fees—Fees of expert witnesses.*

1. Under sub-section (5) of section 2 of the Railway Act, R.S.C. 1906, c. 57, interpreting the word "costs" used in section 199 of the Act, as including fees, counsel fees and expenses, the costs of an owner who succeeds in an arbitration under the Railway Act should be taxed as between solicitor and client.

Malvern Urban District v. *Malvern*, (1900) 83 L.T. 326, followed.

2. The tariff of costs prescribed for ordinary litigation may be accepted as a general guide for taxing the costs of such an arbitration; but when, in the opinion of the taxing officer, the fees fixed by that tariff are inadequate compensation for the services necessarily and reasonably rendered, he is not bound by it and should not follow it.

3. For the purposes of the taxation of such costs the arbitration began when the Company served notice upon the owner offering an amount which they were willing to pay and naming its arbitrator, and items for work done even before that date should be allowed if they were for work that would properly be costs of the arbitration if done after that date; for example, Fee perusing the order of the Railway Commissioners giving leave to expropriate, and taking instructions.

4. The owner was entitled to tax the fees paid to the arbitrators on taking up the award.

Shrewsbury v. *Wirral*, [1895] 2 Ch. 812, distinguished.

5. Counsel fees allowed by the taxing officer were reduced to $100 per day for first counsel and $75 per day for second counsel.

6. The fees actually paid to expert witnesses should not necessarily be allowed, but only fair and reasonable fees for the time occupied in attending before the arbitrators and in qualifying themselves to give evidence.

7. The costs of the taxation, including a fee of $25 for the argument before the Judge, should be borne by the Company. *Re Canadian Northern Railway and Robinson*, 17 M. R. 579.

5. Countermand of notice of trial—*Counsel fee advising on evidence—Counsel fee with brief.*

Where a plaintiff gives notice of trial and afterwards countermands within the proper time and then discontinues, the defendant may tax a counsel fee advising on the evidence, but not a counsel fee with the brief. *Union Bank of Canada* v. *Morriset*, 7 M. R. 470.

6. Defendant against co-defendant.

The bill was filed against Y. and S. to remove from the registry a conveyance from a former owner to Y. as a cloud on the title. Plaintiffs had agreed to sell to S., who declined to complete on account of the registration of the deed sought to be removed. S. allowed the bill to be noted *pro confesso* against him, but appeared at the trial, and asked for costs against his co-defendant Y., on the ground that by registering the conveyance to him the suit had been occasioned.

Held, that the appearance of S. was unnecessary, and he was not entitled to costs. *Sutherland* v. *Young*, 1 M. R. 94.

7. Discharge from imprisonment.

Held, the court has no jurisdiction to impose the payment of costs as a condition of discharge from custody. *Monkman* v. *Sinnott*, 3 M. R. 170.

Distinguished, *Cotter* v. *Osborne*, 17 M. R. 248.

8. Discontinuance.

At the trial, after the case was called, but before it was opened, the plaintiff withdrew the record and immediately afterwards took out a rule to discontinue.

Held, 1. That the defendant was entitled to tax the costs of preparing for trial and fees paid to counsel.

2 A fee to one counsel of $40. was allowed. *Polson* v. *Burke*, 5 M. R. 31.

9. Examination of Defendant — *Shortening of time to answer.*

Held, 1. Plaintiff is not entitled to the costs of an irregular examination of one defendant, to discover the address of his co-defendant, as costs in the cause.

2. Nor to the costs of an application to shorten the time for answer. *McCaffrey* v. *Rutledge*, 2 M. R. 127.

10. Examination for discovery — *King's Bench Act, Rule 932—Parties to action.*

A fiat will not be granted under Rule 932 of The King's Bench Act to tax to a plaintiff the costs of the examination of a defendant who was not a necessary or proper party to the action, although no objection on that ground was taken prior to the application for the fiat.

An insolvent debtor who has made an assignment for the benefit of his creditors is neither a necessary nor a proper party to an action by the assignee to set aside a fraudulent preference given by him.

Weise v. *Wardell*, (1874) L. R. 19 Eq. 171, and *Bank of Montreal* v. *Black*, (1894) 9 M. R. 439, followed.

Gibbons v. *Darvill*, (1888) 12 P.R. 478, distinguished. *Schwartz* v. *Winkler*, 14 M. R. 197.

11. Interpleader—*Liability of execution creditor for—Abandoning on first return of summons—Company—Liquidator.*

B. obtained a judgment against a joint stock company and placed a *fi. fa.* in the hands of the sheriff of the Eastern Judicial District. The sheriff seized certain goods, which were claimed by the Bank of British North America. The sheriff then obtained an interpleader summons. While the summons was pending, and after B. had obtained an enlargement, an order was made winding up the Company and appointing a liquidator. On the return of the summons, B. asked that the liquidator be substituted in his stead.

Held, that B. must either take an issue, or be barred and pay the costs of the claimant and the sheriff.

B. also placed a *fi. fa.* in the hands of the sheriff of the Central Judicial District, who also seized certain goods, which were claimed by A. The sheriff notified B's. solicitors, who replied advising him to interplead. On the first return of the interpleader summons, B. abandoned.

Held, that B. was not liable for costs. *Stephens* v. *Rogers*, 6 M. R. 298, and *Searle* v. *Matthews*, W. N. 1883, 176, distinguished. *Blake* v. *Manitoba Milling Co.*, 8 M. R. 427.

12. Judgment for portion of claim admitted to be due.

A plaintiff being entitled to an order to sign judgment for a portion of his claim (under section 36 of the Q. B. Act) is entitled to the costs down to that period. *McAnneary* v. *Flanagan*, 3 M. R. 47.

13. Leave to plead after demurrer overruled—*Costs, payment of, before pleading.*

Demurrer to the declaration was overruled. Defendants appealed and again failed. They then applied for leave to plead, which was granted, but only upon condition of first paying the costs of the demurrer and appeal. *Toussaint* v. *Thompson*, 5 M. R. 53.

14. Master's office, fees in—*Taxation—Counsel fees.*

In a proper case an appeal from the Master will be allowed upon the *quantum* of counsel fees.

Two fees of $100 each reduced to two of $50 each.

The Master may allow upon proceedings in his office one fee of $20, instead of the usual $1 or $2 per hour; but has no power to exceed that amount. *Rankin* v. *McKenzie*, 3 M. R. 554.

15. Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, s. 37—*Counsel fees as disbursements.*

Counsel fees not shown to have been actually paid should not on taxation of costs be treated as actual disbursements within the meaning of section 37 of the Mechanics' and Wage Earners' Lien Act, R.S.M., 1902, c. 110.

Cobban Manufacturing Co. v. *Lake Simcoe Hotel Co.*, (1903) 5 O.L.R. 447, followed. *Leibrock* v. *Adams*, 17 M. R. 575.

16 Old affidavit used on new motion.

Upon an interlocutory application, defendant refiled material used by him upon a previous application, which he had made, and which had been refused without costs. An order was granted upon the new application with costs. Upon taxation, the Master allowed the costs of preparing the old material, but, upon appeal,

Held, that such costs were improperly allowed. *Hooper* v. *Bushell*, 5 M. R. 300.

17. Partnership suit—*Costs when assets insufficient.*

Usually the costs of a partnership suit are paid out of the assets; that is what remains of the partnership property after payment of debts, including the balance due to any of the partners.

Where the assets are insufficient for the payment of costs then the deficiency must be borne by the partners in proportion to their share of the profits. *Curran* v. *Carey*, 4 M. R. 450.

18. Postponement of hearing.

Held, a trial being postponed because of the unavoidable absence of a material witness, the costs should be costs in the cause. *Vivian* v. *Wolf*, 2 M. R. 122.

19. Power of Taxing Officer.

Held, a taxing officer has power to allow or disallow affidavits used on an application, without express direction.

A motion was refused upon a technical objection, and the Master disallowed affidavits filed in answer to the motion.

His discretion was not interfered with on appeal. *Ogilvie Milling Co.* v. *Small*, 2 M. R. 120.

20. Power to award—*Certiorari*—*Quashing conviction.*

The Court has authority under its general powers to award costs against a defendant on dismissing a rule *nisi* to quash his conviction, although he has not entered into a recognizance to pay costs, if unsuccessful. *Reg.* v. *Starkey*, 7 M. R. 262.

21. Prohibition—*Practice.*

Where a party applies for prohibition without raising the question of jurisdiction in the Court below and having it decided there, if no cause be shown to the rule, he is not entitled to costs. *Massey Manufacturing Co.* v. *Hanna*, 7 M. R. 572.

22. Rival claimants to fund in Court—*Payment into Court by Trustee—Petition for payment out—Practice—Reference to the Master.*

Where there are rival claimants to a fund in Court, and each is held entitled to a portion of the money, each should bear his own costs except in so far as they have been increased by one claiming more than he was entitled to; and then any increased costs occasioned by such unfounded claim should be paid by him to the other party.

It is no objection to the petitioners' claim for costs that the Judge on an *ex parte* application ordered a reference to the Master, instead of disposing of the matter himself. *Re Hamilton Trusts*, 10 M. R. 588.

23. Setting aside order.

Plaintiff obtained an order to set aside a judgment of non-pros. upon payment of costs. The costs not having been paid, the defendant moved to rescind the order and for payment of the costs of the former application.

Held, that the former order should be rescinded, but the costs of it could not be ordered to be paid. *Bailey* v. *Fortier*, 3 M. R. 670.

24. Supplementary material on motion—*Counsel fees—Brief—Taxation.*

1. Where the material upon which a party is moving is defective, and he is allowed to amend or supply what is wanting, he cannot tax the costs of doing so.

2. The discretion of the taxing officer as to the amount of counsel fees not interfered with.

3. A second term brief allowed at the amount for which a second copy of the evidence could have been got from the shorthand writer.

4. Where the defendant succeeds on part of the issues, but the plaintiff obtains

a verdict, the defendant is entitled only to such costs as are exclusively applicable to the issues on which he succeeds. *Morris* v. *Armit*, 4 M. R. 307.

25. Winding up—*Creditors' representative—Costs of—Company.*

In Winding Up proceedings the costs of the appearance of a creditors' representative should be allowed, whenever such appearance is not clearly unnecessary, and the mere fact that the interests of the creditors and official liquidator are identical is not a sufficient reason for refusing costs. *Re Lake Winnipeg Transportation Co.*, 7 M. R. 605.

See Amendment, 4.
— Appeal from County Court, IV.
— Assignment for Benefit of Creditors, 2.
— Attachment of Goods, 3.
— Building Contract, 5.
— Chose in Action, 4.
— Contract, VII, 3; XII, 3.
— Conviction, 1.
— County Court, I, 2.
— Devolution of Estates, 1.
— Dominion Lands Act, 3.
— Ejectment, 6.
— Evidence, 13, 15.
— Examination of Judgment Debtor, 10.
— Fi. Fa. Goods, 4.
— Fraudulent Conveyance, 18.
— Garnishment, VI, 1.
— Homestead, 1.
— Injunction, I, 1; III, 4; IV, 1.
— Interpleader, I, 7; II; IX, 1.
— Libel, 3.
— Liquor License Act, 8.
— Local Option By-law, V, 1.
— Master's Office, Practice in, 1.
— Mechanic's Lien, II; VI, 2.
— Misrepresentation, II, 1.
— Mortgagor and Mortgagee, V, 3; VI, 3, 9, 11.
— Municipality, IV, 1; VIII, 4.
— Negligence, V, 4; VII, 4.
— Pleading, I, 1; III, 1.
— Practice, X, 2; XI, 3; XII, 3; XVI, 6; XX, A 1; XXVIII, 5, 13, 14, 16, 18, 21, 27, 31.
— Railways, I, 2; VII, 2.
— Real Property Act, V, 7, 9.
— Registered Judgment.
— Sale of Land for Taxes, III, 3; X, 4.
— Security for Costs, II, 1; VI, 2.
— Solicitor and Client, I, 2; II; III, 5, 6.
— Statutes, Construction of, 4.
See Summary Judgment, I, 1.
— Title to Land, 1.
— Trespass and Trover, 1.
— Trustee and Cestui Que Trust, 2.
— Vendor and Purchaser, VI, 12, 16; VII, 1.
— Verdict of Jury, 1.
— Winding-up, IV, 1, 8.

COSTS OF FORMER SUIT.

See Staying Proceedings, II.

COUNSEL FEES.

See Mechanic's Lien, VI, 2.
— Practice, XXVII, 5.

COUNTERCLAIM

1. Arising after writ issued.

A defendant cannot counterclaim in respect of a cause of action not matured before the issue of the writ.

A plea of counterclaim should show that it was payable before and at the commencement of the action.

(Over-ruling Taylor, J., Dubuc, J. dissenting.)

Sharp v. *McBurnie*, 3 M. R. 161.

2. Arising out of Jurisdiction.

Held, a defendant can only set up, by way of counterclaim or set-off, a demand for which he can bring an action.

Therefore, a cause of action which arose out of the jurisdiction cannot be set up by way of counterclaim or set-off, unless the circumstances be such as to permit of an action being brought upon it. *Canadian Bank of Commerce* v. *Northwood*, 5 M. R. 342.

See Assignment for Benefit of Creditors, 5.
— Costs, X, 1.
— County Court, I, 2, 3.
— Foreign Judgment, 4.
— Jury Trial, I, 3.
— Master and Servant, IV, 2.
— Pleading, II; VIII, 2; X, 2.
— Set-off.
— Staying Proceedings, III, 3.
— Vendor and Purchaser, II, 6.
— Warranty, 5.

COUNTY COURT.

I. Jurisdiction of.
II. Miscellaneous Cases.

I. Jurisdiction of.

1. By agreement of parties—*County Courts Act, R.S.M.* 1902, *c.* 38, *s.* 73.

It is not competent to the parties to a contract to agree to confer jurisdiction upon the County Court of any judicial division other than the one in which, under section 73 of the County Courts Act, R.S.M., 1902, c. 38, any action arising out of a breach of the contract may be brought, and, if such an action is brought in any other County Court, the Judge should refuse to try it on the ground of want of jurisdiction.

Farquharson v. *Morgan*, [1894] 1 Q. B. 552, followed.

This decision applies only to Courts created by statute and not to Courts of original jurisdiction or to the rights of parties to agree as to the jurisdiction of such last named Courts. *Manitoba Windmill Co.* v. *Vigier*, 18 M. R. 427.

2. Counterclaim—*Power to adjudicate according to equity and good conscience—Costs.*

Action upon a note given for a binding machine. Counterclaim for non-performance of an agreement to furnish repairs. By the written contract provision was made for the case of defective portions of the machine. The evidence did not support a case under the written contract, and the agent who was alleged to have made the verbal agreement had no power to do so.

Held, 1. That under Con. Stat. Man., c. 34, s. 41, authorizing, "in any case not expressly provided for," the application of "the law and the general principles of procedure or practice in the Court of Queen's Bench," the County Court had jurisdiction to consider a counterclaim sounding in damages.

2. That, the defendant having no right acknowledged by the principles of either law or equity, the judge of the County Court had no power to award him damages under the Act authorizing him "to make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience."

An appellant from the County Court succeeded in his appeal, but the principal points raised and argued by his counsel were decided against him.

Held, that there should be no costs of the appeal, or of the application to the County Judge after the trial to reverse his judgment. *O'Donohue* v. *Fraser*, 4 M. R. 469.

3. Counter claim—*Transfer to Queen's Bench—County Courts Act, R.S.M., c.* 33, *s.* 67.

A defendant in an action in the County Court who enters a defence by way of counterclaim for an amount beyond the jurisdiction of the Court without abandoning the excess is not entitled as of right to have the action transferred to the Queen's Bench, where there is nothing in the nature of the counterclaim which puts it outside the jurisdiction of the County Court except the amount.

Under section 67 of The County Courts Act, R.S.M., c. 33, the excess in amount must either be deemed to be abandoned or the counterclaim is improperly put in for the larger amount, and in neither case can the defendant be entitled to the transfer. *McIlroy* v. *McEwan*, 12 M. R. 164.

4. Defendant abroad—*Substitutional service—Title to land.*

The County Court has no jurisdiction to proceed against a defendant resident in the Island of Ceylon, either upon personal, or by directing substitutional, service.

In an action upon a covenant in a deed against encumbrances,

Semble, the title to land would be in question. *Re Ardagh*, 4 M. R. 509.

5. Equitable relief in County Courts, extent of.

County Courts in Manitoba have no jurisdiction to rectify written instruments for fraud or mistake, or to entertain an action for the recovery of money paid under the strict terms of such an instrument. The provision in section 70 of The County Courts Act, that the Judge "may make such orders, judgments or decrees thereupon as appear to him just and agreeable to equity and good conscience," applies only to orders and decrees in actions within the jurisdiction of the Court as defined by section 60, and deals only with the practice and procedure in such actions and with the manner in which the Judges are to dispose of such actions at the trial, and section 60 only gives jurisdiction in personal actions,

which constitute one of the three divisions into which civil actions maintainable in the old common law courts were divided, and the expression cannot be construed to include a claim to reform or cancel a deed for fraud or mistake.

The plaintiff had, by mistake, given the defendants a chattel mortgage for an amount larger than he really owed them.

Under threat of seizure he afterwards paid the full amount mentioned in the mortgage, and then brought this action to recover the excess.

Held, DUBUC, J., dissenting, that the County Court has no jurisdiction to entertain such an action, and a non-suit should be entered.

Foster v. *Reeves*, (1892) 2 Q.B. 255; *Ahrens* v. *McGilligat*, (1873) 23 U. C. C. P. 171, followed. *Crayston* v *Massey-Harris Co.*, 12 M. R. 95.

6. New trial—*Setting aside judgment.*

A County Court Judge under section 308 of The County Courts Act has no jurisdiction to set aside a judgment or entertain an application for a new trial or rehearing after six months from the date when the judgment or decision was pronounced or given. *Grundy* v. *Macdonald*, 11 M. R. 1.

7. Place where cause of action arose—*Prohibition.*

The defendants, by letter written from Brandon, directed to the plaintiff, who was the Registrar at Minnedosa, ordered certain abstracts of title which were mailed by plaintiff at Minnedosa, addressed to defendants at Brandon.

Plaintiff sued for his fees in the County Court at Minnedosa. The defendants defended and raised the question of jurisdiction, contending that the cause of action did not arise within the jurisdiction of the Court at Minnedosa.

WALKER, Co.C.J., gave a verdict in favor of the plaintiff. Thereupon the defendants took out a summons in the Court of Queen's Bench to restrain further proceedings, and to show cause why a writ of prohibition should not issue.

Held, that a writ of prohibition would not lie, on the ground that the cause of action arose within the jurisdiction of the County Court of Minnedosa, and the summons was dismissed with costs. *Brisebois* v. *Poudrier*, 1 M. R. 29.

8. Prohibition—*"Cause of Action."*

If the want of jurisdiction of an inferior court is apparent on the face of the proceedings, the defendant may move at any time for prohibition; but if it does not so appear he should first raise the objection in the inferior court.

"Cause of action" in The County Court Act means the whole cause of action.

An action may proceed in a court other than the one of the district in which the action arose, (1) by leave of the Judge previous to commencing the proceedings or, (2) by transfer from that district after action commenced. *Wright* v. *Arnold*, 6 M. R. 1.

9. Replevin—*Officer—Resisting officer in execution of his duty—Criminal Code*, 1892, *s.* 144—*County Courts Act, R.S.M., c.* 33, *ss.* 74, 204.

Section 204 of The County Courts Act, R.S.M., c. 33, does not authorize the issue of a writ of replevin out of the County Court of any County Court Division except that in which the goods to be replevied are situate. For the construction of the provision in that section as to the Court out of which the writ is to issue, it is proper to look at the prior enactments of which that section is a revision; and, in that light, the words "otherwise ordered" should be held to apply only to an order changing the place of trial and not to give power to order the issue of the writ out of the Court for any County Court Division other than that in which the goods to be replevied are situate.

An order of a County Court Judge for the issue of a writ of replevin out of such other County Court and the writ issued thereunder are wholly *ultra vires* and void and afford no protection to the officer attempting to execute the writ, and the owner of the goods described in the writ cannot be convicted under section 144 of The Criminal Code, 1892, for unlawfully obstructing or resisting the officer in the execution of his duty, because he by force prevented the bailiff from taking the goods under the writ.

Morse v. *James*, (1738) Willes, 122, followed.

Parsons v. *Lloyd*, (1773) 2 W. Bl. 845, and *Collett* v. *Foster*, (1857) 2 H. & N. 360, distinguished.

Per DUBUC, J., dissenting

(1) Taking sections 74 and 204 of The County Courts Act together, it should be held that a Judge has power to order the

issue of a writ of replevin out of a County Court other than that for the Division in which the goods are.

(2) Even if the writ was unauthorized it was issued by order of a Judge and appeared on its face to be perfectly regular and the bailiff was bound to execute it and the acts of the defendants constituted an unlawful resistance and obstruction to a peace officer in the execution of his duty: *Andrews* v. *Marris*, (1841) 1 Q. B. 3; *Parsons* v. *Lloyd*, *supra*; *Colclt* v. *Foster*, *supra*. *Rex* v. *Finlay*, 13 M. R. 383.

10. Transfer to King's Bench—*King's Bench Act, s. 90—Res judicata.*

1. A County Court Judge has no jurisdiction under section 90 of the King's Bench Act, R.S.M. 1902, c. 40, to transfer an action to the Court of King's Bench unless "the defence or counterclaim involves matters beyond the jurisdiction of the Court," and, when it is clear that such matters are not involved, the Court of Appeal will set aside an order allowing such transfer.

Doll v. *Howard*, (1896) 11 M. R. 21, distinguished.

2. A County Court Judge should not entertain an application for such a transfer, if it has been already refused by a Judge of the King's Bench on an application under the same section, as the matter is *res judicata*. *Town of Emerson* v. *Forrester*, 19 M. R. 665.

11. Unsettled account—*Prohibition.*

Application for prohibition to a County Court on the ground that the plaintiff's claim was part of an unsettled account exceeding in the whole $600.

Held, that it was competent, and indeed necessary, for the Judge to inquire into and decide the facts which would determine the question of jurisdiction and, as he had decided the facts in favor of jurisdiction, the Court above should not interfere by reviewing his decision, except under very exceptional circumstances.

Joseph v. *Henry*, (1850) 19 L.J.Q.B.369, and *Elston* v. *Rose*, (1868) L. R. 4 Q. B. 4, followed. *Loppky* v. *Hofley*, 12 M. R. 335.

12. Unsettled accounts—*Prohibition.*

In an action in the County Court on a promissory note for $255, dated 12th March, 1883, payable 9 months after date with interest at 8 per cent. per annum, the plaintiff claimed interest at 8 per cent. up to the time of commencing the suit in 1894, and gave credit for two payments of $50 each on account, and the total balance claimed was $334.30 after crediting the money received. The total amount of the interest claimed was $176.90.

At the trial before the County Court Judge, on objection being taken to the jurisdiction, he allowed the plaintiff to amend his claim, reducing the rate of interest charged to 6 per cent. after the maturity of the note, which brought the plaintiff's total charges for principal and interest under $400, and entered a verdict for the plaintiff.

Defendant then moved for prohibition on the ground that the action was for a balance of an unsettled account exceeding $400, and so forbidden by section 66 of The County Courts Act, R.S.M., c. 33.

Held, (KILLAM, J., dissenting) that the County Court had jurisdiction and that prohibition should be refused.

Per DUBUC, J.—The unsettled account to be investigated was less than $40 and it made no difference that there was also a claim for a liquidated balance added to this, so long as the whole amount claimed did not exceed $400.

The County Court Judge also had jurisdiction to allow the plaintiff to abandon the excess of 2 per cent. above the legal interest after the maturity of the note, and to amend his particulars accordingly.

Per BAIN, J.—The plaintiff was not bound by his particulars claiming 8 per cent. from the maturity of the note, and, as the Dominion Act respecting interest settles the rate at only 6 per cent. after maturity, the subject matter to be investigated was not really an unsettled account at all.

Per KILLAM, J.—The plaintiff may have intended to claim 8 per cent. under some separate agreement, and the charges for interest should be added to the amount of principal so as to ascertain the total amount of the claim to be investigated, and as this exceeded $400 and was partly unsettled, and all arose out of one cause of action, the County Court had no jurisdiction, nor could the County Court Judge, by any amendment, bring the action within his jurisdiction. *McMain* v. *Obee*, 10 M. R. 391.

13. Waiver of objection—*Unsettled account.*

A question of jurisdiction in a County Court was first raised by the dispute note, but when the case came on to be tried the defendant allowed the trial to go on with-

out any mention of the matter, and it was only after the case had been fully tried that objection to the jurisdiction was taken.

Held, that, by so doing, defendant waived any objection to the jurisdiction. The objection should have been taken at the opening of the case. *Friesen* v. *Smith*, 8 M. R. 131.

See COSTS, XI, 9.
— EXAMINATION OF JUDGMENT DEBTOR, 7.
— GARNISHMENT, III.
— LIQUOR LICENSE ACT, 9.
— MUNICIPALITY, IV, 1.
— NEGLIGENCE, VII, 4.
— PROHIBITION, I.

II. MISCELLANEOUS CASES.

1. Appeal—*Replevin—Leave to appeal—Special grounds.*

In an action of replevin in a County Court in which a mother and daughter were defendants, the plaintiff swore to an agreement by which the daughter hired of the plaintiff a sewing machine and agreed to pay therefor $5 a month until $75 should be paid, and in default the plaintiff was to be at liberty to retake the machine, and until full payment no title was to pass. He also gave evidence that he had been paid $5 and no more. The defendants both gave evidence, but did not dispute these statements of the plaintiff. The only defence raised was a set-off of the mother on an old claim against the plaintiff, alleged to have been assigned to the daughter. The jury found a verdict for the defendants. On motion the County Court Judge set aside this verdict and entered one for the plaintiff.

The defendants then appealed to the Court of Queen's Bench under 54 Vic., c. 2, s. 21, (M. 1891), as substituted for section 243 of The County Courts Act, 1887.

Held, that there is no appeal in an action of replevin because the question in issue is not a money demand, but one of title to goods.

The defendants then applied to the County Court Judge for leave to appeal to the Court of Queen's Bench under section 244 of The County Courts Act, 1887, and leave was refused.

They then applied to a Judge of the Court of Queen's Bench for leave to appeal.

Held, that the Judge of the County Court exceeded his powers in entering a verdict for the plaintiff instead of granting a new trial; but that, under the circumstances, the defendants having little means and no apparent defence, it was in the interests of justice not to allow the litigation to be prolonged, and the leave was refused. *Haddock* v. *Russell*, 8 M. R. 25.

2. Change of venue—*Discretion of—Judge—Practice.*

Under section 77 of The County Courts Act R. S. M. 1902, c. 38, which provides that it shall be competent for the Judge, upon what shall appear to him to be sufficient grounds, to order the transfer of a suit from one judicial division to another, the Judge has an absolute discretion to order such transfer if the grounds shown appear to him sufficient, and it is not even necessary for him to have affidavits before him showing such grounds, but he may act upon statements of the parties or their counsel, and the practice in the King's Bench relating to applications for change of venue does not apply in County Court actions. *Sawyer & Massey Co.* v. *Massey Harris Co.*, 18 M. R. 409.

3. County Courts Act, R. S. M. 1902, c. 38, ss. 107, 109, 168, 192—*Evidence of judgment of County Court—Seizure under execution—Adjournment of sale—Sale for inadequate price—Expiry of writ before sale.*

1. Under section 103 (now 107) of The County Courts Act the entry of a judgment in the procedure book constitutes the judgment, and, as, by section 162 (now 168), County Courts are Courts of Record, the production of the procedure book showing the entry proves the judgment and it is not necessary to prove the cause of action upon which such judgment was founded to show that the Court had jurisdiction over it.

2. A judgment should not be held to be invalid because the Clerk of the Court had omitted to make, in the procedure book, the note required by section 105 (now 109) to be entered, in a case where some defendants have been served and some have not, that the plaintiff had requested him to strike out the names of the defendants that had not been served and to amend the style of the action accordingly, and it should not, after a great lapse of time, the judgment standing unreversed, be presumed, from the absence of such a note in

the procedure book, that the plaintiff had not given such instructions.

3. It was a sufficient seizure of the buildings, which were locked up and unoccupied and in a small remote settlement, for the bailiff to put up notices that he had seized them and of the date of sale without leaving any person in possession or attempting to remove them.

4. As a solicitor, at the time of the sale, on the defendant's behalf gave the bailiff a written notice forbidding the sale, the debtor must be presumed to have known of the day finally fixed for the sale, and the fact that no notices of the several adjournments of the sale had been given by the bailiff became unimportant.

5 Although the price obtained at the sale was only a small percentage of the cost of the buildings, the circumstances were such that it did not appear that any greater price could have been got, and the bailiff was not bound to apply to the Judge under section 185 (now 192) for power to sell, as that section is only for the bailiff's protection and his not acting under it should not affect the validity of the sale.

6. If a seizure is made while the writ of execution is in force, a sale may be made after the writ has expired. *Dixon* v. *Mackay*, 21 M. R. 762.

4. Interpleader—*Plaintiff acting for bailiff in seizing under execution—Onus of proof at trial of interpleader issue—Estoppel —Sale of Goods Act, R. S. M.* 1902, *c.* 152, *s.* 20, *R.* 3.

Under sections 82 and 83 of The County Courts Act, R.S.M. 1902, c. 38, before the amendment of s. 83 at the session of 1904, a seizure under execution made by the execution creditor himself under the authority of the bailiff was not unlawful or invalid (RICHARDS, J., dissenting.)

Where wood piles were seized under execution and notices of the seizure attached to the different piles, and a person living near asked by the plaintiff to look after them,and a week or two later the bailiff came and placed the same person in charge, it was held that there was no abandonment of the seizure.

Held, also, per DUBUC, C.J.,

1. The property in the wood never passed to the claimant; for, although he had contracted to buy it from the judgment debtor and had paid him $100 on account, it had not been measured and was not to be measured until brought by railway to Carman, and, therefore, under Rule 3 of section 20 of the Sale of Goods Act, R.S.M. 1902, c. 152, the property had not passed when the seizure was made.

2. The plaintiff was not estopped from enforcing his execution by the fact that he had issued and served upon the claimant a garnishee order attaching any money that might have been due by the claimant to the judgment debtor on a sale of the wood.

PERDUE, J.—Under section 290 of the Act, it was not open to the claimant, on the trial of the interpleader issue, to raise any objections as to the validity of the seizure or as to its abandonment, but he could only take advantage of any such matter by making an application to set aside the interpleader summons. On the hearing of the latter the Judge should confine the investigation to the question whether the goods seized were the property of the claimant as against the execution creditor, and the onus rests on the claimant, in the first instance, of proving his ownership.

The claimant failed to establish his right to the wood as the provisions of the Bills of Sale and Chattel Mortgage Act had not been complied with.

Per RICHARDS, J. (1) In the County Courts there is no preliminary application by the bailiff upon notice to the claimant for an order for the trial of an interpleader issue, but the bailiff takes out a summons and serves it on the claimant who is thereby required to attend at a certain time and place and "establish his claim" to the property seized; and it would be productive of great hardship and expense to the claimant if he were precluded, on the hearing of the summons, from raising any question as to the validity of the seizure and had to make a special application beforehand to the Judge in order to get the interpleader summons set aside. He should, therefore, be allowed to raise the question at the trial of the interpleader issue.

(2) The claimant had a contract for the purchase of the wood sufficient to satisfy the Statute of Frauds, and that gave him an interest in the property that entitled him to claim it as against the plaintiff, whose seizure was invalid as he had no right to act as his own bailiff, and who, for that reason, was only a trespasser. *Huxtable* v. *Conn, Simpson, claimant*, 14 M. R. 713.

5. Judicial discretion—*Adjournment of trial by Judge mero motu to admit further evidence.*

When, at the trial of an action in a County Court, both parties have put in all their evidence, and the Judge comes to a conclusion as to the proper verdict to be rendered, it is not a proper exercise of judicial discretion under section 131 of The County Courts Act, R.S.M. 1902, c. 38, for him of his own motion, without an application by either party or any suggestion as to further evidence being available, to postpone the giving of judgment to allow either party to put in further evidence; and the Court of Appeal will, in such a case, order that judgment be entered in the County Court in accordance with the conclusion arrived at by the trial Judge, subject to all rights of parties as if it had been so entered originally by his direction. *Tett* v. *Bailey Supply Co.*, 19 M. R. 250.

6. Pleading in County Court action—*County Courts Act, R.S.M.* 1902, *c.* 38, *ss.* 95, 114, 116, 118—*Proof of presentment of promissory note payable at a particular place when dispute note does not deny presentment.*

Although a promissory note is payable at a particular place, it is not necessary, in an action upon it in a County Court, to allege presentment at that place in the particulars of claim, or to prove presentment at the trial unless the defendant has expressly set up non-presentment in his dispute note. *Teague* v. *Scoular*, 17 M. R. 593.

7. Service of writ by person other than Sheriff—*Appearance—Waiver.*

Held, (WOOD, C.J., dissenting), affirming the decision of MCKEAGNEY, J., that the service of a County Court writ by a person other than a sheriff, constable or bailiff, as required by 36 Vic., c. 6, s. 6, s-s 1 (Man.), is a nullity, and is not waived by appearance to the writ. *Mercer* v. *McLean*, T. W. 95.

See AMENDMENT, 4.
— APPEAL FROM ORDER, 5.
— CAPIAS, 5.
— EXECUTORS AND ADMINISTRATORS, 1.
— FI. FA. GOODS, 1.
— JURISDICTION, 2.
— MISREPRESENTATION, IV, 2.
— MONEY HAD AND RECEIVED.
— NUL TIEL RECORD, 1, 2.
— PLEADING, I, 2.
— PRACTICE, XX, B, 6; XXVII, 1.
See PROHIBITION, I.
— REGISTERED JUDGMENTS, 2, 5, 7.
— STATUTES, CONSTRUCTION OF, 4.
— STAYING PROCEEDINGS, III, 2.

COUNTY COURT ACTION.

See CONTRACT, VII, 2.

COUNTY COURT CLERK.

See GARNISHMENT, I, 10; V, 5.

COUNTY COURT JUDGMENT.

See RETROSPECTIVE STATUTES.
— STATUTES, CONSTRUCTION OF, 5.

COUPONS.

See MUNICIPALITY, VIII, 1.

COURT OF REVISION.

See SALE OF LAND FOR TAXES, IX, 1.

COVENANTS

1. In assignment of Mortgage—*Covenant that mortgage assigned is a good and valid security—Warranty of title—"Security," meaning of.*

A covenant in an assignment of a mortgage of land that the mortgage is a good and valid security does not mean that the mortgagor had a good title to the land, or that the mortgage is effective to charge the land with payment of the mortgage moneys, but only that the instrument is a genuine one duly executed by the mortgagor, and that there is nothing to affect its validity as a binding contract between the mortgagor and mortgagee for payment of the debt assigned.

Meaning of the word "security" discussed. *McEwan* v. *Henderson*, 10 M. R. 503.

2. Construction of covenant—*Landlord and tenant—Breach—Forfeiture.*

The defendant demised a flour mill and a saw mill to the plaintiff and one C., the former representing and covenanting that he was a skillful miller, and C. that he was a skilled engineer. C. assigned to the plaintiff all his interest in the term. There were various other covenants, including one to take precautions against fire; but the only one in connection with which forfeiture was mentioned was the following: "That no intoxicating liquor . . . . shall be kept, used or drunk in the building or near the same by the lessees, their employees, etc. The said mills shall be run by no person under the influence of liquor, and that under forfeiture of this lease." The plaintiff did not work the flour mill regularly. C. was not a competent engineer. Some sacks had been negligently left on the boiler and had caught fire. Intoxicating liquor had been brought on the premises by a stranger, and the plaintiff and his men had drunk some.

Held, that there was no forfeiture of the lease for breach of covenants in the absence of express agreement for such forfeiture.

Held, that forfeiture for breach of the covenant respecting intoxicating liquor, upon the true construction thereof, would accrue only upon the mill being run by some one under the influence of liquor, and not upon liquor being kept, used or drunk on the premises.

Held, also, that if there had been a right of re-entry in the defendant for forfeiture, that would have been a complete answer to the charge of forcible entry, though the defendant might have been liable to an indictment. *Comber* v. *LeMay*, T. W., 35.

3. Construction of covenants—*Whether dependent or independent.*

An agreement for sale contained the following provision; "The said party of the second part, for himself, ... doth covenant, promise and agree to and with the said party of the first part, his heirs, ... that he or they shall and will well and truly pay or cause to be paid the said party of the first part . . . . . the said sum of money, together with the interest thereon, on the days and times and manner above mentioned, and also shall and will pay and discharge all taxes, ... *In consideration whereof and on payment of the said sum of money with interest* as aforesaid and in manner aforesaid, the said party of the first part doth covenant, promise and agree to and with the said party of the second part to *convey and assure* or *cause to be conveyed and assured* to the said party of the second part, his heirs and assigns . . . . . the said pieces or parcels of land . . . . . and shall and will suffer and permit the said party of the second part, his heirs and assigns, to occupy and enjoy the same until default," &c. Then followed a provision that time was to be of the essence of the contract and that, unless the payments were punctually made, the plaintiff might re-enter on and re-sell the lands and all payments made were to be forfeited.

Held, that the covenants were independent covenants.

The purchaser was bound, on his covenant, to pay the purchase money before the vendor could be compelled, on his covenant, to convey the property agreed to be sold.

The intention of the parties, as far as it can be gathered from the wording of the covenant, must be given the greatest weight. *Macarthur* v. *Leckie*, 9 M. R. 110.

4. Dependent or independent—*Building contract—Payment by instalments.*

To a declaration in an action for breach of a contract contained in an indenture, whereby the defendant covenanted to build a house for the plaintiffs, the defendant pleaded that the plaintiffs had by withholding the monthly payment due to the defendant, contrary to the terms of the indenture, and by their architect refusing the monthly estimates, etc., hindered and obstructed the defendant in the prosecution of the work, and thereby, of their own wrong, caused the breach complained of.

Held, on demurrer to the pleas, that the performance of the defendant's covenants was dependent upon the performance of the plaintiffs', and therefore the pleas were a sufficient answer to the declaration. *Hoskins* v. *Barber*, T W., 264.

5. Dependent or independent.

C. agreed with the city of W. to provide electric lights for street lighting in W., and up to the expiration of six years to keep them lighted from darkness to daylight. In consideration thereof the city agreed to make monthly payments; that

C. should have the sole right and privilege of lighting the streets, and that the city should not contract with any other person, for lighting the streets, during the said period.

Held, 1. That the agreements were dependent, and that if C., failed to perform his part of the agreement, and the city made a new contract with other persons, he could not recover against the city.

2. Whether covenants are dependent, or independent, is determined by the intention of the parties and the application of common sense to each particular case. *Manitoba Electric Light and Power Co.* v. *City of Winnipeg*, 2 M. R. 177.

6. Excuse for non-performance.

To a declaration on a covenant contained in a lease, whereby the defendant covenanted to erect a fence around the demised premises during the term, the defendant pleaded that he was always ready and willing, etc., but the plaintiff wrongfully deprived him of, and converted to his own use, a quantity of lumber with which the defendant intended to fence, etc., whereby the defendant was prevented from performing his said covenant.

Held, on demurrer, bad. *Clarke* v. *Murray*, T. W., 119.

7. Implied covenant to pay debt.

Defendant executed under seal an instrument creating a charge on land in favor of plaintiffs for the price of an engine bought from them and interest to be paid by specified instalments. The instrument further provided that, if notes should be given by defendant for the several instalments, such notes should not be in satisfaction of the said lien and charge, but the same should continue until payment in full of such notes and any renewals thereof. It contained no covenant or promise to pay the debt.

Held, that a covenant or promise to pay the debt could not be implied from the terms of the deed, and that plaintiffs could not have a personal order for payment of the debt based upon anything contained in it.

Waterous Engine Works Co. v. *Wilson*, (1896) 11 M.R. 287, distinguished. *Abell Engine & Machine Works Co.* v. *Harms*, 16 M.R. 546.

8. Joint, or joint and several covenants—*Reformation—Corroborative evidence of claim against estate.*

1. The following covenant is joint, and not joint and several: "The said mortgagors do hereby for themselves, their heirs, executors and administrators, covenant, promise and agree, to and with the said mortgagee, his heirs and assigns, in manner following, that is to say, that they, their heirs, executors, administrators, or some or one of them will pay or cause to be paid," etc.

2. Every contract for a joint loan is, in equity, to be deemed as to the parties borrowing, a joint and several contract, whether the transaction be of a mercantile nature or not.

3. Discussion as to when a Court of Equity will reform a joint bond, making it joint and several.

4. Independently of any statute the practice of the Court of Equity requires that the evidence of a person seeking to establish a claim against the estate of a deceased person should be corroborated. *Rankin* v. *McKenzie*, 3 M.R. 323.

9. Liability of covenantor to covenantee after assignment of covenant.

B. assigned to C. an agreement by A. to purchase land from B. and to pay for same by instalments. B. also guaranteed to C. the payment by A. of the several instalments.

Held, distinguishing *Cullin* v. *Rinn*, (1887) 5 M. R. 8, that B. could not recover from A. the amount of an instalment over due under the agreement, though he might ordinarily have asked the Court to compel A. to pay C. under *Ascherson* v. *Tredegar Dry Dock Co.*, [1909] 2 Ch. 40. *Sutton* v. *Hinch*, 19 M. R. 705.

See Banks and Banking, 8.
— Chattel Mortgage, V, 6.
— Contract, XV, 14.
— Indemnity, 1, 2, 3.
— Mortgagor and Mortgagee, III, 3; VI, 6, 10, 15.
— Pleading, XI, 1.
— Real Property Limitation Act, 1.
— Restraint of Trade.
— Right of Action.

COVENANTS—WHETHER DEPENDENT OR INDEPENDENT.

See Contract, XV, 6.
— Covenants, 3, 4, 5.

CREDITOR HOLDING SECURITY.

See STATUTES, CONSTRUCTION OF, 3.

CRIMINAL COMBINATION.

See CONSPIRACY IN RESTRAINT OF TRADE 2.

CRIMINAL INFORMATION

Foundation for libel—*Public officer.* *Held*, a criminal information will not be granted except in case of a libel on a person in authority, in respect of the duties pertaining to his office.

2. Where the libel was directed against M., who was at the time Attorney-General, but alleged improper conduct upon his part when he was a Judge, an information was refused.

3. The applicant for a criminal information must rely wholly upon the Court for redress, and must come there entirely free from blame.

4. Where there is a foundation for a libel, though it fall far short of justification, an information will not be granted. *Reg* v. *Biggs*, 2 M.R. 18.

CRIMINAL LAW.

I. AMENDMENT OF INFORMATION.

1. After lapse of time limited by statute—*Liquor License Act, R.S.M.* 1902, *c.* 101, *s.* 168—*Certiorari.*

An information under section 168 of The Liquor License Act, R.S.M. 1902, c. 101, for furnishing liquor to an interdict discloses no offence unless it alleges that the defendant had knowledge of the interdiction, and it becomes a new information if amended by introducing such allegation.

If such amendment is not made within thirty days from the date of the offence, the magistrate has no jurisdiction to proceed on the amended information, and a conviction based upon it will be quashed on proceedings by *certiorari*. *Rex* v. *Guertin*, 19 M.R. 33.

2. After lapse of time limited by statute—*Liquor License Act, R.S.M.* 1902, *c.* 101, *amendments of* 1908, *c.* 26, *s.* 30, *s-s.* 32—*Consuming liquor in local option district—Prohibition.*

An information under sub-section 32 of section 30 of 7 & 8 Edward VII, amending The Liquor License Act, R.S.M. 1902, c. 101, for consuming liquor in territory under a local option by-law discloses no offence unless it alleges that the liquor was purchased and received from some person other than a licensee under said section 30, and it becomes a new information if amended by adding such allegation.

If such amendment is not made within thirty days from the date of the offence, the magistrate has no jurisdiction to proceed under the information and prohibition should issue to prevent him from doing so.

Rex v. *Guertin*, 19 M.R. 33, 15 C.C.C., 251, followed. *Rex* v. *Speed*, 20 M.R. 33.

II. ASSAULT OCCASIONING ACTUAL BODILY HARM.

1. Evidence—*Competency of accused to give evidence on his own behalf—Statement by party assaulted—Admissibility of.*

On an indictment for assault and battery occasioning actual bodily harm the accused, at the close of the evidence for the prosecution, asked to be sworn and examined as a witness on his own behalf. The trial Judge held that he was not in a position to find that the only case apparently made out was one of common assault or assault and battery, and refused to allow the evidence. On a Crown case reserved,

Held, that the accused was not a competent witness on his own behalf under R. S. C., c. 174, s. 216.

Reg. v. *Bonter*, 30 U. C. C. P. 19, and *Reg.* v. *Richardson*, 46 U. C. R. 375, followed.

A statement by the man that was assaulted, made immediately after the assault and in the presence of the accused, is admissible in evidence. *Reg.* v. *Drain*, 8 M. R. 535.

2. Summary trial of indictable offence—*Jurisdiction of police magistrate.*

Although a police magistrate, who is not one of those officials to whom power is given by sub-section 2 of section 777 of the Criminal Code, as amended in 1909, to try summarily offences which might, in Ontario, be tried at a Court of General Sessions of the Peace, has power, under paragraph (*c*) of section 773, to try summarily a charge of unlawfully wounding or inflicting grievous bodily harm, an offence which is indictable under section 274, yet he has no power to try summarily a charge of assault occasioning actual bodily harm, as that offence, made indictable by section 295, although of a similar and less serious nature, is not one of those specified in section 773. *Rex* v *Sharpe*, 20 M. R. 555.

III. Bawdy House.

1. Evidence necessary to prove offence—*Criminal Code*, s. 195.

1. A woman, living by herself in a house, cannot be convicted of keeping a bawdy house therein, unless it is shown that one or more other women resort to it for purposes of prostitution.

Rex v. *Young*, (1902) 14 M. R. 58, and *Singleton* v. *Ellison*, [1895] 1 Q.B. 607, followed.

2. In order to support a conviction for keeping a bawdy house, it is not sufficient to show the bad reputation of the house and its inmates and that men resorted to it in the night, but actual proof must be given of some act or acts of prostitution, though definite proof of one may be sufficient.

Regina v. *St. Clair*, (1900) 3 Can. Cr. Cas. at p. 557, followed.

3. Section 195 of the Criminal Code, 1892, does not change the law, as it was before the Code, as to the essential ingredients of the offence of keeping a bawdy house, and is intended merely to define the nature of the premises within which a bawdy house may be kept, and not to state what acts constitute such keeping. See *Stephens' Digest of Criminal Law*, Art. 201. *Rex* v. *Osberg*, 15 M. R. 147.

2. Excessive fine—*Summary trial of indictable offence.*

A conviction adjudging a fine of $100 without any mention of costs upon the summary trial before a police magistrate of a charge of keeping a common bawdy house sufficiently complies with section 781 of the Criminal Code, which provides that the magistrate may condemn the party convicted to pay a fine not exceeding, with the costs of the case, one hundred dollars.

Regina v. *Cyr*, (1887) 12 P.R. 24, distinguished. *Rex* v. *Stark*, 21 M. R. 345.

3. One female—*Criminal Code, ss.* 195 198, 783.

A female cannot be convicted of unlawfully keeping a bawdy house, under section 198 or section 783 of the Criminal Code, unless it is shown that the house or room in question is occupied or resorted to by more than one female for purposes of prostitution.

Singleton v. *Ellison*, [1895] 1 Q. B. 607, followed. *Rex* v. *Young*, 14 M. R. 58.

IV. Carnal Knowledge of Girl under Age.

1. Indictment—*Form of*—*Felonious assault.*

Indictment that the prisoner "in and upon one J., a girl under the age of fourteen years . . . feloniously did make an assault, and her, the said J., then and there feloniously did unlawfully and carnally know and abuse," &c.

The evidence shewed that the girl consented to whatever the prisoner did to her, and that she was under fourteen years of age. The jury found a general verdict of guilty.

Held, that there was only one offence charged in the indictment, viz., the statutory felony of carnally knowing a girl under fourteen years of age, and that the prisoner was properly convicted.

Held, also, that the words "feloniously did make an assault" charged no offence known to the law and should be treated as mere aggravation or surplusage. *Reg.* v. *Chisholm*, 7 M. R. 613. *Jacobs' case.*

2. Indictment for—*Conviction under 53 Vic., c 37, s. 13, s-s. 4, for indecent assault—Consent.*

In fictment that the prisoner "in and upon one R, a girl under the age of fourteen years . . . feloniously did make an assault, and her, the said R., then and there feloniously did unlawfully and carnally know and abuse," &c.

The evidence showed that the girl was between the ages of eight and nine years, and that the acts complained of were committed with her tacit consent, which consent was not procured by force or intimidation. The jury acquitted the prisoner of the felony charged, but under 53 Vic., c. 37, s. 13, s-s. 4 & s. 7 (D. 1890), found him guilty of indecent assault.

Held, that the conviction was right.

Held, also, that the indictment, by virtue of section 13, sub-section 4, included and carried with it a charge of indecent assault within the meaning of section 7 of said Act, and that the consent of the girl was no bar to a conviction for indecent assault. *Reg.* v. *Brice*, 7 M. R. 627.

V. Demanding Money with Menaces.

1. Letter demanding money.

R. S. C. c. 173, s. 1., provides that "Every one who sends, . . . knowing the contents thereof, any letter or writing, demanding of any person with menaces, and without any reasonable or probable cause, any property, chattel, money, ... is guilty of a felony," &c.

Held, (Killam, J., *dubitante*), that a letter sent by the prisoners to a tavern keeper demanding a sum of money, and threatening in default of payment to bring a prosecution under The Liquor License Act, was not a menace within the meaning of the above section.

Held, also, (Killam, J., *dubitante*), that the test is whether the menace was such as a firm and prudent man might and ought to have resisted.

Rex v. *Southerton*, 6 East, 126, followed. *Reg.* v. *McDonald and Vanderberg*, 8 M.R 491.

2. With intent to steal—*Criminal Code, s.* 404.

The prisoner was convicted under section 404 of the Criminal Code, 1892, of having demanded money of the prosecutor with menaces with intent to steal the same, and a case was reserved for the opinion of the Court on the question, whether the evidence was sufficient to prove the crime charged.

The prisoner had demanded $75 from the prosecutor under threat of having him prosecuted for an infraction of The Liquor License Act.

Held, that any menace or threat that comes within the sense of the word menace in its ordinary meaning, proved to have been made with the intent to steal the thing demanded, would bring the case within section 404, and that it need not be one necessarily of a character to excite alarm, but it would be sufficient if it were such as would be likely to affect any man in a sound and healthy state of mind; and the question, whether there was the intention to steal the money demanded, is one of fact and not of law.

Conviction affirmed, Killam, J., dissenting.

Reg. v. *Smith*, (1849) 4 Cox C. C. 42; *Reg.* v. *Robertson*, (1864) L. & C. 483; *Reg.* v. *Tomlinson*, (1895) 18 Cox C. C. 75, followed.

Reg. v. *McDonald*, (1892) 8 M. R. 491, and *Rex* v. *Southerton*, (1805) 6 East, 126, doubted. *Reg.* v. *Gibbons*, 12 M. R. 154.

VI. Evidence.

1. Confessions.

The p isoner being suspected of having been guilty of the murder of one John Gordon but not under arrest, detectives were employed who associated with him, worked themselves into his confidence and, by representing to him that they were members of an organized gang of criminals, engaged in profitable operations, induced him to seek for admission to their ranks. They then intimated to him that he must satisfy them that he was qualified for such admission by showing that he had committed some crime of a serious nature, whereupon, according to the evidence, he claimed that he had killed Gordon as the result of an altercation. The detectives were not peace officers, no charge was then pending against the prisoner, nor did he know that the detectives were such.

Held, that an inducement held out to an accused person in consequence of which he makes a confession must be one having relation to the charge against him, and must be held out by a person in authority, in order to render evidence of the confession inadmissible; that both these grounds of objection were wanting in this case, and that, therefore, the evi-

dence of the confession was rightly received. *Rex* v. *Todd*, 13 M. R. 364.

2. Confession obtained by trick—*Conversation with person who represents himself as having been sent by prisoner's counsel, admissibility of—Evidence of persons who overhear such conversation.*

1. Statements made by a prisoner in a cell to a person whom he reasonably supposed to be an agent sent by his counsel to interview him regarding the defence are as much privileged as would be statements made to the counsel himself.

2. Where persons concealed themselves outside the cell in a position to overhear such statements in pursuance of a scheme previously planned, the interview should be treated as one with several persons who had fraudulently adopted the character of the counsel's representatives, and the cloak of privilege should be applied to what was heard by the listeners without, as well as the one within, the cell. *Rex* v. *Chaney*, 17 M.R. 467.

3. Deposition, admissibility of—*Canada Evidence Act*, 1893, *s.* 5—*Identity.*

At the trial of the prisoner, an official stenographer from the Province of Quebec verified the deposition of John S. Douglas 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 that he was the same man.

Held, (1) following *Reg.* v. *Coote*, L.R. 4 P.C., 599, and *Reg.* v. *Connolly*, 25 O.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.

(2) 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. *Reg.* v. *Douglas*, 11 M.R. 401.

4. Of similar acts at another time—*Criminal Code*, 1892, *ss.* 354, 611—*Indictment—Date of commission of alleged offence—Judge's charge to jury—Fraudulent removal of goods.*

The accused were convicted by the jury at the trial on a count for concealing certain household goods for the purpose of defrauding the insurance company by which they had been insured by representing that they had been destroyed by fire and collecting the insurance money upon them, also on a count which alleged a removal of said goods on or about the 11th day of September, 1900, for a like fraudulent purpose. Both counts were framed under section 354 of the Criminal Code, 1892. Evidence was given at the trial showing the removal of some of the goods in question on the 13th of August, 1900, and of others on the 11th of September, and, in his charge to the jury the trial Judge did not distinguish between the goods removed on 13th August and those removed on 11th September, but left the case to them in such a way that they could convict on both counts or on either of them as to both sets of goods.

In stating a case, the Judge certified that, in his opinion, the evidence of the removal of goods on the 13th of August materially influenced the verdict of the jury.

Held, that the conviction of the accused on the count for concealment was right and should be affirmed, but that, although the evidence of the removal in August was probably admissible for the purpose of showing a criminal intent in the September removal, yet the conviction for the removal should be set aside on the ground of misdirection by the Judge in telling the jury that they could convict for the removal in August, as the trial might not have been a fair one. *Rex* v. *Hurst*, 13 M.R. 584.

5. Theft—*Second trial—Testimony of jurymen at first trial as to condition of exhibit when in jury room.*

The rule of law forbidding the disclosure of what took place in the jury room at the trial will not prevent a juryman at a trial which proved abortive from giving evidence at a second trial before another jury as to the condition of an exhibit when examined in the jury room at the first trial, for example, to show that there were at that time barley ends in a purse which the prosecutor identified as one which had been stolen from him after he had been engaged in threshing barley and which was, after the theft, found in the possession of the accused, who had claimed it to be his own.

Woodward v. *Leavett*, 107 Mass. 453, and *Am. & Eng. Encyc. of Law*, vol. 11, p. 546, referred to.

Rex v. *Ross*, 15 W.L.R. 17, 17 Can. Cr. Cas. 278.

6. Withdrawing case from jury—*Criminal Code, ss.* 744, 746.

The prisoner was tried before a Judge without a jury and convicted of having stolen a purse containing $3.50 in money from the person of Mrs. D. whilst attending the Exhibition, at Winnipeg, on 12th July, 1899.

The evidence showed that Mrs. D. entered the grounds with a number of others, having in her pocket the purse containing the money; that she stopped in a crowd to watch something that attracted attention; that there was a commotion in the crowd during which the prisoner pushed her or was pushed against her; that, just as this occurred, a constable saw the prisoner putting his hand in a fold of her dress which he took to be the situation of her pocket; that the purse was missed within a few minutes afterwards; and that the prisoner, being arrested after an interval, had upon him money in bills and silver, some of which were of the denominations of the money in Mrs. D.'s purse, but none of which could be identified as having been hers.

Counsel for the prisoner requested the trial Judge to reserve a case for the opinion of the Full Court upon the question whether there was sufficient evidence to have warranted the leaving of the case to a jury, if a jury had been sitting. This being refused, the prisoner, with the consent of the Attorney-General, applied for and obtained leave to appeal under section 744 of The Criminal Code.

Held, that the evidence did not raise more than a mere suspicion against the prisoner and was not sufficient in law to warrant a conviction, and that the prisoner should be discharged. *Reg.* v. *Winslow*, 12 M.R. 649.

VII. Indictment or Information, Sufficiency of.

1. Identity with information—*Quashing.*

The Court can entertain a motion to quash an indictment at any time.

An indictment (within R. S. C. c. 174, s. 140), need not follow the exact language of the information. That section does not prevent the finding of any indictment founded upon the facts disclosed in the depositions. *Reg.* v. *Howes*, 5 M.R. 339.

2. Charge of doing an unlawful act—*Criminal Code, s.* 517.

In drawing an information, or indictment, under section 517 of the Criminal Code, it is not sufficient to allege that the accused "did unlawfully, in a manner likely to cause danger to valuable property without endangering life, or person, *do an unlawful act*" without giving some particulars showing in what the alleged unlawful act consisted and such an information, or indictment, will be bad as not disclosing any offence.

A person undergoing imprisonment following a conviction worded in the same way will be entitled to be discharged upon *habeas corpus*. *Rex* v. *Porte*, 18 M.R. 222.

VIII. Lottery.

1. Bonds with chances of winning prizes—*Criminal Code, s.* 236.

The accused had made sales of certain securities called "Bon Panama," which had originally been issued in Paris, France, in 1889, by the Panama Canal Company under the authority of the laws of France. These bonds promised the repayment of 400 francs in the year 1988, and carried with them the chances of getting prizes varying in amount from 500,000 francs to 1,000 francs given to the holders of the lucky numbers by drawings to take place at frequent intervals during the life of the bonds. The accused, in canvassing purchasers of the bonds, held out as an inducement the chance of winning one of these prizes, and the belief that there was such a chance influenced the purchasers in paying the price which they gave for the bonds.

Held, that the accused was rightly convicted of selling lottery tickets contrary to section 236 of the Criminal Code. *Rex* v. *Picard*, 17 M. R. 343.

2. Disposing of property by a mode of chance.

The defendant was convicted before a P. M. of an offence under R. S. C., c. 159, s. 2, which prohibits the "selling or offering for sale of any lot, card, ticket or other means or device for selling or otherwise disposing of any property real or personal by lots, tickets or any mode of chance whatsoever."

His *modus operandi* was as follows: He held a kind of concert in the street and having gathered an audience he proceeded to sell boxes of what he called "Parker's Pacific Pens." Before selling the pens, he placed in an empty box 100 envelopes, each containing a $1 bill, 10 envelopes with a $5 bill in each, 5 envelopes with a $10 bill in each, and one envelope with a $50 bill, making altogether $250 in 116 envelopes He also placed in the box 116 envelopes containing only blank pieces of paper. Every person paying one dollar for one box of pens was entitled to draw one envelope, and persons paying $5 for a box of pens could draw eight envelopes; but he would not take more than $5 from any one person. If the $50 bill was drawn before two-thirds of the pens were sold, he would put another $50 bill in the envelope and 50 envelopes with blank papers. He said he did not sell the envelopes; that he would not take $20 for one of them, but that he sold the pens and distributed the money to advertise the pens.

Held, following *Regina* v. *Freeman*, 18 O. R. 524, that the conviction was right. *Regina* v. *Dodd*, 4 O. R. 390, and *Regina* v. *Jamieson*, 7 O. R. 149, distinguished. *Reg.* v. *Parker*, 9 M. R. 203.

3. Winning of prize dependent partly on skill—*Device to evade the law against lotteries—Criminal Code, s.* 205.

Upon a case reserved for the opinion of the Court as to whether the interposition of a condition that the winner of a prize in a lottery should shoot a turkey at fifty yards in five shots, or, if a lady, that she could choose a substitute to shoot for her, would prevent a conviction under section 205 of the Criminal Code, 1892, it was stated that the evidence showed that any person could easily shoot a turkey under the circumstances.

Held, that it was a question for the jury whether the making of that condition was intended as requiring a real contest of skill, or merely as a device for covering up a scheme for disposing of the property by lot, that the verdict of guilty involved a finding that it was merely a device, that the evidence set out in the case justified that finding and that the conviction should be affirmed. *Reg.* v. *Johnson*, 14 M. R. 27.

IX. Manslaughter.

1. Negligence causing death—*Corporation.*

The defendant company was indicted, under sections 213 and 220 of The Criminal Code, 1892, for negligence in maintaining machinery in a condition dangerous to life, resulting in the death of one of its employees.

There was also a count for manslaughter.

Defendant demurred to the indictment.

Held, that, notwithstanding s-s (t) of s. 3 of the Code, by virtue of which sections 213 and 220 generally apply to corporations as well as individuals, an indictment would not lie against corporation for manslaughter; and, even if a corporation were indicted and convicted of such an offence, there was no provision of law under which any punishment could be imposed.

The punishment for manslaughter being imprisonment for life under section 236 of the Code, section 958 did not apply and a fine could not be imposed in lieu of imprisonment. The general provision of section 639 that, in case of the conviction of a corporation, the Court "may award such judgment and take such other and subsequent proceedings to enforce the same as are applicable to convictions against corporations," could not be interpreted so as to affect or modify the positive enactment of section 236. *Reg.* v. *Great West Laundry Company*, 13 M. R. 66.

2. Peace officer shooting at fugitive offender—*Arrest without warrant—Shopbreaking—Criminal Code*, 1906, *ss.* 30, 41, 461—*Reasonable and probable cause a question for the jury to decide.*

1. The question whether a peace officer, under section 30 of The Criminal Code, on reasonable and probable grounds, believed that an offence for which the offender might be arrested without a warrant had been committed and whether the officer, on reasonable and probable grounds, believed that a fugitive had committed that offence, is one for the jury and not for the Judge to decide.

2. If a person, with intent to steal something out of a shop or store, opens a door leading into it by lifting the latch or turning the knob and then enters the store, although during business hours, for the purpose of carrying out his intention, he may be convicted of shop breaking under section 461 of the Code.

3. When a peace officer, pursuing a fugitive whom he had a right to arrest without a warrant, found that the fugitive was, in his opinion, likely to escape for

the time being owing to superior speed, it is a question for the jury, on the trial of the officer for manslaughter in killing the fugitive by a shot from his revolver intended only to wound and so stop his flight, whether, under all the circumstances, the officer was justified under section 41 of the Code in such shooting in order to prevent the escape of such fugitive, or whether such escape could not have been prevented by reasonable means in a less violent manner.

See the text for the proper charge to the jury in such a case. *Rex* v. *Smith*, 17 M. R. 282.

X. Obstructing or Resisting.

1. Obstructing clergyman at Divine service—*No offence unless clergyman rightfully officiating and lawfully appointed—Property in church building erected by congregation of one religious body, when majority afterwards decides to join another religious body—Indictment, sufficiency of.*

1. An indictment, under section 171 of The Criminal Code, for unlawfully obstructing or preventing a clergyman or minister by threats or force in or from celebrating Divine service or otherwise officiating in any church, chapel, &c., is sufficient without an allegation that the clergyman or minister obstructed was, at the time of the offence, in lawful charge of the church, chapel, &c.

2. To support a prosecution under that section, however, it must be proved at the trial that the clergyman or minister obstructed was, at the time of the alleged offence, either the lawful incumbent of the church or was holding service with the permission of the lawful authorities of the church.

3. A church building erected by a congregation of one religious body remains the property of those who adhere to that body, although a majority of the congregation afterwards decides to join another religious body and assumes to appoint a clergyman or priest to hold services in the church, and those who are opposed to such appointment may lawfully prevent or obstruct the person so appointed from officiating in the church.

Attorney General v. *Christie*, (1867) 13 Gr. 495; *Attorney General* v. *Murdoch*, (1849), 7 Ha. 444, and *Free Church of Scotland* v. *Overtoun*, [1904] A.C. 515, followed. *Rex* v. *Wasyl Kapij*, 15 M. R. 110.

2. Resi ting a peace officer in the execution of his duty.

When a person is charged before a magistrate or two justices of the peace with resisting and obstructing a peace officer in the lawful performance of his duty, the magistrate or justices should observe the directions of section 786 of The Criminal Code and obtain the consent of the accused before proceeding to try the case summarily, notwithstanding that section 144 provides that everyone is "liable on summary conviction before two justices of the peace to six months' imprisonment with hard labor, or to a fine of one hundred dollars, who resists or wilfully obstructs any peace officer in the execution of his duty," etc.

Such offence is practically the same as is referred to in sub-section *e* of section 783 of the Code, and the charge can only be heard in a summary way subject to the provisions of section 786. *Reg.* v. *Crossen*, 12 M.R. 571.

3. Obstructing Sheriff's officer—*Writs of fi. fa.—Erroneous statement therein of date of judgment—Validity of—Irregularity—Amendment—Sheriff—Duty of.*

The prisoner was convicted under an indictment charging him with unlawfully and wilfully obstructing a sheriff's officer in the execution of three writs of *fi. fa.* It was stated in each of the writs that the judgment upon which it was issued had been entered up on 25th February, 1892. The judgments were in fact entered up on 3rd February, 1887. Upon this point the trial Judge reserved a case for the opinion of the Court of Queen's Bench.

Held, that where a writ is delivered to a sheriff in proper form, and on its face regular, he is bound to execute it. That the error was merely an irregularity which might be amended, and that the prisoner was rightly convicted. *Reg.* v. *Monkman*, 8 M.R. 509.

4. Obstruction of street—*By-law prohibiting persons from standing in groups on streets or sidewalks so as to cause obstruction to their free use by foot passengers.*

A conviction under a by-law of a municipality providing that "no persons shall stand in groups * * * * on any of the streets or sidewalks in said city, so as to cause any obstruction to the free use of said streets and sidewalks by foot passengers," will be sustained upon evidence that the occupation of the street by the defendants was such as would of

necessity hinder, delay or impede the progress of any foot passenger who attempted to pass along, and it is not necessary to show that some person was actually obstructed. To obstruct is not necessarily to render impassable, and there may be obstruction, although the whole width of the street is not occupied by the crowd. *Re Bettsworth*, 11 W.L.R. 649.

See COUNTY COURT, I, 9.

XI. SPEEDY TRIAL BY JUDGE WITHOUT JURY.

1. Adding counts t indictment—*Criminal Code*, 1892, *s.* 773.

When an accused person elects to take his trial before a Judge without a jury on the charge upon which he was committed, or to answer which he was bound over to take his trial under section 601 of The Criminal Code, 1892, leave should not be granted, under section 773 of the Code, for the addition to the indictment of new or other charges for offences substantially different, unless the accused elects to be tried on such charges also by a judge without a jury.

Rex v. *Carriere*, (1902) 14 M. R. 52, followed. *Rex* v. *Douglas*, 16 M. R. 345.

2. Preferring indictment for charge different from that in warrant of commitment.

Held, that, notwithstanding the provisions of section 773 of The Criminal Code, 1892, a Judge should not, against the wish of a prisoner, give his consent, at the trial before him without a jury which the prisoner has elected to take, to any charge being preferred in the indictment unless it is clear that, while it may be more formally or differently expressed, it is substantially the same charge as the one on which he was committed for trial. *Rex* v. *Carriere*, 14 M. R. 52.

3. Right to elect for speedy trial after true bill found by grand jury.

The right of an accused person, bound over by the magistrate at the preliminary hearing to appear and take his trial at the assizes, to elect, under section 825 of The Criminal Code, to be tried by a Judge without a jury,may be exercised even after the finding of a true bill by the grand jury on an indictment upon the same charge preferred by the Crown at the next assizes, if such election is made before plea to the indictment.

King v. *Komiensky*, (1903) 6 Can. Cr. Cas. 524, distinguished. *Rex* v. *Thompson*, *Rex* v. *Foulkes*, 17 M. R. 608.

XII. SUMMARY CONVICTION.

1. Distress and imprisonment in default of fine—*Certiorari*—*Practice.*

A statute permitted punishment by imprisonment or penalty, or both. It also provided that, where a fine is imposed and not paid, a warrant of distress may issue, and after a return, if not sufficient goods, the defendant may be committed to gaol. It also provided that no conviction should be quashed for want of form or should be moved by *certiorari* into any superior court. A conviction under this statute directed the payment of a fine and in default of payment a distress, and if no goods then imprisonment.

Held, that, as there was jurisdiction to award distress and imprisonment, the conviction was not bad, although by it the jurisdiction was prematurely exercised—such award at that time was surplusage only.

A fiat for a writ of *certiorari* should not issue, as of course, if the justice do not appear upon notice of an application for a summons that it should issue.

Notwithstanding the statutory provision a *certiorari* may issue where the justice has no jurisdiction. *Reg.* v. *Galbraith*, 6. M. R. 14.

2. Statement of offence.

Under a by-law of the Village of Carman, providing that all pool rooms in the village should be closed from 8.30 p.m. every Saturday until 7 a.m. of the following Monday and should remain closed on every other day from 10 p.m. until 6 a.m. on the following day, the defendant was convicted for that "he did refuse to close a pool room occupied by him in the Village of Carman after the hour of half-past eight, contrary to the by-law of the Village in that behalf."

Held, that the conviction was bad and should be quashed on the following grounds:—

1. It did not state that the pool room had been kept open after half-past eight *in the afternoon*.

2. It did not state that it was on a Saturday or Sunday the offence was committed; for, if it was not Saturday or Sunday, the pool room might have been lawfully kept open until ten o'clock p.m.

3. The conviction did not give the date when the offence had been committed and, for all that it stated, it might have been before the by-law came into operation, or more than six months before the information was laid. *Re Fisher and the Village of Carman*, 15 M.R. 475.

3. Unnecessary recitals in conviction—*Adjournment of hearing in absence of accused.*

1. A conviction in the form prescribed by The Criminal Code will not be held bad because it also contains recitals showing certain adjournments of the hearing before the justice, but not showing that no adjournment had been made for a longer period than the eight days allowed by section 857, sub-section 1, of The Criminal Code, although more than three months had elapsed from the commencement to the end of the proceedings.

It is not necessarily to be inferred from the statement of certain facts, which were not required to be stated, that other circumstances necessary to the jurisdiction of the magistrate did not exist.

2. The hearing before a justice trying a person for an offence punishable on summary conviction may be adjourned from time to time under section 853 of the Code, although the accused be not present, provided the adjournments are made in the presence and hearing of those parties, solicitors or agents who are in fact present. *Proctor* v. *Parker*, 12 M.R. 528.

XIII. Summary Trial of Indictable Offence.

1. Appeals from magistrates.

The first clause of section 808 of The Criminal Code, 1892, should be read as if it were framed thus: "The provisions of this Act relating to preliminary inquiries before justices, except as mentioned in sections 804 and 805, and the provisions of part LVIII, shall not apply to any proceedings under this part," and, so construed, it prevents an appeal from the decision of a police magistrate on a summary trial under part LV of the Code.

Held, accordingly, that a *mandamus* to compel a magistrate to take a recognizance on an appeal from a conviction for theft under section 783, sub-section (*a*), of the Code, should be refused. *Reg.* v. *Egan*, 11 M.R. 134.

2. Information to be given prisoner by magistrate when offering election as to mode of trial—*New trial.*

A police magistrate proceeding, under section 778 of the Criminal Code, to offer a prisoner charged with an offence, for which he cannot be tried summarily without his consent, his choice as to the mode of trial, should give the prisoner all the information set forth in paragraph (b) of sub-section 2 of that section as re-enacted by 8 & 9 Edw. VII, c. 9, and, if he omits to inform the prisoner that he has the option "to remain in custody or under bail, as the Court decides, to be tried in the ordinary way by the Court having criminal jurisdiction," he does not acquire jurisdiction to try the prisoner summarily, although he consents thereto, and a conviction following will be quashed as made without jurisdiction.

King v. *Walsh*, 7 O. L. R. 149, followed.

Prisoner not discharged, but ordered to be brought again before the magistrate for the taking of proceedings *de novo*. *Rex* v. *Howell*, 19 M.R. 317.

3. Jurisdiction of police magistrate—*Common gaming house—Excessive fine—Amending conviction—Criminal Code, ss. 773, 774, 777, 781, 1124—Certiorari.*

1. A police magistrate, though he belongs to the class of officials designated in section 777 of The Criminal Code who may try summarily, with the consent of the accused, a great number of serious indictable offences, can only try summarily *without his consent* a person charged with the indictable offence of keeping a common gaming house under the powers conferred by sections 773 and 774, as re-enacted by chapter 9 of 8 & 9 Edward VII, and section 781 limits the amount of the fine upon conviction in such a case to $100, including costs.

2. A conviction imposing a fine exceeding $100 in such a case cannot be amended, under section 1124 of the Code, and should be quashed on *certiorari*, as that section only applies to summary convictions under part XV of the Code, notwithstanding that that section was, in the revision of 1906, taken out of the Summary Convictions part of the Code, where it formerly stood as section 889, and placed in the part headed "Extraordinary Remedies." *Reg.* v. *Randolph*, (1900) 4 Can. Cr. Cas. 165, followed. *Rex* v. *Shing*, 20 M. R. 214.

4. Magistrate's clerk addressing the accused for the Magistrate.

1. Section 785 of the Criminal Code, 1892, as re-enacted by 63 & 64 Vict., c. 46, gives to the Police Magistrate of a city or

town power to impose the same punishment for a common assault as could be imposed upon a person convicted on an indictment, when he has decided to treat it as an indictable offence and is proceeding under the summary trials part of the Code.

2. The magistrate may ask the question provided for by section 786 of the Code through the mouth of his clerk. *Rex* v. *Ridehaugh*, 14 M.R. 434.

5. Offer of election made by Magistrate's clerk for him—*Warrant of commitmen*—*Criminal Code, s.* 1121.

1. The offer of the magistrate to a prisoner of his right to elect for a summary trial under section 778 of the Criminal Code may be made through the magistrate's clerk speaking for him.

Rex v. *Ridehaugh*, (1903) 14 M. R. 434 followed.

2. On the application of a prisoner undergoing sentence imposed by a police magistrate, after conviction on summary trial of an indictable offence, for a *habeas corpus*, on the ground that the warrant of commitment does not show that the prisoner consented to be tried summarily, the Judge may look at the conviction if it is before him, and, if the conviction shows such consent, section 1121 of the Code applies and the warrant should be held good.

Reg. v. *Sears*, (1897) 17 C.L.T. 124, distinguished. *Rex* v. *Barnes*, 21 M.R. 357.

6. Previous conviction—*Grading sentence within maximum provided*—*Appeal against excessive sentence.*

1. When a prisoner is convicted, on a summary trial before a police magistrate, of theft, he cannot be sentenced, under sub-section 2 of section 386 of the Criminal Code, to more than seven years' imprisonment, although he has been previously convicted of theft, unless such previous conviction has been charged in the information by analogy to section 851 and proved in accordance with section 963, and, where in such a case a greater punishment is inflicted, the Court of Appeal, upon an application under sub-section 2 of section 1016 of the Code, will set aside the sentence and pass what it considers a proper sentence.

Quære, whether the procedure provided in the Code permits of inserting charges of previous convictions in an information leading up to the preliminary hearing of a charge of an indictable offence.

2. When a previous conviction is not charged in the indictment or information, neither a judge nor a magistrate has any right to ask a prisoner, after conviction, whether he has been previously convicted or not, either with the view of ascertaining whether the prisoner is liable to any increased punishment in such case, or with the view of determining what the proper sentence, within the ordinary maximum provided by the statute in the particular case, should be.

Semble, previous convictions cannot be in any way considered in passing sentence unless they have been charged in the indictment or information. *Rex* v. *Edwards*, 17 M. R. 288.

(This has not been followed in subsequent cases) Ed.

7. Taking the evidence in shorthand—*Certiorari.*

1. The Criminal Code contains no provision as to how the evidence of witnesses at the summary trial of an indictable offence shall be taken down, and a conviction entered by the magistrate will not be quashed on *certiorari* because the evidence was taken down by a shorthand reporter.

King v. *Klein*, (1909) 16 Can. Cr. Cas. 503, approved.

2. Section 793, providing that the magistrate shall transmit the depositions of the witnesses to the proper officer, does not, by inference, require that the depositions must be taken in longhand by the magistrate himself. *Rex* v. *Bond*, 21 M. R. 366.

XIV. Trial Before Jury.

1. Juror not understanding English—*Mistrial.*

The fact that one of the jury sworn to try the prisoner did not thoroughly understand the English language is no ground, after trial and conviction, for holding that there has been a mistrial, or for granting a new trial.

It is too late to challenge a juror after he has been sworn, even if the ground for challenge was not known at the time.

Ignorance of the English language would not in this Province be a ground of challenge of a juror.

The provisions of section 746 of The Criminal Code respecting the granting of a new trial, when it is imperative, and

when discretionary, explained. *Reg.* v. *Earl*, 10 M. R. 303.

2. Postponement of trial—*Cancelling postponement and proceeding with trial.*

The Judge at the assizes may, after postponing till the next assizes the trial of a person accused of murder on account of the absence of a witness, order the trial to be proceeded with at the same assizes if the witness is produced. *Rex* v. *Redd*, 21 M. R. 785.

3. Right of Crown Counsel to reply when no witnesses called for defence.

Under section 944 of the Criminal Code, notwithstanding the proviso at the end that the right of reply shall be always allowed to the Attorney General or Solicitor General or to any counsel acting on behalf of either of them, when no witnesses are examined for the defence, the practice on the trial of a civil action should be followed, and counsel for the prosecution should address the jury first, counsel for the defence having the right to reply.

Reg. v. *Le Blanc*, 13 C. L. T. Occ. N. 441. 6 Can. Cr. Cas. 348.

4. Right to be tried by jurors skilled in the language of the defence—*Challenge to array—Demurrer—Case reserved—Writ of error—Ultra vires—Constitutional law.*

The prisoner, having pleaded to an indictment for unlawfully wounding with intent to maim, demanded a jury composed for the one-half at least of persons skilled in the language of the defence—that language being the French language. The statutes of Manitoba did not provide for the summoning of such jurors, and there were not sufficient jurors on the panel so skilled. The prisoner then challenged the array of jurors on that ground. The Crown demurred, and judgment was given allowing the demurrer by the judge presiding at the assize. The learned judge then reserved a case for the consideration of the Court for Crown cases reserved.

Held, 1. That a challenge to the array of jurors is a question of law arising on the trial, which may be reserved within the meaning of R. S. C., c. 174, s. 259, but

2. (DUBUC, J., dissenting) That, judgment having been given on the demurrer, it had become a matter of record and the question could not be reserved, a writ of error being the proper remedy.

The case was, therefore, directed to be quashed.

Reg. v. *Faderman*, 14 Jur. 377, and *Reg.* v. *O'Rourke*, 32 U. C. C. P. 388, considered and commented on.

Per DUBUC, J.—The jury, when empanelled and sworn, become a part of the constitution of the Court, but the selecting and summoning of them are matters of criminal procedure, over which the Parliament of Canada has exclusive jurisdiction.

Per DUBUC, J., also—Sec. 167 of The Criminal Procedure Act, R. S. C., c. 174, is *intra vires* of the Parliament of Canada, and in this Province a prisoner, if he so desires, is entitled to be tried by a jury composed for the one half at least of persons skilled in the language of the defence, if that language is the French or English language. *Reg.* v. *Plante*, 7 M. R. 537.

XV. VAGRANCY.

1. Gaming—*Living by means of—Findings of fact by magistrate—Evidence—Sufficiency of.*

H. was convicted before a police magistrate and sentenced to a term of imprisonment under R. S. C., 1886, c. 157, s. 8, upon a charge of having no peaceable profession or calling to maintain himself by, but who, for the most part, supported himself by gaming, and of being a loose, idle or disorderly person, and a vagrant.

On an application for a writ of *habeas corpus*,

Held, that the weight to be given to the evidence it was the function of the magistrate to decide, and the Court could only search the evidence, ascertain what points might possibly be found in favour of the prosecution, and consider whether, if the magistrate found all of these against the accused, there was reasonable ground for inferring that the accused was guilty of the crime charged.

Held, also, that, although the case was exceedingly weak, the Court could not say that upon no view of the evidence was it possible for the magistrate to make the inferences necessary to support the information, and the application was, therefore, refused.

Held, also, that it is clearly quite an insufficient compliance with the statute for the prosecution to shew merely that an accused party has no apparent occupation or calling, other than gaming, and that he gambles frequently and habitually. *Reg.* v. *Herman*, 8 M. R. 330.

2. Gaming—*Living by means of—Evidence—Sufficiency of.*

R. S. C., c. 157, s. 8, provides that: "All persons who, ... (*k*) have no peaceable profession or calling to maintain themselves by, but who do, for the most part, support themselves by gaming, ... are loose, idle or disorderly persons, or vagrants, within the meaning of this section. 2. Every loose, idle or disorderly person, or vagrant shall, upon summary conviction . . . . . be deemed guilty of a misdemeanor, and shall be liable," etc.

D. was convicted before a police magistrate under above section and sentenced to imprisonment.

On an application for a writ of *habeas corpus*,

Held, that, to support such a conviction, there must be evidence of four distinct propositions: (1) That the accused had no peaceable profession or calling to support himself by; (2) That he practised gaming; (3) That, from this practice, he derived some substantial profits; (4) That these profits constituted the larger portion of his means of support; and, there being no reasonable evidence to warrant a finding of either the third or fourth proposition, it could not be assumed that because of the want of a visible occupation, and of the accused being greatly addicted to gambling, the latter contributed mainly to his support.

The prisoner was discharged. *Reg.* v. *Davidson*, 8 M. R. 325.

3. Gaming—*Living by means of—Sufficiency of evidence—Habeas corpus—Criminal Code, s.* 238 (*l*).

The prisoner was convicted under paragraph (l) of section 238 of the Criminal Code for that, having no peaceable profession or calling to maintain himself by, he for the most part supported himself by gaming and was thereby a loose, idle and disorderly person and a vagrant.

There was evidence that, although he was a carpenter by trade, he had not been working at it or any other trade for about seven months prior to his arrest, that he had been making money by taking a rake-off from men resorting to his house who gambled there and that he had not only paid his rent for several months back but had also repaid $25 of borrowed money during that period and had supported himself and family in some way.

Held, that the magistrate was justified in finding that the prisoner had for the most part supported himself by gaming, and that the prisoner was not entitled to be discharged upon *habeas corpus*. *Rex* v. *Kolotyla*, 21 M. R. 197.

4. Prostitute not giving a satisfactory account of herself—*Criminal Code, section* 238 (*i*)—*Habeas corpus.*

An information under paragraph (*i*) of section 238 of the Criminal Code charging the accused with being a common prostitute or night walker not giving a satisfactory account of herself, and being thereby a loose, idle and disorderly person and a vagrant, is not sufficient without also alleging that she has been asked to give an account of herself, and no criminal offence is stated without such allegation.

A conviction on a plea of guilty to such a charge does not sufficiently disclose any criminal offence and the accused will be entitled to be released upon *habeas corpus* from imprisonment under a sentence following such conviction.

Reg. v. *Levecque*, (1871) 30 U. C. R. 509, and *Rex* v. *Harris*, (1908) 13 Can. Crim. Cas. 393, followed. *Rex* v. *Pepper*, 19 M. R. 209.

XVI. Warrant of Commitment.

1. Defects.

Under 31 & 32 Vic., c. 30, one justice may sign a warrant of commitment.

A warrant may be partly written and partly printed.

A warrant was addressed to the keeper of the common gaol at the City of Winnipeg, instead of to the keeper of the common gaol of the Eastern Judicial District.

Held, sufficient.

The commitment stated the offence as follows: "On or about the 4th day of May, 1886, did embezzle the sum of $104, being the property of the Dominion Express Company."

Held, insufficient. *Reg.* v. *Holden*, 3 M. R. 579.

2. Defective Warrant.

A warrant of commitment must direct the gaoler to receive and retain the prisoner, otherwise it will be quashed. *Reg* v. *Barnes*, 4 M. R. 448.

3. Gaming house — *Poker* — *Playing cards.*

Held, 1. That keeping a gaming house is an indictable offence at common law.

2. That the cards, &c., referred to in section 3 of 38 Vic., c. 41, must be such as

are ordinarily used in playing an unlawful game.

3. That a commitment for unlawfully keeping a common gaming house sufficiently describes an offence, so that the party committed cannot be discharged on the ground of there being any defect on the face of the commitment in merely thus describing the offence.

4. That "poker" is not in itself an unlawful game.

5. That a commitment cannot be quashed where the magistrate had such evidence before him as would warrant him in committing. *Reg.* v. *Shaw*, 4 M. R. 404.

4. Jurisdiction of Indian agent—*Indian Act, s.* 117; 53 *Vic. c.* 29, *s.* 9 (*D*); *and* 57-8 *Vic., c.* 32, *s.* 8 (*D*).

A warrant of commitment signed by an Indian agent, under the provisions of The Indian Act, must clearly show that the agent had jurisdiction at the place where the offence was committed; and, although by s. 8 of c. 32 of 57-8 Vic. (D), substituted for s. 117 of The Indian Act, the agent would have jurisdiction all over Manitoba, there is no ground for assuming that the offence was committed in Manitoba when no place is specified.

Such a warrant could only be supported under s. 108, s-s 2, of The Indian Act or section 886 or 889 of The Criminal Code, 1892, or amended if a proper conviction were shown.

The prisoner was in custody under a warrant defective in this respect, and offered some evidence to show that the conviction was equally defective.

Held, that a writ of *habeas corpus* should be issued to enable him to apply for his release. *Reg.* v. *Kennedy*, 10 M. R. 338.

5. Substitution of corrected commitment.

Prisoner had been committed under a warrant which was defective. Subsequent to the service on the jailor of a writ of *habeas corpus* he received another warrant of commitment which was regular.

Held, that the second warrant of commitment was valid, and sufficient to detain the prisoner in custody. *Reg.* v. *House*, 2 M. R. 58.

6. Substitution of valid for defective conviction and commitment—*Summary conviction.*

The prisoner was convicted under subsection (b) of section 177 of The Criminal Code, 1892, for an indecent exposure of his person and sentenced to three months imprisonment. Neither the conviction nor the warrant of commitment stated, although the evidence tended to show, that the act had been done wilfully. He then applied for a writ of *habeas corpus*.

Held, per MATHERS, J., following *Re Plunkett*, (1895) 1 Can. Cr. Ca. 365, that the prosecution should be permitted, on the hearing of the application, to substitute a new conviction and warrant containing the omitted word: and, the substitution having been made, that the application shohld be refused, but without costs.

Held, also, by the Full Court, that no appeal to the Full Court lies in this Province from the decision of a single Judge refusing a *habeas corpus* application, though a prisoner may make successive applications for the writ to one Judge after another, or he may make a direct application to the Court *in banc*.

Ex parte Alice Woodhall, (1888) 20 Q. B. D. 832, referred to. *Rex* v. *Barre*, 15 M. R. 420.

XVII. MISCELLANEOUS CASES.

1. Appeal in criminal cases—*Questions of law not arising upon the record —Refusal to reserve a case—Writ of error.*

G. was indicted for "assault with intent to murder." At the trial certain evidence was tendered for the Crown, which the prisoner's counsel objected to as inadmissible. The evidence was admitted, and the prisoner's counsel then applied to have a case reserved. The learned judge refused the application. The prisoner obtained a writ of error.

Held, that a writ of error does not lie upon such refusal, and that section 266 of The Criminal Procedure Act of Canada is a restriction, and not an enlargement, of the common law scope of writs of error. *Reg.* v. *Gilboy*, 7 M. R. 54.

2. Arrest without warrant—*Detention of prisoner.*

1. A peace officer who arrests a person, charged with obtaining goods by false pretences with intent to defraud, on a request by telegram from another Province of Canada, where the offence is alleged to have been committed, may justify the arrest and detention of his prisoner under either section 22 or section 552, s-s. 2, of

the Criminal Code by alleging, (a) that the prisoner has actually committed such offence or, (b) that he, the peace officer, on reasonable and probable grounds, believes that the prisoner committed the offence charged.

2. Section 22 of the Code operates, not merely to protect the officer from civil or criminal proceedings, but also to authorize the arrest and make it lawful; and it applies, not only when the arrest could be made by any person without a warrant, but also to cases in which a peace officer only may so arrest.

3. Paragraph (a) at the end of subsection 7, section 552 of the Code, applies only to cases coming solely within subsection 7, and it is not necessary in other cases to bring the person arrested before a justice of the peace before noon of the day following the arrest. *Reg.* v. *Cloutier*, 12 M. R. 183.

3. Bail for prisoner committed to trial for murder—*Justifiable homicide—Self defence.*

When the depositions taken at the preliminary hearing of a charge of murder clearly show that the deceased died by the hand of the prisoner and are such as to justify his commitment for trial and sufficient to establish a case to go to the jury, bail should be refused, although it also appears from the depositions that the prisoner might be able to convince the jury at the trial that his act was done in self defence.

Rex v. *Greenacre*, (1837) 8 C. & P. 594; *Rex* v. *Blythe*, (1909) 19 O. L. R. 386, and *Queen* v. *Mullady*, (1868) 4 P. R. 314, followed. *Rex* v. *Monvoisin*, 20 M. R. 568.

4. Duplicity—*Commitment—Two offences in same charge.*

The charge against the prisoner, who was brought up on a *habeas corpus*, was "for keeping a bawdy house for the resort of prostitutes in the City of Winnipeg." "Keeping a bawdy house" is in itself a substantive offence, so is "keeping a house for the resort of prostitutes."

Held, nevertheless, that there was but one offence charged, and that the commitment was good. *Reg.* v. *McKenzie*, 2 M. R. 168.

5. Forgery of one of several signatures—*Interested witness.*

A joint and several bond was executed by the prisoner under an assumed name for a fraudulent purpose. There was no proof whether the other signatures had been forged or not.

Held, that an indictment that the prisoner had forged the bond was sustained.

The bond was executed in order to obtain a marriage license. It having been obtained, a form of marriage before a person without authority to celebrate marriage was gone through.

Held, that the issuer of the license was not an incompetent witness as a person interested or supposed to be interested.

Per DUBUC, J.—Neither was the woman incompetent as a witness. *Reg.* v. *Deegan*, 6 M. R. 81.

6. Fraud in concealing one's own goods.

Under s. 354 of The Criminal Code (1892), which declares that every one is guilty of an indictable offence who, for any fraudulent purpose, takes, obtains, removes or conceals anything capable of being stolen, the prisoner was convicted on the charge that he had concealed a quantity of his own goods capable of being stolen, for the purpose of defrauding the insurance companies which had insured the goods, and leading the companies to believe that the goods had been destroyed by a fire which had previously taken place.

In a case reserved for the opinion of the Court as to whether such conviction was proper, the Judge at the trial found as a fact that the prisoner had concealed the goods with the intent and purpose of obtaining from the insurance companies their value and also keeping the goods for himself, but it did not appear by the case stated whether the prisoner had actually made any claim under the policies or not.

Held, that the prisoner was properly convicted, and also that, although the goods were his own goods, thay came within the meaning of the expression "things capable of being stolen." *Reg.* v. *Goldstaub*, 10 M. R. 497.

7. Conviction for playing or looking on in a common gaming house—*Charging offence in the alternative—Amendment of conviction—Joinder of several persons charged with offence—Criminal law—Criminal Code, ss.* 229, 725, 985, 986, 1124.

1. Section 725 of The Criminal Code, which permits the statement in an information or conviction that an offence has been committed in different modes, &c.,

does not apply so as to warrant a conviction under section 229 for *playing or looking on* while others are playing in a common gaming house, as these are separate and distinct offences.

King v. *Ah Yin*, (1902) 6 Can. Cr. Cas. 63, followed.

2. Such conviction may, however, be amended under section 1124, on being brought before the Court by *certiorari*, so as to make it a conviction for *playing* in a common gaming house if the evidence shows the commission of that offence, and, when there is the statement of a witness that the accused were all playing on the occasion in question, and it is shown that gaming instruments were found in the room at the time of the arrest, which fact furnishes *prima facie* evidence under sections 985 and 986, the proof is sufficient.

King. v. *Meikleham*, (1905) 10 Can. Cr. Cas. 382, followed.

3. Any number of persons may be charged and convicted jointly with the offence of playing in a common gaming house, if they were all actually present and taking part in the came game. *Rex* v. *Toy Moon*, 21 M. R. 527.

8. Habeas Corpus Act, 31 Ch. II c. 2, s. 2—*Summary trial—Jurisdiction of Police magistrate.*

1. A prisoner's right to *habeas corpus* in Manitoba depends on the *Habeas Corpus Act*, 31 Ch. II, c. 2, s, 2, and the writ cannot be taken out on behalf of a prisoner under sentence of conviction by a police magistrate, exercising the extended jurisdiction to try indictable offences summarily conferred by section 777 of the Criminal Code, unless an absolute want of jurisdiction is shown.

Re Sproule, (1886) 12 S. C. R. 141, followed.

2. A police magistrate of a city or incorporated town, who is also a police magistrate in and for the whole Province, when acting under section 777 of the Code, may try offences committed anywhere in the Province.

3. Such police magistrate at the summary trial of an indictable offence may, under section 951 of the Code, convict the accused of any offence included in the offence charged, although the whole offence charged is not proved, without again offering the prisoner an election as to the mode of trial. *Rex* v. *McEwen*, 17 M. R. 477.

9. Having in possession goods stolen abroad.

Upon a charge of having in possession goods stolen in a foreign country, it is not always necessary to prove the state of the law of that country.

Per TAYLOR, C.J.—When the Crown proved that the prisoner had taken, and had in his possession in Canada, property which he had, in any other country, taken under such circumstances that, had he taken it in like manner in Canada, it would, by the laws of Canada, have been felony, then the offence was proved.

2. And an allegation in the indictment that the prisoner "feloniously had taken and carried away" the goods, does not impose any additional burden of proof upon the Crown.

Per KILLAM, J.—It may be necessary, under certain circumstances, for the Crown to prove the foreign law as an element in the moral quality of the act. *Reg.* v. *Jewell*, 6. M. R. 460.

10. Jurisdiction of County Court Judge—*Appeal from summary conviction by magistrate—Stating case for opinion of Court of Appeal.*

A County Court Judge, hearing an appeal from a summary conviction by a magistrate, has no power under the Criminal Code to state a case for the opinion of the Court of Appeal.

Rex v. *McIntosh*, 14 W. L. R. 548; 17 Can. Cr. Cas. 295.

11. Libel—*Evidence to show that accused cherished ill feeling towards person libelled or her relatives—Inferences from similarity of style and use of common terms in libellous and admitted writings—Proof of handwriting by evidence of experts only.*

1. At the trial for criminal libel where the matter complained of was libellous *per se*, the prosecution should not be allowed to give evidence of acts of hostility on the part of the accused towards the prosecutor or relatives unconnected with the alleged libel, for the purpose of leading to the inference that the accused cherished feelings of ill-will towards the prosecutor and was therefore likely to have been the person who published the libel; and, if such evidence has been admitted, although without objection, the jury should be told that they should give no weight to it.

2. A comparison of style and common forms of expression in the libellous and admitted writings should be by experts or

skilled witnesses and, without such evidence, the trial judge should not invite the jury to draw any inference from similarity in style or expressions.

Scott v. *Crerar*, (1886) 14 A. R. 152, followed.

Per PERDUE, J.A.—When the only evidence of the handwriting of the accused is that of experts, and where the experts called by the prosecutor are contradicted by an equal number of experts called by the defence, the accused denying the authorship on oath, the jury should be told that the prosecutor had failed to establish that the letters had been written by her. *Rex* v. *Law*, 19 M. R. 259.

12. Making of erasures in voters' list—*Dominion Elections Act*, 1900, *ss.* 21, 22, 23, 41—*The Franchise Act*, 1898, *s.* 10.

1. When a returning officer, appointed to hold a Dominion election for an electoral district in Manitoba, selects one of the copies of lists of voters sent to him by the Clerk of the Crown in Chancery pursuant to section 21 of the Dominion Elections Act, 1900, as the one which he will certify and forward to the deputy returning officer, as required by section 41, for use at one of the polling sub-divisions, that copy so selected becomes a voters' list within the meaning of section 503 of The Criminal Code, 1892, and it is an offence under that section for the returning officer wilfully to erase names of voters from it either before or after he certifies it and forwards it to the deputy.

2. Such returning officer has no authority, under the Dominion Elections Act, 1900, to create the voters' lists upon which the election is to be held, or, under sections 22 and 23 of the Elections Act, to make a new division of the constituency into polling subdivisions and re-arrange the names of the voters for each when there are in fact polling divisions already established and used at the last Provincial election for the same territory, whether or not such polling divisions had been established in strict accordance with the requirements of the Provincial statutes.

3. The returning officer who wilfully makes such erasures from a voters' list cannot escape punishment on the ground that he had to make them in consequence of having made new polling subdivisions which he had no authority to make.

4. The fact that the heading of the list of voters in question contained the words "Registration District No. 3," instead of "Polling Division No. 3," did not justify the returning officer in believing, if he did believe, that there were no polling divisions, since the territory of No. 3 was accurately described in the same heading.

The Court, having held that the trial Judge had erred in withdrawing the case from the jury and directing a verdict of not guilty, ordered a new trial. *Rex* v. *Duggan*, 16 M. R. 440.

13. Negativing statutory exceptions—*Conviction—Statutory exceptions not negatived.*

A statute declared certain acts committed by "any person not legally empowered . . . . without the owner's permission," to be unlawful.

A conviction, stating the acts done but not negativing power and permission,

Held, bad. *Reg.* v. *Morgan*, 5 M. R. 63.

14. Recognizance of bail—*Condition to appear for sentence—Conviction quashed and new trial ordered—Estreating recognizance.*

The accused was convicted by a jury of a criminal offence, but the Judge reserved a case as to the admissibility of certain evidence and admitted the prisoner to bail. The condition of the recognizance entered into was that the prisoner would appear at the next sitting of the Court to receive sentence.

Afterwards the Full Court quashed the conviction and ordered a new trial. The accused not having appeared at the next sitting, proceedings were taken to estreat the recognizance and for the collection of the named penalties.

Held, that the condition of the recognizance was not broken and that, the purpose of the accused's attendance having failed, the sureties were not bound for his appearance. Roll of estreated recognizance and *fi. fa.* issued thereon set aside.

Queen v. *Wheeler*, (1865) 1 C. L. J. N. S. 272, and *Queen* v. *Ritchie*, (1865) 1 C. L. J. N. S. 272, followed. *Reg.* v. *Hamilton*, 12 M. R. 507.

15. Secrecy of the ballot—*Compelling witness to disclose for whom he voted—Dominion Electi ns Act, s.* 71.

In a prosecution of a deputy returning officer under the Dominion Elections Act for fraudulently putting into a 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: *Queen* v. *Beardsall*, 1 Q. B. D. 425, 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. *Reg.* v. *Saunders*, 11 M. R. 559.

16. Sunday—*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. *Reg.* v. *Cavelier*, 11 M. R. 333.

17. Theft—*Accessory—Receiver of stolen goods.*

Although, under section 61 of The Criminal Code, a person who has been accessory to a theft may be convicted as a principal thief, this does not prevent his conviction as a receiver of the stolen property, if he has subsequently received it from the actual thief.

The true principle is that it is a receipt which is merely an act done in the commission of the theft which cannot be treated as a separate offence; and the statute which makes counselling or procuring form a participation in the offence, when committed, does not also make a subsequent receipt form a part of a theft completed before the receipt.

Reg. v. *Craddock*, (1850) 2 Den. C. C. 31, and *Reg.* v. *Hughes*, (1860) Bell C. C. 242, followed. *Reg.* v. *Hodge*, 12 M. R. 319.

18. Treason — *Jurisdiction of North West Court — Information — Evidence in shorthand—Appeal upon fact—Insanity.*

1. In the North West Territories a stipendiary magistrate and a justice of the peace, with the intervention of a jury of six, have power to try a prisoner charged with treason. The Dominion Act 43 Vic., c. 25, is not *ultra vires*.

2. The information in such case (if any information be necessary) may be taken before the stipendiary magistrate alone. An objection to the information would not be waived by pleading to the charge after objection taken.

3. At the trial in such case the evidence may be taken by a shorthand reporter.

4. A finding of "guilty" will not be set aside upon appeal if there be any evidence to support the verdict.

5. To the extent of the powers conferred upon it, the Dominion Parliament exercises not delegated, but plenary, powers of legislation.

Insanity, as a defence in criminal cases, discussed. *Reg.* v. *Riel*, 2 M. R. 321.

Leave to appeal to Privy council refused, 10 A. C. 675.

19. Warden's authority without certificate—*Escape—New conviction.*

A statute provided that "The warden shall receive into the penitentiary every convict legally certified to him as sentenced to imprisonment therein, and shall there detain him."

Held, that the absence of a certificate or copy of the sentence did not make the detention of a prisoner, properly convicted and sentenced, illegal.

Per BAIN, J.—*Semble*, even if no such copy of the sentence had originally been delivered to the warden, (and were any such necessary), his possession of it at any time previous to his return to a *habeas corpus* would be sufficient.

A statute provided that "Every one who escapes from imprisonment shall, on being retaken, undergo, in the prison he escaped from, the remainder of his term unexpired at the time of his escape, in addition to the punishment which is awarded for such escape." After an escape and before recapture, the penitentiary was changed from one building to another.

Held, 1. (KILLAM, J., *dubitante*), that a conviction for an escape was not necessary to imprisonment for the unserved portion of the sentence.

2. That imprisonment in the new building was lawful. *Reg.* v. *Peterson*, 6 M. R. 311.

See BALLOT BOX STUFFING.
— BILLS AND NOTES, IV, 5.

See CERTIORARI.
— CONSTITUTIONAL LAW, 3.
— CONVICTION, 2, 4, 5.
— FORGERY.
— FORCIBLE ENTRY.
— MONEY LENDERS' ACT, 1, 2.
— SOLICITOR AND CLIENT, I, 3.
— SUMMARY CONVICTION.

CRIMINAL PROCEDURE.

1. Initialling names of witnesses on indictment—*That party assaulted consented to fight immaterial.*

1. Notwithstanding the language of the Interpretation Act, R. S. C., c. 1, s. 7 (4), the word "shall" in s. 645 of The Criminal Code, which requires the foreman of the grand jury to put his initials opposite the names of the Crown witnesses on the back of the bill of indictment, is not imperative in the sense that the foreman's omission to do so will nullify the proceedings.

O'Connell v. *The Queen*, (1844) 11 C. & F., 155; *Queen* v. *Townsend*, (1896) 28 N. S. 468, followed.

2. The crime of assault may be committed though the party assaulted may have consented to fight.

Regina v. *Coney*, (1882) 8 Q. B. D. 534, followed. *Reg.* v. *Buchanan*, 12 M. R. 190.

2. Quashing conviction—*Jurisdiction of single judge—Full court—Practice—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 A. R. 191, and *Reg.* v. *McAuley*, 14 O. 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: *Paley on Convictions* (6th ed.), 457. *Reg.* v. *Beale*, 11 M. R. 448.

See CERTIORARI, 2.
— CRIMINAL LAW, XI, 3; XII, 1; XIII, 2, 4; XIV, 3.
— JURY TRIAL, I, 7.
— LIQUOR LICENSE ACT, 1.

CROSS APPEAL.

See PRACTICE, III, 1.
— RECTIFICATION OF DEED, 1.

CROSS RELIEF.

See CROWN PATENT, 5.

CROWN COUNSEL.

See CRIMINAL LAW, XIV, 3.

CROWN LANDS.

1. Dominion lands — *Railway trespasses—Continuing trespass—Public convenience—Ministers of the Crown—Disallowance.*

1. The Sovereign is always to be deemed in possession of the lands of the Crown. There can be no occupant of the Queen's possession.

2. Possession, sufficient to enable a plaintiff to maintain an action of trespass, is the possession which is the test of the right to be treated as a plaintiff in possession for the purposes of an injunction suit or motion.

3. An Act of the Province having been disallowed, the order of the Governor-General in Council was published in the *Manitoba Gazette*, and following it was also published a certificate of the Governor-General of the day upon which the Act was received. *Held*, that such publication was a sufficient signification of the disallowance.

4. "The Public Works Act," 48 Vic.,c. 6, furnishes no authority to take compulsorily Dominion lands for the purpose of any Provincial work, for the statute does not expressly relate to the lands of the Crown; and no authority under the words "the *enlargement or improvement* of any public work" to take lands for the purpose of changing ten miles of grade into sixty three miles of railway.

5. When railway companies or individuals exceed their statutory powers in dealing with other people's property, and an injunction is sought to restrain their actions, no question of damage or public convenience is raised.

6. A continuing trespass amounting to permanent appropriation of the property of another is, of itself, a sufficiently serious injury to warrant interference by injunction.

7. Upon motion for an interlocutory injunction where the right is doubtful, the Court will consider on what side is the balance of convenience; to which party is injury more likely to be done by its interference or refusal to interfere; in what way the parties can best, after the final determination of their rights, be kept in, or restored to, their position at the time of the motion.

8. The Court has jurisdiction to grant an injunction, at the instance of the Attorney-General for the Dominion, in respect of trespass upon Crown lands.

9. Persons claiming exemption from the law must show some reason or authority leaving no doubt upon the subject. And, where two persons, who were Provincial Ministers of the Crown, directed a trespass upon lands of the Dominion and showed no such exemption, an injunction was issued against them. *Atty.-Gen.* v. *Ryan*, 5 M. R. 81.

2. Settlement of Manitoba claims—48 & 49 *Vic., c.* 50 (*D*)—49 *Vic., c.* 38 (*Man.*)—*Construction of statute—Title to lands—Operation of grant—Transfer in præsenti—Condition precedent—Ascertainment and identification of swamp lands—Revenues and emblements—Constitutional law.*

The first section of the Act for the final Settlement of the Claims of the Province of Manitoba on the Dominion (48 & 49 Vic., c. 50) enacts that "all Crown lands in Manitoba which may be shown, to the satisfaction of the Dominion Government, to be swamp lands, shall be transferred to the Province and enure wholly to its benefit and uses."

Held, affirming the judgment appealed from (8 Ex. C. R. 337), GIROUARD and KILLAM, JJ., dissenting, that the operation of the statutory conveyance in favour of the Province of Manitoba was suspended until such time or times as the lands in question were ascertained and identified as swamp lands and transferred as such by order of the Governor-General-in-Council, and that, in the meantime, the Government of Canada remained entitled to their administration and the revenues derived therefrom enured wholly to the benefit and use of the Dominion.

Atty.-Gen. for Manitoba v. *Atty.-Gen. for Canada*, 34 S. C. R. 287.

See FIXTURES, 1.
— FRAUDULENT CONVEYANCE, 5.
— HIGHWAY, 1.
— POSSESSION OF GOODS.
— SALE OF LAND FOR TAXES, II.

CROWN PATENT.

1. Cancellation.

S. entered for a homestead and pre-emption, and subsequently by deed conveyed to A. through whom plaintiffs claimed. Before the patent was issued the defendant made application for the same land, alleging that S. had not complied with the requirements necessary to entitle him to the land.

Upon the report of the Land Board the Minister of the Interior cancelled the entry of S. and allowed the defendant to be entered for the land.

The bill prayed that a patent from the Crown granting the lands to plaintiffs might be issued, and that the entry made by the defendant should be set aside.

Held, that the Court had no jurisdiction to grant the relief prayed. *Crotty* v. *Vrooman*, 1 M. R. 149.

2. Law of descent of land in Manitoba prior to creation of Province—*Dominion Lands Act amendment*, 60 & 61 *Vic., c.* 29—*Meaning of word "Province" in Dominion legislation—Construction of statutes—Error or oversight in.*

By an amendment to the Dominion Lands Act, 60 & 61 Vic., c. 29, it is enacted as follows: "Where patents for any lands have been or are hereafter issued to a person who died or who hereafter dies before the date of such patent, the patent in such case shall not therefore be void, but the title to the land designated therein and granted or intended to be granted thereby shall become vested in the heirs, assigns, devisees or other legal representatives of such deceased person according to the laws of the province in which the land is situate, as if the patent had issued to the deceased person during life."

The plaintiff claimed title to the lots in question, now part of the city of St. Boniface, Manitoba, under a patent from the Crown issued in 1906 in the name of Charles Larence, his grandfather, who died in February, 1870, before the creation

of the Province of Manitoba. The patent recited the above Act and also contained the following recitals: "And whereas the legal representatives (within the meaning of the above enactment) of the late Charles Larence, etc., are entitled to a grant of said lands, and application has been made by or on behalf of them or some of them for such patent."

"And whereas, having in view the provisions of the above enactment, we deem it expedient for good and sufficient reasons to issue such grant to or in the name of the said late Charles Larence," and the *habendum* was "To have and to hold the same unto the said Charles Larence, his heirs and assigns forever."

Held, that, as the lands in question were not in any *Province* at the date of the death of Charles Larence, the above statute did not cover the case or avail to validate a patent issued in the name of a deceased person which without the support of some statute was a nullity and that, as the plaintiff was unable to establish a title to the lands independently of the patent, his action must be dismissed.

Although satisfied that there must have been some error or oversight in drafting a statute, the Court cannot correct the error or supply the omission, for that would be to legislate and not to interpret the Act.

Commissioners of Income Tax v. *Pemsel*, [1891] A.C., *per* Halsbury, L.C., at p. 543, and *In re St. Sepulchre's*, (1864) 33 L.J. Ch., *per* Westbury, L.C., at p. 37, followed. *Larence* v. *Larence*, 21 M. R. 145.

3. Ejectment—*Parliamentary title — Equitable defence*—38 *Vic.*, *c.* 12, (*Man.*)—35 *Vic.*, *c.* 23 (*D*).

L., in 1875, applied for a homestead entry for the S.W.¼ of sec. 30, township 6, range 4 west, pre-empted by F., and paid $10 fee to a clerk at the office, but was subsequently informed by the officers of the Crown that his application could not be recognized, and was refunded the $10 he had paid. F. subsequently paid for the land by a military bounty warrant in pursuance of sec. 23 of 35 Vic., c. 23. L. entered upon the land and made improvements. In 1878, after the conflicting claims of F. and L. had been considered by the officers of the Crown, a patent for this land was granted by the Crown to F., who brought an action of ejectment against L. to recover possession of the said land. F., at the trial, put in, as proof of his title, the Letters Patent, and L. was allowed, against the objection of F.'s counsel, to set up an equitable defence and to go into evidence for the purpose of attacking the plaintiff's patent as having been issued to him in error, and by improvidence and fraud. The Judge, who tried the case without a jury, rendered a verdict for the defendant.

Held, on appeal, reversing the judgment of the Court of Queen's Bench (Man.), that L., not being in possession under the statute, had no parliamentary title to the possession of the land, nor any title whatever which could prevail against the title of F. under the Letters Patent.

Per GWYNNE, J.—That under the practice which prevailed in England in 1870, which practice was in force in Manitoba under 38 Vic., c. 12, at the time of the bringing of this suit, an equitable defence could not be set up in an action of ejectment.

Farmer v. *Livingstone*, 5 S. C. R. 221.

4. Setting aside—*Estoppel—Covenant for further assurance—Estate subsequently acquired by covenantor.*

Defendant was the patentee from the Crown of Lot A, but before patent he had sold and conveyed to one Clarke, the plaintiff's predecessor in title, 43 feet in frontage of Lot A. Defendant, at the time of that conveyance, had such an interest in the 43 feet and the rest of Lot A that the Department of the Interior recognized it by issuing the patent, which they did without knowledge that defendant had conveyed away the 43 feet.

The defendant's deed to Clarke was made before 14th May, 1875, when the first Statute relating to Short Forms of Indentures was passed.

It purported to be made in pursuance of the Act respecting Short Forms of Conveyances, and was in the form set out in the first schedule to the Short Forms Act, afterwards R. S. M. 1892, c. 141, with the covenants in column one, but it contained no recitals.

At the hearing it was assumed, though not expressly admitted by the defendant's counsel, that under s. 2 of the Act the effect of the deed was to make the defendant's covenants equivalent to those in the second column of the first schedule to the Act, and it was contended by the plaintiff that this worked an estoppel against the defendant. The deed did not come within the Estoppel Act, R. S. M. 1892, c. 52.

Held, that the defendant was not estopped by his mere grant from setting up a title subsequently acquired, at least when it did not appear that he had no title at all at the time of his grant.

Doe d. Oliver v. *Powell*, 1 A. & E. 531; *Right d. Jefferys* v. *Buchnell*, 2 B. & Ad. 278, followed.

In the absence of legislation covenants do not estop: *Heath* v. *Crealock*, L. R. 10 Ch. 22; *General Finance Co.* v. *Liberator Building Society*, 10 Ch. D. 15, and *Onward Building Society* v. *Smithson*, [1893] 1 Ch. 1.

Specific performance of the defendant's covenants for further assurance could not be decreed without an amendment of the bill, which did not set out the covenants in the forms in the deed, or in those which the statute gives to them.

When no legal estate passes, the covenants do not run with the equitable title so as to enable the assignee to sue at law: *Onward Building Society* v. *Smithson*, *supra*.

It appeared clear from *Browning* v. *Wright*, 2 B. & P. 13, and the wording of the covenant number 5 in the schedule, that the covenantor was not bound under covenant to convey or assure to the covenantee or his assigns any estate subsequently acquired by the covenantor and which he had never previously held.

The plaintiff had wholly failed to establish the title set up by him, a title in fee simple, whether legal or equitable, or that there had been such mistake as, under the judgment in *Attorney General* v. *Fonseca*, 17 S. C. R. 612, would warrant the setting aside of the patent.

Bill dismissed with costs.

Fraser v. *Sutherland*, 15 C. L. T. Occ. Notes 17.

5. Setting aside in part—*Purchaser for value—Laches—Estoppel by former suit—Cross-relief—Improvidence without fraud—Presumption.*

1. A patent may be good in part and bad in part, and may be set aside so far as it relates to certain of the property included in it.

2. The plea of purchaser from the patentee for value without notice is of no avail as against the Crown. In such case the maxim applicable is *Debeo digniori*, and not *Potior est conditio defendentis*.

3. The plea of laches is no defence as against the Crown. The *Nullum tempus Act*, 9 Geo. 3, c. 16, is not in force in this Province.

4. In a former suit in which the same portion of the patent was attacked upon the same ground, the relator in this information was plaintiff, and the Attorney-General was defendant. The bill in that case was dismissed, but such dismissal was held to be no estoppel as against the Attorney-General in this information. The Attorney-General in the former case could not, under General Order, have prayed cross-relief against his co-defendants. In any case it was not obligatory upon him to do so.

5. A patent may be set aside upon the ground of improvidence although no fraud is charged against the patentees.

6. The presumption against error in a Crown patent is not so strong as in an ordinary deed between subject and subject.

7. In order that a patent may be set aside it is not necessary to shew that some person is entitled to the land. It is sufficient that there existed claims or material facts, which, if present to the mind of the Crown, would have influenced it in dealing with the land.

8. It is not an answer to a charge of improvidence and mistake, that the Crown had in its possession documents which disclosed the claims or material facts, if these are shown not to have been present to the mind of the official when granting the patent. *Attorney-General* v. *Fonseca*, 5 M. R. 173.

Reversed on appeal to the Supreme Court. See decision which immediately follows.

6. Setting aside—*Error and improvidence — Superior title — Evidence — Res judicata—Estoppel by, as against the Crown.*

Held, 1. That a judgment avoiding letters patent upon an information at the suit of the Attorney-General could only be justified and supported upon the same grounds being established in evidence as would be necessary if the proceedings were by *scire facias*.

2. The term "improvidence," as distinguished from error, applies to cases where the grant has been to the prejudice of the commonwealth or the general injury of the public, or where the rights of any individual in the thing granted are injuriously affected by the letters patent; and, F.'s title having been recognized by the Government as good and valid under the Manitoba Act, and the lands granted to him in recognition of that right, the letters patent could not be set aside as

having been issued improvidently except upon the ground that some other person had a superior title also valid under the Act.

3. Letters patent cannot be judicially pronounced to have been issued in error or improvidently when lands have been granted upon which a trespasser, having no color of right in law, has entered and was in possession without the knowledge of the Government officials upon whom rests the duty of executing and issuing the letters patent, and of investigating and passing judgment upon the claims therefor; or when such trespasser, or any person claiming under him, has not made any application for letters patent; or when such an application has been made and refused without any express determination of the officials refusing the application, or any record having been made of the application having been made and rejected.

4. *Per* PATTERSON, J., That in the construction of the statute effect must be given to the term "improvidence" as meaning something distinct from fraud or error; letters patent may, therefore, be held to have been issued improvidently if issued in ignorance of a substantial claim by persons other than the patentee to the land which, if it had been known, would have been investigated and passed upon before the patent issued; and it is not the duty of the Court to form a definite opinion as to the relative strength of opposing claims.

5. *Semble, per* GWYNNE, J., There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit. *Fonseca* v. *Attorney-General*, 17 S. C. R. 612.

See CONSTITUTIONAL LAW, 8, 10.
— DOMINION LANDS ACT.
— ESTOPPEL, 1.
— EVIDENCE, 12, 13.
— FRAUDULENT CONVEYANCE, 5.
— HIGHWAY, 2.
— SALE OF LAND FOR TAXES, I, 2; II; X, 7.
— TITLE TO LAND, 2, 3.

CROWN SUITS.

See STATUTES, CONSTRUCTION OF, 2.

CURRENT MONEY OF CANADA.

See ELECTION PETITION, IX, 1; X, 1, 2.

CUSTODY OF INFANT.

See INFANT, 4, 5.

DAIRY INSPECTION.

See MUNICIPALITY, VII, 1, 2, 3.

DAMAGES.

1. Amount—*Breach of contract for erection of buildings, etc.*

The plaintiff and defendant agreed that the plaintiff should procure a site for a mill and build the same so as to be ready for the reception of machinery, which the defendant was to supply. The plaintiff incurred expense in building the mill, in building a house for the defendant at his request, to be ready for him on his arrival from Ontario in going to Ontario on account of the defendant's neglect to carry out the terms of the contract, in paying wages to a man whilst absent in Ontario, and in going to Winnipeg on business of the venture. The defendant refused to carry out the agreement.

Held, that the true measure of the plaintiff's damages was the loss on the sale of the house built by him for the defendant, and the loss in respect of the mill building; but that he was not entitled to recover for the journeys to Ontario and Winnipeg or for the wages. *Simpson* v. *Ellis*, T. W., 31.

2. Amount—*Breach of covenant by landlord to build fence.*

The defendant demised land to the plaintiff for one year, at $200, and covenanted to fence the premises. He neglected to build the fence, and the plaintiff refused to pay an instalment of rent, amounting to $100. The defendant distrained a yoke of oxen and a wagon,

with household furniture, not finding any other distress on the premises. After seizure, appraisement and notice of sale, the bailiff found some barley in a shed on the premises, but made no change in the seizure or inventory, thinking he had no right to do so, and believing that the barley was not there when he made the seizure. The plaintiff never objected to the seizure of the oxen, and once asked for a postponement of the sale. The oxen and wagon were sold, the plaintiff buying them for $160. The rent and expenses amounted to $135.30. The surplus was retained by the plaintiff. The day after the sale he issued a writ. The jury found a verdict for the plaintiff on the counts for breach of covenant to fence, distraining beasts of the plow and excessive distress, and assessed the damages at $180.

Held, that the damages were excessive, and that there should be a new trial unless the plaintiff consented to reduce his verdict.

The measure of damages on the breach of covenant was what it would have cost the plaintiff to have leased another piece of land fenced; for distraining beasts of the plow, what it would cost the plaintiff to have hired oxen for the several days he was deprived of the use of them. *Per* WOOD, C.J. *Clarke* v. *Murray*, T. W., 127.

3. Excessive damages—*Jury fee.*

In an action for assault, false imprisonment, slander and libel, the assault and imprisonment consisted in the defendant putting his hand upon the plaintiff's shoulder, pushing her into the office and locking the door for a short time. No evidence was given of special damage under the slander and libel counts, and a verdict upon them alone could not therefore be supported. The jury gave a general verdict of $300.

Held, 1. That, although the damages were excessive, the Court would not interfere with the verdict upon that account.

2. Although a jury fee would have been payable but for the existence of the slander and libel counts, and although no evidence of the special damage was given under these counts, yet the general verdict would not for non-payment of the fee be set aside. *McMonagle* v. *Orton*, 5 M. R. 193.

4. Expropriation—*Damages in lieu of specific performance—Presumption against holder of unproduced document—Dedication.*

Defendants took proceedings to expropriate lands of the plaintiff. The commissioners awarded to the plaintiff $21,455, but the award was not confirmed by a judge, as required by the defendant's charter.

Held, (overruling DUBUC, J.) that the award could not be enforced.

After the award the defendants agreed to give to the plaintiff, in exchange for the same land, two other pieces of land and $12,000. The plaintiff thereupon removed certain buildings, the defendants used the land for a street, and the defendants paid the $12,000, but refused to convey the two parcels of land, alleging that they formed portions of streets.

Held, (affirming DUBUC, J.), 1. That a bill might be filed to recover damages for the breach of the contract, the deed from the plaintiff to the defendant having erroneously acknowledged receipt of the purchase money.

2. That the damages might fairly be placed at the difference between the $21,455 and the $12,000, without proof of the locality of the two parcels of land or their value, the defendants having had in their custody the documents by which the locality could have been proved, and not having produced them, but alleged their loss. *Wright* v. *Winnipeg*, 4 M. R. 46.

See ANIMALS RUNNING AT LARGE, 2, 3.
— ASSIGNMENT FOR BENEFIT OF CREDITORS, 5.
— BANKS AND BANKING, 6.
— BREACH OF WARRANTY.
— BUILDING CONTRACT, 3, 4.
— CONTRACT II, 2; VII, 3.
— GARNISHMENT, IV, 1.
— INFANT, 1.
— INJUNCTION, I. 1; II, 1.
— JOINT TORT FEASORS.
— LANDLORD AND TENANT, I, 1, 2.
— MASTER AND SERVANT, IV, 2.
— MISREPRESENTATION, I; II; III, 1, 4.
— MUNICIPALITY, IV, 1.
— NEGLIGENCE VI, 6; VII, 4.
— NUISANCE, 2.
— PLEADING, XI, 1, 8.
— RAILWAYS VIII, 1, 5; XI, 4, 5.
— RATIFICATION.
— SALE OF GOODS, II. 3; III, 1; IV, 1, 4; V, 1.
— SALE OF LAND FOR TAXES, I, 2.
— SET OFF, 2.
— SLANDER OF REAL ESTATE.
— SPECIFIC PERFORMANCE.
— TRADE UNIONS.

See TRESPASS AND TROVER, 1.
— VENDOR AND PURCHASER, VI, 2, 15; VII, 2, 11, 12.
— WARRANTY, 2, 3.

DAMAGES FOR DELAY.

See PLEADING, VIII, 2.

DAMAGES FOR PERSONAL INJURY.

See NEGLIGENCE, VII, 4.

DANGEROUS THINGS, HANDLING OF.

See NEGLIGENCE II, 2.

DEATH BY ACCIDENT.

See WORKMEN'S COMPENSATION FOR INJURIES ACT, 3, 4.

DEATH HAPPENING OUT OF THE JURISDICTION.

See LORD CAMPBELL'S ACT, 1, 2.

DEBENTURES.

See MUNICIPALITY, VIII, 8.

DEBTOR AND CREDITOR.

See GARNISHMENT, VI, 10.

DEBTORS' ARREST ACT.

See EXAMINATION OF JUDGMENT DEBTOR, 8.

DECLARATION OF OFFICE.

See PUBLIC SCHOOLS ACT, 1.

DECLARATION OF RIGHT.

See COSTS, III, 2.
— FRAUDULENT CONVEYANCE, 10.
— REAL PROPERTY LIMITATION ACT, 8.

DECLARATORY JUDGMENT.

See PLEADING, X, 9.

DEDICATION.

1. Absence of user by public.

Filing in the registry office a plan of property showing a street or lane does not, in the absence of user by the public, amount to a dedication. *Wright* v. *Winnipeg*, 4 M. R. 46.

2. Occupancy by person filing plan.

Dedication of a street not having been acted upon—the property not having been used as a street, but on the contrary the plaintiff's occupancy of it having been sanctioned by the City—did not affect the plaintiff's title. *Wright* v. *Winnipeg*, 3 M. R. 349.

See DAMAGES, 4.
— ESTOPPEL, 1.

DEED OF LAND.

1. Reservation of right to compensation for depreciation in value caused by closing of street.

The owner of land, which it is expected will be depreciated in value by the contemplated closing of a street, may, in conveying it to a purchaser, reserve the right to collect and receive the compensation that may be thereafter awarded in respect of such depreciation, and afterwards his claim for such compensation cannot be answered by showing that he has sold and conveyed the land. *Re Codville*, 16 M. R. 426.

2. Priority as between unregistered equitable charge and subsequent registered conveyance—*Effect of grant of land by registered owner "according to his estate and interest therein and as fully*

and effectually as he lawfully can or may" to an assignee in trust for creditors—Assignments Act, R.S.M. 1902, *c.* 8., *ss.* 6, 7—*Lien Notes Act, R.S.M.* 1902, *c.* 99, *ss.* 4, 7—*Registry Act, R.S.M.* 1902, *c.* 150, *s.* 72.

The defendant Burnett, having executed an agreement under seal creating an equitable lien or charge on his farm land in favor of the plaintiffs for the price of certain machinery which agreement could not, under section 4 of The Lien Notes Act, R.S.M. 1902, c. 99, be registered, subsequently executed a deed of assignment to the defendant Haverson as trustee for creditors. As regards Burnett's lands, the wording of the assignment was as follows: "The said debtor, according to his estate and interest therein and as fully and effectually as he lawfully can or may, . . . by these presents doth hereby grant . . . unto the said trustee . . . all the real estate, lands, tenements, and hereditaments of the said debtor . . . of or to which he may have any estate, right, title or interest of any kind or description with the appurtenances."

This assignment was made and duly registered shortly after the commencement of this action.

Held, that such deed purported to deal only with such estate or interest in the land as the assignor then had and did not operate or assume to operate so as to convey the land free from the equitable charge or lien previously given to the plaintiffs.

Sections 6 and 7 of The Assignments Act, R.S.M. 1902, c. 8, do not help the assignee, as the assignment was not in the words, or to the like effect of the words given in section 6, and section 7 provides only that every assignment . . . . shall vest the estate "thereby assigned" in the assignee, and does not assume to give the deed any larger effect in the way of passing property than on its face it purports to have.

The only interest, therefore, that passed to the assignee being what was left after the plaintiffs' equitable charge should be satisfied, neither section 72 of The Registry Act, R.S.M. 1902, c. 150, nor section 7 of The Lien Notes Act can have any application, as they only apply to invalidate an unregistered instrument as against a registered instrument that affects the same estate or interest in lands. *Canadian Port Huron Co.* v. *Burnett*, 17 M. R. 55.

DEED OF SETTLEMENT.

Improvidence—*Resulting trust upon conveyance by husband to wife—Trusts of land under Real Property Act—Parties to action — Vagueness and uncertainty in trusts as expressed—Power of revocation—Independent advice to settlor—Acquiescence, laches and delay in taking steps to set aside trust deed—Double possibility—Thellusson Act—Rule against perpetuities.*

The personal representatives of a deceased settlor are necessary parties to an action by his widow to set aside a deed of settlement executed by the settlor and his wife conveying property to trustees.

Held, also, by MATHERS, C.J.K.B.

1. Where a man executes a voluntary conveyance of lands to his wife, there is no presumption of a resulting trust in his favor, but it is open to the grantor or his representatives to show that under the circumstances there was such resulting trust and in that case the lands will be deemed in equity to be his, whether they are under the Real Property Act or not.

Childers v. *Childers*, (1857) 3 Jur. N.S. 1277; *Marshall* v. *Crutwell*, (1875) L.R. 20 Eq. 328, and *Re Massey & Gibson*, (1890) 7 M.R. 172, followed.

2. A deed of settlement, although it transferred all the property of the settlors to the trustees without power of revocation in trust to pay the net income or part thereof to the settlors or the survivor of them until the death of the survivor, and afterwards to distribute the corpus or the income thereof between the children or some of them in the absolute discretion of the trustees, was held, in the peculiar circumstances set forth in the judgment, not to be improvident.

3. If the trusts declared in a deed of settlement are too vague and uncertain to be executed, a trust in favor of the next of kin would result by operation of law, and the trustees would not take for their own benefit: *Lewin*, p. 164.

4. The settlor may wish to protect himself from his own improvidence or against importunities of relatives and in such a case the absence of a power of revocation in the deed is not a ground for setting it aside.

Toker v. *Toker*, (1863) 3 De G.J. & S. 487, and *Phillips* v. *Mullings*, (1871) L.R. 7 Ch. 244, followed.

Coutts v. *Acworth*, (1869) L.R. 8 Eq. 558, distinguished.

5. As the trustees were not beneficiaries under the deed, the absence of independent advice in the execution of it was not important.

Huguenin v. *Baseley*, (1807) 14 Ves. 273, distinguished.

6. The plaintiff, one of the settlors, after the death of her husband, had, in the circumstances set forth in the judgment, estopped herself from complaining of the deed by acquiesence, laches and delay.

Turner v. *Collins*, (1871) L.R. 7 Ch. 329; *Allcard* v. *Skinner*, (1887) 36 Ch. D. 145, and *Jarratt* v. *Aldom*, (1870) L.R. 9 Eq. Cas. 463, followed.

Sharp v. *Leach*, (1862) 31 Beav. 491, distinguished.

7. As the deed in question required that the estate should be converted into money at the death of the widow, in contemplation of equity the estate conveyed consisted of personal estate: *Attorney-General* v. *Dodd*, (1894) 2 Q.B. 150; and, since the rule against a "double possibility" or "a possibility upon a possibility" has, according to *In re Bowles, Amedroz* v. *Bowles*, [1902] 2 Ch. 650, no application to personal estate, therefore the deed was not objectionable as offending against such rule, although it might have been in the absence of a direction for such conversion.

8. Under the deed there might be an accumulation of income beyond the period permitted by the Thellusson Act, if the trustees should exercise the power given them of withholding the shares of some of the beneficiaries and giving them to others, and an accumulation beyond the permitted period would be void under the Act, but the gift itself would not be void unless it would also infringe the rule against perpetuities.

Godefroi on Trusts, 912; *Jagger* v. *Jagger*, (1883) 25 Ch. D. 729, and *Tench* v. *Cheese*, (1855) 24 L.J. Ch. 55, followed.

9. The possibility of a power in a deed of settlement being at some future time exercised so as to infringe the rule against perpetuities does not make the power itself void, where it is such that it may be exercised in a manner entirely unobjectionable.

Slark v. *Dakyns*, (1874) L.R. 10 Ch. 35; *Picken* v. *Matthew*, (1878) 10 Ch. D. 264, and *Re Bowles*, [1905] 1 Ch. 371, followed.

Leake v. *Robinson*, (1817) 2 Mer. 389, distinguished.

10. As the widow and children of a deceased son would be entitled under the deed attacked to a share of the estate and so were interested in maintaining the deed, they were necessary parties to the action attacking it, which therefore failed for lack of parties, notwithstanding that the executors of the will of said son had been made parties.

These executors took nothing under the deed and did not represent the infant children of their testator and therefore had been made parties unnecessarily. *Fonseca* v. *Jones*, 21 M. R. 168.

DEFAMATION.

See COSTS, XIII, 2.
— LIBEL, 5.

DEFAULT OF PURCHASER.

See VENDOR AND PURCHASER, II, 3.

DEFECT IN SYSTEM.

See NEGLIGENCE, II, 1; VII, 8.

DEFECTIVE APPARATUS.

See NEGLIGENCE V, 4, 5.

DEFECTIVE MATERIAL.

See PRACTICE XXVIII, 6.

DEFECTIVE WORKMANSHIP.

See PLEADING, VIII, 2.

DEFENCE ON THE MERITS.

See SECURITY FOR COSTS, III.

DEFICIENCY IN LAND.

See VENDOR AND PURCHASER, VI, 13.

DELAY.

See AMENDMENT, 2.
— INFANT, 11.
— INTERPLEADER, VIII, 1.
— PRACTICE, XVII, 3; XX, B, 1, 2.
— SECURITY FOR COSTS, X, 1.
— SETTING ASIDE JUDGMENT.
— SOLICITOR, 6.
— TRADE NAME.
— VENDOR AND PURCHASER, VI, 15.

DELEGATION OF AUTHORITY.

See MUNICIPALITY, I, 5; VII, 1, 2, 3.

DELEGATION OF DUTY.

See ARBITRATION AND AWARD, 11.

DELIVERY.

See GIFT, 1.

DELIVERY IN BLANK.

See BILLS AND NOTES, VI, 1.

DELIVERY OF DEED.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 4.

DELIVERY OF GOODS.

See PRINCIPAL AND AGENT, I, 1.
— RAILWAYS, III, 1, 4, 5, 6.
— SALE OF GOODS, I, 1, 2; IV, 2; VI, 5.

DELIVERY OF POSSESSION.

See BILLS OF SALE, 1, 2.

DEMAND.

See TAXES.

DEMAND AND REFUSAL.

See MONEY HAD AND RECEIVED.

DEMAND OF POSSESSION.

See VENDOR AND PURCHASER, IV, 6.

DEMURRER.

1. Argument of, before trial—*King's Bench Act, Rule* 453.

Under Rule 453 of the King's Bench Act, R.S.M. 1902, c. 40, an order to have a demurrer disposed of or argued before the trial of the case should not be made unless the points of law involved are such as affect the whole case and the disposition of which would either determine the whole case or declare some important principle which would influence the consideration of the matters remaining.

London, Chatham & Dover Ry. Co. v. *South Eastern Ry. Co.*, (1885) 53 L.T. 109; *Parr* v. *London Assurance Co.*, (1891) 8 T.L.R. 88, and *Makarsky* v. *C.P.R.*, (1904) 15 M.R. 53, followed.

Under the rule the question is largely one of convenience, and the Court will not hear and determine piecemeal the various matters involved in a complicated suit. *Gardiner* v. *Bickley*, 15 M.R. 354.

2. Ore tenus.

A demurrer *ore tenus* will not be allowed unless there is a demurrer on the record. *Wright* v. *Winnipeg*, 3 M.R. 349.

3. Plea bad as to part—*Demurrer to part of plea—Discontinuance.*

If a plea is bad in part, it is bad as to the whole, and a demurrer should be to the whole plea, otherwise it will work a discontinuance. *Sparham* v. *Carley*, 8 M.R. 448.

See COMPANY, IV, 12.
— COSTS, XIII, 3.
— CRIMINAL LAW, XIV, 4.
— MORTGAGOR AND MORTGAGEE, III, 3.
— PRACTICE, XXIII, 1, 3; XXVIII, 7.
— PRIVITY OF CONTRACT.
— PUBLIC SCHOOLS ACT, 2.
— RAILWAYS, II, 2.
— SALE OF LAND FOR TAXES, VIII, 1.
— TIME, 1.
— WORKMEN'S COMPENSATION FOR INJURIES ACT, 4.

DEPARTURE.

See PLEADING, I, 1; XI, 8.

DEPOSIT.

See PLEDGE.

DEPOSIT IN LIEU OF RECOGNIZANCE.

See SUMMARY CONVICTION, 1.

DEPOSIT RECEIPT.

See NEGOTIABLE INSTRUMENT.

DEPOSITION OF DECEASED WITNESS.

See EVIDENCE, 6.

DEPOSITIONS—ADMISSIBILITY OF.

See CRIMINAL LAW, VI, 3.

DEPOSITIONS—MANNER OF TAKING.

See EVIDENCE ON COMMISSION, 1, 2.
— EXAMINATION OF JUDGMENT DEBTOR, 5.
— EXTRADITION, 3, 4, 5.
— MASTER'S OFFICE, PRACTICE IN, 2.

DESCENT OF LAND.

Law of primogeniture in force in Manitoba up to 3rd May, 1871.

The Legislature of Manitoba passed the first Intestacy Act in May, 1871, and before that time the law of descent applicable in England to estates in lands and tenements should be held to have been in force in Manitoba, and therefore, where a person died intestate in April, 1871, being the owner in fee simple of a parcel of land, the Court.

Held, that the land descended to the eldest son to the exclusion of the other children. *Re Tait*, 9 M.R. 617.

See CROWN PATENT, 2.

DESCRIPTION.

See FRAUDULENT PREFERENCE, VI.

DESCRIPTION OF GOODS.

See BILLS OF SALE, 1.
— CHATTEL MORTGAGE, V, 1.
— WARRANTY, 4.

DESCRIPTION OF LAND.

1. Ambiguity—*Charge on homestead before patent—Dominion Lands Act*, s. 42—60 & 61 *Vic.* (*D.*), *c.* 29, *s.* 5.

The written contract signed by defendant for the purchase of machinery from the plaintiff provided for a lien or charge upon the "N.E. ¼ Section 2, Township 4, Range 14," without stating whether the range meant was 14 west or east of the principal meridian, both of which ranges are in this Province; but the evidence showed that it was range 14 west that was intended.

Held, (1) That the expression N.E. ¼ sufficiently designated the north-east quarter, as such contractions are in daily use.

(2) That in this case the description was sufficient to warrant the order for a charge on the N.E. ¼ 2-4-14 W.; for, (*a*) if judicial notice should be taken of the surveys that had been already made in Manitoba and of those which had not been made, then, as township 4 in range 14 east had not been surveyed into sections, township 4 in range 14 west must have been the one intended by the contract, and there was no ambiguity requiring evidence to explain; and, (*b*) if judicial notice of such surveys could not be taken, then the ambiguity, if any, was a latent one and oral testimony was admissible to ascertain what land was meant.

It was suggested in argument that defendant was merely a homesteader under The Dominion Lands Act, and had not received his patent, and that, under sec-

tion 42 of that Act, he could not validly create a charge on the land.

Held, that the defendant could not raise such an objection in this action, and that the plaintiff was entitled to an order for the charge on the land and the chance of realizing on it, though he might afterwards be defeated by the action of the Dominion Government. *Abell* v. *McLaren*, 13 M.R. 463.

Not followed as to last holding. *Cumming* v. *Cumming*, 15 M.R. 640.

Followed as to first holding. *Caisley* v. *Stewart*, 21 M.R. 341.

2. Ambiguity—*Falsa demonstratio — General, followed by specific description.*

Plaintiff and defendant were entitled, under the deeds of conveyance to their predecessors in title respectively, to the western and eastern parts respectively of a fractional quarter section of land of an irregular shape bordering on a lake at the east side and containing about 132 acres. The land was crossed by a highway called the Gimli road running in a somewhat oblique direction from north to south. The conveyance on which the plaintiff relied described his land as the west half of the quarter section *or* that part lying on the west side of the Gimli road, and the defendant's title was for the east half, &c., *or* that part lying on the east side of the Gimli road. Possession had continued in accordance with the belief on both sides that the Gimli road divided the fractional quarter section into nearly equal portions.

On discovering that there was in fact a larger area on the east side of the road than on the west, the plaintiff brought this action for possession of such excess, being part of the land on the east side in the possession of the defendant.

Held, 1. As applied to the land in question, the words "east half" were not sufficient to describe with clearness the land intended to be conveyed and, consequently, the words which follow could not be rejected as *falsa demonstratio*.

Gillen v. *Haynes*, (1873) 33 U. C. R. 516; *Iler* v. *Nolan*, (1861) 21 U. C. R. 309, and *Cartwright* v. *Detlor*, (1860) 19 U. C. R. 210, distinguished.

2. This was a proper case for the application of the rule that, when there is a general description followed by a specific one, the specific and not the general description must be taken to govern, and that the expression "east half" in this case was a general description that must yield to the specific description that follows.

Murray v. *Smith*, (1848) 5 U. C. R. 225, and *Smith* v. *Galloway*, (1833) 5 B. & Ad., 43 followed.

3. The ambiguity in the description in question was a latent one, only becoming patent when evidence was given of the irregular shape of the land, and therefore extrinsic evidence was admissible to show the intention of the parties.

Semble, the defendant might also succeed on the doctrine of election as set forth in *Elphinstone on Deeds*, 105, *Vin. Ab.*, Grant, H. 5, and *Shep. Touch.*, 106, 251, on the ground that his deed gave him the option of taking the east half *or* the land on the east side of the road and he had elected to take the latter. *Oleson* v. *Jonasson*, 16 M.R. 94.

See CONTRACT, XV, 1.
— REAL PROPERTY ACT, I, 4,5, 7.
— RECTIFICATION OF DEED, 2.
— SALE OF LAND FOR TAXES, VI, 3.
— STATUTE OF FRAUDS, 3.

DESTRUCTION OF EVIDENCE.

See TRADE UNIONS, 1.

DETENTION OF PRISONER.

See CRIMINAL LAW, XVII, 2.

DETERMINATION OF ACTION.

See REPLEVIN, 2, 3.

DEVOLUTION OF ESTATES.

1. Death of administrator—*Unadministered estate of intestate—Appointment of administrator of estate of deceased administrator—Costs.*

L., the owner of the land in question, died intestate. His widow was appointed administratrix of his estate. She died without dealing in any way with the land, and the plaintiffs were appointed administrators of her estate.

Held, that the plaintiffs had no title to the land, and that a grant of letters of

administration of the unadministered estate of L. would be necessary, followed by a conveyance from the new administrator to the plaintiffs, before they could get title.

The defendant was only allowed the costs of a demurrer, as the point of law was apparent on the pleadings and he should have raised it by his pleadings instead of going to trial in the ordinary way. *National Trust Co.* v. *Proulx*, 20 M. R. 137.

2. Registered judgment—*Interest of heir in lands of intestate, whether realty or personalty—Parties to action.*

Z., the owner of the lands in question, having died intestate, his widow, A, took out letters of administration to his estate. B., the only child of Z. and A., subsequently married the defendant and than died childless and intestate. The plaintiff, having recovered a judgment in the King's Bench against the defendant, registered in the proper Land Titles office a certificate of the judgment and then brought this action for a sale of the defendant's interest in the lands to realize his judgment.

A. had not disposed of the land in any way under her letters of administration, nor had letters of administration of the estate of B. been taken out.

Held, that the defendant had no interest in the lands in question which was bound by, or could be sold under, the registered judgment.

Held, also, that an administrator of the estate of the defendant's wife was a necessary party to any proceedings affecting her estate or the defendant's interest in it.

Re Shephard, (1889) 43 Ch. D. 131, followed.

Semble, even if the estate of the defendant's wife had been represented in the action, it would have to be held that the defendant, while the land remained vested in the administrator, had no interest in it which would be bound by the judgment; *Thomas* v. *Cross*, 2 Dr. & Sm. 423.

Section 3 of The Judgments Act, R.S.M. 1902, c. 91, with the interpretation of the word "land" given in s-s (j.) of s. 2, refers to a present existing interest in land, and does not cover an interest which may come to a beneficiary as real estate or may come to him as money according to the actions of the administrator and the unknown exigencies of the administration. *McDougall* v. *Gagnon*, 16 M. R. 232.

DIRECTORS.

See COMPANY, II, 2; IV, 7, 8.

DIRECTORS, LIABILITY OF.

See WINDING-UP, I, 5; IV, 3.

DIRECTORY OR IMPERATIVE REQUIREMENTS.

See CRIMINAL LAW, XIV, 1.
— CRIMINAL PROCEDURE, I.
— EVIDENCE ON COMMISSION, 7.
— LOCAL OPTION BY-LAW, V, 3.
— MUNICIPAL ELECTIONS, 4.
— MUNICIPALITY, VII, 4.
— PROHIBITION, III, 1.
— REAL PROPERTY ACT, I, 1, 6.
— STATUTES. CONSTRUCTION OF, 1
— WORKMEN'S COMPENSATION FOR INJURIES ACT, 4.

DISALLOWANCE OF PROVINCIAL ACTS.

See CROWN LANDS, 1.
— INJUNCTION, I, 10.

DISCHARGE OF RETIRING PARTNER.

See PARTNERSHIP, 4.

DISCHARGE FROM IMPRISONMENT.

See COSTS, XIII, 7.

DISCLAIMER.

See COSTS, II, 1, 2.
— MUNICIPAL ELECTIONS, 1.

DISCLOSURE OF RELEVANT FACT

See ATTACHMENT OF GOODS, 4.
— INJUNCTION, I, 1; III, 2.

DISCONTINUANCE.

See COSTS, XIII, 8.
— DEMURRER, 3.
— PRACTICE, X, 1.

DISCOVERY.

See EXAMINATION FOR DISCOVERY.
— PRODUCTION OF DOCUMENTS, 7, 13, 14.

DISCOVERY OF NEW EVIDENCE.

See APPEAL TO SUPREME COURT, 5.
— EVIDENCE, 10.

DISCRETION.

See JUDICIAL DISTRICT BOARDS, 2.

DISCRETION OF COURT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 5.
— FIRE INSURANCE, 3.
— PRACTICE, XX, B. 5.
— PROHIBITION, I, 4, 5, 7; III, 1, 3.
— REAL PROPERTY ACT, II, 2.
— SOLICITOR AND CLIENT, III, 5.
— STAYING PROCEEDINGS, II, 2.
— SUMMARY JUDGMENT, I, 2.

DISCRETION OF JUDGE.

See COSTS, XIII, 2.
— COUNTY COURT, II, 2, 5.
— EXAMINATION OF JUDGMENT DEBTOR, 15.
— INJUNCTION, I, 1.
— INTERPLEADER, II, 7.
— JURY TRIAL, I, 4.
— PLEADING, I, 2; VIII, 2.
— PRACTICE, XX, B. 7, XX, C.

DISCRETION OF MASTER.

See SOLICITOR AND CLIENT, II, 1.

DISCRETIONARY ORDER.

See COSTS, XIII, 2.
— JURY TRIAL, I, 1.

DISCRIMINATION.

See MUNICIPALITY, I, 6.
— REAL PROPERTY ACT, III. 3.

DISMISSAL OF ACTION.

See MUNICIPALITY, VI, 2.
— PRACTICE, XXVIII, 24, 25.
— PRODUCTION OF DOCUMENTS, 5.
— SECURITY FOR COSTS, VI, 2.

DISOBEDIENCE OF ORDER.

See SOLICITOR, 1, 8.

DISPUTE NOTE.

See PLEADING, I, 2.

DISQUALIFICATION.

See ELECTION PETITION, IV, 3.
— MUNICIPAL ELECTIONS, 2, 6.

DISTRESS AND IMPRISONMENT.

See CRIMINAL LAW, XII, 1.

DISTRESS FOR INTEREST.

See DISTRESS FOR RENT, 3.
— MORTGAGOR AND MORTGAGEE, VI, 4.

DISTRESS FOR RENT.

1 Illegal distress—*Damages for—Leave and license—Contract not under seal and without consideration—Nudum pactum.*

The defendant attempted to justify a seizure for rent under a warrant of distress,

by producing a document signed by the plaintiff, which purported to give him the right to seize the plaintiff's goods for rent before the rent fell due according to the lease. The learned Judge found as a fact that this document was not sealed at the time of its execution, and no consideration was shown for the plaintiff executing it.

Held, that it was a *nudum pactum* and that the defendant could not justify under it. *Brayfield* v. *Cardiff*, 9 M. R. 302.

2. Illegal distress—*Estoppel in pais—Fraudulent removal of goods to avoid distress—Landlord and tenant.*

Some of the plaintiff's goods having been seized and sold along with those of his wife under a distress warrant issued by the defendant H. to his co-defendant, for the purpose of levying an amount due by the wife for rent of certain premises, from which, before the seizure, all the goods had been removed with the fraudulent intention of evading payment of the rent, the plaintiff brought this action for damages. When the bailiff made the seizure the plaintiff forbade him to do so, but he did not at any time inform H. or the bailiff that he claimed some of the goods to be his; and after the seizure his attorney wrote several letters to H., demanding that the goods be given up, and referring to them as belonging to the plaintiff's wife.

Counsel for defendants contended that the plaintiff was estopped by his silence as to his ownership of some of the goods, and by the language of the attorney's letters, from setting up the present claim.

Held, (DUBUC, J., dissenting) that the defendants had failed to prove that they had been induced to do anything, or to abstain from doing anything, by reason of what the plaintiff had said or done, or omitted to say or do, and that the plaintiff was entitled to recover.

Pickard v. *Sears*, 6 A. & E. 469, distinguished. *Montgomery* v. *Hellyar*, 9 M. R. 551.

3. Illegal distress—*Distress for interest — Mortgage — Attornment — Evidence — Admission—11 Geo. 2, c. 19, s. 19.*

The plaintiff sued the defendants in trespass and trover for seizing and selling her crops under a warrant of distress issued by them directing their bailiff to levy the amount of arrears of interest due on a mortgage given them by one Robertson, the lessor of the plaintiff, on the land on which the crops had been grown. The mortgage contained the usual provision that the defendants might distrain for arrears of interest. It also contained an attornment clause by which the mortgagor became a tenant to the defendants of the land at a yearly rental equal to the amount of interest payable in the mortgage.

Held, that under R.S.M., c. 46, s. 2, the distress was wholly illegal, as the defendant could only take the goods of the mortgagor for arrears of interest due by him.

The bailiff, after making the seizure, neglected to give notice of the distress or to make an appraisement of the goods, but it appeared that, after the seizure and sale of the crops, the plaintiff's husband agreed with the defendants' manager to pay the defendants $200 if they would abandon their claim to the crops, and procure a release from the person who had bought them at the sale. This money was afterwards paid and accepted by the defendants, and they contended that the agreement was an admission of rent being due and that the statute 11 Geo. 2, c. 19, s. 19, applied so as to prevent the plaintiff from bringing an action such as the present, and that she was restricted to an action on the case for any special damages that she might be able to prove.

Held, that there was not sufficient evidence that any interest was in arrear on the mortgage or any rent overdue, and that the agreement entered into by the plaintiff's husband could not be construed as an admission that any rent was due by Robertson, and therefore that the case was not brought within the last mentioned statute. *Miller* v. *Imperial Loan & Investment Co.*, 11 M. R. 247.

See CHATTEL MORTGAGE, II, 3.
— DAMAGES, 2.
— FI. FA. GOODS, 4.
— LANDLORD AND TENANT, I.

DISTRESS FOR TAXES.

See TAXATION, 1.
— TAXES.

DOCUMENTARY EVIDENCE.

See EVIDENCE, 3.

DOG RUNNING AT LARGE.

Destruction of unlicensed dog.

The defendant shot and killed the plaintiff's dog, which was running home alone on the highway, at the bidding of the plaintiff's wife, whom he had been following. He had not a metallic ticket fastened on his neck, as required by 34 Vic., c. 21 (Man.), which enacts that every dog found running at large without such a ticket might be destroyed by any one who should so find him running at large; nor had the Provincial tax fixed by the Act been paid for several years.

Per WOOD, C.J.—The dog was running at large within the meaning of the Act, and was therefore lawfully destroyed by the defendant.

Per MCKEAGNEY, J.—The dog was obeying the command of the plaintiff's wife, was therefore under her control, and was not running at large within the meaning of the Act.

The Court being equally divided, the verdict for the plaintiff in the Court below was upheld. *Allan* v. *McKay*, T. W., 111.

DOMINION ELECTIONS ACT.

R. S. C. 1906, c. 6, ss. 193, 206—*Application for recount of votes—Mandamus to County Court Judge to proceed—Return to Clerk of the Crown in Chancery—Affidavit on application to County Court Judge to order recount, requirements of, under section* 193*—Swearing on information and belief not sufficient.*

The affidavit required by section 193 of the Dominion Elections Act, R. S. C. 1906, c. 6, upon receipt of which the County Court Judge is to proceed to recount the ballots cast at an election of a member of the House of Commons, must be such as to *make it appear* to the Judge that a deputy returning officer has erred as therein stated, and such requirement is not satisfied by the affidavit of an elector who merely states that he verily believes that such error has been committed. All that was made to appear by the affidavit was the deponent's belief in certain facts, but the Act requires that the facts themselves must be made to appear by the affidavit.

Re North Cape Breton and Victoria Election, (1908) 6 East. L. R. 37, 532, followed.

After the returning officer has made his return to the Clerk of the Crown in Chancery, it is too late to apply, under section 206 of the Act, to a Judge of the King's Bench in Manitoba for an order compelling the County Court Judge to proceed with the recount.

Bellechasse Election, (1886) 17 Q. L. R., 294, and *Portneuf Election*, (1892) 1 Q. R. S. C. 268, followed. *Re Dauphin Election*, 21 M.R. 629.

DOMINION LANDS.

See BOUNDARY LINES.
— CROWN LANDS, 1.

DOMINION LANDS ACT.

1. Agreement to assign interest in homestead before issue of patent—*Illegality.*

1. Under section 42 of the Dominion Lands Act, R.S.C., c. 54, as re-enacted by section 5 of 60 and 61 Vic., (D.), c. 29, an agreement made by a homesteader, before issue of the patent and before procuring a certificate of recommendation for patent from the local agent, to assign and transfer an interest in the homesteaded land to another person, though made in good faith and for an adequate consideration, is absolutely null and void and cannot be enforced at the suit of such other person.

Abell v. *McLaren*, (1901) 13 M.R. 463, not followed.

2. Since the case of *Aubert* v. *Maze*, (1801) 2 B. & P. 371, there has been no distinction between *malum prohibitum* and *malum in se* as to anything forbidden by statute.

Cannan v. *Bryce*, (1819) 3 B. & Ald. 179, and *Wetherell* v. *Jones*, (1832) 3 B. & Ad. 221, followed. *Cumming* v. *Cumming*, 15 M.R. 640.

2. Charge on land created by homesteader before recommendation for patent—*Declaration by Minister of Interior as to effect of such charge—Estoppel.*

A charge on land created by a homesteader before it is recommended for patent is absolutely void under section 142 of the Dominion Lands Act, R.S.C. 1906, c. 55, and a declaration of the Minister of the Interior under that section waiving the forfeiture of the homestead

right that would otherwise follow the giving of such a charge has not the effect of making it valid in the hands of the grantee.

Harris v. *Rankin*, (1887) 4 M.R. 115, *Cumming* v. *Cumming*, (1904) 15 M.R. 640, and *Anderson* v. *Carkins*, (1890) 135 U.S.R. 483, followed.

One who took a conveyance of the property from the homesteader after recommendation for patent is not estopped from setting up the invalidity of a charge created before recommendation by reason only that he had acted as the agent of the party in acquiring the prior charge, having ceased to be such agent before getting his deed.

HOWELL, C.J.A., dissenting. *American Abell Co.* v. *McMillan*, 19 M.R. 97.

3. Charge on land for debt to Crown —*Costs—Real Property Act—Registry Act.* Under section 18 of 60 & 61 Vic., (D.), c. 29, amending the Dominion Lands Act and set out in statement of case, unless the Registrar makes the necessary entries respecting the indebtedness of the patentee there referred to "in the proper register or other record book in his office," no charge or lien will be created on the land comprised in the patent for such indebtedness

A docket or note book in which the Registrar kept a record of applications under The Real Property Act received and examined by him is not to be considered "the proper register or record book" in which to make the necessary entries, which should have been made in the Abstract Book kept under The Registry Act, as the patent had been registered under the old system of registration.

Under Rule 277 of The Queen's Bench Act, 1895, costs will be given against the Crown when it fails in proceedings taken by way of caveat and petition under The Real Property Act. *Reg.* v. *Fawcett*, 13 M.R. 205.

DOMINION PARLIAMENT—POWERS OF.

See CONSTITUTIONAL LAW.

DOUBLE POSSIBILITY.

See DEED OF SETTLEMENT.

DRAINAGE.

See MUNICIPALITY, II, 2; III, 2, 3, 4. — WATERCOURSE.

DREDGING SAND FROM BED OF RIVER.

See INJUNCTION, I, 4, 5.

DRUGGIST SELLING LIQUOR.

See LIQUOR LICENSE ACT, 4.

DRUNKENNESS.

See CONTRACT XI, 1; XV, 7. — MASTER AND SERVANT, IV, 3, 4.

DUPLICITY.

See CRIMINAL LAW, XVII, 4. — EXTRADITION, 8. — LIQUOR LICENSE ACT, 10.

DURESS.

1. Agreement signed under threat of criminal proceedings—*Award—Acquiescence—Waiver.* The plaintiff having bought two horses from the defendant and given a chattel mortgage upon them which was to be paid by delivering hay, a dispute arose as to whether the horses had been paid for or not. Defendant then seized the horses, claiming a right to do so under the chattel mortgage, when plaintiff prosecuted him for stealing. The defendant then threatened to prosecute the plaintiff for perjury in swearing to the information. The parties then agreed to refer their disputes to arbitration, the plaintiff having been induced by the threats to do so. The proceedings of the arbitrators were admittedly irregular, but an award was made giving the horses to defendant who was to pay the feed bill due against them, and $15 for previous expenses. The defendant then paid the feed bill and the $15 and took away the horses.

More than four months afterwards the plaintiff replevied the horses in the County Court, when the Judge found that the horses had been paid for by the delivery of hay, and that the arbitration proceedings were irregular, but was of opinion that plaintiff had by his conduct and acquiescence waived all objections to the award.

On appeal to a Judge of the Queen's Bench,

Held, that the agreement of arbitration was wholly void.

Williams v. *Bayley*, 4 *Giff.* 638, L. R. 1 H. L. 200, and *Windhill Local Board* v. *Vint*, 45 Ch. D. 351, followed.

Flower v. *Sadler*, 10 Q. B. D. 572, distinguished.

Held, also, that the plaintiff was not estopped from objecting to the agreement and award by the fact that he had allowed the defendant to take the horses and pay the money according to the award, or by allowing the defendant to keep the horses for so long. *Hayward* v. *Phillips*, 6 A & E. 119; *Bartle* v. *Musgrave*, 1 Dowl. N. S. 325, followed. *Laferriere* v. *Cadieux*, 11 M. R. 175.

2. Promissory notes signed under threat of criminal prosecution—*Recovery of money paid on such notes—Undue influence — Practice — Re-instating abandoned pleas.*

Demurrer to plea on equitable grounds setting up that the defendant had been induced to sign the promissory notes sued on by threats of a criminal prosecution in settlement of a claim preferred against him by the plaintiff, and that the defendant was not really liable for such claim, that he had acted without legal or independent advice, and had been induced to believe that he was liable for the amount and signed the notes in that belief and in consequence of such threats, and that save as aforesaid no value or consideration had passed for the making or payment of the notes.

Held, DUBUC, J., dissenting, that this plea was good as it showed sufficient grounds in equity for granting relief to the defendant: *McClatchie* v. *Haslam*, 65 L. T. N. S. 691, and *Osbaldiston* v. *Simpson*, 13 Sim. 513, followed.

The other plea demurred to was one of counter claim setting up the same state of facts as to the giving of the notes in question, and that the defendant had paid certain sums of money on account of such notes and seeking to recover back such payments.

Held, that this plea could not be supported, as it did not show that the payments in question had been made in consequence of any fresh threats or undue influence or pressure, but as far as the plea showed had been voluntarily made.

The defendant had withdrawn certain pleas, intending to rely on the issue in law on the demurrer; but, when the plaintiffs, on their demurrer failing, got leave to file replications, the defendant was also given leave to re-instate his plea of *non fecit*, and to apply on affidavit to re-instate his other pleas. *Commercial Bank* v. *Rokeby*, 10 M. R. 281.

See BILLS AND NOTE, VIII, 11.
— MORTGAGOR AND MORTGAGEE, IV, 3.

EARLY CLOSING.

See CONSTITUTIONAL LAW, 16.
— MUNICIPALITY, VII, 4.

EASEMENT BY PRESCRIPTION.

See WAY OF NECESSITY.

EJECTMENT.

1. Evidence of default in payment of mortgage—*Possession—Payment of taxes is evidence of possession.*

The plaintiff brought ejectment in 1893 for the lot of land in question, upon which he had made a mortgage in 1875, and set up that all claim under the mortgage was barred by the Statute of Limitations, and that it must be presumed to have been satisfied, and that neither the mortgagees nor any person claiming through them had attempted to take possession of the property until the year 1892. The defendant relied on a sale under the power of sale in the mortgage which took place in the year 1877, and claimed that he had in 1891 acquired the property by an agreement of sale from the purchaser under the mortgage. The defendant in June, 1892, took actual possession of the property, put a fence around it and erected a dwelling upon it. There was no direct evidence of default

in payment of the mortgage, but a notice of intention to exercise the power of sale in it was produced dated November 20th, 1876. This notice was in the usual form and had indorsed on it a certificate of service on the plaintiff by a bailiff, since deceased, whose handwriting was proved. The conveyance under the power of sale was proved, dated June 16th, 1877, and some entries showing that there had been a mortgage sale were produced from a solicitor's docket. The taxes on the lot since they were first levied in 1882, and up to the present time, were paid by the defendant, and those through whom he claimed. The plaintiff had done nothing to assert his title, or his right of possession, from the time of the mortgage sale up to the issue of the writ of ejectment.

Held, that under the circumstances there was sufficient evidence to prove default in payment of the mortgage in the absence of any evidence to the contrary, and that the service of the notice of sale and the sale under the power were sufficiently proved.

Held, also, that the payment of the taxes by the defendant and those through whom he claimed was evidence of possession, and that the defendant had established occupation and possession of the said land by himself and those through whom he claimed for over eleven years, and that the plaintiff should be nonsuited. *Hughes* v. *Rutledge*, 10 M.R. 13.

2. Local action — *Ejectment — Moving against irregularity.*

Held, 1. A writ of ejectment must be issued in the district in which the land lies.

2. A party objecting to a proceeding on the ground of irregularity must move within the time allowed to take the next step in the cause. *Landed Banking and Loan Co.* v. *Douglas*, 2 M.R. 221.

3. Right of action by reversioner.

An owner of land may bring an action to recover possession, although he has previously given a lease of it to a third party. *Penner* v. *Winkler*, 15 M.R. 428.

4. Stay of execution till equity done by plaintiff.

Where a plaintiff recovered a verdict in an action of ejectment, execution was stayed until he had paid the amount of an equitable mortgage on the land, the value of improvements made by the purchaser from the equitable mortgagee, and confirmed a lease of the premises. *McKenney* v. *Spence*, T.W., 11.

5. Title by possession — *Subsequent possession of defendant.*

In 1862, T. erected a house on the land in question, the fee of which was in the Crown, and lived in the house and exercised acts of possession on the land for two years, when he died. Before his death, he verbally gave the house and his interest in the land to his daughter, the wife of W., who was residing with him. After T.'s death, W. resided on the land for a few months, and then left. W. conveyed to the plaintiff by deed, which was registered. After the conveyance to the plaintiff, and about two years before action, the defendant commenced plowing part of the land in question, and afterwards took possession of the whole, though forbidden by the plaintiff. The action was commenced in 1880.

Held, that the mere prior possession of W., the plaintiff's grantor, was not sufficient to entitle the plaintiff to recover as against the mere possession of the defendant. *Lacerte* v. *Hargrave*, T.W., 343.

6. Transfer of title pending action — *Evidence without objection—Costs.*

When inadmissible evidence is received at the trial without objection, the opposite party cannot afterwards object to its having been received.

In ejectment, if at the trial the evidence shows title out of both parties, although in plaintiff when writ issued, the plaintiff is entitled to judgment for costs only. *McLaren* v. *McClelland*, 6 M.R. 533.

See CROWN PATENT, 3.
— PLEADING, I, 3; II, 1; XI, 9.

EJUSDEM GENERIS.

See CONTRACT V, 5.

ELECTION EXPENSES.

See ELECTION PETITION, IV, 3.

ELECTION OF BENEFITS.

See LIFE INSURANCE, 2.

ELECTION OF REMEDY.

Proceedings at law and in equity—*Statutes—Construction.*

Plaintiff, after recovering judgment at law against defendant, placed *fi. fa.* goods and lands in the hands of the sheriff, and issued garnishing orders. Under the *fi. fa.* goods the sheriff seized certain mortgages. The plaintiff also registered the judgment against certain lands, and filed a bill for a sale. Upon an application, at law, to compel the plaintiff to elect between the proceedings at law and in equity,

Held, 1. The case was not within the provisions of the Con. Stat. Man., c. 37, s. 83.

2. There is no practice outside the statute applicable to the case. At most the question would be one of costs.

3. The statute can only apply to proceedings at law and in equity, against lands—and probably the same lands—not to proceedings at law against goods, and in equity against lands. *Alloway* v. *Little*, 1 M.R. 316, considered.

4. In any case the application was premature, the answer in equity not having been filed. *Ferguson* v. *Chambre*, 2 M.R., 186.

See CONTRACT, X, 1.
— ESTOPPEL, 2.
— EVIDENCE, 17.
— PLEADING, III, 2.
— REGISTERED JUDGMENT, 1.

ELECTION PETITIONS.

I. AFFIDAVIT OF PETITIONER.

1. Abuse of the process of the Court—*Preliminary objections—Dominion Controverted Elections Act—54 & 55 Vic., (D.), c. 20, s. 3—Examination of petitioner.*

The affidavit required by 54 & 55 Vic. (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, (1) 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, (BAIN, J., dissenting as to this point.)

(2) That under section 2, s-s. (*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.

Re Marquette Election, *King* v. *Roche*, 11 M.R. 381.

Appeal to Supreme Court quashed, 27 S.C.R. 219.

2. Abuse of the process of the Court—*Dominion Controverted Elections Act—Preliminary objections—54 & 55 Vic.*, (D.), *c.* 20, *s.* 3—*Examination of petitioner.*

This was a motion to stay the proceedings on an election petition on the same ground as that relied on in *Re Marquette Election*, *supra*. 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 that he could not have made the affidavit on the same information that the petitioner had.

Appeal from judgment of KILLAM, J., dismissing motion, dismissed without costs. *Re Macdonald Election, Snider* v. *Boyd*, 11 M.R. 398.

II. ALLEGATIONS IN PETITION.

Preliminary objections—*Status of petitioner—Notice in Gazette—"Immediately"—Identity of petitioner—Vagueness—Security—Bond—Affidavits of justification.*

The status of the petitioner may be enquired into upon a preliminary objection to the petition.

The absence of notice of presentation of the petition in the *Gazette* is not a ground for preliminary objection.

Meaning of the word "immediately."

The absence of the words "Whose name is subscribed," after the name of the petitioner is not a sufficient ground of objection to a petition.

A petition is not insufficient for vagueness or uncertainty because it alleges a number of wrongful acts in the alternative. A petition is sufficient, if it allege merely that the respondent was guilty of a corrupt practice within the meaning of section 198 of The Election Act of Manitoba, 1886.

Security for costs may be given by bond to the respondent.

A bond was given to secure certain named costs "and also all *costs* which on the final disposal of the petition the court shall award to be payable as provided by the Manitoba Act." The statute required security for "any and all other *expenses* and *charges*."

Held, that the bond was sufficient, affidavits of justification need not accompany the bond. But if the sufficiency of the security be attacked the absence of such affidavits may be considered. *Re Cartier Election*, 4 M.R. 317.

Not to be relied on: *Re St. Boniface*, 8 M.R. 479.

III. COPY OF PETITION.

1. For returning officer—*Preliminary objections—R.S.C., c. 9, s. 63—English general rules—R.S.C., c. 9, s. 9 (h)—Description and occupation of petitioner.*

Held, by the Supreme Court, 20 S.C.R. 1, affirming the judgment of the Court below, (7 M.R. 581) that, the Judges of the Court in Manitoba not having made rules for the practice and procedure in controverted elections, the English rules of Michaelmas Term, 1868, were in force, (R.S.C., c. 9, s. 63), and that under rule 1 of said English rules the petitioner, when filing an election petition, is bound to leave a copy with the Clerk of the Court to be sent to the returning officer, and that his failure to do so is the subject of a substantial preliminary objection and fatal to the petition. STRONG and GWYNNE, JJ., dissenting.

Held, further, reversing the judgment of the Court below, that the omission to set out in the petition the residence, address and occupation of the petitioner is a mere objection to the form which can be remedied by amendment, and is therefore not fatal. *Re Lisgar Election, Collins* v. *Ross*, 20 S.C.R. 1.

2. Signature of copy—*Setting aside service.*

Motion to set aside the service of an election petition upon the grounds:

1. That the copy served was not signed by the petitioner, and did not show that the original was signed.

2. That the copy of the recognizance served did not show that the original was under seal, and if the original was under seal the copy served is not a true copy.

3. That there was no style of cause in the petition.

Refused with costs. *La Verandrye Election*, 1 M.R. 11.

3. True copy.

The following variances between the original petition and the copy filed; "person" instead of "persons;" "places" instead of "place;" "John A. McDonell" instead of "John A. McDonald;" "cause" instead of "caused."

Held, immaterial.

The condition of the recognizance was as follows:—"The condition of this recognizance is that John Hall shall *and* well and truly pay."

Held, sufficient.

In a certificate at the end of the recognizance one of the sureties was referred to as "the above named W. A. Baldwin." It should have been "William Augustus Baldwin."

Held, sufficient. *Re Lorne Election*, 4 M.R. 275.

IV. Corrupt Practices.

1. Bribing—*Manitoba Controverted Elections Act—Agency—Trivial and unimportant offences.*

At the trial of the petition against the respondent seeking to have his election declared void and himself disqualified for bribery and corrupt practices, within the meaning of The Manitoba Controverted Elections Act, R.S.M., c. 29, it was proved that one D. had been guilty of bribery of a voter.

D. was a person regularly employed by one of those most prominent on respondent's committee, and was working in the committee rooms prior to the elections just as any other member of the committee.

Held, that he must be considered to be an agent of the respondent, that the respondent was liable for any corrupt practice committed by him, that it was doubtful if the direct purchase of even a single vote for a payment in money by an agent of the respondent could be treated as of a trivial and unimportant character, and the election saved under section 248 of the Elections Act as amended by 55 Victoria, c. 12, s. 11; and the election was declared void.

The only personal charge which was pressed against the respondent was on account of his having paid money for the hire of teams to bring voters to the Court of Revision of the voters' list, held shortly before the election took place, and after respondent had declared himself a candidate. He had treated this expenditure as part of his election expenses in furnishing the statement of such after the election.

Held, that, although this payment, not being included in the list of permitted expenses under section 216 of the Elections Act, was forbidden by that section, yet it was not a corrupt practice within the meaning of section 214. *Re Election for Beautiful Plains, Ferguson* v. *Davidson*, 10 M.R. 130.

2. Bribery — *Treating — Furnishing transportation—Proof of agency of person guilty of corrupt practice—The Dominion Elections Act*, 1900, *ss.* 108-111.

1. A charge of bribery, whether by a candidate or his agent, is one which should be established by clear and satisfactory evidence, as the consequences resulting from such a charge being established are very serious: *Londonderry Case*, (1869) 1 O'M. & H. 274; *Warrington Case*, (1869) *Id.* 42; *North Victoria Case*, (1874) Hodg. Elec. Cas. 702.

2. To prove agency, the evidence should also be clear and conclusive and such as to lead to no doubtful inference: *Sligo Case*, (1869) 1 O'M. & H. 300; *Perth Case*, (1895) 2 Ont. Elec. Cas. 30.

3. To constitute agency in election cases, as in other cases, there must be authority in some mode or other from the supposed principal. It may be by express appointment or direction or employment or request, or it may be by recognition and adoption of the services of one assuming to act without prior authority or request. It may be directly shown, or it may be inferred from circumstances. It may proceed directly from the alleged principal or it may be created indirectly through one or more authorized agents: *Taunton Case*, (1874) 2 O'M. & H. 74; *Strand Case*, (1874) 3 O'M. & H. 11; *North Ontario Case*, Hodg. Elec. Cas. (1875) 304; *East Elgin Case*, (1899) 2 Ont. Elec. Cas. 100.

4. The fact that a person is a delegate to, or member of, the convention or body which selects a candidate does not of itself make such person an agent of the candidate chosen: *Harwich Case*, (1880) 3 O'M. & H. 69; *Westbury Case*, (1880) *Id.* 78; *West Simcoe Case*, (1883) 1 Ont. Elec. Cas. 159.

5. Canvassing, speaking at meetings, or other work in the promotion of an election does not *per se* establish agency, although, according to degree and circumstances, it may afford cogent evidence of agency: *Londonderry Case*, (1869) 1 O'M. & H. 278; *Staleybridge Case*, (1869) *Id.* 67; *Bolton Case*, (1874) 2 O'M. & H. 141; *East Peterboro*, (1875) Hodg. Elec. Cas. 245; *Cornwall*, (1874) *Id.* 547; *South Norfolk*, (1875) *Id.* 660.

6. Accompanying a candidate in his canvass is not sufficient in itself to constitute agency: *Shrewsbury*, (1878) 2 O'M. & H. 36; *Harwich*, (1880) 3 O'M. & H. 69; *Salisbury*, (1883) 4 O'M. & H. 21.

7. Section 109 of The Dominion Elections Act, 1900, is new and goes far in advance of the former law as to treating voters at an election in omitting the element of corrupt intent, and should be strictly construed. Under that section the providing or furnishing of refreshments or drink would not be an offence unless done at the expense of the candidate.

8. The treating of electors prior to and on polling day by an agent of the respondent, although done on a liberal scale, will

not be assumed to have been done with the corrupt intent necessary to make it an offence, when the Court is satisfied that he was accustomed to keep at all times considerable quantities of liquors on hand and to supply them quite freely to others in the way of hospitality or as a matter of business, and there is no other evidence to show that the treating was done in order to influence a voter or voters: *Glengarry Case*, (1871) Hodg. Elec. Cas. 8; *Brecon Case*, (1871) 2 O'M. & H. 44; *East Elgin Case*, (1879) Hodg. Elec. Cas. 769; *Welland Case*, (1871) *Id.* 50.

The same rule applies to treating when done in compliance with a custom prevalent in the country and without express evidence of any corrupt intent in so treating; also to the supplying of meals at a private house to electors who have come from a distance, in the absence of evidence that this was done for the purpose of influencing the election: *The Rochester Case*, (1892) 4 O'M. & H. 157; *Dundas Case*, (1875) Hodg. Elec. Cas. 205; *London Case*, (1875) *Id.* 214.

9. The taking unconditionally and gratuitously of a voter to the poll by a railway company or an individual, or the giving to a voter of a free pass or ticket by railway, boat or other conveyance, if unaccompanied by any condition or stipulation affecting the voter's action in reference to his vote, is not a corrupt practice, and the *onus* is on the petitioner to prove that the railway tickets supplied had been paid for: *Berthier Case*, (1884) 9 S.C.R. 102; *North Perth Case*, (1891) 29 S.C.R. 331; *Lisgar Case*, (1901) 13 M.R. 478.

10. Where a charge is made of an offer not accepted of money to influence a voter the evidence is required to be particularly clear and conclusive: *South Grey Case*, (1871) Hodg. Elec. Cas. 52; *Prescott Case*, (1883) 1 Ont. Elec. Cas. 88; *Northallerton Case*, (1869) 1 O'M. & H. 167.

The witness in this case, whom the Judges considered to be honest and reliable, said first that the agent, Fiset, told him that the other side was poor, but, "if you come with us, we have lots of money," and afterwards testified: "He said our side was poor and that I wanted money, and if I wanted to go on their side they would give me some money."

Held, too indefinite and vague.

The respondent was nominated at a meeting of delegates from different portions of the constituency, and, at a public meeting after the close of the convention, he stated that he expected all the delegates to help at the election and that he looked for assistance not only from them, but from all supporters of the Government.

Held, that these and other general remarks made by the respondent were not sufficient to constitute all his supporters his agents, but that the persons promoting his election from a central agency or committee in Winnipeg recognized and visited by him, and persons sent out from that agency, should be deemed to be his agents for the purposes of the election.

In the following cases agency was held to have been sufficiently proved:

Alexander Smith, who went to a polling place on election day to look after it, armed with authority to vote there as the respondent's agent.

Edward Jobin, who had been recognized by the central agency in Winnipeg. Talbot, Bureau and Ami, who came from outside the constituency and made Somerset their headquarters for the promotion of the respondent's election and acted openly there for about three weeks and went about addressing public meetings for the respondent. Bureau also had been sent out by the Winnipeg agency to speak at a meeting, and the respondent had an important meeting with Bureau and Talbot from which it was reasonable to infer that he recognized them as working for him in the district.

Aurele Fiset. This man canvassed in the constituency for ten days, was at a meeting at which Bureau spoke and Talbot and Ami were present, and he publicly thanked the people for attending at his request.

The respondent having allowed the organization of the contest to go into the hands of persons as to whom he could or would not give any information, and having failed to show that he had made any serious effort to prevent illegal practices, he was refused any costs of his attendance or examination as a witness, but in other respects the petition was dismissed with costs. *Re Lisgar Election*, 14 M.R. 310.

3. Evidence to disqualify—*Proof that candidate took all reasonable means to prevent the commission of corrupt practices—The Dominion Elections Act*, 1900, *ss.* 123, 127, 146—*Offences of a trivial, unimportant and limited character—Burden of proof—Costs—Witness fees—54-5 Vic., c.* 20, *s.* 15—*Statement of election expenses—Payments by candidate otherwise than through*

his election agent—Payment for expenses or services of agent.

At the trial of a petition to set aside the election of the respondent and for the disqualification of the respondent for personal complicity in corrupt practices, the Judges found on the evidence that corrupt practices had been committed by five or six different agents of the respondent; but it was urged on his behalf that, under section 127 of The Dominion Elections Act, 1900, the election should not be declared void. The Judges, however, found that, as regards at least two of the said agents, the respondent had given no orders or cautions against the commission of corrupt practices, and that the circumstances were such as to throw upon him the suspicion of having sanctioned or connived at the corrupt practices committed by a third agent, although he denied on oath having been guilty of any such conduct.

Held, (1) That the offences proved could not be deemed to have been of a trivial, unimportant and limited character, and that the onus was on the respondent to prove affirmatively, for the purpose of saving the election, that the particular offences proved were committed contrary to his orders and without his sanction and that he had taken all reasonable means for preventing the commission of corrupt practices, and that, as he had failed to satisfy the Court in that regard, the election must be set aside under section 123 of the Act.

(2) That, as to disqualification of the candidate, the onus was on the petitioner to prove beyond a reasonable doubt the guilt of the respondent, and that there was not sufficient evidence to warrant an affirmative finding that he had personally been guilty of corrupt practice.

Centre Wellington Case, (1874) Hodg. Elec. Cas. 579; *Russell Case*, (1875) *Ib.* 199; *Welland Case*, (1875) *Ib.* 187, followed.

(3) That the omission from the election accounts furnished under section 146 of the Elections Act of certain payments made by the respondent and his personal payment of the sums directly and not through his election agent, although forbidden by the Act, are not expressly constituted as corrupt practices voiding the election. The *Lichfield Division Case*, (1895) 5 O'M. & H. 34, and the *Lancaster Division Case*, (1896) *Ib.* 39, distinguished on the ground that the Imperial Statute under which they were decided expressly makes these things illegal practices and declares that an election shall be voided for such practices.

(4) That the payment by a candidate of an agent's legitimate expenses while engaged in promoting his election is not a corrupt practice; and *quære*, whether payment for the services of such an agent would be so where not colorably made to secure the agent's vote.

Costs awarded according to the findings.

In view of the wording of sub-section 4 of section 15 of 54 & 55 Vic., c. 20, the Court subsequently made an affirmative order allowing to the respective parties the witness fees and other actual, necessary and proper disbursements incurred in respect of the issues on which the findings had been in their favor respectively. *Re Lisgar Election*, 13 M.R. 478.

4. Returning officer participating in

—Dominion Controverted Elections Act, R.S.C., c. 9, s. 2 (f) and s. 7—Preliminary objections—Corrupt practices — Returning officer as party respondent to petition—Certainty in pleading.

Hearing of preliminary objections to election petitions against both the successful candidates and the returning officers.

Each petition alleged, among other things, that the returning officer, acting in collusion with the elected member, unlawfully established different polling divisions from those arranged by the Provincial authorities for Provincial elections; that, instead of supplying the deputy returning officers with the copies of the voters' lists received from the Clerk of the Crown in Chancery, he made changes and erasures therein and removed therefrom the names of many persons entitled to vote and so prevented such electors from voting at the election; that he had given copies of the voters' lists so improperly made out to his co-respondent and refrained from furnishing such copies to the opposing candidate and concealed these matters entirely from the latter, and that all this had been done in furtherance of a design previously arranged between the respondents to embarrass and hinder those opposed to the election of the elected member; also that the returning officer had signed a large number of certificates in blank to enable voters to vote at polling places for which their names did not appear, and that the respondents had, in these and other ways, conspired to impede and interfere with the free

exercise of the franchise of many voters.

Held, 1. That the acts complained of might constitute corrupt practices within the meaning of sub-section (f) of section 2 of The Dominion Controverted Elections Act, R.S.C., c. 9, for, although they were not so declared by the Dominion Elections Act, or by any other Act of the Parliament of Canada, yet they were infractions of subsequent statutory provisions as to the conduct of elections and may amount to corrupt practices within the common law of Parliament, as they might be of such extent that the constituency had not had a fair and free opportunity of electing the candidate whom the majority might prefer, this being the test applied by Lord COLERIDGE, C.J., in *Woodward* v. *Sarsons*, (1875) L.R. 10 C.P. at p. 743, and therefore the paragraphs of the petition setting forth such acts should not be struck out on preliminary objections.

2. The conduct of the returning officer in connection with the election being complained of, he was properly joined as a respondent under section 7 of the Act.

3. An allegation in the petition that the returning officer, with the knowledge and consent of the elected member, in many ways improperly aided in the election of the latter is too vague and should be struck out. *Re Lisgar Election Petition, re Selkirk Election Petition, re Brandon Election Petition, re Portage La Prairie Election Petition*, 16 M.R. 249.

5. Treating—*Intent— Appeal — Disqualification—Payments for accommodation.*

Held, upon an appeal by the petitioner, the respondent has no right to seek a reversal of the certificate dismissing counter charges against the defeated candidate.

Held, (TAYLOR, J., dissenting), although a successful candidate, at an election for the Legislative Assembly, may be found guilty of treating electors, with intent to influence their votes, he may be unseated only, and not disqualified.

Held, *per* WALLBRIDGE, C.J. 1. Treating *per se* is not illegal. It is the corrupt intent of influencing voters by it that the statute condemns.

2. The word "corrupt" in the statute does not mean depraved, but rather that the act was done in so unusual and suspicious a way, that the Judge ought to impute to the person a criminal intention in doing it.

Held, *per* TAYLOR, J. 1. The difficulty of finding the existence of corrupt intent in treating, where, according to the habits and practices of the respondent, and existing generally in the locality, treating is customary, discussed.

2. Payments to an elector not an hotel keeper for accommodation, unless excessive, are not *prima facie* corrupt.

3. Treating, after a meeting, at taverns where supporters of both parties are present—promiscuous treating among a large crowd of men attracted together by a political meeting—is not *prima facie* corrupt.

4. Much weight will be attached to the denial by the respondent of corrupt intent.

5. To prove agency, authority from the alleged principal must be shown. *Re Rockwood Election, Brandrith* v. *Jackson* 2 M.R. 129.

V. PRACTICE.

1. Abandoned petition—*Costs.*

A petition was filed, styled in the Electoral Division of *Kildonan*. After a preliminary objection had been taken on the ground that the name of the constituency was Kildonan and St. Paul's, a new petition was served, together with a notice of abandonment of the former petition. This notice was styled in the Electoral Division of Kildonan and St. Paul's. Upon a motion by the respondent that the first petition should be discontinued and that the petitioner should pay the costs incurred,

Held, 1. That such an application could be entertained.

2. That, under the circumstances, the application could not be defeated because the summons was styled in the Electoral Division of Kildonan and St. Paul's.

3. Although the statute requires that two copies of the preliminary objections are to be left with the prothonotary, one for file and one for the petitioner, yet, if one copy be filed, and one be served upon the petitioner as provided by Rule 14. the petitioner cannot object.

4. Proceedings upon the second petition not stayed until payment of the costs of the first. *Re Kildonan & St. Paul's Election*, 4 M.R. 252.

2. Service of order—*Counsel representing witness—"Sufficient sureties."*

At law an order must be drawn up and served within a reasonable time, otherwise

the other party may treat it as abandoned. But the order will not be set aside on the ground of delay unless the other party's position has been affected by it.

In equity only *ex parte* orders require service. The common law prevails as to service of orders in election cases.

An order was made for the examination of witnesses upon a chamber application. The order was not served, but the opposite attorney attended on, and took part in, the examination.

Held, that the depositions might be read.

A witness cannot be represented by counsel, nor can counsel engaged in the case be heard in support of any objection the witness may have to giving evidence.

The expression in The Controverted Elections Act, "three sufficient sureties," means three sureties *each* of whom is sufficient for the whole amount. *Re Assiniboia Election*, 4 M.R. 328.

VI. Preliminary Objections.

1. Appeal from single Judge—*Election petition without prayer—Amendment.*

An appeal will lie against the order of a single Judge allowing preliminary objections, and thereupon dismissing a petition.

An election petition set forth certain corrupt practices and concluded as follows: "Your petitioner alleges that, by reason of one or more of such acts or practices, the election of said C. E. H. was void."

Held, that these words constituted a sufficient prayer for relief.

2. That, if necessary, an amendment could be made. *Re Shoal Lake Election*, 5 M.R. 57.

2. Re-opening trial to let in further evidence — *Dismissal for want of prosecution—Manitoba Controverted Elections Act, R.S.M.* 1902, *c.* 34, *ss.* 10, 13—*Dominion Controverted Elections Act, R.S.C.* 1906, *c.* 7, *s.* 39—*King's Bench Act, R.S.M.* 1902, *c.* 40, *ss.* 92, 93.

1. Under The Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, and sections 92 and 93 of the King's Bench Act, R.S.M. 1902, c. 40, the Judge, at the trial of preliminary objections to an election petition, may, even after the petitioners have closed their case, re-open it and allow them to put in further evidence to prove their status as petitioners.

2. The requirement in section 39 of The Dominion Controverted Elections Act, R.S.C. 1906, c. 7, that an election petition must be brought to trial within six months from the time of its presentment, is not imported into the law governing election petitions under The Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, by the language of section 13 of the latter Act. Such a provision would require a positive statute, as it deals with something more than a mere matter of practice and procedure. *Re Morris Election*, 17 M.R. 330.

3. Service of.

The Manitoba Controverted Elections Act, R.S.M. c. 29, s. 37, provides that "Within five days after the service of the petition . . . . . the respondent may produce any preliminary objections, or grounds of insufficiency, which he may have to urge against the petitioner or against the petition; . . . . . he shall in such case at the same time file a copy of such objections or grounds for the petitioner."

Rule 14, after dealing with the subject of filing preliminary objections, says, "and shall serve a copy thereof."

The respondent filed a copy of his preliminary objections for the petitioner and then, under rule 14, obtained a summons to dispose of these objections. There was no evidence to show whether they had been served or not.

Held, that, there being no evidence to show that a copy of the preliminary objections had not been served, it must be assumed that the Judge who issued the summons was satisfied with the regularity of the respondent's proceedings up to that time. *Re St. Boniface Election*, 8 M.R. 446.

4. Summons to dispose of—*Time within which to take out.*

The preliminary objections to an election petition cannot be dismissed on the ground that the respondent did not, within five days after the filing of the objections, take out a summons to dispose of them, as required by Rule 14. The statutory obligation to hear and decide the objections still remains.

Rule 14, as to taking out such a summons, is equally obligatory upon each party.

Re St. Andrews Election, 4 M.R. 514, commented on. *Re Brandon City Election*, 8 M.R. 505.

See Costs, XII, 1.

VII. Recognizance.

1. Justice of the Peace.

An election petition was filed and served on 15th January. An order allowing respondent ten days' further time to file preliminary objections "to the petition and proceedings" was made on the 20th January. A statement of preliminary objections was filed on the 26th January, among which was an objection that the recognizance for security for costs was taken before a Justice of the Peace.

Held, that such an objection was not a preliminary objection; that the rules were erroneous in so treating it, and that the objection might be taken at any time.

The Elections Act declared that "The Judge shall then hear the parties upon such objections." The rules limited the time for hearing to five days after the commencement of the time referred to as "then."

Held, that this rule was *ultra vires*.

The recognizance was taken before S., who was a commissioner for taking affidavits, and also a Justice of the Peace. It purported to have been taken before S. in his quality of a Justice. As a Justice he had no power to take the recognizance, but as a commissioner he had.

Held, that the recognizance was void. *In re St. Andrews*, 7 C.L.T., Occ.N. 277.

2. Justice of the Peace.

An objection that the recognizance for security for costs was taken before a Justice of the Peace is a preliminary objection. Preliminary objections having been filed in proper time, a summons to consider them will not be discharged merely because it has not been taken out within the time limited by statute.

A Justice of the Peace has no power to take a recognizance in an election case. (*Re North Dufferin Election*, 4 M.R. 280, followed.)

A recognizance was taken before R. S., described as a Justice of the Peace. He was also a commissioner, but nothing appeared upon the recognizance to show that fact.

Held, that the recognizance was invalid.

These were appeals from the decision of Wallbridge, C. J., in *re St. Andrews Election*, and Dubuc, J., in *re Lavarandrye Election*, (in which he followed *re St. Andrews Election*). *Re Laverandrye Election, re St. Andrews Election*, 4 M.R. 514.

3. Justice of the Peace—*Amendment of security.*

Justices of the Peace have no authority or jurisdiction save that of the old "Conservators of the Peace," and such as have been given to them by statute. They have no power to take a recognizance upon an election petition.

A person voluntarily entering into a recognizance is not estopped from denying its validity.

The practice in England with reference to security for costs has not been introduced into Manitoba.

If the security upon an election petition be imperfect there is no power to permit an amendment of it or the substitution of other security.

Upon a preliminary objection to a petition upon the ground that the recognizance was taken before a Justice of the Peace, the recognizance having been held bad, the petition was dismissed with costs. *Re North Dufferin Election*, 4 M.R. 280.

4. Justice of the Peace—*Bond without seals—Amendment.*

An instrument in the form of a recognizance not under seal, taken before a Justice of the Peace, was filed as security for costs.

Held, 1. Irregular as a recognizance, (*Re North Dufferin Election*, 4 M.R. 280 followed); and invalid as a bond for want of seals.

2. That the Court had no power to permit the substitution of other security. *Re Emerson Election*, 4. M.R. 287.

VIII. Return to Writ.

Preliminary objections — *Manitoba Controverted Elections Act, R.S.M., c. 29, s. 18—Manitoba Election Act, R.S.M., c. 49, s. 196—Return to Clerk of Executive Council and gazetting same before result of recount—Time for filing petition.*

The Returning Officer having made his return to the Clerk of the Executive Council, pursuant to section 196 of The Manitoba Election Act, R.S.M., c. 49, but without waiting for the result of a recount of which he had received notice, the Clerk, as required by section 200, published the election of the respondent in the next number of the Manitoba Gazette.

The petition was filed on the last of the 30 days thereafter in accordance with section 18 of The Manitoba Controverted Elections Act, R.S.M., c. 29.

After the result of the recount was made known confirming the election of the respondent, the Returning Officer sent another return to the Clerk of the Executive Council, which he duly gazetted, but this was more than six weeks after the filing of the petition.

Held, that the petition was regular and that a preliminary objection based on the contention that the first return and gazetting of the election were void, and that only a petition filed after the second return would be good, should be overruled. *Re Rosenfeldt Election*, 13 M.R. 87.

IX. Security for Costs.

1. Preliminary objections—*Proof that security was duly given—Evidence that notes deposited were current money of Canada—Statement of the purposes for which the security was given—Manitoba Controverted Elections Act, R.S.M.*, 1892, *c.* 29, *ss.* 21, 22.

The petitioners, intending to comply with sections 21 and 22 of The Manitoba Controverted Elections Act, R.S.M., c. 29, made a deposit with the Prothonotary, consisting of Dominion notes, one for $500, one for $100, and 150 for $1 each, and got a receipt stating that the sum of $750 had been deposited as security "for the payment of all costs, charges and expenses which the Court shall award to be payable by the petitioners on the final disposal of the petition."

On the hearing of preliminary objections it was shown that the notes had been handed out by one bank to the petitioners' solicitor as Dominion notes in payment of a cheque; and that, after receiving them, the Prothonotary deposited them in another bank, which received them as cash. The note for $500 was produced and identified at the hearing, but the others had been paid out in the course of business and could not be traced.

Held, (1) That it was not necessary to prove that the notes were genuine and signed by the proper officials with the same strictness as would be required in proving other documents before the Court, and that the evidence adduced was sufficient *prima facie* to establish compliance with the Act; and

(2) That the petitioners were not bound by the form of the receipt given by the Prothonotary as to the purposes for which the security given was intended, as no receipt is required by the statute to be given. The money was paid in as security for costs in the matter, and sections 21 and 22 of the Act make it security for all purposes therein referred to. *Re St. Boniface Election*, 13 M.R. 75.

2. Statement of purposes for which given—*Recognizance under seal—Bond.*

Security for "the costs, charges and expenses in respect of the election petition" is sufficient without enumerating the various items for which security is required by the statute to be given.

Security was given by an instrument in the form of a recognizance, but executed under seal. It was invalid as a recognizance because taken before a Justice of the Peace.

Held, that it could not be supported as a bond. *In re West Brandon Election*, 7 C.L.T., Occ. N. 301.

X. Status of Petitioner.

1. Burden of proof of—*Preliminary objections — Security for costs — Current money of Canada.*

Where a petition against the election of a member of the Legislative Assembly is presented by a person other than a candidate, the *onus* is on the petitioner to establish his *status*.

Where the only evidence of *status* was contained in an affidavit which stated: "I was at the time of said election, and at the time of the filing of the petition herein and am now, an elector of the said electoral division, and had a right to vote at said election."

Held, insufficient.

The Richelieu Election Case, 21 S.C.R., 168, followed.

The security for costs required to be given by the petitioner under R.S.M., c. 29, s. 22, must be in legal tender, *i. e.*, gold coin or Dominion notes.

Re St. Boniface Election, 8 M.R. 474, followed. *Re Cypress Election*, 8 M.R. 581.

2. Burden of proof of—*Preliminary objections — Security for costs — Current money of Canada.*

A petitioner against the election of a member to the Provincial Legislature, who was not a candidate, must, if the objection is taken by preliminary objection, establish his *status* by producing a properly verified copy of the list of electors and some evidence of his identity with some person whose name appears thereon.

Stanstead Election Case, 20 S.C.R. 12, followed.

The security for costs required to be given by R.S.M., c. 29, s. 22, must be in gold coin or Dominion notes. *Re St. Boniface Election*, 8 M.R. 474.

3. Proof of — *Dominion Controverted Elections Act—The Franchise Act*, 1898—*The Dominion Elections Act*, 1900.

On the trial of the preliminary objection to an election petition, filed under The Dominion Controverted Elections Act, that the petitioners were not persons entitled to vote at the election in question, it is not necessary since the passing of The Franchise Act, 1898, and The Dominion Elections Act, 1900, to prove that the names of the petitioners were on the list of voters which was actually used by the deputy returning officer at the particular polling division; but it will be sufficient to show that their names were on the original list transmitted under section 16 of The Franchise Act, 1898, by the custodian thereof after final revision to the Clerk of the Crown in Chancery, as this is declared by s-s. 2 of section 16 to be "the original and legal list of voters for the polling division for which the list of which it is a copy was prepared;" and under section 10 of the same Act this list may be proved by the production of a copy authenticated by the ordinary imprint of the Queen's Printer.

The Richelieu Case, (1892) 21 S.C.R. 168, and the *Winnipeg* and *Macdonald Cases*, (1897) 27 S.C.R. 201, distinguished on the ground of changes in legislation. *Re Provencher Dominion Election*, 13 M.R. 444.

4. Proof of—*What list of electors must be produced.*

A petitioner against the election of a member of the Provincial Legislature, who was not a candidate, being required, under The Controverted Elections Act, R.S.M. c. 29, s. 14, to prove his right to vote at the election in answer to a preliminary objection, may do so by showing that his name appears on the list of electors for the whole constituency, prepared and revised under The Election Act, R.S.M. c. 49, s. 148, and need not show that his name was on the list of voters supplied to the deputy returning officer for use in the polling division in which the petitioner would have the right to poll his vote. (TAYLOR, C.J., dissenting.)

The Richelieu Election Case, 21 S.C.R. 168, considered and distinguished. *Re Brandon City Election*, 9 M.R. 511.

5. Proof of—*List of voters—Certificate of Clerk of the Crown in Chancery.*

On the hearing of preliminary objections to the election petition, in order to prove the status of the petitioner, a certificate of the Clerk of the Crown in Chancery, verifying a copy of the list of voters as finally revised for the electoral district, and stating that the copy is a true copy of the list of voters which was used at such polling division and was returned to him by the returning officer for said electoral district "in the same plight and condition as it now appears, and that said original list of voters is now on record in my office," is, by virtue of section 114 of The Dominion Elections Act, R.S.C. c. 8, sufficient proof that the petitioner was an elector.

Richelieu Election Case, 21 S.C.R. 168, followed.

Re Macdonald Dominion Election, 17 C.L.T.Occ.N. 159.

6. Proof of — *Manitoba Controverted Elections Act, R.S.M.* 1902, *c.* 34, *ss.* 10, 13 —*Preliminary objections—Reopening trial to let in further evidence—Evidence to prove deposit of security—Dominion Controverted Elections Act, R.S.C.* 1906, *c.* 7, *s.* 6—*Affidavit verifying petition—Practice and procedure in election petitions, what is —Construction of statutes—Headings to groups of sections—Notice to the respondent of the furnishing of the security—Scrutiny of votes—Claim of seat for opposing candidate—Manitoba Election Act, R.S.M.* 1902, *c.* 52, *ss.* 183, 184.

1. Section 13 of The Manitoba Controverted Elections Act, R.S.M. 1902, c. 34, which provides that, "until rules shall have been made in pursuance of the Act and in all cases unprovided for by such rules when made, the principles, practices and rules then in force by which election petitions under The Dominion Controverted Elections Act, R.S.C. 1906, c. 7, are governed, shall be observed so far as, consistently with this Act, they may be so observed," should be limited in its application to matters with respect to which the Judges of the Court of King's Bench might, under section 10 of the Act, make general rules or orders; that is, for the effectual execution of the Act and of the intention and object thereof and the

regulation of the practice and procedure with respect to election petitions, &c.

2. Accordingly, the requirement of section 6 of the Dominion Act, that the petition should be accompanied by an affidavit verifying the petition, is not imported into the Manitoba Act, which gives the right to any elector to present such petition without limiting it to those who can make such an affidavit.

3. The concurrence of two things is essential before the Dominion practice can be applied in any particular case; first, the subject must not have been dealt with by the Manitoba Act or rules; and, secondly, it must be something concerning which the Judges would have power to make a rule. The requirement of an affidavit verifying the petition is something beyond a mere matter of "practice and procedure," and, therefore, the Judges would have no power, under section 10, to make a rule introducing it.

4. The inclusion of section 13 among a group of sections headed "Rules of Court" is further evidence that the Legislature did not intend by that section to incorporate the Dominion statutory enactments as distinguished from rules of practice and procedure.

5. The rules in force under the Manitoba statute do not provide that the respondent should have notice of the furnishing of the security by the petitioner depositing current money of Canada, instead of giving a recognizance or bond as formerly.

6. A petition under the said Act may ask for a scrutiny of the votes at the election and may also claim the seat for the opposing candidate.

7. To prove the petitioner's status on the trial of the preliminary objections, it would be sufficient to produce either the list of electors for the whole constituency certified by the Clerk of the Executive Council, or the list actually used by the deputy returning officer with identification of his name as being on one of these lists, provided there be further evidence to show that the petitioner is not disqualified as a voter under the provisions of section 184 of The Manitoba Elections Act, R.S.M. 1902, c. 52. This latter evidence is necessary because the petitioner must be a person who has the right to vote and section 183 says that every person whose name appears as an elector on the list . . . shall be entitled to vote at such election, *provided at the time of such election such person is not disqualified under the provisions of the next following section.*

8. Although the petitioner has closed his case without giving such further evidence, the trial Judge may, as at the trial of an ordinary action, re-open the case, and allow him to put in further evidence to prove his status.

To prove that the documents purporting to be Dominion of Canada notes deposited with the Prothonotary by the petitioner for the necessary security were genuine, he produced at the hearing of the preliminary objections the identical notes so deposited, showed that the Prothonotary had received them as genuine and had given a receipt describing them, and called a bank official with an experience of ten years who testified that the notes were genuine and that he knew them by the paper, the scroll on them and by their general appearance. The Prothonotary also swore that the deposit had been made in Dominion notes.

Held, sufficient, although the bank official did not know by whom Dominion notes should be signed or the genuineness of the signatures appearing on them. *In re St. Boniface Election Case*, 13 M.R. 75, followed. *Re Morris Provincial Election*, 6 W.L.R. 742.

See COSTS, XII, 1.

ELECTION TO AFFIRM CONTRACT.

See MISREPRESENTATION, III. — MISTAKE, 1.

ELECTRIC LIGHT COMPANY.

See MUNICIPALITY, VIII, 7.

ELECTRIC WIRES.

See NEGLIGENCE, VI, 1.

ELECTRO-THERAPEUTICS.

See MEDICINE. PRACTICE OF

EMBARRASSING PLEADINGS.

See LIBEL, 4.
— PLEADING, X.
— PRACTICE, XXIII, 2.

EMPLOYER AND EMPLOYEE.

See NEGLIGENCE, VII.

ENGLISH COURTS, DECISIONS OF

See MORTGAGOR AND MORTGAGEE, VI, 15.

ENLISTMENT IN MILITIA.

See MILITARY LAW.

ENTERING JUDGMENT.

See PRACTICE, XXVIII, 17.

EQUALIZED ASSESSMENTS.

See JUDICIAL DISTRICT BOARDS.

EQUITABLE ASSIGNMENT

1. After acquired property—*Assignment of—Banks—Powers of—Advances on security of choses in action.*

A firm of contractors agreed with S. that, if he would indorse their notes to the Molsons Bank to the amount of $10,000, they would give an assignment to the Bank of all moneys to be payable to them from a Railway Company on contracts made and to be made by them with the Railway Company to secure the notes. They also agreed with the Bank that, in consideration of an advance to them of the money upon their notes endorsed by S., they would assign to the Bank the said moneys, and gave to N., the Bank manager, a power of attorney authorizing him to collect from the Railway Company the said moneys. S. endorsed the notes and the moneys were advanced.

Held, that this transaction amounted to an equitable assignment to the Bank of the moneys in question.

Rodick v. *Gandell*, 1 D. M. & G. 763, distinguished.

Held, also, that moneys arising out of future contracts can be assigned.

Tailby v. *The Official Receiver*, 13 App. Cas. 523; *Re Clarke, Coombe* v. *Carter*, 36 Ch. D. 348, and *Re Turcan*, 40 Ch. D. 5, followed.

Brown v. *Johnston*, 12 A.R. 190, distinguished.

Held, also, that it is within the powers of incorporated Banks to make advances upon the security of any *choses* in action, except in so far as the Banking Act expressly excludes such transactions. *Molsons Bank* v. *Carscaden*, 8 M.R. 451.

2. Half-breed allotment—*Registration of patent—Recitals in patent.*

A half-breed child conveyed all his "right, title, interest, claim, property and demand both at law and in equity of which he is now in possession, or of which he may hereafter become possessed, of, in and to the said land to which he is, or may become, entitled as heir at law of such half-breed in the said Province of Manitoba, wheresoever the same has been, or may hereafter be, allotted."

Held, a good equitable assignment.

Held, that a vendor is bound to register the patent through which he claims title.

Held, that a recital, in a patent two years old, of a death intestate is not sufficient evidence of the fact, as between vendor and purchaser. *Sutherland* v. *Schultz*, 1 M.R. 13.

3. Not necessary to be in writing—*Equitable assignment—Notice.*

Held, by the Full Court, affirming the decision of TAYLOR, J., that an equitable assignment of a *chose* in action may be made by any words or acts shewing a clear intention to assign; a deed or writing is not necessary. *McMaster* v. *Canada Paper Co.*, 1 M.R. 309.

EQUITABLE CLAIM.

See CONSTRUCTIVE NOTICE.
— DEED OF LAND, 2.

EQUITABLE DEFENCE.

See PLEADING, X, 3.

EQUITABLE ESTOPPEL.

Remarks upon equitable estoppel, and the Statute of Frauds, as viewed in Courts of Equity. *McKenney* v. *Spence*, T.W. 11.

EQUITABLE EXECUTION.

Receiver—*Trade Union—Dues and assessments payable by members.*

If there is nothing in the constitution or rules of a trade union importing a contract express or implied on the part of members to pay dues or assessments; a receiver will not be appointed to collect them by way of equitable execution to satisfy a judgment against the union, as a receiver could not recover such dues and assessments by action.

Cochran v. *Boleman*, (1904) 1 Am. & Eng. Ann. Cas., 388, and *In re Ontario Insurance Act*, (1899) 31 O.R. 154, followed. *Cotter* v. *Osborne*, 19 M.R. 145.

See GARNISHMENT, V, 1, 2, 5.

EQUITABLE INTEREST.

See LANDLORD AND TENANT, IV, 1.
— PARTIES TO ACTION, 3.

EQUITABLE MORTGAGE.

Subsequent conveyance to innocent purchaser—*Parol release of equity of redemption—Statute of Frauds.*

G. being seized in fee simple in possession of a piece of land, borrowed £7 from D., and as security therefor deposited with him his title deeds. Being unable to pay the money, it was verbally agreed that D. should take the land in satisfaction. To effectuate this they went to the Hudson's Bay Company's office to have a transfer made. It appeared that the Company kept a register of lands granted by them, on which they entered the name of the grantee, the consideration and a description of the land; and when their grantee or those claiming under him made a sale it was entered in a like manner, sometimes on production of a conveyance, sometimes on the verbal statement of both parties appearing in person. The official, on this occasion, made the entry as to part of the land, but as to the part in question he refused to make the entry, because no entry or conveyance appeared from the Company's grantee to G. G. remained in possession on an understanding that he might redeem D. within a reasonable time. In 1867 D. got into possession, and subsequently sold the land to the defendant, whose name, at the time of the trial, appeared in pencil in the Company's book. G. then conveyed to the plaintiff. Prior to this conveyance D. got a verdict against G. in the General Court of Assiniboia for trespass. And in an action of ejectment in the same Court by the plaintiff against D., after the conveyance to the plaintiff, the jury found a verdict for D.

Held, (BETOURNAY, J., dissenting), that the plaintiff was entitled to succeed; for D., by deposit with him of the title deeds, took an equitable mortgage only, and the subsequent transaction at the Hudson's Bay Company's office had not the effect of conveying the legal estate to him.

Per WOOD, C.J.—Though equity will presume a release of the equity of redemption to a mortgagee after a lapse of time, especially where the acts of the mortgagee with respect to the property are such that he could not charge the expense incurred thereabout in an account as mortgagee, in this case any such presumption was rebutted by the mortgagor's remaining in possession and by the mortgagee's own admissions.

Per BETOURNAY, J.—The Statute of Frauds did not apply to the release of the equity of redemption, because by D.'s taking possession the contract became an executed one, and D. had acquired the legal estate as shown by the verdict in the actions of trespass and ejectment in the General Court of Assiniboia. *McKenney* v. *Spence*, T.W., 11.

See PLEDGE.

EQUITABLE RELIEF.

See CONTRACT, VII, 2.
— COUNTY COURT, I, 25.
— JURISDICTION, 2.
— MISREPRESENTATION, IV, 2.
— MONEY HAD AND RECEIVED.
— MORTGAGOR AND MORTGAGEE, I, 4.
— PLEADING, X, 8; XI, 9.
— VENDOR AND PURCHASER, II, 2, 4, 7; VII, 6.

EQUITABLE RIGHT.

See OWNERSHIP OF CROPS.

EQUITABLE SECURITY.

See GROWING CROPS.

EQUITY OF REDEMPTION.

See EQUITABLE MORTGAGE.

ERROR.

See MORTGAGOR AND MORTGAGEE, VI, 11.

ERROR AND IMPROVIDENCE.

See CROWN PATENT, 6.

ERRORS IN SURVEY.

See SURVEY OF LAND.

ESCAPE.

See CRIMINAL LAW, XVII, 19.

ESCROW.

See RECTIFICATION OF DEED, 1.
— VENDOR AND PURCHASER, VI, 10.

ESTATE SUBSEQUENTLY ACQUIRED BY COVENANTOR.

See CROWN PATENT, 4.

ESTATE TAIL.

Barring entail—*Enrolment of deed.*

A conveyance barring an entail does not require enrolment, registration being sufficient. *Reid* v. *Whiteford*, 1 M.R. 19.

ESTOPPEL.

1. Acceptance of patent.

Plaintiff claimed title through B. to land which the City claimed to have been owned by R. and by him dedicated as a street. Previous to any patents B. had owned south of a creek and R. north of it. By the Dominion survey a straight line was run disregarding the sinuosities of the creek, and both parties accepted patents according to this survey. Previous to the patents B. owned the land in question. Under the patents R. owned it. B.'s patent was issued in March, 1875, R.'s in May, 1878. B. sold to plaintiff in 1871 and got some papers which were afterwards given up and a new deed executed in May, 1872. The description in this deed by mistake only covered a portion of the land. In 1873 or 1874 B. gave plaintiff a memorandum showing what land should have been conveyed, and on the 6th November, 1877, executed a proper conveyance. On the other hand R., assuming to own the land in question prior to his patent, in August, 1874, registered a plan including this property upon which it appeared as a street. R. shortly after obtaining his patent and in July, 1878, conveyed the land to B.

Held, 1. That B. and the plaintiff as his assignee were not estopped by the patents from setting up the true ownership. *Wright* v. *Winnipeg*, 3 M.R. 349.

2. Business name—*Change of, upon change of ownership—Notice to creditors.*

The defendant carried on business under the style of Rowe & Co. She sold to her husband (stipulating that the name of the firm should be changed) who continued the business under the style of A. Rowe & Co. Before, as well as after, the sale, the husband was the actual manager of the business and, beyond the change of name, there was nothing to indicate a change of ownership. The defendant had dealt with the plaintiffs and her husband continued the account, having agreed to pay the liabilities of the old business.

In an action for the price of goods delivered by the plaintiffs upon the orders of A. Rowe & Co.,

Held, that the defendant was not liable.

The defendant's husband, after continuing the business for some time, sold it to The W. T. P. & P. Co., and this company agreed to assume and pay the

liabilities of Rowe & Co. Pending this action the plaintiffs recovered judgment against the company for the amount here sued for.

Held, that this judgment was evidence of the election by the plaintiffs to look to the company for the old debt. *Richards* v. *Rowe*, 4 M.R. 112.

3. Failure to defend action on prior note forged by same person—*Forgery.*

A person whose indorsement on a promissory note has been forged is not estopped from denying his signature by the fact that he had allowed judgment to go against him by default in a previous action by the same plaintiff on an indorsement of his name on a prior promissory note forged by the same person, although the forger negotiated the second note after such judgment.

Morris v. *Bethell*, (1869) L.R. 5 C. P. 47, followed.

MacKenzie v. *British Linen Co.*, (1881) 6 A.C. 82, distinguished. *Simon* v. *Sinclair*, 17 M.R. 389.

4. By representation—*Lien on land—Consideration—Exemption of homestead.*

Action to recover balance due for a threshing outfit sold and delivered by the plaintiff company to defendants, Charles Hornby and his wife, Ellen Hornby, under a written agreement signed by defendants which provided that promissory notes were to be given on approved security for the amounts payable at the dates mentioned. When the machinery had been delivered at the defendants' farm, the plaintiffs' agent called there to take settlement for it. Defendants then signed the notes asked for and the agent demanded a lien on the farm as security for the notes, and, relying on the representations of both defendants then made that the wife owned the land, accepted a lien on the land for the amount, signed by Mrs. Hornby in the presence of her husband, and did not insist, as he might have done, that the husband should also sign it. It appeared that the title to the land was then actually in the husband, and had remained so ever since.

Renewal notes had been given by the defendants and the original periods of credit considerably extended, and during this time the husband wrote several letters in which the wife was spoken of as the actual owner.

The chief contention at the trial was as to whether the plaintiffs were entitled to a lien on the land for the debt as against the defendant Charles Hornby.

Held, 1. There was ample consideration for the giving of the lien, as the plaintiffs might have removed the machinery and refused to carry out the transaction if it had been refused.

2. The defendant Charles Hornby was estopped by the representations he had made, and subsequently repeated, from denying that the land in question was his wife's property and from claiming it as his own as against the plaintiffs.

Freeman v. *Cooke*, (1848) 2 Ex. 654, followed.

3. Defendant Hornby was also thereby estopped from claiming it to be exempt as land occupied by him from proceedings under a registered judgment.

Judgment declaring that the lien claimed formed a valid charge on the land referred to for the amount of the plaintiffs' claim and costs of suit. *John Abell Co.* v. *Hornby*, 15 M.R. 450.

5. Res judicata—*Order of liability among owners of parts of equity of redemption—Defective registration.*

The usual mortgage decree with a reference as to encumbrances was made. Subsequently the Master made a report finding that the plaintiff and certain of the defendants had encumbrances upon the whole land. This was not appealed from. Afterwards an order was made referring it to the Master to inquire whether as between themselves any one or more of the *defendants* was or were entitled to be relieved from the payment of the plaintiff's mortgage, and to fix the order of liability.

Held, that the defendants were estopped from denying the priority of the plaintiff's mortgage.

It is the duty of a vendor who has been paid in full to discharge any encumbrances on the land, and it is immaterial as regards the application of this principle whether the encumbrance was created by the vendor or resulted from the act of a prior owner. If, therefore, the encumbrance extends to other lands, those, and not the land conveyed, are the primary fund for its payment. *Pierce* v. *Canavan*, 7 A. R. 194, followed.

If those other lands are subsequently sold to another purchaser they remain in his hands subject to the same liability.

The encumbrance—a mortgage, contained the following clause: "Provided further that the said mortgagee will

release any portion of the lands hereby mortgaged on receiving a sum on account of the said principal money equivalent to, or in the ratio of, fourteen hundred dollars per acre for the portion so released." The area of the mortgaged premises was such that, computed at $1,400 per acre, there would be more than sufficient to pay off the amount of the mortgage.

Held, that these circumstances would not vary the result. *Davies* v. *White*, 16 Gr. 312, distinguished.

If the deed to the second purchaser be registered before that to the first, the second is entitled to have the first purchaser's property first applied in satisfaction of the mortgage.

Registration is ineffectual if the addition or calling of the witness be not set forth in the affidavit of execution. *Renwick* v. *Berryman*, 3 M.R. 387.

See AMENDMENT, 8.
— ARBITRATION AND AWARD, 8.
— BILLS AND NOTES, VIII, 12.
— CHOSE IN ACTION, 4.
— COMPANY, IV, 10, 14.
— COUNTY COURT, II, 4.
— CROWN PATENT, 4, 5, 6.
— DOMINION LANDS ACT, 2.
— DURESS, 1.
— EQUITABLE ESTOPPEL.
— EVIDENCE, 7.
— EXECUTORS AND ADMINSTRATORS, 2.
— EXPROPRIATION OF LAND, 3.
— FIRE INSURANCE, 4, 6.
— FIXTURES, 3, 8.
— GARNISHMENT, IV, 2.
— HUSBAND AND WIFE, IV, 2.
— INDEMNITY, 4.
— INDIANS, 1.
— LANDLORD AND TENANT, I, 6.
— MORTGAGOR AND MORTGAGEE, VI, 1.
— MUNICIPALITY, I, 3; IV, 5; V, 1; VIII, 7.
— NEGLIGENCE, VII, 6.
— PLEADING, VIII, 2.
— PRACTICE, XVII, 2.
— PRINCIPAL AND AGENT, IV.
— REAL PROPERTY LIMITATION ACT, 6.
— SALE OF GOODS, VI, 6.
— SALE OF LAND FOR TAXES, VI, 1.
— VENDOR AND PURCHASER, V, 2.
— WINDING-UP, IV, 5.

ESTOPPEL BY JUDGMENT.

See PRACTICE, II, 1.
— VENDOR AND PURCHASER, V, 2.

ESTOPPEL IN PAIS.

See CHATTEL MORTGAGE, V, 1.
— CHOSE IN ACTION, 3.
— DISTRESS FOR RENT, 2.
— HOMESTEAD, 3.
— MUNICIPALITY, I, 3.

EVIDENCE.

1. Admissions of judgment debtor—*Garnishment—Assignment for creditors.*

Interpleader issue to decide the title to a sum of money claimed by the plaintiff under an assignment from H. for the benefit of his creditors as against the defendant, a judgment creditor of H., who claimed the money under a garnishing order attaching it in the hands of C. who had paid it into court.

Held, (DUBUC, J., dissenting) that evidence of the admissions of the judgment debtor was not admissible as against the garnishing creditor either on account of any privity between them, or as evidence of declarations made by a party against his own interest (there being no proof of his death); and that, as there was no other evidence to show that the money in question belonged to the estate of H., a verdict should be entered for the defendant with costs. *Bertrand* v. *Heaman*, 11 M.R. 205.

2. Admission of judgment debtor not admissible as between his creditor and a third party—*Garnishment—County Courts Act, R.S.M., c. 33, ss.* 261, 266.

In an interpleader issue between a garnishing creditor and a third party claiming the attached money, evidence of an admission of the judgment debtor as to the right to the money is not admissible in favor of the third party.

Bertrand v. *Heaman*, (1896) 11 M.R. 205, followed.

Where the garnishee has paid the attached money into court, a third party claiming it has no right, under section 261 or 266 of The County Courts Act, R.S.M., c. 33, on the trial of an interpleader issue, without giving some proper *prima facie* evidence of his right to the money or debt, to apply to set aside the garnishing order, or to raise the question whether the debt was properly attachable under the Act.

The claimant was granted leave to have a new trial of the issue on payment of costs. *Marshall* v. *May*, 12 M.R. 381.

3. Affidavits, when allowed to be read—*Real Property Act—Appeal—Documentary Evidence Act—Deed of Municipality—Absence of witness—New trial.*

An appeal will lie from a verdict rendered upon the trial of an issue under the provisions of the Real Property Act, 1889.

2. Upon such an appeal, affidavits cannot be read, when they are not mentioned in the notice of appeal, or of the intention to read which notice has not been given until two days before the argument of the motion, unless satisfactory reasons are assigned why an earlier notice was not given.

3. A conveyance executed by a municipality is not a public document within the meaning of the Documentary Evidence Act, 8 & 9 Vic., c. 113, s. 1.

4. The sufficiency of certain oral testimony in proof of corporate seal discussed.

5. A party who finds himself at the trial without some important witness should ask for an adjournment of the trial instead of proceeding with the trial. If he proceeds, a new trial will not afterwards be granted. *Morice* v. *Baird*, 6 M.R. 241.

4. Breach of promise of marriage—*32 & 33 Vic., (Imp.), c. 68, s. 2—The Manitoba Evidence Act, R.S.M.*, 1902, c. 57.

The Imperial Statute 32 & 33 Vic., c. 68, s. 2, requiring the plaintiff's evidence in an action for breach of promise of marriage to be corroborated by some other material evidence in support of such promise, is in force in Manitoba, not being either expressly or by implication repealed by The Manitoba Evidence Act, 57 Vic., c. 11, now chapter 57 of the Revised Statutes of Manitoba, 1902. *Cockerill* v. *Harrison*, 14 M.R. 366.

5. Character of plaintiff—*Admissibility of evidence as to, in action for malicious prosecution.*

The plaintiff, in an action for false imprisonment and malicious prosecution brought against defendant, a constable, for arresting him for obscene language, put in evidence a prior conviction of himself and wife for keeping a disorderly house, which had been quashed on appeal, in order to show want of reasonable and probable cause for the defendant's prosecution of the plaintiff. Thereupon the defendant cross-examined the plaintiff, and gave evidence as to the plaintiff's general bad character.

Held, that such evidence was improperly received. *Fitch* v. *Murray*, T. W., 74.

6. Depositions taken on a preliminary investigation before a magistrate—*Criminal Code, ss. 590 and 687.*

Depositions of a witness since dead taken on a preliminary investigation before a Justice of the Peace of a charge against a prisoner will be admissible, under section 687 of The Criminal Code, at his subsequent trial, if they purport to be signed by the Justice by or before whom they purport to have been taken, provided it be proved that they were taken in the presence of the accused and that he or his counsel had a full opportunity of cross-examining the witness, notwithstanding that the signature of the witness was written with only one of two Christian names given in the caption, and that the Justice omitted to put the letters "J.P." after his signature, as in the Form S appended to The Criminal Code.

On the preliminary investigation before a Justice of the Peace of a charge against the accused, the depositions of several witnesses were taken on March 25th, and committed to writing by the Justice under the heading "Canada, Province of Manitoba, Western Judicial District." "The depositions of Matthew Hamilton of, etc., and others, of , taken on this 25th day of March, etc., at Brandon, etc., before the undersigned, one of Her Majesty's Justices of the Peace for the said Province in the presence and hearing of Alexander Hamilton who stands charged," etc. The first three pages of the record made contained the evidence of Matthew Hamilton and another witness and concluded as follows: "Prisoner is remanded until Thursday, March 29th, at 10.30," with the date, 25th March, 1898, and the signature of the Justice.

On 29th March following, Martha Louise Walker, since deceased, whose name did not appear previously in the record, appeared to have given her evidence which the Justice took down on twenty-two other sheets of paper, beginning simply "Martha Louise Walker sworn saith." This was merely annexed to the first three sheets, and concluded with the signatures of "Louisa Walker" and "K. Campbell, P.M."

Held, that the latter deposition could not be read under section 687 of The Criminal Code in evidence against the accused at his trial, as it did not purport

to be a deposition taken by a Justice of the Peace on the charge against the accused, and therefore it could not be said that it purported to be signed by the Justice by or before whom it purported to have been taken.

Semble, if it had been proved that section 590 of the Code had been complied with by reading over the deposition to the witness and by the witness and magistrate signing in the presence of the accused, all three being present together, and in other respects, the deposition might have been admissible in evidence independently of section 687 of the Code.

Although the deposition held inadmissible was taken on a charge on which the accused was acquitted, it contained very material testimony bearing on the charge on which he was convicted which might have influenced the jury, and the Court ordered that the conviction should be set aside and a new trial granted. *Reg.* v. *Hamilton*, 12 M.R. 354.

7. Estoppel — *Promissory note made payable to B. on sale made by A. of A.'s goods.*

One Kirkpatrick, having previously bought a threshing outfit from the plaintiffs, upon which he still owed them a large amount, made a sale of it to the defendant. As a matter of convenience this sale was carried out by the defendant signing an order for the purchase and making a note for the price in favor of the plaintiffs. The defendant resisted payment of the note on the ground that the consideration for it had wholly or partly failed, and that he had not got all the goods ordered or an engine of the quality ordered. and contended that the documents relied on were conclusive evidence that the sale had been made by the plaintiffs and that they were estopped from denying it.

Held, that the plaintiffs were not estopped from showing that it was Kirkpatrick who had made the sale and that, as the evidence established this, defendant had no remedy against the plaintiffs for any defects in the threshing outfit and must pay the amount of the note. *Case Threshing Machine Co.* v. *Wermiger*, 17 M.R. 52.

8. Examination of party, use of at trial.

Held, that the examination of a party to an action, taken for the purpose of discovery, may be used at the trial to contradict the same party, but cannot be put in evidence as an admission. *Arnold* v. *Caldwell*, 1 M.R. 155.

9. Further evidence, leave to give —*Affidavit — Judgment — Sale of land — Queen's Bench Act, 1895, Rule 803—Parties —Postponement for further evidence.*

A judgment debtor served, under Rule 803 of The Queen's Bench Act, 1895, with a notice of motion calling upon him to show cause why the land alleged to be bound by the registration of a certificate of judgment against him should not be sold to satisfy the judgment, has a right to be heard on the motion, and to object to the sufficiency of the materials filed in support of it, although he may have transferred all his interest in the land to a third party for the purpose of defeating creditors, or otherwise.

The Full Court will not grant a postponement for the purpose of enabling the applicant to procure further evidence which he might have got at an earlier stage of the proceedings.

The evidence filed in support of the motion for the sale of the land in question consisted of an affidavit made by a clerk in the plaintiffs' employment that they had recovered a judgment against the defendant in a County Court, and caused a certificate of said judgment in the proper form required by the statute to be issued, and that the same was duly registered in the Land Titles Office for the district in which the land was situated, but not showing his means of knowledge of such facts; and of a post-card, dated at "L. T. O., Morden," containing a memorandum to the effect that a certificate of judgment for $110.20 against Robert Warener, in Belmont County Court, was received and registered the 24th of July, 1896, in suit of *Massey-Harris Co.* v. *Robert Warener*, but not stating where the same was registered. The memorandum had the words "District Registrar" at the foot, without any signature or name.

Held, that such evidence was not sufficient to warrant the making of an order for sale on such a motion. *Massey-Harris Co.* v. *Warener*, 12 M.R. 48.

10. Further evidence, leave to give —*Master's office—Opening up reference after same closed—Admissibility of further evidence—Surprise—Discovery of new evidence—Diligence—Corroborative evidence—New trial.*

The plaintiffs filed a bill to foreclose a mortgage, by which interest was reserved

at the rate of nine per cent. per annum. The defendants allowed the bill to be taken *pro confesso*, but attended on the taking of accounts in the Master's office. The mortgage was long overdue. By the Master's report, interest was allowed at the rate of nine per cent., after the principal money became due. The defendants appealed, on the ground that the plaintiffs were entitled to six per cent. only, after the time when the principal money became payable, and the appeal was allowed.

The plaintiffs then presented a petition to have the decree vacated and for leave to amend their bill, on the grounds of surprise and discovery of new evidence. After the appeal was disposed of, they discovered, among the papers in their solicitor's office, a letter dated October 26th, 1888, signed by defendant, J. G. McL. (the mortgagor), in which he agreed to pay interest on his mortgage "at nine per cent. per annum until the 21st October next, or so long as you allow the same to stand." The surprise was claimed to arise out of certain interviews in 1888 with defendant's solicitor, in which he asked that the interest be reduced to eight per cent., and the summary manner in which the matter was disposed of in the Master's office.

Held, that, after the Master has closed the hearing on a reference, he should not open it or receive any further evidence, except under such a state of facts as would warrant a new trial at law being granted, and that no such case was made.

Waddell v. *Smith*, 3 Ch. Ch. 412, followed.

Held, also, that it is not sufficient to show that the new evidence is material. Evidence of materiality must be accompanied by evidence of previous diligence.

Held, also, that as some evidence was given before the Master in support of an agreement to pay the higher rate of interest, the letter was only corroborative, and discovery of merely corroborative evidence is no ground for a new trial.

Held, also, that the additional interest claimed could not be a charge on the land, because the letter was signed by J. G. McL. only, and his co-defendant was the owner of the equity of redemption, and it was not shown that she had notice of the letter, or that J. G. McL. was her agent. *Freehold Loan and Savings' Co.* v. *McLean*, 8 M.R. 334.

11. Identity of grantor—*Real Property Act—Sale of land.*

Issue under the Real Property Act, as to whether the plaintiff acquired by conveyance from the patentee of certain lands an estate in fee simple therein as against the defendants. At the trial the defendant's counsel, at the request of plaintiff's counsel, produced the letters patent by which, after the recital that "B. V., son of M. V., in his lifetime of the Parish of St. Francois Xavier and Baie St. Paul, in the Province of Manitoba," had applied for a grant of the lands, and had been found entitled thereto, and that B. V. had since died intestate leaving him surviving "M. V., of the said Parish of St. Francois Xavier and Baie St. Paul, his father, and sole heir-at-law," the lands were granted M. V. in fee simple. The plaintiff then produced an instrument purporting to be a deed of conveyance of the lands in fee by "M. V., of Edmonton in the North-West Territories of Canada, farmer, father and sole heir-at-law of B. V., of the Parish of St. Francois Xavier, in the Province of Manitoba, deceased," to the plaintiff. The signature was that of a marksman. The attestation clause stated it was read over and explained, and then followed the signatures of two witnesses.

The first witness gave evidence at the trial, and stated that he was in the North-West with G., the husband of the plaintiff. That at G.'s request he went for M. V. to the place where he lived and brought him to Edmonton. That M. V. spoke French and Cree, but not English. That M. V. did not even know that he owned the land. That it was the first time he saw M. V., and that he did not know that he formerly lived at St. Francois Xavier. That the deed was read over in English, and G. explained it to M. V. in French. Another witness stated that he lived at St. Francois Xavier. That he had known one B. V. but did not know whether he was alive or dead. That he did not know the father of this B. V., and that he knew one M. V., who had formerly lived at St. Francois Xavier, and afterwards at Edmonton. No evidence was offered for the defence.

Held, that the evidence was insufficient to establish that the plaintiff's grantor and the patentee of the land were the same person. *Grant* v. *Hunter*, 7 M.R. 243.

12. Issue of grant of land by the Crown—*Production of copy—Lord Brougham's Evidence Act*, 1851—*Manitoba Evidence Act, R.S.M.* 1902, *c.* 57, *s.* 21—*Pleading—Statement of defence—General denial—King's Bench Act, Rule* 290.

The plaintiff, in order to succeed in this action, had to prove the issue of a patent from the Crown for the land in question. He produced what purported to be a copy of such patent, but he had not given notice of his intention to use such copy as required by section 21 of The Manitoba Evidence Act, R.S.M. 1902, c. 57.

Held, that, under that Act, such copy could not be received in evidence, and that it could not be received under Lord Brougham's Evidence Act, 1851, which, by its terms, can only be applied when no other statute exists which renders the contents of such a document provable by means of a copy.

A general denial of all the allegations in the statement of claim does not comply with Rule 290 of the King's Bench Act, which requires the defendant in his statement of defence to deny the plaintiff's allegations specifically wherever possible, and such a pleading would be struck out on application of the plaintiff. If not moved against, however, it will be treated as good at the trial. *McPherson* v. *Edwards*, 14 W.L.R. 172.

See next case.

13. Issue of grant of land by the Crown—*Setting aside non-suit—Re-opening trial—Leave to supply evidence—Amendment—Costs—New trial.*

On appeal from the non-suit entered at the trial of the case last above noted, the Court of Appeal ordered that, upon the plaintiff paying the costs of the trial within two weeks, the non-suit should be set aside, and a new trial had with leave to the parties to amend their pleadings and to the plaintiff to give proper evidence of the issue of the Crown patent, but that, in default of payment of such costs by the plaintiff, the appeal should be dismissed with costs. *McPherson* v. *Edwards*, 16 W.L.R. 648.

14. Judicial notice of Orders-in-Council.

Prisoner was charged with committing forgery in the State of Minnesota.

Held, 1. Upon the evidence, that a *prima facie* case had been made out.

2. Judicial notice must be taken of Orders-in-Council bound up with the Dominion Statutes, in pursuance of 38 Vic., c. 1. *Re G. A. Stanbro*, 2. M.R. 1.

15. Ownership of goods, to prove—*Action for money had and received—Breach of warranty of title—Costs—Objections not taken at trial.*

In an action for breach of warranty of title it is necessary to prove at the trial that the title was not as warranted.

Defendants, under warrant against the goods of one Mitchell under the distress clause in a mortgage executed by him, caused the animals in question to be offered for sale by public auction, when the plaintiff purchased. Afterwards the animals were taken away by one Black who claimed they were his, and the plaintiff brought a replevin suit against Black to recover them, in which he failed.

At the trial of the present action defendants' counsel admitted the fact that judgment in the replevin suit for the same animals had been entered by Black.

Held, that this was not sufficient evidence that the animals had not belonged to the mortgagor at the time of sale.

No costs of the appeal to this Court, although successful, were allowed because the objection as to want of evidence had not been taken at the trial. *Koester* v. *Hamilton Provident & Loan Society*, 10 M.R. 374.

16. Parol agreement collateral to written agreement—*Lien.*

1. A workman employed to cut trees into cordwood has not at common law a lien for his wages.

2. If the workman, however, contracts to haul as well as cut the wood, he may have a lien for the carriage.

3. A common law lien will be lost by the sale of the article.

4. A. made an agreement in writing with B. that he, A., would cut certain trees into cordwood and would haul it to, and deliver it at, S. station; and B agreed to pay certain prices, paying 80 per cent. upon delivery at the station and the balance upon the completion of the work. Contemporaneously the parties verbally agreed that if the contract price were not paid upon the completion of the work the wood was to become the property of A. and that he was to be at liberty to sell it.

Held, that evidence of this verbal agreement was admissible, even in an action to which third persons were parties. *McMillan* v. *Byers*, 3 M.R. 361.

Reversed, 4 M.R. 76.
Restored, 15 S.C.R. 194.

17. Parol agreement collateral to written contract—*Representation or con-*

dition, when treated as ground for rescission, and when as a warranty only.

1. When a verbal agreement has been made for the sale of horses or other chattels, and the purchasers afterwards sign a lien note securing payment with the usual provisions of such a note, evidence may be given of representations or conditions of the sale or to prove a warranty when it appears that it was not intended to include in the lien note all the terms of the agreement between the parties.

De Lasalle v. *Guildford*, [1901] 2 K. B. 215, and *Erskine* v. *Adeane*, (1873) L. R. 8 Ch. 756, followed.

2. When the purchaser of a chattel bought with a warranty keeps it for a considerable time and makes a payment on account, the contract must be treated as executed, and any representation or condition as to the quality of the goods must then be regarded only as a warranty, for the breach of which compensation must be sought in damages and not by rescission of the contract. *McKenzie* v. *McMullen*, 16 M.R. 11.

18. Parol agreement conflicting with written statement—*Brokers bought notes.*

The plaintiff, wishing to speculate in shares on the Montreal Stock Exchange, employed defendants to purchase certain shares there for him on margin. He knew that the defendants would employ a broker in Montreal as their agent, and that the latter would make the actual purchases, advance the balance of the money required and hold the shares in his own name as security.

The plaintiff paid the defendants certain sums as margins on the purchases made, and afterwards brought an action against defendants to recover these sums as moneys paid on a consideration which had wholly failed, and relied upon the terms of the bought notes received from defendants, commencing: "We have this day bought for your account * * * shares * * * stock," as evidence that the defendants should have purchased and held the shares in their own names.

Held, that evidence of the true agreement between the parties could be given notwithstanding the language of the bought notes, and that the plaintiff could not recover, although the defendants had not themselves acquired any of such shares. *Jackson* v. *Allan*, 11 M.R. 36.

19. Parol agreement superseded by written contract—*Implied obligation—Expressum facit cessare tacitum—Parol evidence to contradict written document—Formal release of all claims of plaintiff.*

1. Evidence should not be allowed to prove the terms of a verbal agreement between the parties, when they subsequently entered into a written agreement relating to the same subject matter, although the latter has been lost and it cannot be proved by a copy; and, when the plaintiff claiming under the verbal agreement cannot remember the contents of the written agreement, and the evidence on the part of the defendant as to such contents is not credited by the trial Judge, the result is that no agreement is proved, and the plaintiff must fail.

2. The presumption of the law that two parties making a purchase of land for their joint benefit should contribute equally to the payments required should not be applied in a case where they have reduced their agreement to writing containing the terms on which they purchased together, even when those terms cannot be shown in consequence of the writing having been lost. In such a case the maxim *"expressum facit cessare tacitum"* applies.

Merrill v. *Frame*, (1812) 4 Taunt. 329, and *Mathew* v. *Blackmore*, (1857) 1 H. & N. 762, followed.

The plaintiff's assignor had given the defendant, long after the accruing of the latter's alleged debt sued for, a release to the following effect:

"I agree to release T. W. Miller from all agreements made before this date between himself and me and acknowledge this as a receipt in full for all moneys due me to date."

Held, that evidence contradicting the meaning of this writing, and limiting its application to a particular set of items so as to exclude the debt sued for ($2,000), should not have been received at the trial, in the absence, at all events, of any proof of fraud, mistake or some other invalidating influence present in the transaction.

Jackson v. *Drake*, (1906) 37 S.C.R. 315, followed. *Wicks* v. *Miller*, 21 M.R. 534.

20. Parol evidence to contradict deed—*Statute of Frauds—Executed contract.*

The Statute of Frauds does not apply to a contract for the sale of lands after execution of the conveyance.

The plaintiff sold land to the husband of the defendant who sold to the defendant. The agreements were not in writing. For convenience the plaintiff conveyed direct to the defendant. Upon a bill filed for a vendor's lien—

Held, that, notwithstanding the statute, the defendant could show by parol a purchase from her husband, and to this extent contradict the deed. *Brown* v. *Harrower*, 3 M.R. 441.

21. Parol evidence to vary written contract—*Promissory note—Indorsement—Bills of Exchange Act, s. 55, s-s. 2—Parol agreement contemporaneous with written one.*

Parol evidence will not be received to show that a person who indorsed a promissory note to another for valuable consideration stipulated at the time that he was not to be liable on the indorsement, as that would be contradicting the contract which such indorsement, by subsection 2 of section 55 of The Bills of Exchange Act, 1890, imports.

Abrey v. *Crux*, (1869) L. R. 5 C. P. 37; *Henry* v. *Smith*, (1895) 39 Sol. J. 559, and *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487, followed.

Pike v. *Street*, (1828) Moo. & M. 226, dissented from. *Smith* v. *Squires*, 13 M.R. 360.

22. Parol evidence to vary written contract—*Bills of Exchange Act—Leave to appear—Discretion.*

Parol evidence of a verbal agreement, made at the time of signing a promissory note, that the note should not be payable at maturity, is not admissible; and more especially if there be a written agreement, made at the same time, inconsistent with the alleged verbal agreement. Such evidence could only be given on the ground of fraud or mistake.

A defendant should be admitted to defend in an action under The Bills of Exchange Act where there is a shadow of reason to believe that he has a defence. Where evidence of the alleged defence would be inadmissible, no appearance should be permitted. *Imperial Bank* v. *Brydon*, 2 M.R. 117.

23. Reply, evidence in—*Contributory negligence.*

A plaintiff is not allowed in presenting evidence to divide his case; either by omitting to give evidence originally upon a material point and offering such evidence in reply; or by giving some evidence upon a particular point in his original case and offering other evidence upon the same point in reply.

In an action for damages sustained in alighting from a railway train, the defendants gave evidence that the train was in motion when the plaintiff was alighting. The plaintiff, in reply, desired to contradict this evidence. There was a dispute as to whether the plaintiff's witnesses had touched upon the point in making the case.

Held, that the evidence was properly excluded because the fact that the train had stopped was a necessary part of the plaintiff's case, and if omitted could not be given in reply. *Harvey* v. *C. P. R.*, 3 M.R. 266.

24. Trial—*Motion to discharge jury after evidence given which the trial Judge had ruled to be inadmissible.*

Although a witness at a trial before a jury volunteers evidence which the trial Judge has already ruled to be inadmissible and which might have weight with the jury in arriving at a verdict, yet the Judge should not for that reason immediately discharge the jury and impanel a new jury to try the case. *Rex* v. *Grobb*, 17 M.R. 191.

25. Weight of evidence—*Denial by answer—Two witnesses.*

The rule as to requiring more than one witness to overcome a denial in the defendant's answer discussed. *Cowan* v. *Britton*, 3 M.R. 175.

26. Will, to prove—*Evidence of executor's title in ejectment—Probate sufficient evidence of will—Evidence of identity—Devolution of Estates Act.*

The Devolution of Estates Act, R.S.M. c. 45, s. 21, taken together with The Manitoba Wills Act, R.S.M. c. 150, s. 20, and The Surrogate Courts Act, R.S.M. c. 37, ss. 17, 18, 20 and 22, have made such a change in the old law that the probate of a will is now the necessary and only admissible evidence of the title of the executors claiming in ejectment, and it is no longer necessary to produce or prove the will itself as formerly.

As to the identity of the plaintiffs with the executors named in the probate, and the identity of the patentee with the testator, the evidence of his daughter and her husband taken on commission, although very slight, was held sufficient when taken along with the identity of

the names. *Simpson* v. *Stewart*, 10 M.R. 176.

27. Witness refusing to answer questions on cross-examination—*Onus of proof—Stock-gambling transaction.*

Plaintiff's claim was for a balance alleged to be due on a purchase of shares for defendant. Defendant swore at the trial that the transaction was a gambling one and that it was understood between him and plaintiff that no shares were, in fact, to be purchased.

To prove that the shares had actually been bought, the plaintiff put in the evidence of a Halifax broker, taken on commission, that he had purchased the shares on the plaintiff's order. On cross-examination, however, he had refused to say from whom he had bought them, without giving any reason for the refusal.

Held, that, on account of such refusal, no weight should be given to this evidence, and that the defendant was entitled to a verdict. *Hickey* v. *Legresley*, 4 W.L.R. 46.

28. Fraud—*Misrepresentation—Rescission of contract—Appeal from Judge's finding of facts.*

Defendant H. sold land to C. at $10 an acre; defendant C. sold to plaintiff at $30, representing to him that he was acting as agent for the owner; plaintiff purchased, believing defendant C. to be an agent merely. Plaintiff would have made further enquiries before purchasing had he known that C. was the real owner. C. procured H. to convey direct to plaintiff. The consideration expressed was the higher price. H. was no party to the fraud.

Held, (reversing the decision of TAYLOR, J., 1 M.R. 17), that to the rescission of a contract "there must be a false representation knowingly made, that is, a concurrence of fraudulent intent and false representation"; that, the contract having been entered into deliberately, the plaintiff's statements should have been corroborated; and where the evidence is contradictory the Court ought to have been satisfied that the plaintiff's account is strictly true, and that the evidence in the present case was insufficient, and the bill must be dismissed with costs. *Hutchinson* v. *Calder*, 1 M.R. 46.

See QUO WARRANTO, 1.
— RAILWAYS, II, 1; III, 1, 2; V, 4; VII, 2.
— REAL PROPERTY ACT, I, 7; II, 2; IV, 1; V, 3.
— REAL PROPERTY LIMITATION ACT, 4, 6.
— RECTIFICATION OF DEED, 1.
— RESTRAINT OF TRADE.
— SALE OF GOODS, II, 1.
— SALE OF LAND FOR TAXES, III, 2; VI, 1; IX, 3.
— SECURITY FOR COSTS, VIII, 2.
— SPECIFIC PERFORMANCE.
— STATUTE OF FRAUDS, 3, 4, 7.
— STOPPAGE IN TRANSITU.
— TITLE TO LAND, 3, 4.
— TRADE UNIONS, 1.
— TRESPASS AND TROVER, 1.
— TRIAL.
— VENDOR AND PURCHASER, VI, 10.
— WARRANTY, 3.
— WEIGHTS AND MEASURES ACT, 1.
— WILL, III, 4.
— WINDING-UP, I, 2, 3, 4; IV, 1.

EVIDENCE BY AFFIDAVIT.

See RAILWAYS, V, 3; VIII, 3.

EVIDENCE—CORROBORATION OF

See ADMINISTRATION, 7.
— BREACH OF PROMISE OF MARRIAGE.
— CONTRACT, VI, 1.
— COVENANTS, 8.
— EVIDENCE, 10.
— EXTRADITION, 8.
— FRAUDULENT JUDGMENT, 4.
— HUSBAND AND WIFE, I, 4, 5; III, 2; IV, 3.
— PRINCIPAL AND AGENT, V, 2.

EVIDENCE OF EXPERTS.

See WILL.

EVIDENCE ON COMMISSION.

1. Depositions, manner of taking—*Commission—Interrogatories—Suppression—Waiver.*

Under an order to take evidence on commission the evidence can only be taken on interrogatories unless otherwise ordered.

Under such an order a commission was issued to take the evidence *viva voce*.

Held, 1. That the commission was irregular and the depositions were suppressed.

2. That the objection had not been waived by cross-examining the witnesses after raising the objection and subject to it; nor by omitting to object after the commission had been informally returned, upon an application to send it back for a proper return, or upon a further application to extend the time for the return of the commission.

3. *Per* BAIN, J.—Waiver as a general rule is doing something after an irregularity committed, when the irregularity might have been corrected before such act was done. It may consist, too, of lying by, and allowing the other party to take a fresh step in the case. *Watts* v. *Anderson*, 5 M.R. 291.

2. Depositions, manner of taking—*Interrogatories or viva voce.*

Prima facie the examination upon a commission is to be upon interrogatories.

And, where an order for a commission made no provision for the mode of examination, depositions which had been taken *viva voce* were quashed. *Mulligan* v. *White*, 5 M.R. 40.

3. Expert Evidence—*Witnesses abroad.*

Held, by TAYLOR, J., on appeal, affirming the decision of the referee:—

1. A commission to examine a party to the suit or his employee will not be ordered, if opposed, no special circumstances being shown.

2. Expert evidence will not be permitted to be taken abroad, except under special circumstances.

3. The issuing of a commission to take evidence abroad is in the discretion of the Court. *Washburn & Moen Manufacturing Co.* v. *Brooks*, 2 M.R. 44.

4. Objections to leading questions.

Leading questions appearing in a foreign commission may be objected to at the trial, although counsel appeared upon the execution of the commission and made no objection. *Mercer* v. *Fonseca*, 2 M.R. 169.

5. Of plaintiff abroad—*Application for—Material for, sufficiency of.*

A plaintiff suing in a foreign forum should not ordinarily be excused from

appearing there and giving his evidence: *per* CHITTY, J., in *Ross* v. *Woodford*, [1894] 1 Ch. at page 42, and the proof that the interests of justice require the issue of a commission to take his evidence abroad should be of the clearest kind and best nature that can be got, affidavits sworn to on information and belief only being insufficient. The issue of such a commission should be the exception and should only be resorted to when the inconvenience or expense caused by requiring the plaintiff's personal attendance at the trial would pretty nearly thwart the ends of justice.

Keeley v. *Wakley*, (1893) 9 Times L. R. 571, followed.

These principles applied upon an application by the plaintiffs, a company whose head office was in Ottawa, Ontario, for the issue of a commission to take the evidence of a number of the Company's officers at Ottawa, in spite of affidavits tending to show that the books of the Company at the head office, which would have to be put in evidence, were in constant use there and could not be brought to Winnipeg without great inconvenience and loss, also that it would be practically impossible to carry on the business of the Company if all the officers whose evidence would be necessary at the trial had to be absent from the head office for the time necessary to attend the trial at Winnipeg. The Court was of opinion that the material was not sufficient to show that all the books must be kept at the head office all the time and that, if the evidence were taken on commission at Ottawa, the defendant would probably have to go there himself in order to instruct counsel on cross-examination of the witnesses as to entries in the books.

Order for commission set aside with all costs to the defendant in any event.

Semble, if a proper case were made, an order might go for the examination of some of the officers of the Company at Ottawa on some of the facts which the plaintiffs wished to prove; and that the books, or at all events all those that were not absolutely required all the time at the head office, might be brought to Winnipeg with the other officers to verify them so that the Court might see those books themselves rather than certified copies of portions of them. *Canadian Railway Accident Insurance Co.* v. *Kelly*, 17 M.R. 645.

6. Of plaintiff's chief witness abroad *—Application for—Material for, sufficiency of.*

A commission to take the evidence in Toronto of the plaintiff's general manager for use at the trial was refused where it was shown that he would be the chief witness for the plaintiff to meet defences denying the sale of the goods sued for and setting up that the plaintiff had agreed to accept shares in the defendant company in satisfaction of the debt guaranteed by the individual defendants and that shares had been accordingly allotted to and accepted by the plaintiff, and when the only material in support of the application was an affidavit of the witness saying that he was a material witness to prove the account and to disprove the various defences, and that it would entail great loss and expense for him to attend a trial at Winnipeg, as his duties as general manager of the plaintiff company required his continued presence in Toronto.

Canadian Railway, &c. Co. v. *Kelly*, (1908) 17 M.R. 645; *Lawson* v. *Vacuum Brake Co.*, (1884) 27 Ch. D. 137, and *Ross* v. *Woodford*, [1894] 1 Ch. 42, followed. *Toronto Carpet Manufacturing Co.* v. *Ideal House Furnishers*, 20 M.R. 571.

7. Depositions taken on commission *—Irregularities—Directory or imperative requirements.*

Application on behalf of one of the defendants to suppress depositions taken in Montreal, on the ground that the return had not been properly made. Some of the exhibits used on the examination had been detached from the depositions and used for other purposes, although they had been subsequently re-attached to the depositions before they were filed.

Held, that, where no injustice had been done, nor would result from non-compliance with the directions of an order to examine, these directions may be treated as merely directory; though there had been grave irregularities in regard to the exhibits and the manner in which the examination was returned, yet there was no object in putting the plaintiff to the great expense of having the examination taken again, when the position would be exactly the same. No injustice could be done in this case by treating the directions of the order to examine as directory in this instance and, if the special examiner would make an affidavit identifying the exhibits and showing they were all now in

Court, the examination should be confirmed.

The defendant to have the costs of the application.

Cowan v. *Drummond*, 14 C.L.T. Occ.N. 24.

8. Suppression of depositions—*Oath of Commissioner—Before whom taken—Manner of taking depositions—Narrative form.*

Where evidence, in a cause pending in a Court of Manitoba, is taken under a foreign commission, the commissioner must, before entering on his duties, take an oath for the due discharge thereof, unless it is expressly dispensed with by the order directing the issue of the commission, or unless the commission is addressed to a Judge of a foreign Court, or to the foreign Court itself.

The oath must be taken before some person deriving his authority to take such oaths from the laws of Manitoba.

A foreign commission directed the commissioner to reduce the questions and answers to writing. He took down the evidence of some of the witnesses in narrative form.

Held, a fatal objection. *Gendron* v. *Manitoba Milling Co.*, 7 M.R. 484.

9. Suppression of depositions — *Waiver—Practice—Interpleader—Reversing Judge's order—49 Vic., c. 35, s. 19.*

Where an order for a commission to take evidence is silent as to the mode of examination, the evidence must be taken on interrogatories; but, if the commission be issued to take the evidence *viva voce*, this is a mere irregularity which may be waived by any participation in the proceedings under it.

In an interpleader issue the plaintiff obtained a Judge's order directing the issue of a commission to take evidence in a foreign country. The evidence was taken, and on the return of the commission the defendant moved before the Referee to suppress it.

Held, that the Referee had no jurisdiction to set aside a Judge's order, and he cannot do it indirectly by suppressing the commission.

Per KILLAM, J. The objection can only be raised in showing cause to the summons for an order directing the commission, or at the trial as an objection to the admissibility of the evidence. *Thompson* v. *Seguin*, 8 M.R. 79.

10. Use of at trial.

A party who has procured evidence to be taken on commission is not bound to put it in at the trial, but, if it has been duly returned into Court, the opposite party has a right to put it in on his own behalf if he desires.

Gordon v. *Fuller*, (1835) 5 O.S. 174, followed. *Richardson* v. *McMillan*, 18 M.R. 359.

11. Use of, at trial—*Order to read at the hearing—Orders to examine made before cause at issue.*

Held, affirming the order of the Referee, that evidence taken abroad under an order may be read at the hearing, although the order does not state that the evidence may be so read.

The proper time to obtain a commission (where the bill is not merely for discovery) is after issue. But where upon notice orders to take evidence abroad had been made before issue,

Held, that the depositions would not on that account be suppressed, the proper course was to have appealed against the orders. *Grisdale* v. *Chubbuck*, 1 M.R. 202.

12. Witness not under control of party—*Agent of party—Procuring attendance at trial.*

Appeal by the plaintiffs from an order of the Referee refusing a commission to take the evidence of one Stephenson.

The affidavit in support of the application stated that the witness lived in Ontario; that he was a material and necessary witness for the plaintiffs, and that they could not safely proceed to trial without his evidence. Stephenson was a commercial traveller living in Toronto; while he acted as the plaintiffs' agent in the transaction out of which the action arose, he was not in their employment in that sense that they could insist on his coming to Manitoba, at any time, to give his evidence.

Held, that the plaintiffs were *prima facie* entitled to an order: *Armour* v. *Walker*, 21 Ch. D. 673.

Appeal allowed with costs to the plaintiffs in any event; costs below to be costs in the cause. *Carter* v. *Rogers*, 19 C.L.T. Occ.N. 410.

See MARRIED WOMAN, 4.

EVIDENCE ON MOTION.

See CAPIAS, 3.
— PRACTICE, I, 1; XXVIII, 12.

EVIDENCE—PAROL.

See CONTRACT, VI, 2; XIII, 1, 2.
— EVIDENCE, 19, 20, 21, 22.
— RECTIFICATION OF DEED, 1.
— STATUTE OF FRAUDS, 5.

EVIDENCE—RELEVANCY OF

See EXAMINATION FOR DISCOVERY, 12, 13, 14.
— EXAMINATION OF JUDGMENT DEBTOR, 13, 14.

EVIDENCE TO VARY WRITTEN CONTRACT.

See VENDOR AND PURCHASER, VI, 1.

EXAMINATION DE BENE ESSE.

See PRACTICE, V, 2.

EXAMINATION FOR DISCOVERY.

1. Discovery as to accounts before judgment.

In a partnership bill there were some general charges of misapplication and misappropriation of moneys. The right to a decree for account was conceded but the defendants refused, upon examination, to answer questions based upon the general charges.

Held, 1. That the defendants were bound to answer, even though the questions related to matters that would be referred to the Master and not determined at the hearing.

Elmer v. *Creasy*, L.R. 9 Ch. 69, approved.

2. Although the charges might not have been sufficiently specific upon demurrer, yet, the defendants having answered, they were precluded from refusing to answer fully.

3. Some of the questions were directed to the defendants' dealings with the "Pruden Farm." The defendants swore that this farm was not an asset of the firm, but they were nevertheless ordered to give a full discovery respecting the property.

Monkman v. *Robinson*, 3 M. R. 640, distinguished. *Macdonald* v. *McArthur*, 4 M.R. 56.

2. Examination of defendant on application to sign judgment.

Upon an application under 46 and 47 Vic., c. 23, s. 16, one defendant made an affidavit of merits, and the presiding Judge in chambers made an order for the examination of two other defendants.

Held, affirming order of DUBUC, J., that the examination of these defendants was in the discretion of the Judge, and the appeal should be dismissed with costs. *Imperial Bank* v. *Adamson*, 1 M.R. 96.

3. Of a defendant by another defendant—*King's Bench Act, Rule* 387—*Meaning of expression "party adverse in point of interest."*

A defendant who, in his defence, submits completely to the relief sought by the plaintiff, neither denying nor admitting the allegations of the statement of claim, is not a "party adverse in point of interest" to another defendant, who disputes the plaintiff's rights, within the meaning of Rule 387 of The King's Bench Act, and the latter, therefore, cannot, under that rule, examine the former for discovery, as the pleadings do not raise any issue between them.

Shaw v. *Smith*, (1886) 18 Q.B.D. 193, followed.

Moore v. *Boyd*, (1881) 8 P.R. 413, not followed. *Fonseca* v. *Jones*, 19 M.R. 334.

4. Examination of defendants out of the jurisdiction.

An order may be made for the examination of a defendant upon his pleas, even though the defendant resides out of the jurisdiction (affirming DUBUC, J.).

It would be a convenient practice to grant such an order upon summons only, but a Judge may, in his discretion, grant it *ex parte*.

Service upon attorneys resident abroad, as agents for the defendant's attorneys, is not sufficient if their power to receive notice was not established (overruling DUBUC, J.). *Miller* v. *Henry*, 3 M.R. 425.

5. Officer of corporation.

Plaintiff issued an appointment under Rule 379 of The Queen's Bench Act, 1895, for the examination of one Somerset, as an officer of the defendant company. On the advice of the defendants' solicitor, Somerset did not attend and the plaintiff moved under Rule 390 to commit him for contempt.

Plaintiff's cause of action was that, while in the employ of the defendants and working with some wires, the electric current was carelessly turned on, whereby he sustained injury. The current was generated at and turned on from the building called the power house, and Somerset was an electrician in defendants' employ at the power house and had the control and management thereof and of the electric current as a foreman, but his duties had never been defined by the directors nor had any resolution or by-law been passed making him an officer of the company.

Held, that he was an officer of the company within the meaning of that expression in Rule 379, and should attend and submit to be examined. *Canada Atlantic Railway Co.* v. *Moxley*, 15 S.C.R. 145, followed.

Review of a number of the conflicting decisions on the point. *Dixon* v. *Winnipeg Electric St. R. Co.*, 10 M.R. 660.

6. Officer of company—*Information not within his personal knowledge—Duty of officer to investigate for himself—Production of documents.*

On the examination of an officer of a company for discovery, it is not competent for him to make use of a memorandum prepared by the company's solicitor purporting to contain the information asked for, if he knows nothing of the facts otherwise than as stated in the memorandum and has not verified its accuracy, or to refuse to answer proper questions without referring to the memorandum on the ground that he has no personal knowledge of the matters inquired into. It is the duty of the officer in such a case to investigate for himself the original sources of information in the possession or under the control of any officer of the company and come prepared to answer all relevant questions without the aid of any memorandum unless prepared by himself or, otherwise, under such circumstances that he can pledge his oath to its accuracy.

Bolckow v. *Fisher*, 10 Q.B.D. 161, and *Anderson* v. *Bank of British Columbia*, 2 Ch. D. 657, followed.

Welsbach Co. v. *New Sunlight*, [1900] 2 Ch. 1, distinguished.

Fraser v. *C.P.R.*, 4 W.L.R. 525.

The Court of Appeal subsequently, on defendant's counsel undertaking to produce, for the inspection of plaintiff's solicitor, all documents, other than privileged ones, on which the memorandum referred to or any part of it was founded, set aside the above decision and reinstated the order of the Referee refusing to compel the officer to attend again for further examination. *Fraser* v. *C.P.R.*, 5 W.L.R. 42.

7. Officer of company.

Held, that the chief officer in this Province of a foreign corporation can be examined for discovery. *Real Estate Loan Co.* v. *Molsworth*, 2 M.R. 93.

8. Officer of company—*King's Bench Act, Rule 387—Conductor of railway train, when he may be examined as an officer.*

The plaintiff's claim being that, while employed as a brakeman on one of defendants' trains, he went under one of the cars, by order of the conductor in charge, for the purpose of adjusting some chains, and that, while so engaged, the train was started without warning to him and caused him injury.

Held, that the conductor, under the circumstances, was an officer of the railway company within the meaning of Rule 387 of The King's Bench Act, and must attend and submit to be examined as to his knowledge of the matter in question.

Moxley v. *Canada Atlantic Railway Co.*, (1887) 15 S.C.R. 145; *Leitch* v. *G.T.R.*, (1890) 13 P.R. 359, and *Dixon* v. *Winnipeg*, (1895) 10 M.R. 663, followed. *Gordanier* v. C.N.R., 15 M.R.I.

9. Officer of corporation—*King's Bench Act, Rule* 387.

Held, that the plaintiff could not, after examining an officer of the defendant corporation for discovery under Rule 387 of The King's Bench Act, require another officer of the corporation to attend for a similar examination when the information desired could have been obtained from the first officer examined.

Dill v. *Dominion Bank*, (1897) 17 P.R. 488, not followed. *Brown* v. *London Fence Limited*, 19 M.R. 138.

10. Officer of corporation—*King's Bench Act, Rule* 387.

In an action against a city corporation for damages occasioned by the negligence of an employee of the Waterworks Department of the City in discharging his duty of examining a water meter in the plaintiff's premises, the plaintiff has a right, under Rule 387 of The King's Bench Act, to examine for discovery a water meter inspector of the City as an officer of the corporation.

Dixon v. *Winnipeg Electric Railway Co.*, (1895) 10 M.R. 660, followed. *Shaw* v. *Winnipeg*, 19 M.R. 551.

11. Privileged communications — *Communication between manager of bank and head office—Principal and agent.*

The manager of a branch bank at W., having its head office at M., laid an information against plaintiff, who subsequently brought an action against the bank for malicious arrest. On an examination of the manager:

Held, 1. That he ought to have answered the following questions: "When did you first communicate with them (defendants) about it?" "How did you first communicate, by letter or telegraph?"

2. That he was right in refusing to answer the following question:

"Did you from time to time communicate the facts previously stated in your examination as they occurred?" *McLean* v. *Merchants' Bank*, 1 M.R. 178.

12. Relevancy of questions—*Action for account of profits of partnership—Ambiguity in written contract—Evidence tending to elucidate.*

When the plaintiff alleges and the defendant denies that, upon the true interpretation of an ambiguous contract between them, he is entitled to call upon the defendant for an account of the profits of a partnership between them, the defendant should, upon his examination for discovery in the action, answer questions as to the profits, because the evidence so elicited may throw some light upon the meaning attached to the language of the document by the parties at the time and so assist the Court in deciding the issue between the parties.

Even when the discovery sought is in aid of something which does not form part of what the plaintiff must prove at the hearing, but is merely consequential to it, the Court has a discretion to compel answers when it would not be oppressive to do so.

Graham v. *Temperance, &c., Ass. Co.*, 16 P.R. at 539, and *Parker* v. *Wells*, 18 Ch. D. at 477, followed. *Vanderlip* v. *McKay*, 3 W.L.R. 232.

13. Relevancy of questions—*Injunction against use of trade name—Questions tending to show misrepresentation by plaintiffs as to their goods, relevancy of.*

On a motion for an injunction to prevent the use or imitation of the plaintiffs' trade names for their medicinal preparations, the truth or falsity of the representation as to the curative value and ingredients of such preparations made by the plaintiffs in the advertisements issued by them is relevant, and questions addressed to the plaintiffs' manager, on his cross-examination on his affidavit filed in support of the motion, with a view to elicit evidence of such falsity, must be answered by him. *Theo Noel Co.* v. *Vitæ Ore Company*, 17 M.R. 87.

14. Relevancy of questions—*King's Bench Act, Rule* 379—*Disclosing names of witnesses—Irrelevant matter.*

On an examination of a plaintiff for discovery under Rule 379 of The King's Bench Act, he cannot be compelled to disclose the names of his witnesses, or to answer questions as to whether he has received from persons or corporations, not parties to the action, assistance or promise of assistance or indemnity as to the costs of the action, or as to whether he consulted before action with such other persons as to bringing the suit. *Gibbins* v. *Metcalfe*, 14 M.R. 364.

15. Statement of claim showing no right to relief claimed against party examined—*Refusal to answer questions—Assignment by A. to B. in trust for C.*

If the statement of claim does not state a case entitling the plaintiff to any relief against one of two defendants, an order should not be made compelling him to answer, on his examination for discovery, questions which would be relevant if a good cause of action had been disclosed.

The case alleged against the defendant McLaws was simply that the plaintiff

company had assigned to him certain accounts and securities to be held by him as trustee for his co-defendant Bennetto as collateral security to a chattel mortgage which the plaintiff had given to Bennetto, and that Bennetto had collected through McLaws large sums of money upon such accounts and securities for which Bennetto had not accounted to the plaintiff. It was not alleged that McLaws had retained any of the moneys collected in his hands, or that the amount collected exceeded the amount necessary to discharge the mortgage.

Held, that, as the case was stated, McLaws was not a trustee for the plaintiff company and was not liable to account to it, and the company had no right to complain because he had not done so, and no right to any relief against McLaws was disclosed.

If it had been alleged in the statement of claim that McLaws had collected more than enough to satisfy the chattel mortgage and that the surplus was in his hands and that he had refused to pay it over, even though he had collected it as trustee for Bennetto, he would be a proper party to the action and the plaintiff would be entitled to relief against him: *Cowper* v. *Stoneham*, (1893) 68 L. T. 18. *Winnipeg Granite and Marble Co.* v. *Bennetto*, 21 M.R. 743.

16. Witness refusing to make affidavit—*Order for examination.*

1. An order for the examination of a person who refuses to make an affidavit is discretionary. Under the circumstances in this case it was refused.

2. Before a person can be said to have refused to make an affidavit it should in its main particulars be prepared and handed to the person asked to make it, with the offer to modify or vary the statements according as he may be prepared to testify.

3. The holder of a judgment alleged to have been fraudulently obtained may refuse to answer questions respecting it. *Brown* v. *Hooper*, 3 M.R. 86.

See COSTS, XIII, 10.
— EVIDENCE, 8.
— PRACTICE; IV, XIV, 1; XVI, 3, 4; XXII, 3; XXVIII, 21.
— PRODUCTION OF DOCUMENTS, 4.
— SECURITY FOR COSTS, I, 1.

EXAMINATION OF JUDGMENT DEBTOR.

1. Commitment for contempt in refusing to give satisfactory answers —*King's Bench Act, Rules* 748, 755.

The defendant, on her examination as a judgment debtor under Rule 748 of the King's Bench Act, R.S.M. 1902, c. 40, admitted that she had upon her person more than enough money to pay the judgment, but refused to answer whether she would pay it or to say why she would not. Afterwards upon the plaintiff's application, under Rule 755, the defendant was ordered by MATHERS, J., to be committed to gaol for twelve months on the ground that, within the meaning of that Rule, she had not made satisfactory answers to the questions. On appeal.

Held, *per* HOWELL, C.J.A., and PERDUE, J.A., following *Merrill* v. *McFarren*, (1881) 1 C.L.T. 133, and *Metropolitan Loan Co.* v. *Mara*, (1880) 8 P.R. 360, that the order was justified and should not be set aside.

Per RICHARDS and PHIPPEN, JJ.A., that the word "satisfactory" in Rule 755 only means "full and truthful" and that, as Rule 748 does not provide for any questions as to the debtor's willingness to pay or as to his reasons for refusing to pay, there should be no order to commit under Rule 755 for refusal to answer such questions.

The Court being equally divided, the appeal was dismissed without costs.

Subsequently an order was made on consent providing for the release of the defendant, pending an appeal to the Supreme Court, on terms satisfactory to the plaintiff. *Bateman* v. *Svenson*, 18 M.R. 493.

Appeal quashed, 42 S.C.R. 146.

2. Conduct money.

A judgment debtor served with an order and appointment under section 52 of The Administration of Justice Act, 1885, is entitled to be paid conduct money and expenses as in the case of an ordinary witness. *Galt* v. *Stacey*, 5 M.R. 120.

3. Contributories in winding up—*Company—Winding up—Orders for contributories to pay, judgments of the Court—Liability of contributory to examination as a judgment debtor.*

Orders to pay, under section 78 of The Winding Up Act, R.S.C. c. 129, are judgments of this Court.

An order to examine a judgment debtor should not be granted, unless the creditor shows that execution has been issued, placed in the sheriff's hands and returned *nulla bona*, or that, if called upon to return the *fi. fa.*, the sheriff would return same *nulla bona*.

Quære, whether contributories ordered to pay money can be examined under A. J. Act, R.S.M., c. 1, s. 64. *Re Bishop Engraving and Printing Co.*, 9 M.R. 62.

4. Discretion of Judge.

Held, 1. An order to examine a judgment debtor may, in the discretion of the Judge, be refused.

2. An order to examine a judgment debtor will not be made *ex parte*. *Ferguson* v. *Chambre*, 2 M.R. 184.

5. Evidence of refusal to answer—*Certificate of examiner—Reading over letter before acknowledging signature—Discretion of examiner in taking down answers.*

A certificate of the examiner, as to what took place upon the examination of a judgment debtor, is proper evidence on a motion to commit for refusal to answer, and it is not necessarily an objection that such certificate was settled and given *ex parte*.

It is improper for defendant and his counsel during the examination to converse together, and especially in another language.

A witness, when shown a document and asked whether the signature is his, is not entitled to read over the document before answering the question. If he really cannot answer the question without reading over the document or some part of it, he should say so.

Semble, the judgment debtor under examination is not entitled to have every word or sentence he uses taken down by the examiner. The latter may use his discretion and only put down relevant answers or explanations. *Brock* v. *D'Aoust*, 9 M.R. 195.

6. Fraudulent prior judgment—*Interpleader—Evidence for use on motion or summons.*

Under section 46 of the C. L. P. Act, 1854, a judgment creditor who claims that prior judgments are fraudulent and void, and is called upon by interpleader summons issued at the instance of the sheriff to maintain or abandon his claim, may examine the judgment debtor as to the nature of his dealings with the other judgment creditors, and as to the indebtedness on which such other judgments were obtained, and such examination may be used upon the return of the interpleader summons. *Carscaden* v. *Zimmerman*, 9 M.R. 178.

7. Jurisdiction of County Court Judge—*Separate or firm property.*

Under section 65, sub-section (*a*), of The Queen's Bench Act, R.S.M., c. 36, a County Court Judge is authorized to order the examination of judgment debtors.

Where there were two judgment debtors and the order was to examine them "touching their estate and effects,"

Held, that they could be examined as to their individual estate and effects as well as to their firm or joint property. *Imperial Bank* v. *Smith*, 8 M.R. 440.

8. Married woman—*Debtors' Arrest Act, s.* 7.

A married woman may be examined as a judgment debtor, and punished by arrest for refusal to obey the order for her examination; for, although, by section 7 of the Debtors' Arrest Act, no married woman is liable to arrest on mesne or final process, the order to attend and be examined may be enforced by an order for her commitment to prison, which would be a punishment for contempt of court and not in the nature of imprisonment for debt. *Sanford Manufacturing Co.* v. *McEwan*, 10 M.R. 630.

9. Non-resident corporation or individual debtor—*Queen's Bench Act*, 1895, *Rule* 732-3—*Non-resident.*

No order can be made under Rule 733 of The Queen's Bench Act, 1895, for the examination out of the jurisdiction of an officer of a judgment debtor corporation for discovery of assets, &c., and it is doubtful whether, under Rule 732, an individual judgment debtor who is resident abroad can be so examined unless he comes within the jurisdiction.

Grey v. *Manitoba & N.W.R.Co.*, 12 M.R. 32.

10. Officer of debtor company—*Examination of officer — Corporation — Production of books of corporation—Costs.*

Upon an application to examine an officer of a judgment debtor corporation there should be distinct evidence that the person named is an officer of the corporation, and what office he holds.

No order can be made that an officer do produce the books of the corporation. (*a*).

No order can be made directing that the costs of the application and examination be added to the plaintiff's debt. *Jukes* v. *Winnipeg and Hudson's Bay Ry. Co.*, 5 M.R. 14.

(*a*) As to this, however, see *Mann* v. *Winnipeg & Hudson's Bay Ry. Co.*, 7 M.R. 457, next case.

11. Officer of debtor company—*Corporation—Examination of officers—Production of books by corporation.*

Under section 52 of The Administration of Justice Act, 1885, an order may be made for the examination of an officer of a judgment debtor corporation, and for production by the corporation of books, papers and documents. *Mann* v. *Winnipeg & Hudson's Bay Ry. Co.*, 7 M.R. 457.

12. Refusal to answer questions concerning business carried on in wife's name—*Separate property of wife—Business in which others are interested.*

On an examination of defendant, a judgment debtor, it appeared that a business was carried on under the name of Carley Bros. Defendant's wife and his brother were partners; the capital was contributed by them in equal shares, and they alone were interested in it; none of defendant's personal money went into the business; his wife took no part in the management except through him; he acted for her under a power of attorney; the business was managed by his brother and himself, and he received a weekly salary.

Held, that the business was not one carried on by the wife separately from the husband; she did not carry it on at all; he represented his wife's share in the business, except through him she took no part in it.

Held, also, that a sufficient case had been made to show that the husband was entitled to an interest in the profits. He was, therefore, bound to answer such questions as might be put to him respecting the profits derived from the business, and how they had been disposed of and dealt with. That others were interested was not a reason for refusing to make such discovery.

Monkman v. *Robinson*, 3 M.R. 640, and *Ross v. VanEtten*, 7 M.R. 598, followed. *Merchants Bank*, v. *Carley*, 8 M.R. 258.

Distinguished, *Nicol* v. *Gocher*, 12 M.R. 178.

13. Refusal to answer questions as to wife's property—*Unsatisfactory answers.*

A judgment debtor upon his examination refused to answer questions as to his wife's property.

Held, that his refusal was justifiable.

To a number of questions the debtor replied that he did not know, or that he had forgotten.

Held, that these answers could not be said to be unsatisfactory, although there was a strong suspicion that they were not altogether truthful. *Monkman* v. *Robinson*, 3 M.R. 640.

Distinguished, *Macdonald* v. *McArthur*, 4 M.R. 56

14. Relevancy of questions—*Refusal to answer—Satisfactory answers.*

Upon an application to compel the defendant to answer certain questions which he had refused to answer on his examination as a judgment debtor,

Held, the rule is, do the questions relate to the debtor's property or his transactions respecting the same? If so, he must answer them.

Held, also, the fact that the information obtained from the answers is intended to be used for the purposes of a suit against a third party is no ground for refusing to answer.

The meaning of the expression "satisfactory answers," in sub-section 1 of section 52 of The Administration of Justice Act, 1885, considered. *Ross* v. *Van Etten*, 7 M.R. 598.

15. Return by Sheriff necessary before order made.

A judgment debtor is not examinable until the judgment creditor has placed a *fi. fa.* in the Sheriff's hands, and it has either been returned *nulla bona*, or the Sheriff has notified the judgment creditor that, if called upon to return the execution, such would be his return.

Ontario Bank v. *Trowern*, 13 P.R. 422, followed. *Carscaden* v. *Zimmerman*, 9 M.R. 102.

16. Secured debt—*Order refused.*

Whether an order will be made for the examination of a judgment debtor is discretionary with the Judge applied to.

The debt being amply secured, an order was refused and upon appeal this refusal was upheld.

Per DUBUC, J. When a Judge has a discretion to exercise and has exercised it, his order should not be rescinded unless it is found to be manifestly erroneous, through misconception of some facts or of some principle of law. *Ferguson* v. *Chambre*, 3 M.R. 574.

See APPEAL TO SUPREME COURT, 6.
— ATTACHMENT OF THE PERSON, 1.
— INFANT, 10.
— PRACTICE, XXVIII, 8.

EXAMINATION ON AFFIDAVIT.

1. **Place of examination**—*Garnishee.*

Writ issued in the Western Judicial District. An order was obtained for the examination, at Brandon, of the garnishee, on an affidavit made by him. The garnishee resided in Winnipeg.

Held, that the order ought to be varied, and direct the examination to be held at Winnipeg. *Imperial Bank* v. *Angus, Fraser, Garnishee*, 1 M.R. 98.

2. **Second affidavit of same person**—*Practice.*

Upon a motion, defendant filed an affidavit of A., who afterwards made another explanatory affidavit at the instance of the plaintiff.

Held, that defendant was not entitled to an order for the oral examination of A. *Carey* v. *Wood*, 2 M.R. 32.

3. **Spent affidavit**—*Affidavit used on an application in Chambers—Subsequent examination of deponent.*

Held, that where an affidavit had been used, and answered the purpose for which it had been filed, an order to examine the deponent upon it will not be granted. *Imperial Bank* v. *Taylor*, 1 M.R. 244.

4. **Spent affidavit**—*Affidavit having served purpose for which filed—No motion pending—Order to examine on—Ex parte order—Deponent refusing to attend on examination.*

Plaintiff brought an action by a writ issued under The Summary Procedure on Bills of Exchange Act, and defendant company obtained, on an affidavit of D., its president, an *ex parte* order giving it leave to appear. The plaintiff then obtained *ex parte*, from the Referee in Chambers, an order directing D. to appear before a special examiner and submit to be examined *viva voce* on his affidavit. In support of this application there was filed an affidavit of plaintiff's attorney that it was plaintiff's intention to move to rescind the order giving leave to appear. This order, with examiner's appointment, was duly served and conduct money paid, but D. did not appear. A motion was then made before the Referee to strike out the defence or set aside the order allowing appearance. The Referee made an order directing D. to appear for examination at his own expense and in default that the defence should be struck out.

From this order defendant appealed to a Judge in Chambers, who reversed the order and dismissed the application. Plaintiff then appealed to the Full Court.

Held, that the order for examination should not have been made on the grounds that the affidavit had served its purpose and there was no motion pending.

Held, also, that the Court was not obliged to enforce the order, although it had been made and had not been rescinded. *Long* v. *Winnipeg Jewelry Co.*, 9 M.R. 159.

See ELECTION PETITION, I, 1, 2.
— FOREIGN COURT, 1.
— PRACTICE, XXII, 2.
— PRODUCTION OF DOCUMENTS, 7, 13, 14.
— WINDING-UP, IV, 2.

EXCEPTIONS TO THE DECLARATION.

See PLEADING, X, 1.

EXCESSIVE FINE.

See CRIMINAL LAW, XIII, 3.

EXCESSIVE RENT.

See LANDLORD AND TENANT, II, 4.

EXCESSIVE SEIZURE.

See THRESHER'S LIEN.

EXCHANGE OF GOODS.

See SALE OF GOODS, VI, 4.

EXCHANGE OF LANDS.

See MORTGAGOR AND MORTGAGEE, V, 3.
— PRINCIPAL AND AGENT, II, G.
— VENDOR AND PURCHASER, VII, 4.

EXECUTED CONTRACT.

See EVIDENCE, 17, 20.

EXECUTION.

See FI. FA. GOODS.
— PRACTICE, III, 4.

EXECUTION CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2, 3.
— ATTACHMENT OF GOODS, 6.
— BILLS OF SALE, 2.
— COSTS, XIII, 11.
— FI. FA. GOODS, 4.
— FRAUDULENT CONVEYANCE, 8.
— GARNISHMENT, VI, 2.
— HUSBAND AND WIFE, I, 3; III, 2.
— LANDLORD AND TENANT, IV, 1.
— OWNERSHIP OF CROPS.
— PARTNERSHIP, 6.
— SECURITY FOR COSTS, I, 2.
— SHERIFF, 2.
— WINDING-UP, III, 1; IV, 5.

EXECUTORS.

See WILL, I, 2; III, 5.

EXECUTORS AND ADMINISTRATORS.

1. Judgment against—*Form—Pleading—Reference under R.P.Act.*

A certificate of a County Court judgment against "A. B., administrator of the estate of X.," charges A. B. personally and not the estate.

The note or memorandum of a County Court Judge is not, but the entry of the clerk in the procedure book is, the judgment.

Upon a reference by the Registrar-General under The Real Property Act, no material other than the case submitted, together with any documents transmitted, can be considered.

Semble, when an executor or administrator is made a party to an action, as such, he must declare, or be charged, clearly in that character. *Re Joyce & Scarry*, 6 M.R. 281.

2. Personal liability of—*Liability of executor for goods supplied for business of testator carried on for benefit of estate under authority in will—Estoppel—Statute of Limitations.*

The estate of John N. Braun, deceased, was being administered in this action commenced in May, 1892, and Velie brought into the Master's office in 1901 a claim for goods supplied to the executor, Henry Braun, between July, 1890, and March, 1892, for use in carrying on the hotel business of deceased under authority conferred by his will.

Velie had, in May, 1893, sued the executor in a County Court for the price of the goods in question, but the County Court Judge dismissed the action on the ground urged by the defendant that he was not personally liable, but that the claim should be against the estate. The executor claimed in the administration proceedings that the estate was insolvent, but in April, 1894, an order was made by consent for the transfer of all the assets to him personally upon his undertaking to pay or settle with all the creditors of the estate and paying $1,200 into the hands of trustees for the benefit of the children of the deceased and certain costs, and this order was carried out on both sides. The order contained provisions that the Master should forthwith adjudicate upon and settle all claims against the estate, that the executor should indemnify and save harmless the estate from all such claims and that he should carry out and perform all the terms and provisions of the settlement.

Held, (1) A person supplying goods to an executor under such circumstances has no right against the estate, but he may sue the person who incurred the debt, and he also has a right to be subrogated to any right of indemnity which the executor has against the estate in respect of the liability so incurred: *In re Frith*, [1902] 1 Ch. 342; *Dowse* v. *Gorton*, [1891] A. C. at p. 199.

(2) *Per* KILLAM, C.J.—That the executor was estopped by the agreement of

settlement he made and by the order confirming the same from setting up the defence of a deficiency of assets out of which to pay, and that under the circumstances Velie's claim should be treated as one against the estate upon which the Master was bound to adjudicate under the consent order.

(3) *Per* DUBUC, J.—That the executor was estopped by the course he had taken in the County Court suit from disputing the validity of the claim against the estate.

(4) There was no ground for setting up that the claim was barred by the Statute of Limitations. *Braun* v. *Braun*, 14 M.R. 346.

3. Personal liability of—*Liability of estate for work done for administrator.*

An estate in the hands of an administrator is not liable for work done or services performed at the request of the administrator, although the estate gets the benefit of the work and services, but the administrator is liable in his personal capacity in such a case.

Farhall v. *Farhall*, (1871) L.R. 7 Ch. 123, followed. *Dean* v. *Lehberg*, 17 M.R. 64.

4. Remuneration of—*Executors and trustees.*

In fixing the amount of compensation to trustees, there should be taken into consideration:

(1) The magnitude of the trust;

(2) The care and responsibility springing therefrom;

(3) The time occupied in performing its duties;

(4) The skill and ability displayed;

(5) The success which has attended its administration.

Such compensation, while fair and just, must be reasonable but not necessarily liberal.

The duties of the executors in this case were to realize on the real estate of the testator in Manitoba and transmit the proceeds to the Ontario executors. It took nine years to complete the work, and it appeared that the executors had carried out their duties with great faithfulness and unusual success, assisted by the great advance in the values of real estate during that period, and that the total amount of money realized was over $300,000, also that Mr. Riley, who had had the chief management of the work, had already received under orders of the Court $19,500 on account.

Held, that an additional compensation to Mr. Riley of two per cent of the gross amount realized would be fair and reasonable and that the other two executors should together have two per cent of the same.

Held, also, that Mr. Riley was not entitled to commission as a real estate agent on sales of lands to purchasers secured by him personally, although he might have employed another person at the expense of the estate to perform such services: *Am. & Eng. Ency.*, vol. xi, p. 1306. *Re Sanford Estate*, 18 M.R. 413.

See ADMINISTRATION, 2, 3.
— CONTRACT, VI, 1.
— INJUNCTION, I, 8.
— REAL PROPERTY ACT, V, 3.

EXECUTORS AND TRUSTEES.

See WILL.

EXEMPLARY DAMAGES.

See TRESPASS AND TROVER, 1.

EXEMPTIONS

1. Abandonment of homestead—*Statutes—Repeal.*

49 Vic., c. 17, s. 117, s-s. 8, exempts from execution the land upon which the defendant or his family resides, or which he cultivates wholly or in part, not exceeding 160 acres, provided that "said 160 acres must be outside the limits of any city or town." The proviso was by 49 Vic., c. 35, s. 2, repealed.

Held, that the repeal rendered lands within town limits exempt from execution for debts incurred previous to the repeal.

Defendant owned a homestead and occupied a house upon it for several years. He himself was much absent in England, but his family continued to reside there until the 1st of October, 1889; when, without defendant's knowledge, they removed to another place—for the temporary purpose merely of wintering their cattle. In the following March they returned to the homestead accompanied by the defendant.

Held, that, in the absence of evidence to show any intention to abandon the homestead, or that the plaintiff was in any way misled, the exemption still continued.

A conveyance of a homestead by way of mortgage does not preclude a claim of exemption from execution.

Quære, can one member of a partnership after dissolution assign a judgment obtained by the firm. *Hockin* v. *Whellams*, 6 M.R. 521.

2. Actual residence or home of debtor—*R.S.M., c. 53, s. 43, s-s. (k).*

Defendant claimed that certain buildings seized in August, 1898, under execution were exempt under section 43, subsection (*k*), R.S.M., c. 53, as being his actual residence or home.

The evidence was that in September, 1897, defendant gave up his position as Indian agent at Berens River, and rented the buildings in question, in which he had been living and which he had erected on Crown land, to his successor in office. He then built a temporary log house on an island about 1½ miles away, in which he lived with his family, and where he maintained himself by fishing. He afterwards tried to sell the building in question to the Dominion Government.

He swore that his absence was only temporary and that, if he could not get the Government to purchase, he intended to return and occupy the buildings as his own.

Held, DUBUC, J., dissenting, that the buildings had ceased to be the actual residence or home of the defendant and were, therefore, not exempt from seizure. *Dixon* v. *McKay*, 12 M.R. 514.

3. Actual residence or home of debtor—*Homestead—Judgments Act, R.S. M., c. 80, s. 12.*

The plaintiff claimed a right to have two village lots owned by defendant sold to satisfy a judgment of which he had registered a certificate.

Defendant occupied as his dwelling the upper floor of a two-story building on one of the lots, the ground floor having been built for use as a store. There was a stairway inside the building connecting the two floors, also a stairway from the outside to the dwelling.

The two lots were occupied as one property and some use was made of the vacant store for storage of articles used in connection with the dwelling.

The Judge at the trial found that the value of the property was $3,000 and that there was a mortgage upon it for an amount exceeding $2,000.

Held, that the defendant was *bona fide* using the whole premises as his residence and that, under section 12 of The Judgments Act, R.S.M., c. 80, the property as a whole was free from sale under the judgment.

BAIN, J., *dubitante*. *Codville* v. *Pearce*, 13 M.R. 468.

4. Building partly occupied as home of debtor—*Married woman.*

The defendant, a married woman, owned a building subject to a mortgage. She occupied a part of it as a home (her husband living elsewhere) and rented the rest to another for use as a shop. There were separate entrances to the two portions of the building. Upon a bill to enforce a registered judgment obtained against the defendant,

Held, 1. That the portion occupied by the defendant was exempt from seizure or sale.

2. That the portion rented was not exempt.

3. That the mortgage should be apportioned.

4. Reference to the Master to ascertain exactly the portions occupied and rented and to apportion the mortgage.

5. A *fi. fa.* goods must be returned before sale under *fi. fa.* lands, but not necessarily before a decree can be made to enforce the statutory lien given by registration of a judgment. *Warne* v. *Housley*, 3 M.R. 547.

5. Building partly occupied as home of debtor—*Actual residence or home of any person—Building used as dwelling and shop.*

A building in which is the actual residence and home of a judgment debtor, and not worth more than $1,500, will be exempt under R.S.M. c. 53, s. 43, from proceedings to realize the judgment, notwithstanding that the lower story was built for and wholly used as a general store; and such a building, therefore, will not pass to the assignee by an assignment for the benefit of creditors under section 3, R.S.M., c. 7. *Bertrand* v. *Magnusson*, 10 M.R. 490.

6. Death of judgment debtor—*Judgments Act, R S M., c. 80, s. 12.*

The plaintiffs recovered a judgment against the defendant as surviving executor of the estate of one William Kines, and under Rule 804 of The Queen's Bench Act, 1895, applied for an order for the sale of a parcel of land vested in the defendant as such executor. The widow and minor children of Kines were living on the land.

Held, that section 12 of The Judgments Act, R.S.M., c. 80, which provides that no proceedings shall be taken under any registered judgment against the land upon which the judgment debtor or his family actually resides or which he cultivates, would not apply so as to prevent the sale of the land in question, as neither the defendant nor his family resided upon or cultivated it.

Statutes conferring exemptions or privileges in derogation of the general law must be construed strictly, so that the protection of s. 12 does not continue after the death of the judgment debtor, although his widow and children may be living upon the property; and *a fortiori* no exemption can be claimed when the judgment in question is recovered against the executor of the deceased debtor. *London & Canadian Loan & Agency Co.* v. *Connell*, 11 M.R. 115.

7. Homestead of debtor conveyed to his wife—*Registered judgment—Fraudulent conveyance.*

The plaintiff recovered a judgment against the defendant which was registered in July, 1896. The defendant, in August, 1896, became entitled as a homesteader to a patent to a quarter section of land, but in September signed a quit claim deed in favor of his wife, in consequence of which the patent issued in his wife's name. At the time of the transfer the husband was insolvent. The transfer was given without consideration and for the purpose of protecting the husband against his creditors. The wife claimed no interest in the land other than as trustee for her husband. The defendant claimed that the land was exempt from sale under The Judgments Act, R.S.M., c. 80, s. 12 (a), being the land upon which he and his family actually resided.

Held, *per* BAIN, J., that the plaintiffs were entitled to an order for the sale of the lands under Rule 803 of The Queen's Bench Act (now Rule 742 of The King's Bench Act) to satisfy their judgment. The conveyance to the wife, although fraudulent and void as against creditors, was still good as between the parties to it, and so, as between the husband and his wife, the title to the lands was in her, and he had no interest in them, and a man could not claim as an exemption land that does not belong to him and in which he has no interest, although he may actually live upon it.

Massey-Harris Co. v. *Warener*, 17 C.L.T. Occ.N. 409.

N.B. The Full Court afterwards allowed an appeal from the above decision, but on the ground that the plaintiffs had not given proper proof of the registration of their judgment against the defendant, expressing no opinion on the point decided by BAIN, J. See 12 M.R. 48.

8. Horse and harness—*Weigh scales.*

Held, that a horse and harness, which were part of the goods seized under an execution against goods, were privileged from seizure under execution under The Homestead Act, 34 Vic., c. 16, being the only horse and harness of the debtor, but that a set of weighing scales was not exempt. *Nelson* v. *Gurney*, T. W., 173.

9. Land once bound by writ not afterwards exempted.

Defendant sold land to his father in 1882. Plaintiff recovered judgment against defendant in 1885 for $15,000, and issued *fi. fa.* lands. In 1888 a decree declared the deed from defendant to his father fraudulent as against the plaintiff. Immediately after decree the father re-conveyed the land to the defendant to enable him to claim it as exempt from seizure. Until the re-conveyance defendant lived with his father upon the land as a member of his family only; and the cultivation was by, or for the the benefit of, the father. After the re-conveyance the father lived with the defendant who resided upon and cultivated the land.

Held, that the land was not exempt from sale under the *fi. fa.* The land having once been bound by the writ did not become exempt by the acts of the defendant. *McLatchie* v. *McLeod*, 6 M.R. 452.

10. Lien on land not presently enforceable—*Registered judgments—Lien on land—Judgments Act, R.S.M.*, 1892, *c.* 80, *sections* 5 *and* 12.

The registration of a certificate of judgment under section 5 of The Judgments Act, R.S.M., c. 80, constitutes a lien and charge on the lands of the judgment debtor, even although he actually resides

thereon, or cultivates the same either wholly or in part, and the effect of section 12 of the same Act is simply that, so long as that state of affairs continues, no proceedings can be taken to realize the judgment out of the land. *Re Frost and Driver*, 10 M.R. 319.

11. Seizure of goods for the price of which the action was brought—*Suit on bill of exchange given for such price.*

Goods generally exempted from seizure under execution by virtue of section 29 of The Executions Act, R.S.M., 1902, c. 58, but withdrawn from such exemption by section 36 of the Act when the purchase price of them is the subject of the judgment proceeded upon, are subject to seizure although the judgment has been recovered only upon a bill of exchange for the price accepted by the judgment debtor.

Black on Executions, par 217; 18 *Cyc.* 196; 12 *Am. & Eng. Ency*, 175, followed. *Canada Law Book Co.* v. ———, 17 M.R. 345.

12. Selection of exemptions by assignee when assignor neglects to make choice—*Assignment for creditors—Assignments Act, R.S.M., c. 7, s. 3—Executions Act, R.S.M., c. 53, s. 43.*

When a debtor merchant makes an assignment in the form prescribed by The Assignments Act, R.S.M., c. 7, of all his stock-in-trade and personal property, etc., liable to seizure under execution to a trustee for creditors, the assignee has a right to select such articles as would be exempt under The Executions Act, R.S.M., c. 53, s. 43, in the absence of a selection by the debtor; and, if he appropriates and sells only a portion of the property coming under the head of any class of the statutory exemptions and leaves to the debtor a sufficient quantity of the same kind of property to reach the prescribed value, he will not be liable to an action for the value or the proceeds of the portion sold. *Cloutier* v. *Georgeson*, 13 M.R. 1.

See CHATTEL MORTGAGE, III, 1; V, 4.
— ESTOPPEL, 4.
— FRAUDULENT CONVEYANCE, 1, 3, 4, 9, 10.
— FRAUDULENT PREFERENCE, III, 5.
— HOMESTEAD, 4.
— PLEADING, IX, 1.
— REGISTERED JUDGMENT, 2, 6, 8.
— TAXATION, 3.

EXEMPTION FROM TAXATION.

See C. P. R. LANDS, 1.
— CONSTITUTIONAL LAW, 17.
— MUNICIPALITY, VIII, 6.
— TAXATION, 3.

EXHIBITS.

See PRACTICE, XXVIII, 9.

EX PARTE APPLICATION.

See PRACTICE, XXVIII, 22.

EX PARTE ORDER.

See APPEAL FROM COUNTY COURT, VI, 2.
— EXAMINATION ON AFFIDAVIT, 4.
— GARNISHMENT, I, 7.
— PRACTICE, V, 3; XX, B, 6.
— REFEREE IN CHAMBERS, 1.
— VENDOR AND PURCHASER, VII, 8.

EXPERT EVIDENCE.

See EVIDENCE ON COMMISSION, 3.
— WILL, III, 3.

EXPERTS.

See CRIMINAL LAW, XVII; II.

EXPRESS COMPANY.

See BAILMENT, 3.
— TAXATION, 2.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

See JURISDICTION, 8.

EXPRESSUM FACIT CESSARE TACITUM.

See EVIDENCE, 19.

EXPROPRIATION OF LAND.

1. Assessment by arbitrators of value of land taken—*Value at time of making award or at date of by-law to expropriate—Winnipeg Charter, ss.* 823—826.

Under section 825 of The Winnipeg Charter, 1 & 2 Edward VII, c. 77, when the City has passed a by-law for the expropriation of land for any purpose of the City, but the land has not been entered upon or used by the City, it is not bound by any award the arbitrators may make as to the value of the land proposed to be taken unless the award is, within three months thereafter, adopted by another by-law; but, if the City exercises its power of entering upon or using the land before the making of the award, it would be bound to carry out the purchase.

Held, that, in the former case, the arbitrators should assess the value of the land as at the time of making the award and not as at the date of the by-law, if values have changed in the meantime.

Prittie v. Toronto, (1892) 19 A.R. 503, distinguished.

Order referring the matter back to the arbitrators to assess the value as of the date of their previous award. *Byerley and Winnipeg, Re* 20 M.R. 438.

2. Implied power to expropriate lands.

By 43 Vic., c. 27, s. 2 (Man.), the plaintiff corporation had full power and authority to construct a bridge across the Red River, at such place within the City of Winnipeg to such place in St. Boniface on the opposite side of the River as they might deem advisable. No express power to expropriate lands was given by the Act. The plaintiffs under this enactment took lands of the defendant on the bank of the River in St. Boniface for one of the abutments of the proposed bridge, whereupon the defendant commenced an action of ejectment against them, and this bill was filed to restrain the defendant from proceeding with the action of ejectment.

Held, WOOD, C.J., dissenting, on demurrer to the bill of complaint, that the plaintiffs had no implied authority to expropriate lands, though they were absolutely necessary for the purposes of the bridge.

Mayor and Council of the City of Winnipeg v. *Cauchon*, T.W. 350.

3. Proceeding for—*Arbitration and award—Estoppel—Waiver—By-law authorizing arbitration—Municipal law—Pleading.*

In a notice given under section 699 of The Municipal Act of proceedings for the expropriation by arbitration of the plaintiff's land, the defendants stated that a petition would be presented to fix a compensation to be *paid to the plaintiff* for the land required instead of that to be *allowed for the land*, and the notice also differed from the form directed by that section in referring to the Judge of the County Court of the "Eastern Judicial District," instead of the "Judicial Division," within which the land lies; but the defendants proceeded with the arbitration proceedings and procured the award of commissioners under that and following sections of the Act, although they declined afterwards to submit the award to the County Court Judge for confirmation.

In an action by the plaintiff for a mandamus to compel the defendants to complete the arbitration proceedings, and pay the amount of the award,

Held, on demurrer, that the defendants could not rely upon such slight differences between the notice actually given and the notice provided for by the statute; that such differences were mere irregularities which were waived by defendants taking subsequent proceedings, and that defendants were also estopped from relying upon such mistakes in the notice prepared and served by them.

Held, also, that it was not necessary for the plaintiff to allege in his declaration that a by-law had been passed by the defendants authorizing the notice of arbitration in question: *Harpel* v. *Portland*, 17 U.C.R. 455, followed.

The count of the declaration setting up a money demand by virtue of the award was held bad, because the award had not been confirmed by the County Court Judge. *Scott* v. *City of Winnipeg*, 11 M.R. 84.

See ARBITRATION AND AWARD, 6.
— MUNICIPALITY, VIII, 3.
— PUBLIC PARKS ACT.
— RAILWAYS, V; XI, 5.
— SALE OF LAND FOR TAXES, X, 6.

EXTENSION OF TIME.

See SECURITY FOR COSTS, I, 2, 4.

EXTORTION.

See CONVICTION, 1.
— CRIMINAL LAW, V, 1.
— DURESS, 1, 2.

EXTRADITION.

1. Evidence at hearing—*Extradition Act, R.S.C.* 1906, *c.* 155, *s.* 16—*Proof of foreign law—Affidavit evidence, use of—Grand larceny—Evidence of guilt, sufficiency of—Criminal Code, s.* 686.

1. Proof of the foreign law is not necessary to show that "grand larceny" is included in the crime of larceny mentioned in the Extradition Treaty between the United States and Great Britain.

In re Murphy, (1895) 22 A.R. 386, followed.

2. When, at the close of the evidence for the demanding country at the hearing of an application for extradition under The Extradition Act, R.S.C. 1906, c. 155, the Judge calls on counsel for the accused for his defence, a committal subsequently made will not be set aside on *habeas corpus* on the ground that the Judge did not formally ask the accused if he wished to call any witnesses as required by section 686 of The Criminal Code.

3. Notwithstanding the wording of section 16 of The Extradition Act, affidavits sworn to in the foreign State may be received and acted on in extradition proceedings, following the practice adopted in *Counhaye Case*, (1873) L.R. 8 Q.B. 410, and in many Canadian cases.

4. When a charge of larceny is made in respect of a sum of money alleged to have been received by the accused from the prosecutor to be accounted for and to have been fraudulently converted by the accused to his own use, sufficient *prima facie* evidence of the payment by cheque of the money to the accused is not given without production of the cheque or the receipt given by the accused, in the absence of any deposition of an official of the bank on which the cheque was drawn.

Reg. v. *Burke*, (1889) 6 M.R. 121, and *Re Harsha* (*No.* 1), (1906) 10 Can. Cr. Cas. 433, followed.

The evidence contained in the affidavits being in this respect and otherwise insufficient to establish a *prima facie* case against the accused, he was held entitled to his discharge on *habeas corpus*.
Re Moore, 20 M.R. 41.

2. Evidence of innocence—*Proof of handwriting—Admissibility of confession.*

Held, 1. That evidence to disprove the crime charged is inadmissible.

2. Admissibility and strength of evidence as to handwriting discussed.

3. Admissibility of confessions discussed.
Re Stanbro, 1 M.R. 263.

3. Evidence taken in shorthand.

Under section 13 of The Extradition Act, R.S.C. 1906, c. 155, which provides that the Judge before whom the fugitive is brought should hear the case in the same manner as nearly as may be as if the fugitive was brought before a justice charged with an indictable offence, the proceedings are regulated by sections 682-686 of The Criminal Code and under section 683, if the evidence is taken in shorthand, it is imperative that the transcript be signed by the Judge and be accompanied by an affidavit of the stenographer that it is a true report of the evidence before there can be a committal of the accused for extradition, and, if these be lacking, the prisoner is entitled to his discharge on *habeas corpus*, although there would be nothing to prevent fresh proceedings being taken against him.

In re Stanbro, (1884) 1 M.R. 325, and *Dale's Case*, (1881) 6 Q.B.D. 376, followed. *Re Royston*, 18 M.R. 539.

4. Form of taking evidence—*Habeas corpus.*

Where prisoner was charged with an extraditable crime and the evidence was taken down in the narrative form on the Judge's notes, and by way of question and answer by a shorthand reporter which were afterwards extended by the reporter but were not read over to the witnesses or signed by them,

Held, upon *habeas corpus*, that there was no evidence—that is, no evidence that the Court could look at—as proof of the alleged crime. *Re Stanbro*, 1 M.R. 325.

5. Identity of charge—*Foreign depositions—Condensed depositions—Evidence for extradition—Accessories—Statute passed after Extradition Act.*

The information upon which the original warrant for the arrest of the prisoner issued was sworn on the 20th June. It was afterwards amended and re-sworn on the 2nd July. The prisoner in fact came before the extradition Judge on the 26th day of June. The caption of the evidence given before the Judge stated that it was

taken in the presence of the prisoner, "who is charged on the 26th day of June, 1889, and this day before me," &c. The charge in the information and the caption of the evidence were identical.

Held, that the evidence so taken could be read in support of the information.

Foreign depositions may be read, although not taken in the presence of the prisoner.

Depositions were taken by a stenographer before a grand jury in a foreign country. From these a shorter statement was made by an attorney, who swore that he omitted nothing material. The witnesses were then with this shorter statement sent back to the grand jury. When tendered in evidence here, the depositions appeared to be properly certified as having been signed and sworn to by the witnesses.

Held, that such depositions were admissible.

Foreign depositions more in the form of affidavits than depositions may be admissible in evidence here.

The evidence necessary for extradition must be as strong as (in the case of a domestic offence) that necessary for committal for trial.

Upon appeal, the finding of the single Judge as to the weight of evidence will not be interfered with.

The foreman of a grand jury is an "officer" who can certify to depositions in order that the same may be used here.

DUBUC and KILLAM, JJ.—The offence of being accessory to a murder is included in the offence of murder under The Extradition Act.

TAYLOR, C.J.—In determining whether the offence charged constitutes a crime within The Extradition Act, the law of the date of the offence governs and not that of the time of the treaty. *Reg.* v. *Burke*, 6 M.R. 121.

6. Political crime.

The accused was a member of the social democratic party in Russia, whose object was not only to alter the form of government but also to do away with private ownership of property. A propaganda was carried on by them throughout the country and many revolutionary outrages had been committed by them.

The crime of which the accused was charged was the killing of a constable, in a district where martial law had been proclaimed and was in force, under the following circumstances:

The accused and a companion, strangers to the locality, were staying at the house of a resident, when the village constable and a number of watchmen, hearing of their visit, decided to take them to the administrative office to give an account of themselves. When they got outside of the house the accused shot and killed one of the watchmen and he and his companion, being pursued, fired several more shots at their pursuers but escaped. They had not been accused of any offence and were not taken for any.

Held, that this crime, even although called in Russia, under the circumstances, a political crime, was not a crime of a political character within the meaning of the treaty between Great Britain and Russia as it was not one committed in furtherance of any political object, and that the prisoner should be remanded for extradition.

Re Castioni, [1891] 1 Q.B. 156, followed. *Re Fedorenko* (No. 1), 20 M.R. 221.

7. Requisition from foreign Government—*Extradition treaty with Russia, articles VIII and IX—Extradition Act, R.S.C.* 1906, *s.* 155, *ss.* 3, 10.

When under the terms of an Extradition Treaty with a foreign government, as in the case of the treaty with Russia printed in the Canada Gazette for 1887 at page 1918, Articles VIII and IX, a requisition from that government for the surrender of a fugitive is provided for as preliminary to any proceedings for the arrest of the fugitive, any such proceedings taken without such requisition having been made are entirely unauthorized, and the fugitive, even after he has been committed for extradition by a Judge of this Court, should be discharged upon *habeas corpus*. Sections 3 and 10 of our Extradition Act, R.S.C. 1906, c. 155, distinctly provide that nothing in the Act which is inconsistent with any of the terms of an Extradition Treaty shall have effect to contravene the treaty.

Re Lazier, (1899) 3 Can. Cr. Cas. 167, 26 A.R. 260, distinguished on the ground that there was no corresponding provision in the Extradition Treaty with the United States. *Re Fedorenko* (No. 2), 20 M.R. 224.

Reversed, [1911] A.C. 735, where it was held that, under Art. IX of the Extradition Treaty with Russia, 1886, after a requisition in due form, it is obligatory on the authorities to arrest the fugitive.

The Article does not provide that there shall be no arrest till after requisition, and is not inconsistent with s. 10 of The Extradition Act.

8. Warrant of committal—*Form of—Information—Amendment of—Duplicity—Order in Council—Proof of—United States—Local law of one State—Corroborative evidence.*

Judicial notice will be taken of Orders in Council published with the Dominion Statutes pursuant to R.S.C., c. 2, s. 9.

Re Stanbro, 2 M.R. 1, followed.

A warrant of committal, under The Extradition Act, of a fugitive to await surrender to the foreign state, after reciting the apprehension of the accused, that he had been brought before the Judge, and that the Judge had determined that he should be surrendered, continued: "on the ground of his being accused of the crime of forgery and also of the crime of uttering what was forged within the jurisdiction of the State of Ohio, one of the United States of America, and of the United States of America."

Held, that this was a sufficient description of the offences to show a ground of detention under the statute.

Per BAIN, J.—If it were a warrant of commitment for trial or for punishment after conviction, it would be bad.

The information charged the accused both with the forgery of a promissory note and with the uttering of a forged note.

Held, that the information was not bad for duplicity.

The information charged the accused with forgery and uttering forged paper. After a large part of the evidence was given the information was amended by changing the words "to the intent thereby then to defraud," in the charge of uttering, to "with intent thereby then to defraud," and the information was then resworn. There was no new jurat. Further evidence was then taken, but insufficient in itself to warrant a committal.

Held, that the amendment was on a wholly immaterial point, and the extradition Judge could proceed with the inquiry under the original and amended information, as one into really the same charges, and use all the evidence thus taken in deciding whether there were sufficient grounds for committal.

The accused was charged with the offences of forgery and uttering forged paper at the City of Toledo in the State of Ohio, one of the United States of America. The evidence showed that these offences were crimes under the statute law of the State of Ohio, but that there was no law of the United States as a whole under which these offences would be crimes.

Held, that these offences were within the meaning of the Extradition Treaty between Great Britain and the United States.

Re Windsor, 6. B. & S. 522, commented on.

Re Phipps, 1 O.R. 586, and *Reg.* v. *Burke*, 6 M.R. 121, followed.

Per BAIN, J.—In extradition proceedings, the evidence of interested parties need not be corroborated.

Per KILLAM, J.—*Semble*, some evidence should be given to shew that some reasonable corroborating evidence, without which there could never be a conviction, was likely to be forthcoming upon the trial.

Per KILLAM, J.—The telegrams sent by accused at the time of his arrest constituted some corroborating evidence. *Re McCartney*, 8 M.R. 367.

EXTRA-PROVINCIAL CORPORATION.

See C. P. R. LANDS, 2.

FAILURE OF CONSIDERATION.

See LIMITATION OF ACTIONS, 1.
— MISREPRESENTATION, III, 2.

FALSE IMPRISONMENT.

1. Justification—*Reasonable and probable cause.*

The defendant, the Chief of Police for the City of Winnipeg, went to the plaintiff's house, and while there an altercation ensued, and the plaintiff applied an abusive epithet to the defendant. For this, the defendant arrested the plaintiff and locked him up, and on being brought before a magistrate the plaintiff was convicted, but the conviction was quashed. The plaintiff then brought this action for false imprisonment and malicious prosecution.

Held, that, even assuming the use of the abusive epithet to have been an offence, the defendant was not justified in arresting the plaintiff in his own house, the law constituting it an offence only when occurring on a public street, etc.

Held, also, that there was no reasonable and probable cause for the prosecution of the plaintiff. *Fitch* v. *Murray*, T.W., 74.

2. Misdirection to jury—*Constable—Assault—Self-defence.*

In an action for malicious arrest and false imprisonment against a constable, the learned Judge charged the jury to say whether the defendant acted in his own defence, or committed the first assault. He also told the jury that the defendant was acting in his official capacity, and that it was for them to find whether he acted maliciously or *bona fide*.

Held, misdirection. *Fitch* v. *Murray*, T.W., 74.

3. Want of reasonable and probable cause—*Malice—Application for new trial—Misdirection—Putting questions to jury—Evidence as to character of plaintiff.*

1. At the trial of an action for false imprisonment, the Judge is not bound to put to the jury specific questions, such as "Did the defendants take reasonable care to inform themselves as to the facts?", "Did the defendants honestly believe that the plaintiff was guilty of the offence for which he was arrested?" but may, with a proper charge, submit all the facts to the jury, leaving them to return a general verdict.

2. In charging the jury, the Judge should not suggest to them that they might put themselves in the plaintiff's place, and consider how much they ought in that case to be paid: *Hesse* v. *St. John Ry. Co.*, (1899) 30 S.C.R. 218. But, as no objection had been raised as to the damages allowed being excessive, the verdict should not be disturbed on that ground.

3. Evidence to prove the bad character of the plaintiff in such an action, was properly rejected at the trial. *Newsam* v. *Carr*, (1817) 2 Stark, 69; *Jones* v. *Stevens*, (1822) 11 Price, 235, and *Downing* v. *Butcher*, (1841) 2 Moo. & R. 374, followed.

4. The Judge's charge to the jury that it is necessary in such an action for the plaintiff to prove malice as well as want of reasonable and probable cause was wrong; but, although there was no evidence of malice except as it might have been inferred from the absence of reasonable and probable cause, the misdirection was not a ground for ordering a new trial, the verdict not having been attacked as excessive.

5. There is no ground for an action for malicious prosecution unless the acts complained of are the result of a complaint laid before a magistrate: *Austin* v. *Dowling*, (1870) L.R. 5 C.P. 534.

The plaintiff was arrested for theft of a valise which had been left in the hall of a hotel adjoining the bar-room, and was, in fact, removed by another person and put under a table in a near by restaurant. The plaintiff had been in the hotel hall after the valise was left there, and before it was removed. The hall was open to the public and there was no evidence as to how many people, other than the plaintiff, had entered it during the same period. The plaintiff afterwards went into the restaurant and sat at the table under which the valise was, but did not know it was there. The arrest was made before the valise was found.

Held, that such facts were not sufficient to justify the arrest of the plaintiff without a warrant. *Sinclair* v. *Ruddell*, 16 M.R. 53.

See MUNICIPALITY, II, 1.

FALSE PLEADING.

See PLEADING, X, 6.

FATHER AND SON.

See UNDUE INFLUENCE.

FELON.

Property of convicted felon—*Imp. Act, 33 & 34 Vic., c. 23—Pleading—Allegations of fraud.*

Before the passing of the Imperial Act, 33 & 34 Vic., c. 23, by the law of England all chattel property, including choses in action, possessed by a felon at the time of his conviction or acquired thereafter during the currency of his sentence, passed to the Crown.

Quære, whether the said Act, which also prohibits a convict from suing and vests the right to sue in an administrator, is in

force here. Precision in pleading fraud discussed. *Haffield* v. *Nugent*, 6 M.R. 547.

But see *Young* v. *Carter*, 26 O.L.R. 576.

FELLOW SERVANT'S NEGLIGENCE.

See NEGLIGENCE, II.

FENCES.

Obligation to keep cattle from trespassing—*Boundary Lines Act, R.S.M., 1892, c. 12, s. 4—Possession as against trespasser—Right of action—Parties to action.*

The provision in section 4 of The Boundary Lines Act, R.S.M., c. 12, viz.: "Each of the parties occupying adjoining tracts of land shall make, keep up and repair a just proportion of the division or line fence on the line dividing such tracts, and equally on either side thereof," does not supersede the Common Law liability of an owner of cattle for all their trespasses except such as are due to defects in fences which the complainant is bound as between himself and such owner to keep up; and such owner will be liable for the trespasses committed by his cattle unless it is shown that the complainant was bound to keep up and repair the particular part of the fence through which the cattle entered. The Common Law rule is not displaced by a joint liability to keep up fences.

The injured crops were raised by plaintiff who was in possession, but another person had a half interest in the crop.

Held, that sole possession by plaintiff was sufficient to support an action of trespass, and it was not necessary to make the co-owner a party or to obtain any release from him: *Star* v. *Rookesby*, (1711) 1 Salk. 335; *Graham* v. *Peat* (1801) 1 East, 246. *Garrioch* v. *McKay*, 13 M.R. 404.

See ANIMALS RUNNING AT LARGE, 1, 2, 3. — RAILWAYS, VI.

FI. FA. GOODS.

1. County Court execution—*Interpleader—Application of proceeds of sale by bailiff.*

Under a County Court execution in this case the bailiff seized an automobile and was proceeding to sell it, when the sheriff notified him that he held prior writs against the defendant, and told the bailiff that he would allow him to go on and sell, if he afterwards paid the money to the sheriff.

Upon an interpleader issue in the County Court between the plaintiff and sheriff,

Held, that the bailiff in making the sale was really acting for the sheriff, who thereupon became entitled to the proceeds in the same manner as if he had seized. *Maw* v. *Moxam*, 18 M.R. 412.

2. Priority—*Execution — Sheriff — Executions Act, R.S.M. 1892, 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.

Freeman on Executions, sec. 206, quoted and approved. *Hazley* v. *McArthur*, 11 M.R. 602.

3. Satisfaction of judgment—*Amending sheriff's return.*

Under plaintiff's judgment and execution the sheriff seized and sold certain horses of the defendants. S. and M., claiming to be mortgagees of the horses, attended the sale and notified intending purchasers. The horses having been sold, the mortgagees brought trespass and trover against the sheriff and recovered against him the amount for which he had sold the horses.

Plaintiff had indemnified the sheriff against damage by reason of the seizure and sale, and also by reason of payment to him of the purchase money and, the sheriff having paid over the money to the plaintiff, the plaintiff paid the mortgagees the amount of their verdict against the sheriff.

Plaintiff then issued an *alias fi. fa.* taking no notice of the return of the sheriff to the previous writ of "money made and paid to the plaintiff's attorney."

Held, that the new *fi. fa.* should be set aside; satisfaction be entered up on the judgment roll, and a summons to amend the sheriff's return should be dismissed. *Hanna* v. *McKenzie*, 6 M.R. 250.

4. Seizure under execution—*Residue of proceeds of sale—Garnishment—Priority between garnishing creditor and execution creditor—Effect of sheriff seizing after seizure by landlord—Sale of goods—When property passes—Interpleader—Proof of judgment as against third parties—New trial—Costs.*

The sheriff under a writ of *fi. fa.* goods went to the premises of the judgment debtors, who were a firm of grocers, when he found S. the landlord's bailiff in possession under a distress for rent, and he gave the latter a warrant to hold for him. The landlord's bailiff sold the goods seized, by auction, to W. on Dec. 30th, 1891, for $2,021. W. paid a deposit of $200. On 2nd January, 1892, M. & Co. served a garnishing order on W. On the morning of 3rd January, 1892, T., McK. & Co. placed a second execution in the hands of the sheriff. On the evening of 3rd January, W. took possession of the goods. After paying the landlord and the first execution, W. paid the residue of the purchase money into court under the garnishing order. An interpleader issue was directed in which the garnishing creditors were made plaintiffs, and the execution creditors, defendants. At the trial, the execution creditors proved the writ of execution, but did not prove the judgment, and the evidence was conflicting as to whether the property in the goods passed to W. on 30th December, the day of sale, or on 3rd January, the day he took possession.

Held, that the property in the goods was not taken out of the debtors by the distress, and the placing of the execution in the sheriff's hands bound the goods subject to the distress.

The sheriff may make a qualified seizure subject to the distress, which will be binding upon the execution debtor and those claiming under him.

Belcher v. *Patten*, 6 C.B. 608, followed.

Held, also, that the purchase money was owing to the landlord or his bailiff only and that there was no privity between the purchaser and the judgment debtors, and no attachable debt owing from the purchaser to the judgment debtors.

Evans v. *Wright*, 2 H.&N. 527, and *Yates* v. *Eastwood*, 6 Ex. 805, followed.

Held, also, that the money having been paid into court under the garnishing order, the garnishing creditors had a *prima facie* claim upon it and, notwithstanding the form of the issue, the *onus* was on the execution creditors to prove their claim.

Held, also, that the right of the second execution creditors to the money depended wholly on the time when the property in the goods passed to the purchaser and, as the evidence was conflicting and uncertain, there should be a new trial upon that point.

Held, also, that it was necessary for the second execution creditors to prove, as against third parties, a judgment as well as an execution.

A new trial was directed, without costs to either party.

Per KILLAM, J.—The second execution creditors, having failed to prove their judgment, should pay the costs. *Macdonald* v. *Cummings*, 8 M.R. 406.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3.
— BILLS OF SALE, 2.
— CHATTEL MORTGAGE, II, 1; III, 1.
— FIXTURES, 1.
— HUSBAND AND WIFE, I, 1.
— LANDLORD AND TENANT, IV, 1.
— PARTNERSHIP, 6.
— PRACTICE, VIII; XX, A, 1, 2.
— SHERIFF, 3, 5, 6.
— STATUTE OF FRAUDS, 6.
— TRESPASS AND TROVER, 2.

FI. FA. LANDS.

See EXEMPTIONS, 9.
— FRAUDULENT CONVEYANCE, 8.
— GARNISHMENT, VI, 2.

FINAL JUDGMENT.

See PRACTICE, X, 1; XXIV, 3.

FINAL ORDER OR JUDGMENT.

See APPEAL FROM COUNTY COURT, VI, 1.
— APPEAL TO SUPREME COURT, 4.

FINDINGS OF JURY.

See NEGLIGENCE, I, 2.

FIRE.

1. Damages—*Negligence.*

The plaintiff's claim was for damages by fire occasioned by the use of the defendant's steam thresher, but the jury found that the defendant was not guilty of negligence.

Held, that where a person uses fire in his field in a customary way for the purposes of agriculture, or other industrial purposes, he is not liable for damages arising from the escape of the fire to other lands, unless the escape is due to his negligence; and that the plaintiff could not recover. *Owens* v. *Burgess*, 11 M.R. 75.

2. Damages—*Negligence.*

The defendants, having used fire to burn a ring or guard round some of the hay stacks on their farm, took measures to, as they thought, effectually put it out before leaving it; but high winds having prevailed during the next two days some smouldering embers were blown into flame and spread to the plaintiff's property, causing damage to him.

The trial Judge found as a fact that the defendants had not been guilty of negligence, having used every reasonable precaution to extinguish the fire, and having had reason to believe that it was completely extinguished.

Held, that the defendants' use of fire under the circumstances was a customary one for purposes of agriculture in Manitoba, and was even justified by The Fires Prevention Act, R.S.M., c. 60, and that, as they had not been guilty of negligence, they were not liable to the plaintiff for the damages claimed.

Owens v. *Burgess*, (1896) 11 M.R. 75, and *Buchanan* v. *Young*, (1873) 23 U.C.C.P. 101, followed. *Chaz* v. *Les Cisterciens Reformes*, 12 M.R. 330.

3. Damages—*Negligence.*

The defendant, who was very short-sighted, while examining a fence on his land, observed on the prairie near him a pile of ashes and some fragments of partially burned willow roots. Imagining he saw smoke, he moved the ashes with his foot to ascertain whether or not there was fire. As he did so, the wind, then blowing very strongly, carried the burning embers into the long grass adjoining, which at once took fire. He then started to beat the fire out, and, as the burning grass was in a measure isolated by a strip of burned over ground on one side and by short grass on the other, he succeeded, as he believed, in preventing the fire spreading and in finally extinguishing it.

Held, that, even if the fire which, on the same day, destroyed the plaintiff's property was caused by the fire which defendant started, as to which there was grave doubt, the defendant had not been guilty of negligence and was not liable to the plaintiff for damages.

Owens v. *Burgess*, (1896) 11 M.R. 75, and *Chaz* v. *Les Cisterciens Reformes*, (1898) 12 M.R. 330, followed. *Holliday* v. *Bussian*, 16 M.R. 437.

See CONTRACT, VIII, 4.
— NEGLIGENCE, III.
— RAILWAYS, VII, 2.
— SALE OF GOODS, I, 2.

FIRE INSURANCE.

1. Carpenter's risk — *Repayment — Condition—Proofs of loss—Condition precedent—Construction of relative words.*

Declaration upon a policy of fire insurance, which recited that the plaintiff had paid the sum of $106 and also the additional sum of $2.25 for insuring against loss by fire, and especially any loss arising from carpenters, &c., being employed upon

the premises. Another count was upon an interim receipt which recited an application for insurance against loss by fire and especially any loss arising from carpenters, &c., being employed upon the premises, and payment of the $106 and also the additional sum of $2.25 with a provision on the issuing of the policy for cancellation of the receipt. Both the policy and the receipt were alleged to be subject to a condition that the Company would not be answerable for loss by fire in or of any buildings under construction wherein carpenters were employed unless the special consent of the Company in writing was first obtained and endorsed upon the policy.

To these counts the defendant pleaded (7th plea) that after making the policy and before loss, and also (18th plea) after the granting of the receipt and before loss, the plaintiff had employed in the buildings carpenters, &c., without having obtained, and having endorsed on the policy, the consent in writing of the defendant.

Held, 1. That the condition as to the employment of carpenters was not repugnant to the contract, and did not itself constitute a consent of the Company as stipulated for by the condition.

2. That the pleas were bad because they did not allege the employment of the carpenters at the time of the occurrence of the fire

A policy was subject to the following condition:—"Persons sustaining any loss or damage by fire are forthwith to give notice thereof in writing at, &c., . . . and are within fourteen days after the loss, to deliver in writing, in duplicate, a particular statement and account of their loss, &c., ... the assured's title or interest therein, and the names and residences of all other parties (if any) interested therein, &c., ... whether any other insurance, &c., ... also stating in what manner . . . . the building insured was occupied at the time of the loss . . . . and when and how the fire originated as far as the assured may know or believe; and the assured shall verify such statement, &c., and, until such accounts, declaration, testimony, vouchers and evidence as aforesaid, are produced and examined (if required) and such explanations given, no money shall be payable by the Company under this policy. . . . . and if the claim shall not, for the space of three months after the occurrence of the fire, be in all respects verified in manner aforesaid, the assured shall forfeit every right to restitution or payment by virtue of this policy, and time shall be of the essence of the contract."

Held, 1. That the delivery of the statement and account within the 14 days was a condition precedent to the assured's right to recover.

2. That the words in the condition, "as far as the assured may know," related to "when and how the fire originated," and not to all the preceding requirements of the condition. *Morrison* v. *The City of London Fire Insurance Co.*, 6 M.R. 225.

2. Notice of loss.—*Condition requiring notice of loss to be given in writing forthwith—Pleading—King's Bench Act, Rule 315 A.*

Held, per METCALFE, J. at the trial

1. A provision of a fire insurance policy requiring the insured to give notice in writing of any loss to the company forthwith as a condition precedent to the liability of the company must be strictly complied with; and, if the insured fails to give such notice, he cannot recover on the policy, even in a case where the company was advised of the loss on the same day by a telegram from its agent, and he at once employed a professional adjuster to investigate the loss and report to the company.

Bell Bros. v. *Hudson's Bay Insurance Co.*, (1909) 2 Sask. 355, followed.

2. The receipt by the company of a statutory declaration by the insured, giving particulars of the loss, 17 days after the fire, was not a compliance with the condition requiring notice in writing "forthwith."

The Queen v. *Justices of Berkshire*, (1878) 4. Q.B.D. per COCKBURN, C.J., at p. 471, and *Atlas* v. *Brownell*, (1899) 29 S.C.R. 545, followed.

The defendants had in their pleading alleged the condition relied on to be that the plaintiff * * * "should forthwith give notice of the alleged damage and loss to the defendants at their office."

On appeal,

Held, per HOWELL, C.J.A., and PERDUE, J.A., that the defendant had not strictly set up the conditions of the policy intended to be relied on, which differed materially from that set up by the pleading, and had therefore failed to comply with Rule 315 A added to the King's Bench Act by 7 & 8 Edw. VII, c. 12, s. 10, and that the appeal should be allowed, but without costs, as the point had not

been taken at the trial or in the grounds of the appeal.

Held, per RICHARDS and CAMERON, JJ.A., that the condition of the policy had been set up with sufficient distinctness and that, at all events, it was too late to object to the plea on the ground urged for the first time on the argument of the appeal, and that the appeal should be dismissed.

The Court being evenly divided, the appeal was dismissed without costs. *Prairie City Oil Co.* v. *Standard Mutual Fire Ins. Co.*, 19 M. R. 720.

Reversed *sub nom. Lewis* v *Standard Mutual Fire Insur. Co.*, 44 S.C.R. 40. See next case.

3. Statutory conditions—*Gasoline on premises—Illuminating oils insured—Notice of loss—Remedial clause in Act—Discretion of Court—Construction of Statute—R.S.M.* (1902) c. 87.

By the Manitoba Fire Insurance Policy Act, R.S.M. 1902 c. 87, Sch., an insurance company insuring against loss by fire is not liable "for loss or damage occurring while * * * gasoline * * * is stored or kept in the building insured or containing the property insured unless permission is given in writing by the company" Insurance was effected "on stock consisting chiefly of illuminating and lubricating oils, etc., and all other goods kept by them for sale." A quantity of gasoline was in the building containing the stock when destroyed by fire.

Held, that gasoline, being an illuminating oil, was part of the stock insured and the above statutory condition could not be invoked to defeat the policy.

Held, per ANGLIN, J., that if gasoline was not insured as an illuminating oil it was within the description of "all other goods kept for sale."

By section 2 of the Act, "where, by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurance company after the occurrence of a fire have not been strictly complied with * * or where from any other reason the court or judge before whom a question relating to such insurance is tried or inquired into considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions," the company shall not be discharged from liability.

By statutory condition 13 (a) in the schedule to the Act every person entitled to make a claim "is forthwith after loss to give notice in writing to the company."

Held, FITZPATRICK, C.J., dissenting, that the above clause applies to said condition and under it, in the circumstances of this case, the insurance should be held not to be forfeited by reason of the failure to give such notice.

Judgment appealed from (19 M. R. 720) reversed, FITZPATRICK, C.J. dissenting. *Lewis* v. *Standard Mutual Fire Ins. Co.*, 44 S.C.R. 40.

4. Other insurance—*Condition as to other insurance without consent—Nature of contract entered into by interim receipt—Payment of premium in cash—Estoppel.*

B., having a policy of insurance in the Manitoba Assurance Co. for $2,000 on his stock in trade, wrote to D., a sub-agent of the Royal Insurance Co., informing him that he had a stock of over $5,000 which was insured for $2,000 in the Manitoba Co., that people had told him it was a weak company, that he was going to abandon that insurance, and that he wished to insure in the Royal Co. for about $3,000. D. replied that he would be glad to have his insurance and requesting him to send $75 for the premium. B. then wrote that he could not pay the amount at once but would do so later, in reply to which D. sent him a promissory note for $51 and asked him to sign the note and return it with a cheque for $25. This was done and D. sent B. the usual interim receipt of the Royal Co., promising the subsequent issue of a policy which was to be subject to the conditions indorsed on the receipt. These were the usual statutory conditions without alteration or addition, one of which (the 8th) provided that the policy should be void if there was any prior insurance on the property unless the consent of the company was indorsed thereon. D. discounted the note for $51 and accounted to the Royal Co. in due course for the full amount of the premium. The goods insured were destroyed by fire before the due date of the note, which B. paid at its maturity. There was no formal application for the insurance signed by B. or by any one by his authority, although D. sent the company an application form filled up but not signed, in which the question as to other insurance was answered "No" by D. A policy was subsequently made out

upon this application and sent to D. before the fire, but it was never delivered.

B. having become insolvent made an assignment to the plaintiffs, who brought these actions upon the two insurances. The Royal Co. defended on the ground that there was a prior insurance on the insured property without its consent, and the Manitoba Co. objected to pay on the ground that B. had effected a subsequent insurance on the property in the Royal without notice to it and relied on the 8th statutory condition indorsed on its policy.

Held, (1) That under the circumstances B.'s statement that he was going to abandon the insurance in the Manitoba Co. was not merely a representation or expression of intention, but was a term or condition that affected the very existence of the proposed insurance in the Royal, which was not to become effective until that condition was fulfilled, and that, as B. never did so abandon, there never was any effective insurance on his goods in that company and that the verdict in its favor was right.

(2) That it followed from this that the Manitoba Co. could not set up the conditional contract of insurance in the Royal as a breach of the statutory condition, and that the verdict in plaintiff's favor against it should stand.

Commercial Union Ass. Co. v. *Temple*, (1898) 29 S. C. R. 206; *Western Ass. Co.* v. *Temple*, (1901) 31 S. C. R. 373, followed.

Held, also, *per* KILLAM, C.J., (1) That D.'s authority to bind the Royal Co. by the issue of the interim receipt was limited to cases in which the premium was paid in cash: *London and Lancashire Life Ass. Co.* v. *Fleming*, [1897] A. C. 499, and *Canadian Fire Insurance Co.* v. *Robinson*, 31 S.C.R. 488, but *quære* whether defendants should be permitted to avail themselves of this defence in view of the circumstances.

(2) That the right of action against an insurance company upon an interim receipt still depends, as it did before the fusion of law and equity, upon the right to a specific performance of the agreement which it involves to issue a policy or other contract in binding form, such receipt being, in general, only an executory contract and not one which would have been enforceable at law under the former practice.

(3) That, in view of the statements in B.'s letters to D., which constituted the only application there was for the insurance, the case should be treated upon the basis that, either there was not to be a contract concluded until the prior insurance had been abandoned, or it was a condition of the executory contract that it should be abandoned, and that, as it had not been abandoned, the company could not be bound to issue a policy, except one with their usual conditions making it void if there was a prior insurance without their consent, and, therefore, that the plaintiff was not entitled to recover upon the interim receipt.

(4) That neither the making of a claim by B. for the subsequent insurance, his putting in of proofs of loss thereunder, nor the bringing of an action thereon, created any estoppel in favor of the Manitoba Co., and B.'s statement in his proofs of loss sent in to that company that "there was no other insurance on the property at the time of the fire excepting a policy in the Royal Insurance Co. for $3,000," did not prevent him from showing that the insurance in the Royal was never completed so as to bind it. B. and the plaintiffs were placed in such a position that they had to claim for both insurances; for, if they had elected to claim from one company only, they ran the risk of losing the one from which they could recover, and it should be held that they were entitled to recover from the Manitoba Co., if, as a matter of fact, there was no subsequent binding contract for concurrent insurance. An erroneous claim that there was did not change the facts. *Whitla* v. *Royal Insurance Co.*; *Whitla* v. *Manitoba Assurance Co.* 14 M. R. 90.

Both judgments reversed, 34 S.C.R. 191, where it was

Held, that, as the Royal Insurance Company had been informed, through their agent, of the prior insurance by B. when effecting the substituted insurance, they must be assumed to have undertaken the risk, notwithstanding that such prior insurance had not been formally abandoned, and that the Manitoba Assurance Company were relieved from liability by reason of such substituted insurance being taken without their consent.

Held, further, that, under the circumstances, the fact that B. had made claims upon both companies did not deprive him or his assignees of the right to recover against the company liable upon the risk.

The Chief Justice dissented from the opinion of the majority of the Court which held the Royal Insurance Company liable and considered that, under the circumstances, B. could not recover against either Company. *Manitoba Ass. Co.* v. *Whitla*, *Royal Ins. Co.* v. *Whitla*, 34 S.C.R. 191.

5. Storing or keeping of gasoline on premises—*Excessive claims for loss as a defence to action on policy—Provision in policy for settlement of amount of loss by arbitration.*

1. The proper construction to be given to the words "stored or kept," in a condition of a fire insurance policy providing against liability of the company for loss or damage occurring while gasoline, &c., is stored or kept on the premises, is that they do not apply to a small quantity kept on hand for domestic purposes but import the idea of warehousing or depositing for safe custody or keeping in stock for trading purposes.

Thompson v. *Equity Fire Ins. Co.*, [1910] A.C. 592, reversing 41 S.C.R. 491, followed.

2. A clause in a policy of fire insurance providing for the settlement of the amount of the loss or damage suffered by the insured by arbitration whether the right to recover is disputed or not and independently of all other questions, unless made by the policy a condition precedent to the right to bring an action, will not prevent the insured from suing without taking any steps towards such arbitration.

Scott v. *Avery*, (1856) 5 H. L. Cas. 811, and *Caledonian Ins. Co.* v. *Gilmour*, [1893] A.C. 85, followed.

The goods, insured for $1000, were valued at $1400 in the application. After the fire the plaintiff, in his proofs of loss, swore that his loss was $2359.50, but the trial Judge estimated the loss at only $400.

Held, that this inflation of values was not fraudulent to the extent of vitiating the policy, or the plaintiff's claim under it. *Patterson* v. *Central Canada Ins. Co.*, 20 M. R. 295.

6. Variations from statutory conditions—*Fire Insurance Policy Act, R.S. M.* (1892), *c.* 59—*Proofs of loss—Interest—Valuation of property—Waiver—Estoppel.*

Defendants objected to the plaintiff's claim for loss of property insured under a policy of fire insurance issued by defendants on the ground that at the time of the loss a portion of plaintiff's note given for the premium for the insurance was unpaid, and relied on a condition indorsed on the policy that the company should not be liable for any loss or damage that might occur to the property mentioned while any promissory note or obligation or part thereof given for the premium remained due and unpaid.

What purported to be the statutory conditions prescribed by The Fire Insurance Policy Act, R.S.M., c. 59, were printed on the back of the policy, and following these, under the heading "Variations in Conditions," were several other conditions including the one relied on by defendants printed in ink of a different color but in type of apparently the same size as that of the statutory conditions, which the Judge held was not conspicuous type within the meaning of the Act.

The conditions printed on the policy also differed in several important particulars from the words found in the statute; and, after the heading "Variations in Conditions," the Company had omitted to print the part of the heading prescribed by section 4 of the Act, "This policy is issued on the above statutory conditions, with the following variations and additions," or any other words to the same effect.

Held, following *Sly* v. *The Ottawa Agricultural, c., Co.*, (1878) 25 U.C.C.P. 28; *Sands* v. *Standard Ins. Co.*, (1879) 27 Gr. 167, and *Bellagh* v. *Royal Mutual Fire Insurance Co.*, (1880) 5 A.R. 87, that the requirements of the statute were imperative, and that plaintiff was not bound by the condition on which the defendant relied.

The policy contained in the body of it the words, "The company is not responsible for loss caused by prairie fires," and defendant contended that, as plaintiff had alleged the contract of insurance to be an absolute one, he could not recover without an amendment setting up the policy correctly and proof that the loss was not caused by a prairie fire.

Held, that such qualification or exception to the absolute contract of the Company must be regarded as a condition of the insurance within the meaning of the Act, and that, as it was not one of the statutory conditions, it would be legal and binding on the assured only if it were indicated and set forth on the policy in the manner prescribed by the Act, which

it was not, and in pleading the plaintiff might ignore it altogether as he had done.

The defendants also objected at the trial to the sufficiency of the proofs of claim; but, although they had objected to payment of the loss on other grounds than for imperfect compliance with the conditions regarding proofs of loss, they did not notify the plaintiff in writing that his proof was objected to.

Held, that, under section 2 of the Act, they could not now take advantage of any defect in the proofs.

Held, also, that the plaintiff was entitled, under 3 & 4 Wm. IV., c. 42, s. 29, to interest on the insurance money, but only from the expiration of thirty days from the time he sent in his corrected and completed proofs of loss, as he thereby admitted that his first proofs were imperfect.

Held, further, that the insured was not precluded from showing what the real value of the property insured was by the fact that he had, under peculiar circumstances, offered to sell it for less than the amount insured on it. *Green* v. *Manitoba Ass. Co.*, 13 M.R. 395.

See CONTRACT, VIII, 4.
— GARNISHMENT, V, 2.
— NEGLIGENCE, III; VII, 7.
— RAILWAYS, VII, 3.

FIRE LIMITS BY-LAW.

See MUNICIPALITY, I, 2.

FIXTURES.

1. Buildings erected by squatter on Dominion lands—*Execution against goods.*

The plaintiff sued for the delivery of certain buildings erected by the defendant upon land, the title to which was, at the time of such erection, and continued to be in the Crown.

The plaintiff claimed title through a sale made to her under an execution issued from the County Court on a judgment, under which execution the bailiff purported to sell the buildings as chattels of the defendant.

The defendant had erected the buildings about 19 years previously, and had lived in them until 1896. He did not actually reside in them at the time of the seizure under execution, but took possession again before this action was brought.

The buildings were not so affixed to the freehold as to require that anything should be broken or separated by force in order to remove them.

Held, on appeal from the decision of RICHARDS, J., 22 C.L.T. Occ.N. 374, that the buildings were fixtures to the land, having become part of the freehold which was the property of the Crown, and they could not be seized under an execution from the County Court. *Dixon* v. *Mackay*, 24 C.L.T., Occ.N. 28; 21 M.R. 762.

2. Conditional sale of chattel —*Lien note—Purchaser without notice.*

If a purchaser of a chattel such as a furnace annexes it to land in such a manner that it would ordinarily become a part of the realty, it cannot be deemed to remain a chattel because of an agreement between the purchaser and the vendor that, until paid for, the property in it should remain in the vendor, and that, in case of default of payment, the vendor might detach it and take it away.

Such an agreement merely confers a license to enter on the land and sever what is no longer a chattel so as to make it again a chattel and to remove it, and a purchaser of the realty without notice of the agreement is not bound by it, nor can the vendor of the chattel recover possession of it or damages for its conversion from him.

Hobson v. *Gorringe*, [1897] 1 Ch. 182, and *Reynolds* v. *Ashby*, [1904] A.C. 466, followed.

Waterous v. *Henry*, [1884] 2 M.R. 169, and *Vulcan Iron* v. *Rapid City*, [1894] 9 M.R. 577, overruled. *Andrews* v. *Brown*, 19 M.R. 4.

3. Conditional sale of machinery afterwards affixed to freehold of third party—*Right of unpaid vendor to recover possession—Estoppel by taking proceedings under Mechanics' Lien Act.*

W. & Co., having a contract to build an elevator for the defendants, purchased an engine, boiler and other machinery from the plaintiffs on the terms that the ownership was not to pass until payment in full of the price which was to be paid in cash on delivery, and that in case of default in payment the plaintiffs were to be "at liberty, without process of law, to enter upon our premises and take down and remove the said machinery." Plaintiffs

were aware that the machinery was to be placed in the defendants' elevator.

It was built into the elevator in such a manner that it would have become part of the freehold if both had been owned by the defendants, but the evidence showed that it could be removed without doing serious damage to the building.

Plaintiffs first took proceedings under the Mechanics' Lien Act to realize the amount of their claim, but afterwards abandoned them. In the present suit the plaintiffs asked that the defendants might be ordered to deliver up the machinery, and to permit the plaintiffs to enter the elevator and take down and remove the machinery, and for further and other relief.

Held, that the plaintiffs were entitled to relief, but without deciding whether they should have permission to enter the defendants' premises and remove the machinery or not, as they were willing to accept a decree for payment of the value of the machinery, to be ascertained by a reference to the Master, and it was so ordered.

Polson v. *Degeer*, 12 O.R. 275; *Stevens* v. *Barfoot*, 13 A.R. 367, and *Waterous Engine Co.* v. *Henry*, 2 M.R. 169, followed.

Held, also, that the plaintiffs were not estopped by having commenced proceedings under the Mechanics' Lien Act, as they had not gone on to judgment.

Priestly v. *Fernie*, 3 H. & C. 977, distinguished. *Vulcan Iron Works Co.* v. *Rapid City Farmers' Elevator Co.*, 9 M.R. 577.

Overruled, *Andrews* v. *Brown*, 19 M.R. 4, *ante*.

4. Machinery—*Mortgagee and execution creditor—Interpleader—Question whether machinery part of realty.*

In the absence of evidence of a contrary intention, machines affixed to the freehold merely for the purpose of steadying them, and used for the purpose of a manufacturing business for which the freehold is occupied, and to which it is devoted, become part of the freehold, even though the mode of affixing them is such that they can easily be detached without injury either to themselves or to the freehold.

In the absence of evidence of a contrary intention, similar pieces of machinery standing on the freehold, but not affixed to it, except by the leathern bands communicating to them motive power, retain the character of chattels, notwithstanding that the work done by them is an essential process in the manufacture to which the freehold is devoted.

A fastening by cleats affixed to the building only, and not affixed to the machine except by being placed close against it, is not an affixing of the machine at all, and is not sufficient, in itself, to make the machine a part of the realty.

Longbottom v. *Berry*, L.R. 5 Q.B. 123, followed. *Sun Life Assurance Co.* v. *Taylor*, 9 M.R. 89.

5. Machinery in sash and door factory.

The boiler in a sash and door factory was set upon timbers for a foundation, suspended by rods to a frame and covered over with brick-work. It could not be removed without taking down a portion of the building.

The rest of the machinery was not attached to the building, but was kept in position by sockets and cleats nailed round the feet of the machines to steady them. The whole constituted a sash and door factory and planing mill.

Held, upon question between a mortgagee of the realty after the machinery was in operation and a subsequent purchaser from the mortgagor by bill of sale, that all the machines were fixtures and part of the realty. *Adamson* v. *McIlvanie*, 3 M.R. 29.

6. Mill machinery — *Mortgagee and execution creditors.*

Articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of shewing that they were so intended lying on those who assert that they have ceased to be chattels. *Hollan* v. *Hodgson*, L.R. 7 C.P. 328, followed.

After the execution of a mortgage covering a saw mill, the mortgagors brought into the building a planing machine. It was not attached in any way to the freehold, but was connected by belts with the engine which supplied the motive power.

Held, that, as between the mortgagee and an execution creditor, the machine was a chattel and not part of the freehold. *Canada Permanent Loan & Savings Co.* v. *Merchants' Bank*, 3 M.R. 285.

7. Mill machinery.

McD. & McP. ordered from plaintiffs certain planing mill machinery, at an

agreed price, part of which was paid down, and notes were given for the balance. The agreement provided that notwithstanding the payment, and giving notes, the property in the machinery should not pass to McD. & McP., but should remain in the plaintiffs until payment in full had been made. The machinery was placed in a building which was then used as a planing mill. Afterwards McD. & McP. mortgaged to the defendants the land upon which the mill stood. Afterwards McD. & McP. mortgaged the same land to the plaintiffs to secure the balance then remaining due to them. The parcels, after describing the land, specified the machinery in detail, and concluded, "which are attached to the freehold and are to be considered as fixtures and not as chattels." The plaintiffs took this mortgage upon the representation of McD. & McP. that there were no incumbrances upon the property, and it was not intended by the plaintiffs to give up their first claim to the machinery.

Held, 1. That as between the plaintiffs and McD. & McP. the machinery remained chattels, such being the intention expressed in their agreement, and the declaration to the contrary in the mortgage was confined to the purposes of that mortgage and, in any event, was not binding by means of the misrepresentation.

2. That the defendants' mortgage was subject to the plaintiffs' agreement, and that the defendants could not avail themselves of the declaration in the plaintiffs' mortgage.

3. The question whether articles are fixtures or not depends entirely upon intention.

4. The intention, object and purpose for which articles for the purpose of trade or manufacture are put up by the owner of the inheritance is the true criterion by which to determine whether such articles become realty or not. *Waterous Engine Works Co.* v. *Henry*, 2 M.R. 169.

Overruled, *Andrews* v. *Brown*, 19 M.R. 4, *ante*.

8. **Trade fixtures**—*Restraining waste—Estoppel.*

Held, 1. *Prima facie* an hotel is part of the freehold.

2. But if it has been erected by a tenant for the purpose of trade it is to be regarded, in the absence of evidence to the contrary, as a trade fixture.

3. The right of a tenant to remove fixtures continues only during his original term and during such further period of possession by him as he holds the premises under a right still to consider himself as tenant.

4. The right to restrain waste, involved in the removal by a tenant of a building forming part of the freehold, is clear.

A tenant, who had completed upon the demised premises a building, partly erected by a former tenant through whom he claimed, and which was erected and used by both for trade purposes, having held over after the expiration of the lease to the first tenant, and having subsequently been granted by his landlord a new lease, with the usual covenant to repair and a proviso that the lessee should have the privilege, at the expiration of the term, of removing any building erected on the demised lands, unless the same should be purchased by the lessor at a price to be fixed by the lessee,

Held, that, under the circumstances shown in evidence, the building remained the property of the tenant as a trade fixture, and could be removed by him at any time during the term.

The tenant having given a chattel mortgage of the building, the building was about to be sold at public auction, *during the term*, under a provision in the mortgage. The landlord, hearing of it, went to the place advertised, where he was informed that the wife of the tenant was going to buy in the building at the auction. Satisfied with this he went away before the sale, making no objection to it and taking no steps to warn bidders of any claim that the building had become part of the freehold, and had passed to him as such; but, on the contrary, giving the bailiff conducting the sale a distress warrant, under which the landlord was to be paid a portion of the proceeds of the sale;

Held, that, as against a purchaser ignorant of the landlord's rights, the landlord was estopped from claiming the building as a part of the freehold, and from asserting any right to restrain the removal during the term.

Upon rehearing,

Held, that the lessor had until the last day of expiration of the term to make his election to purchase the building; but that, not having up to that time made such election, the plaintiff had no right to an injunction to prevent the removal of the

building until the expiration of the term. *Gray* v. *Maclennan*, 3 M.R. 337.

See REPLEVIN, 5.
— VENDOR AND PURCHASER, IV, 5.

FORBEARANCE TO SUE.

See SOLICITOR AND CLIENT, I, 2.

FORCIBLE ENTRY.

Trespass on lands—*Criminal Code*, s. 89.

A trespasser upon lands in the occupation of another, although he enters in a manner likely to cause a breach of the peace and with force sufficient to overcome resistance, cannot be convicted of a forcible entry under section 89 of The Criminal Code, where the entry was made for the sole purpose of seizing and taking away goods and there was no intent to take possession of the land or to oust the person in possession or to interfere with his actual occupation of it.

Russell on Crimes, (4th ed.) vol. 1, p. 427, followed.

Section 89 of the Code was not intended to make any change in the former law as to forcible entry or to create any new offence. *Reg.* v. *Pike*, 12 M.R. 314.

See COVENANTS, 2.
— TRESPASS.

FOREIGN BANKRUPT.

See CONFLICT OF LAWS, 1.

FOREIGN COMMISSION.

See EVIDENCE ON COMMISSION.

FOREIGN COMPANY.

See COMPANY, IV, 4.
— SECURITY FOR COSTS, IV.

FOREIGN CORPORATION.

1. Lending money on mortgage—*Tax sale — Irregularities — Banking business.*

A foreign corporation lent money on mortgage in this Province. The mortgage was executed in the foreign country and the advances made there. The corporation had no license to do business in Manitoba,

Held, that the mortgage was valid and vested the land in the corporation.

The plaintiff corporation had for its purposes "The investment of capital on the security of real estate, personal property, assets and obligations," and was prohibited from engaging "in the business of banking." The plaintiff corporation made loans to L. & Co., taking notes from which the interest was deducted in advance. D., a member of the firm of L. & Co., made a mortgage to the plaintiff corporation to secure payment of the moneys so advanced,

Held, that the mortgage was not *ultra vires*.

Held, that, where on a tax sale the deed was dated on the 15th of October, 1881, and a suit was begun on the 14th of October, 1882, the suit was begun "within one year from the execution of the deed," as provided by the Statute.

Where the advertisement published had no proper description of the lands mentioned in it, and the reason why the taxes had not been collected was not stated,

Held, a fatal objection.

Where a sale took place on the 3rd of March, and an advertisement appeared on 15th, 22nd and 28th of February, it was not advertised "at least three weeks in succession," as required by the statute.

A tax deed recited that "G., then treasurer," &c., sold the lands, and proceeded "Now know ye that I, G., treasurer, in pursuance of such Act, do hereby grant," &c. The testatum clause was "In witness whereof, I, G., have hereunto set my hand and affixed the seal of the municipality this," &c. It was signed, "G., treasurer of municipality of S. and S." and the seal of the municipality was affixed. G. was not the treasurer who sold, but his successor.

Semble, the deed was invalid.

Held, to a perfect registration it is essential that all the requirements of the Registry Act should be complied with.

Quære, whether unpatented lands can be sold for taxes. *Farmers & Traders Loan Co.* v. *Conklin*, 1 M.R. 181.

2. Writ for service out of jurisdiction—*Setting aside.*

Held, 1. A writ of summons, in form for service in Manitoba, against a foreign corporation having no agent in the Province, is not a nullity, and (*semble*), the irregularity will be waived by appearance.

2. Such a foreign corporation may be sued in Manitoba for work done for the corporation there.

3. It will be assumed that a United States corporation is liable to be sued there in its corporate capacity, until the contrary be shown.

4. Service of a writ may be effected under Con. Stat. Man., c. 31, s. 32, upon a foreign corporation out of the jurisdiction, but the service cannot be made upon a mere clerk.

5. Service of such a writ may, under section 35, be authorized upon an assistant-secretary, but it must appear that service cannot be effected upon one of the proper officers of the company, and the nature of the duties of the office must be shown.

6. An order allowing service upon a foreign corporation out of the jurisdiction should be of a notice, not a copy, of the writ.

7. A writ for service in Manitoba may be issued concurrently with one for service upon an alien out of the jurisdiction.

8. An application may be made to set aside the service of a writ upon the ground that it was not served upon the proper officer of a corporation. It is not necessary to await the result of a motion to homologate the service or for leave to proceed. *Crotty* v. *Oregon Transcontinental Ry. Co.*, 3 M.R. 182.

See CONFLICT OF LAWS, 1.
— PRIVATE INTERNATIO AL LAW.]
— PRODUCTION OF DOC MENTS, 8, 12.
— REAL PROPERTY ACT, V, 4.
— SCIRE FACIAS.
— SECURITY FOR COSTS, IV.

FOREIGN COURT.

1. Order for attendance of person within jurisdiction for cross-examination upon affidavit filed in suit pending in a foreign court—*Manitoba Evidence Act, R.S.M.* 1902, *c.* 57, *s.* 57, *as re-enacted by* 4 & 5 *Edw. VII, c.* 11, *s.* 1.

1. Section 57 of the Manitoba Evidence Act, R.S.M. 1902, c. 57, as re-enacted by s. 1 of c. 11 of 4 & 5 Edw. VII, does not empower the Court to make an order commanding the attendance of a person making an affidavit in a suit or proceeding pending in a Court outside the Province of Manitoba for the purpose of being cross-examined upon it within the Province.

2. If an order is made without jurisdiction, the right to move for its rescission is not lost by laches or acquiescence.

Smurthwaite v. *Hannay*, [1894] A.C. 501, and *Hoffman* v. *Crerar*, [1899] 18 P.R. 473, followed.

3. An order for attendance of witnesses for examination for the purposes of a suit in a foreign court made under the section of the Evidence Act above quoted is only an interlocutory order and may be founded on affidavits sworn merely on information and belief.

4. Such an order, if otherwise properly made, may require the witnesses to produce any relevant documents on their examination, although the order of the foreign court upon which it is founded makes no mention of any documents; and such production should not be confined to documents relevant to the affidavits on which it is desired to cross-examine the witnesses or to those in their possession, but may include all documents relevant to the issue between the parties and either in the possession or under the control of the affiants.

5. If a party complies with an order or delays for an unreasonable time in moving against it, he will be precluded thereby from objecting to it on the ground of irregularities merely. *Bank of Nova Scotia* v. *Booth. Dominion Fish Co., Garnishees*, 19 M.R. 394.

2. Order for attendance of witnesses for purposes of inquiry by foreign tribunal—*Whether commissioners appointed by the Government of another Province under an Act of its Legislature are a court or tribunal—Constitutional law—Ultra vires.*

1. Commissioners appointed by the Government of another Province under an Act of its Legislature to conduct an inquiry constitute a court or tribunal within the meaning of section 57 of the Manitoba Evidence Act, R.S.M. 1902, c. 57, as re-enacted by 4 & 5 Edw. VII, c. 11, and an order may be made under that section at the request of such commis-

sioners requiring the attendance of witnesses in Manitoba to testify as to matters within the scope of their commission.

2. If there is nothing to prevent such commissioners from coming to Manitoba to take evidence, the order may properly require the attendance of such witnesses before the commissioners themselves at any place within this Province named by them, as well as before an examiner appointed by them.

3. Section 57 of the Manitoba Evidence Act may be regarded as relating to the administration of justice in the Province, also to a matter of a merely local or private nature in the Province, and so it is not *ultra vires* of the Local Legislature under the British North America Act, 1867.

Re Wetherell and Jones, (1884) 4 O.R. 713, not followed.

Re Alberta & Great Waterways Ry. Co. 20 M. R. 697.

See INJUNCTION, IV, 6.

FOREIGN DEPOSITIONS.

See EXTRADITION, 5.

FOREIGN EXECUTORS.

See RECTIFICATION OF DEED.

FOREIGN JUDGMENT.

1. Action on—*Evidence—Exemplification and office copy—Pleading.*

An action will not lie upon a foreign judgment unless it be final. The distinction between a final judgment and an interlocutory order discussed.

The plea of "never indebted" is applicable to a declaration upon a foreign judgment and puts the plaintiff to the proof of a judgment sufficient to support his action.

Judgment of TAYLOR, C.J., affirmed.

Graham v. *Harrison*, 6 M. R. 210.

2. Defences litigated in original action—*Striking out pleas disposed of in original action.*

Action upon a judgment obtained in Ontario for goods sold and delivered to a firm of which defendant was a member. The defendant defended the original action upon the ground that prior to the sale of the goods the defendant had left the firm and had so notified the plaintiff. After a verdict had been entered for the plaintiff the defendant moved in Term for a new trial, upon the ground that the verdict was against law and evidence and the weight of evidence, but his motion was refused and judgment was entered for the plaintiff. In the present action the defendant pleaded the same defence.

On motion to strike out the pleas, upon the ground that they delayed and embarrassed the plaintiff,

Held, that the pleas should be struck out, and the plaintiff permitted to sign judgment. *Gault* v. *McNabb*, 1 M. R. 35.

Distinguished *Hickey* v. *Legresley*, 15 M. R. 305.

3. Defences which might have been set up in original action.

Plaintiff, an Ontario solicitor, recovered judgment against defendant, a resident of Ontario, for default of appearance, in an action for professional services.

Defendant applied before the Master in Chambers to set aside the judgment, alleging that he had not received properly signed bills of costs, that services had been charged for which he had not authorized and on other grounds.

Mr. Dalton held the judgment good, but ordered that on payment of the costs of the application, defendant should be allowed a certain time to tax plaintiff's bills, the judgment in such case to be reduced by the amount taxed off, and that, failing such payment and taxation within such time, the judgment should stand for amount for which signed.

An appeal from this order to a judge was dismissed.

Defendant allowed the time limited by the Master's order to pass without paying the costs of the application or taxing the bills.

In an action on the Ontario judgment defendant pleaded:—

Never indebted, and two other pleas alleging, respectively, that plaintiff was not a duly certified attorney according to the law of Ontario, and that he had not delivered signed bills according to such law, and a fourth plea by way of counterclaim for damages resulting from alleged want of skill on plaintiff's part. The plaintiff applied to strike out the defence

on the ground of embarrassment and delay.

Held, that, as defendant could under the circumstances of the case have availed himself of these defences in Ontario, his pleading them here caused embarrassment and delay, and that the pleas should be struck out. *Meyers* v. *Prittie*, 1 M. R. 27.

Not followed, *Hickey* v. *Legresley*, 15 M. R. 304.

4. Defences which might have been set up in original action—*Counter-claim—Foreign affidavits.*

A plea to an action on a foreign judgment, of the Statute of Limitations, to the original cause of action, ought not to be struck out as embarrassing; a plea of the Statute of Limitations being *lex fori* and one which could not have been pleaded in a foreign country. Nor should a counter-claim be struck out where, at all events, the defendant was not bound to raise it in the original action.

Irregularities in foreign affidavits treated leniently.

Quære, whether the Manitoba statute relating to foreign judgments does not entitle the defendant, in an action on a foreign judgment, to set up any defence which he might have set up, if the plaintiff had sued on the original cause of action instead of on the judgment. *British Linen Co.* v. *McEwan*, 6 M. R. 292.

5. Defences which might have been set up in original action — *Pleading Statute of Limitations*—48 *Vic.*, *c.* 15, *s.* 45, *s-s.* 2—*Pleading on the merits.*

To an action on a foreign judgment the defendant pleaded that he was not at the commencement of the suit in which the alleged judgment was recovered, or at any time previous to the recovery of the alleged judgments, resident or domiciled within the jurisdiction of the court, and that he had no notice or knowledge of the suit, or any opportunity of defending himself.

Held, (affirming the decision of KILLAM, J.), that the plea was bad, because it did not aver that the defendant was not a subject or citizen of the foreign country, and not amenable to its jurisdiction.

Fowler v. *Tait*, 27 U.C.C.P. 417, 4 A.R. 267, followed.

McLean v. *Shields*, 9 O.R. 699, not followed.

48 Vic., c. 15, s. 45, s-s. 2, (R.S.M., c. 1, s. 39), provides that "a defendant in any action upon a judgment obtained in any court out of the Province, or upon a foreign judgment, may plead to the action on the merits, or set up any defence which might have been pleaded to the original cause of action for which such judgment has been recovered."

Held, (reversing the decision of KILLAM, J.), that the defendant in an action on a foreign judgment may plead on the merits to the action on the judgment, or he may set up any defence which he might have set up in an action on the original cause of action in the foreign court, but he cannot plead a defence which he might have set up to the original cause of action, had it been sued upon in Manitoba, but which could not be raised in the foreign court.

The defendant also pleaded that "the alleged cause of action, in respect of which the alleged judgment was recovered, did not accrue within six years before the commencement of the said suit in the declaration mentioned, or within six years before this action."

Held, that the plea was bad for not averring that the facts stated therein would constitute a defence in the foreign court. *British Linen Co.* v. *McEwan*, 8 M.R. 99.

6. Defences which might have been set up in original action.

To a count on a foreign judgment the defendant pleaded nine pleas which might have been pleaded in the foreign country to the original cause of action. There was no evidence that they were untrue.

Held, that these pleas could not be struck out on the ground of embarrassment or delay, and the fact that the plaintiffs might be put to great expense about procuring evidence in the foreign country to meet, by way of anticipation, what was set up in the pleas, was no ground for striking them out. *International, &c., Corp.* v. *Great N. W. Central Ry. Co.*, 9 M.R. 447.

7. Defences that had been set up in the original action—*King's Bench Act, R.S.M.* 1902, *c.* 40, *s.* 38, *s-s.* (*l*)—*Embarrassment or delay as ground of striking out pleadings.*

The defences that may be set up in an action in Manitoba on a foreign judgment by virtue of sub-section (1) of section 38 of the King's Bench Act, R.S.M. 1902, c. 40, are not limited to such as might have been, *but were not*, pleaded in the

original action, but include such as were actually pleaded there, subject to the power of the Court or a Judge to strike them out on the ground of embarrassment or delay.

In answer to the plaintiff's application to strike out such defences, the defendant set up by affidavit that he had fully intended to defend the Cape Breton suit, but that, owing to misunderstandings, he was unable to be present when it came on for trial and that, as a result, judgment went against him by default.

Held, that the defences should not be struck out on the ground of embarrassment or delay, and, being allowed by the statute, must be allowed to stand.

Gault v. *McNabb*, (1884) 1 M.R. 35, distinguished on the ground that, in that case, the defences sought to be raised in this Court had been set up in the original action and had been fully gone into at the trial and finally decided in favor of the plaintiff, and therefore, when pleaded in this Court, had probably been struck out on the ground of embarrassment and delay.

Meyers v. *Prittie*, (1884) 1 M.R. 27, not followed.

British Linen Co. v. *McEwan*, (1892) 8 M.R. 99, discussed. *Hickey* v. *Legresley*, 15 M.R. 304.

8. Foreign Statute of Limitations—*Interest on foreign judgment.*

In an action commenced in Manitoba in 1878, on a judgment recovered in Ontario on 7th October, 1864, the defendant set up that the debt on the judgment had been extinguished by R.S.O., c. 108, ss. 23 and 15, which declare that no action shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land, etc., but within ten years, etc., and that, after the determination of the period limited to any person to bring his action, the right and title of such person to the land shall be extinguished.

Held, that this enactment deprived the plaintiffs of their remedy in Ontario against the debtor's lands only, and that his personal obligation upon the judgment existed for twenty years from the date of the judgment under R.S.O., c. 61, s. 1, which enacts that an action on a covenant, bond, or other specialty shall be commenced within twenty years.

Held, also, that, though interest on a foreign judgment could not be recovered as incident thereto, a jury might allow interest as damages, but not more than six years arrears. *Bank of Montreal* v. *Cornish*, T.W., 272.

9. Non-service in original action.

Action upon a judgment obtained in the Province of Quebec. Service of the writ in the original action had been effected by advertisement. Defendant never resided in or carried on business in the Province of Quebec, and had no personal knowledge of the proceedings in the action.

Held, that the defendant was not bound by the judgment. *Schneider* v. *Woodworth*, 1 M.R. 41.

10. Setting aside judgment on—*Special indorsement—Interest.*

A foreign judgment constitutes a simple contract debt.

Judgment by default, therefore, may be signed in an action upon a foreign judgment; and also for the costs of a motion made in a foreign action.

Final judgment in default of a plea to a declaration upon the common counts cannot be signed unless particulars have been furnished. And *quære*, even if such particulars have been served.

The special indorsement upon a writ serves as particulars under the common money counts of the declaration; and no further particulars can regularly be delivered without a Judge's order.

Judgment in default of a plea cannot include interest subsequent to the issue of the writ although judgment in default of appearance may.

Judgment in default of a plea having been signed for $4.93 too much, it was set aside and not merely reduced by that amount, a meritorious defence being sworn to. *Martel* v. *Dubord*, 3 M.R. 598.

11. Summary judgment in action on—*Liquidated demand.*

A foreign judgment is a liquidated demand within the meaning of section 34 of The Queen's Bench Act, 1885.

On a motion for final judgment, under the above section, the non-service of an order allowing service out of the jurisdiction is waived by the defendant entering an appearance. *Whitla* v. *McCuaig*, 7 M.R. 454.

See CONTRACT, XIV, 2.
— LIMITATION OF ACTIONS, 4.

See PLEADING XI, 16.
— SECURITY FOR COSTS, III, 2.
— STAYING PROCEEDINGS, I, 1.
— SUMMARY JUDGMENT, III, 1.

FOREIGN LAW.

See CRIMINAL LAW, XVII, 9.
— EXTRADITION, 1.

FORECLOSURE.

See MORTGAGOR AND MORTGAGEE, I; VI, 6, 10, 13.
— REAL PROPERTY LIMITATION ACT, 7.
— RECTIFICATION OF DEED, 2.

FORFEITURE.

See COMPANY, IV, 14.
— COVENANTS, 2.
LANDLORD AND TENANT, V, 3.
— REGISTERED JUDGMENT, 5.
— THRESHERS' LIEN.
— VENDOR AND PURCHASER, II, 3, 7.

FORFEITURE OF LEASE.

See LANDLORD AND TENANT, III, 3.

FORFEITURE OF LICENSE.

See TICKET OF LEAVE ACT.

FORGERY.

False entries—*Extradition.*

Forgery is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person. A simple lie, reduced to writing, is not necessarily forgery.

Consequently where a bank clerk made certain false entries in the bank books under his control, for the purpose of enabling him to obtain money of the bank improperly,

Held, that he was not guilty of forgery. *Reg.* v. *Blackstone*, 4 M.R. 296.

See BILLS AND NOTES, VIII, 6.
— CRIMINAL LAW, XVII, 5.
— ESTOPPEL, 3.
— WILL, III, 3.

FORMS.

See CAPIAS, 2.
— CHATTEL MORTGAGE, I, 6; III, 2.
— ELECTION PETITION, II.
— GARNISHMENT, I, 9.
— HOMESTEAD, 4.
— INTERPLEADER IV; IX, 1.
— LOCAL OPTION BY-LAW, II, 1.
— PLEADING, XI, 1.
— REAL PROPERTY ACT, V, 8.
— REGISTERED JUDGMENT, 4.
— SECURITY FOR COSTS, I, 3.

FRATERNAL ORDER.

Secession of Grand Lodge from Supreme Lodge—*Right of Supreme Lodge to operate in territory of seceding Grand Lodge and to organize new Grand Lodge therein.*

Up to the year 1904, the plaintiff Grand Lodge of the Ancient Order of United Workmen of Manitoba and the North-West Territories, which had been incorporated under that name in the year 1893 under the laws of the Province of Manitoba, had been carrying on the business of life insurance amongst its members in subordination to, and under a charter granted to it by the defendant Supreme Lodge of the same order, which had its headquarters in Texas. In that year the plaintiff Grand Lodge refused any longer to be subject to the jurisdiction of the Supreme Lodge, or to levy or remit to the latter the special assessments demanded by it for a guarantee fund created for the purpose of meeting any excess over estimated death losses that might occur in any of the jurisdictions under the Supreme Lodge. In 1905 the Supreme Lodge suspended the plaintiff Grand Lodge and organized a new Grand Lodge for Manitoba, Saskatchewan and Alberta with subordinate lodges, all working in harmony with and under the control and supervision of the Supreme Lodge, and all using the words "Ancient Order of United Workmen" as part of their names.

These newly created bodies at once commenced and thereafter carried on the

business of fraternal life insurance in the same way as it had been carried on by the plaintiff Grand Lodge. They issued circulars and sent them to the members of the plaintiff Grand Lodge who still adhered to it as well as to other persons, and carried on an active propaganda in opposition to the plaintiffs.

Held, (1) The plaintiff Grand Lodge was not entitled to an injunction restraining the defendants from using the name "Ancient Order of United Workmen" in Manitoba and the North-West Territories, or from carrying on business there in the name of the Supreme Lodge, A.O.U.W., or from collecting any money for life insurance from the members of the plaintiff Grand Lodge, or from soliciting such members to join or contract with the defendant Supreme Lodge or any of its subordinate lodges.

(2) Although the plaintiff Grand Lodge had for a number of years levied and collected special assessments for the general guarantee fund created by the Supreme Lodge as above mentioned, and had voluntarily remitted some of these moneys to the Treasurer of the Supreme Lodge, yet the evidence failed to show that there was any contractual relationship existing between the two bodies by which the former was under any legal obligation to pay over to the latter any of the money raised by these assessments which had not been already paid over.

(3) The defendant Supreme Lodge was not entitled to an injunction forbidding the plaintiffs, their members, servants or agents, to use the name "Ancient Order of United Workmen," as the plaintiff Grand Lodge had been legally incorporated in 1893, with the knowledge and consent of the Supreme Lodge, and had issued a great many beneficiary certificates for life insurance, a great proportion of which were still in force. The Supreme Lodge incurred no liability under these certificates, and to restrain the plaintiff from the use of its own name would be practically to nullify the powers conferred upon it by our Provincial laws for the benefit of a foreign corporation not even licensed to do business in Manitoba. *Grand Lodge, A.O.U.W.* v. *Supreme Lodge, A.O.U.W.*, 17 M.R. 360.

FRAUD.

1. Deed obtained by Fraud—*Intoxication—Evidence.*

Plaintiff gave defendant a mortgage and subsequently executed a conveyance to him of the equity of redemption. Plaintiff asserted that the conveyance was obtained from him by fraud and while intoxicated through drink supplied to him by the defendant, at his (defendant's) hotel.

Held, that the evidence did not establish the fraud charged.

Held, that though plaintiff was a hard drinker he had not become so incapacitated for business that equity would relieve him from his acts, and the bill must be dismissed with costs. *McIlroy* v. *Davis*, 1 M. R. 53.

2. Undue influence — *Misrepresentation—Ratification of bargain.*

The plaintiff in this action sought to set aside a transfer of land which the defendant had obtained from him by the exercise of what the Judge held to have been both fraud and undue influence, but the defendant contended that the plaintiff had, after the commencement of the action, compromised and settled it by signing the agreement referred to in the judgment.

A full statement of the facts will be found in the judgment.

Held, that the alleged ratification as well as the original transfer had been obtained by fraud and undue influence and that the transfer should be set aside with costs.

Holland's Jurisprudence, p. 222; *Bridgman* v. *Green*, (1755) 2 Ves. Sr. 627 and *Moxon* v. *Payne* (1873) L. R. 8 Ch. 881, followed. *Atkinson* v. *Borland*, 14 M. R. 205.

See BILLS AND NOTES, VIII, 1, 11.
— CRIMINAL LAW, XVII, 6.
— EVIDENCE, 28.
— FRAUDULENT CONVEYANCE, 3, 17.
— FRAUDULENT JUDGMENT, 4.
— FRAUDULENT PREFERENCE, I, 1.
— MISREPRESENTATION, IV, 1, 4; V, 1.
— MORTGAGOR AND MORTGAGEE, V, 3.
— PLEADING, III, 2; VI, 1.
— PRINCIPAL AND AGENT, V, 2.
— PRINCIPAL AND SURETY, 2.
— SUMMARY JUDGMENT, I, 3.
— VENDOR AND PURCHASER, I, 1; VI, 9, 12.

FRAUD ON COURT.

See MORTGAGOR AND MORTGAGEE, V, 2.

FRAUDULENT CONCEALMENT.

See SALE OF LAND FOR TAXES, V, 2.

FRAUDULENT CONVEYANCE.

1. Assignment for benefit of creditors—*Business to be carried on—Reservation of property exempt from execution.*

An assignment for the benefit of creditors contained the following clauses: "Provided always that the said trustee shall have power and authority, if he shall deem it expedient and for the general benefit of the creditors, from time to time and as often as he shall deem it proper out of the proceeds of the sales of the said stock to purchase goods and stock for the purpose of enabling him to assort and sell off the present stock to the best advantage for the benefit of the creditors, but such purchase shall be made with such view only and not with a view of continuing the business beyond a reasonable time. * * * Provided also that the said party of the first part, notwithstanding anything herein contained, shall have the right and privilege if he so elects within a reasonable time to reserve to himself out of the goods and chattels and property hereinbefore conveyed and assigned such property as would be exempt from seizure under execution according to the laws of the Province of Manitoba."

Held, that the assignment was not, by reason of these clauses, void as against creditors. *Robinson* v. *Huston*, 4 M. R. 71.

2. Burden of proof of solvency—*Amendment.*

C. P. was indebted to plaintiffs in respect of a mortgage upon certain lands in Emerson. After default he conveyed certain other lands to his son, who immediately conveyed them to his (C. P's.) wife. The conveyances were voluntary and intended as a "provision for the wife so that she could have a house." Previous to the date of the conveyances, land had become unsaleable in Emerson, and the plaintiff's security was altogether inadequate. There was no direct evidence that C. P. had no other property sufficient to pay the debt, but there was sufficient to lead the court to suspect it. The deeds were not registered, but were handed to the wife, who was not careful to keep them separate from her husband's papers. The husband continued to collect the rents and to put them into the common purse for household purposes. At the hearing the wife, without withdrawing her answer, offered to consent to a sale and a rateable division among all her husband's creditors of the proceeds.

Held, that the conveyance was fraudulent as against creditors.

Per TAYLOR, C.J.—The onus of shewing the existence of other property available for creditors is upon those supporting a voluntary conveyance. The bill was originally filed upon a certificate of judgment against C. P. alone. He having then disclosed the conveyances to his wife, she was made a party, the existence of a *fi. fa.* against C. P. alleged, and the conveyances attacked as fraudulent against creditors. At the hearing it appeared that the *fi. fa.* was placed in the sheriff's hands after the bill was filed. An amendment was allowed in order to make the bill one on behalf of all the creditors of C. P. *Dundee Mortgage Co.* v. *Peterson*, 6 M. R. 66.

3. Burden of proof of bona fide purchase — *Exemptions — Real Property Act, R.S.M., c. 133, s. 57—Concealed fraud—Laches.*

The plaintiffs were judgment creditors of the defendant McLean, who at the time judgment was recovered was, and had since remained, in insolvent circumstances; and this action was brought to have it declared that two quarter sections of land which were bought after the recovery of the judgment in the name of the defendant McKenzie were held by her as a bare trustee for McLean, or had been fraudulently transferred to her in order to hinder and defeat the creditors of McLean.

Both parcels of land had formerly belonged to McLean, but they had been sold for arrears of taxes in 1886; and subsequently the purchasers after negotiations carried on by McLean or his solicitor assigned the tax sale certificates to the defendant McKenzie, a poor girl who lived with McLean, her uncle. Tax deeds were issued to her by the Municipality and certificates of title under The Real Property Act were obtained for both parcels in Miss McKenzie's name. She claimed that she had furnished the money, $125, required to acquire the tax sale certificates, but the evidence in support of this was not satisfactory to the Court which held that the *onus* was upon her to establish this

fact by clear and convincing proof, and the additional sum, about $125 more, required to complete the purchases and procure the certificates of title was not provided by her.

After the purchase, the charge and management of the lands were left wholly in McLean's hands, and Miss McKenzie had never received any rents or exercised any rights of ownership except that she agreed to a suggestion that her cousin, McLean's son, made to her seven or eight years ago, that she should rent them to him. But no terms were discussed and he had paid her no rent.

The evidence also showed that the defendant McLean had himself cultivated and managed the farms for his own benefit, and had in fact always dealt with the lands as if they were his own, but in his evidence at the trial he stated that he had been working for his son in cultivating the land.

Held, (1) That the plaintiffs were entitled to the relief asked for and that section 57 of The Real Property Act, R.S.M., c. 133, as amended by 55 Vic., c. 38, s. 4, does not prevent the granting of the relief, as it provides that a certificate of title is "subject to the right of any person to show fraud wherein the registered owner has participated or colluded," and the law declares that such a transaction as was held to have been proved is fraudulent under 13 Eliz., c. 5, and Miss McKenzie participated in it.

Barrack v. *McCulloch*, (1856) 3 K. & J. 117; *Merchants Bank* v. *Clarke*, (1871) 18 Gr. 594; *Harris* v. *Rankin*, (1887) 4 M.R. 129, and *Re Massey & Gibson*, (1890) 7 M.R. 172, followed.

(2) The Statute of Limitations could not be set up as a defence as the fraud was a concealed one, and the plaintiffs, without any want of reasonable diligence, became aware of the facts only about 18 months before the commencement of the action.

(3) That the defendant McLean, in view of the evidence given by himself at the trial, was not entitled to claim any part of the lands as exempt from seizure and sale. *Merchants Bank* v. *McKenzie*, 13 M.R. 19.

Distinguished, *Logan* v. *Rea.*, 14 M.R. 544.

4. Conveyance without consideration—*Exemption from seizure.*

Defendant, J. S., took up a quarter section as a homestead, performed settlement duties and obtained a patent. He then made a conveyance to J. R., and J. R. conveyed to M. S., the wife of defendant J. S. Subsequently to these conveyances, plaintiff obtained judgments at law against the defendant J. S. The conveyances were without consideration. J. S. had no other property. Within three months after the execution of the conveyances, executions to the amount of $1,388.38 against J. S, were placed in the sheriff's hands.

Held, 1. That the conveyances must be set aside, and equitable execution decreed.

2. That it is not necessary that the debts should have become payable before the fraudulent disposal of the property was made.

3. Exemptions from execution under Con. Stat. Man. c. 37, s. 85, s-s .8, as amended by 47 Vic., c. 16, s. 6, discussed. *Brimstone* v. *Smith*, 1 M.R. 302.

5. Crown lands—*Purchase of land from Provincial Government—Lien on land created by purchaser—Subsequent transfer of purchaser's interest to third party.*

The defendant Bourdin purchased the land in question from the Government of Manitoba in May, 1904, paying $64.00 on account and agreeing to pay the balance in yearly instalments. In January, 1905, he created a lien on the land in favor of the plaintiffs who registered it. He made no further payments to the Government, but put improvements on the land estimated at $100. He gave a quit claim deed of it in August, 1906, to the defendant Le Seach. The Land Department ignored the lien of the plaintiffs and, upon Le Seach paying the balance of the purchase money, issued a patent for the land to him.

Held, that it should be inferred from these facts that the Government had treated Bourdin's interest in the land as forfeited because of his default in payment and had intentionally disregarded the plaintiff's registered lien, and that the patent to Le Seach could not be set aside for improvidence or on any other ground. *North-West Thresher Co.* v. *Bourdin*, 20 M.R. 505.

6. Evidence to establish the fraud—*Purchase of land by debtor in name of another—Presumption.*

The plaintiff claimed a declaration that a certain piece of land purchased from the

Dominion Government in the name of the defendant J. was the property of his brother, the defendant R., and should be sold to realize the plaintiff's registered judgment against R.

At the time of the purchase in 1888, R. was indebted to the plaintiff in a sum of over $1,800 and to another person for over $4,000, and it was shown that J. had never paid anything on the land either for purchase money or taxes and had never received anything by way of rents or profits; also that the money for the first instalment had been advanced by another brother, that R. had paid the rest of the purchase money from the proceeds of the land, of which he had always enjoyed the use and occupation, and that the Crown Patent for the property was issued to J. in 1892 without his having applied for it.

The defendants at their examination for discovery before the trial swore that the whole transaction was *bona fide* and that R. was J.'s agent throughout in respect of the property, but R. was not called as a witness for the defence. J., also, in a letter to R. written in 1889, had referred to the property as "your land."

Held, that the proper conclusion upon the whole evidence was that the land was really R.'s property and had been purchased and held in J.'s name for the purpose of preventing creditors from realizing out of it, and that the plaintiff was entitled to the relief asked for.

Semble, that, when a defendant who is in Court does not give evidence to support his case, the Judge is entitled to make every reasonable presumption against him: *Barker* v. *Furlong*, [1891] 2 Ch. 172, *per* ROMER, J., at page 184. *Miller* v. *McCuaig*, 13 M. R. 220.

7. Evidence to establish the fraud—*I. O. U.—Assignment—Interpleader.*

An I. O. U. was made by McD. & R. in favor of McL., and assigned by him to the plaintiff. Subsequently McD. & R. were served with a garnishee order, in a suit of the present defendants against McL. attaching all moneys due by them to McL.

McD. & R. interpleaded.

Held, upon the evidence, that the assignment was only a contrivance and not a real transaction, and was void as against the defendants. *Bateman* v. *Merchants Bank*, 1 M. R. 260.

8. Execution creditor suing on behalf of himself and all other creditors—*Abolition of fi. fa. lands—Multifariousness—Bill by execution creditor on behalf of all others.*

A judgment creditor, although entitled to priority over others, may file a bill on behalf of himself and the others, to have a deed declared fraudulent against creditors.

An Act repealed the only statutory provisions under which real estate became bound by, and could be sold under, writs of *fi. fa.* The same Act provided that writs then in the sheriff's hands "shall remain in full force, virtue and effect, and may be renewed from time to time." During the following session another Act empowered sheriffs to sell lands under writs remaining in their hands. Between these Acts a bill was filed by an execution creditor on behalf of himself and all others to set aside a deed.

Held, that under the former Act writs remained in the sheriff's hands in full force, but awaiting further legislation to enable the sheriff to proceed; and that, even prior to such further legislation, the plaintiff had a sufficient *locus standi*. *Western Canada Loan Co.* v. *Snow*, 6 M. R. 606.

9. Exemptions—*Lien of registered judgment—Taking proceedings under, while debtor in occupation—County Courts Act, R.S.M.* 1892, *c.* 33, *ss.* 196, 197, *as amended by* 55 *Vic., c.* 7, *s.* 5—*The Judgments Act, R.S.M.* 1892, *c.* 80, *s.* 12.

1. The registration of a certificate of judgment, under sections 196 and 197 of The County Courts Act, R.S.M., c. 33, as amended by 55 Vic., c. 7, s. 5, binds and charges the land of the judgment debtor, though it may be his actual residence or home, and the creditor may take proceedings to realize whenever the defendant ceases to be entitled to claim the property as his exemption.

Frost v. *Driver*, 10 M.R. 319, followed.

2. When a debtor has absolutely conveyed all his interest in the land on which he resides by a conveyance valid and binding on him, even when set aside by the Court as against creditors, the claim that the land is an exemption of his under section 12 of The Judgments Act, R.S.M., c. 80, can no longer be maintained.

Brimstone v. *Smith*, (1884) 1 M.R. 302, and *Massey-Harris Co.* v. *Warrener*, 17 C.L.T., Occ .N. 409, column 426 *supra*, followed.

3. Under such circumstances, when the debtor has made a conveyance of his home, which is fraudulent against creditors under 13 Eliz., c. 5, the creditor is entitled to an immediate order for sale of the property to realize the amount of the judgment and costs.

Taylor v. *Cummings*, (1897) 27 S.C.R. 592, distinguished. *Roberts* v. *Hartley*, 14 M.R. 284.

Distinguished, *Logan* v. *Rea*, 14 M.R. 544.

10. Exemptions — *Lien of registered judgment—Proceedings to realize while debtor in occupation—Declaration of right without order for sale—The Judgments' Act, R.S.M.* 1902, *c.* 91, *s.* 9.

The defendant, Mrs. Rea, who lived on the property in question, conveyed it to her son without consideration because she thought she might thereby prevent the sale of the land to realize the plaintiff's claim, and both she and her son admitted that fact in this action and that the property was the mother's and that the son had no interest in it. The plaintiff sought a declaration that the land belonged to the mother and that the son held it only as trustee for her and asked a sale of the land to satisfy the lien of his registered judgment.

Held, that the plaintiff was entitled to the declaration asked for but not to a sale, as the property was exempt under section 9 of The Judgments Act, R.S.M. 1902, c. 91, it being the actual residence and home of the judgment debtor, and not worth more than $1,500.

Roberts v. *Hartley*, (1902) 14 M.R. 284, and *Merchants Bank* v. *McKenzie*, (1900) 13 M.R. 19, distinguished on the ground that there both the grantor and grantee united in asserting the reality of the transfer and neither alleged nor proved any trust in favor of the grantor. *Logan* v. *Rea*, 14 M.R. 543.

11. Grantee liable for proceeds of property—*Onus as to solvency.*

C., being indebted to the plaintiffs in an amount exceeding $1,600, part of which was shortly coming due, sold his entire business, receiving $1,000 in cash and $3,500 in notes. He transferred the notes and all his book-debts to his wife, the defendant, and shortly afterwards left the country, making no provision for plaintiff's claim.

Upon a bill filed to set aside this transaction, the wife swore that she had lent to C. large sums of money, and that the transfer was in consideration of this indebtedness.

Held, (reversing BAIN, J.)—

1. That the unsupported and bald statement of a loan by a wife to a husband was not sufficient evidence of a legal indebtedness.

2. The *onus* is upon the grantee in a voluntary conveyance, when it is attacked by creditors, to show the existence of other property available for creditors.

3. The defendant, having sold the notes after bill and injunction served, was directed to account for the money obtained for them. *Osborne* v. *Carey*, 5 M.R. 237.

12. Grantor remaining in possession.

A lease made by a debtor, of his farm property, under the terms of which the debtor was to remain in possession, and out of the crop pay himself $1,500, declared void as against creditors although there was no evidence of financial embarrassment or inability to pay debts in full. *Way* v. *Massey Manufacturing Co.*, 4 M.R. 38.

13. Holder in due course—*Fraudulent assignment—Transfer of overdue promissory note—Payment by note—Parties.*

Defendant was sued for the amount of an account for goods obtained from Spratt & Co., the account having been with others sold to plaintiff by the assignee in insolvency of Spratt & Co.

Defendant showed that before the assignment he had given Spratt & Co. a promissory note for the amount of the account and that such note was outstanding in the hands of a bank. It appeared, however, that before the note was given the sheriff had taken possession of Spratt & Co.'s business under an order for an attachment issued under The Queen's Bench Act, 1895, and that the note was in the hands of Spratt & Co. until after its maturity.

Held, that defendant could not have been compelled to pay the note to Spratt & Co., if they still held it, because they had no right to the money, that he was not liable upon it to the bank which took it after maturity, and that plaintiff was entitled to judgment.

Held, also, that it was not necessary to make the holder of the note a party to the action.

Bertrand v. *Hooker*, 10 M.R. 415, not followed. *Clay* v. *Gill*, 12 M.R. 465.

14. Husband and wife—*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 favor 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 there was no change of possession at the marriage. *Ramsay* v. *Margrett*, [1894] 2 Q.B. 18, distinguished. *Brown* v. *Peace*, 11 M.R. 409.

15. Limitation of actions—*Statute of Limitations—Amendment after cause of action barred—Promissory note—Negotiable instrument—13 Eliz., c. 5—Registration of certificate of County Court judgment, binding effect of.*

1. An instrument in the form usually called a lien note is not a negotiable promissory note: *Bank of Hamilton* v. *Gillies*, (1899) 12 M.R. 495, and the right of action upon it is barred by the Statute of Limitations in six years from the due date of it without adding any days of grace.

2. A voluntary conveyance of land cannot be successfully attacked under the Statute 13 Eliz., c. 5, on the basis of a debt due at the time of the conveyance but barred by lapse of time before the commencement of the action to attack.

Struthers v. *Glennie*, (1888) 14 O.R. 726, followed.

3. A voluntary conveyance of land, if meant to be absolute as between the parties, so that the grantee holds it free of trust for the grantor, leaves no interest in him which can be affected by the registration of a certificate of a subsequently recovered County Court judgment against the grantor.

A debt of the grantor, though owing at the time of the making of such voluntary conveyance, became afterwards barred by the Statute of Limitations before the creditor sued the grantor upon it. The grantor neglected to plead that statute and judgment was recovered against him.

Held, that, as against the grantee, such judgment does not relate back to the original debt so as to form the basis for an action under 13 Eliz., c. 5. The grantee, having once gained the right to plead the Statute of Limitations in such last named action, can not be deprived of

that right by the act or omission of the grantor. *Keddy* v. *Morden*, 15 M.R. 629.

16. Parties to action—*Trustee and cestui que trust—Grantor not a proper party—Trust deed, when revocable—Delivery of deed—Multifariousness.*

To the creditor's bill to set aside a conveyance to a trustee for other creditors, the *cestuis que trustent* are not necessarily parties defendants. It is discretionary with the Court.

It is not usual in the style of cause to describe a party in the capacity in which he is made a party, *e. g.* "Executor of," &c.

Semble, the grantor is not a proper party to a suit to set aside a conveyance as fraudulent against his creditors.

A bill may be filed by a creditor who has not obtained a judgment, on behalf of all other creditors, to set aside a fraudulent conveyance.

The plaintiff's debt was in respect of two promissory notes to which the grantor in the alleged fraudulent conveyance was an accommodation party only.

Quære. Should the other parties to the notes have been parties to the bill.

A deed which the grantor has power to revoke and which he attempts to use as a shield against his creditors cannot be otherwise than fraudulent and void against his creditors.

Retaining possession of the deed is a very strong circumstance to show that it was really intended as a shield. So also continuing to deal with the property as owner.

The fact that the grantee has sold certain of the lands conveyed to him will not prevent a decree being made setting aside the conveyance as to other lands.

Quære. Is a bill to set aside a conveyance as fraudulent and for administration of the grantor's estate multifarious? *Leacock* v. *Chambers*, 3 M.R. 645.

17. Pleading.

It is not sufficient in a bill impeaching a conveyance as fraudulent against creditors to allege that it was made for the purpose and intent of defrauding, &c., without alleging the purpose and intent to have been those of the grantor.

In such a bill the insolvency of the grantor is not shown by alleging, (1) that at the time of the making of the deed the grantor was indebted to the plaintiff and others in large sums of money; (2) and was not at the time of making said deed, or at any time since, able to pay his creditors and others, and (3) was and is in fact insolvent.

Charges of fraud must be precise and definite. *Western Canada Loan Co.* v. *Snow*, 6 M.R. 317.

18. Pleading—*Injunction — Parties to action—Costs.*

The plaintiffs, in an action before judgment to set aside alleged fraudulent conveyances of his property by the defendant Wright to his wife, obtained an interim injunction to prevent further transfers of the property by either defendant.

Held, that the injunction should be dissolved, because the statement of claim contained no distinct allegation that the grantor was indebted to the plaintiffs at the time of the alleged fraudulent conveyance.

Leave to amend the statement of claim was granted; but, as it contained no sufficient allegation of the indebtedness of the grantor to the plaintiffs or any claim for an order against him for payment and it could not, therefore, be determined, until after the amendments were made, what relief would be claimed against the alleged fraudulent grantor which might make him a proper party or whether he would or would not be retained as a party,

Held, that the plaintiffs should be ordered to pay the defendants' costs of the motion for injunction and of the appeal forthwith. *Traders Bank* v. *Wright*, 17 M.R. 614.

19. Proceedings to set aside—*King's Bench Act, Rules 507, 742, and 743—Order for sale of land to realize judgment—Affidavits in support of motion for—Evidence to prove registration of certificate of judgment—Gift from husband to wife made prior to incurring of debt.*

1. A motion under Rules 742 or 743 of the King's Bench Act for an order to set aside an alleged fraudulent conveyance of land, and for the sale of the land to realize the amount of a registered judgment, is not an interlocutory motion within the meaning of Rule 507, and affidavits grounded merely on information and belief are not sufficient to support such motion.

Gilbert v. *Endean*, (1878) 9 Ch.D. 259, followed.

2. The only proper evidence of the registration of a certificate of judgment is a certified copy of it: *Massey Harris* v. *Warener*, (1897) 12 M.R. 48.

3. Where the debt for which a judgment was recovered was incurred more than a year after the gift from a debtor to his wife complained of, and it was not shown that the property conveyed constituted the whole or even a substantial part of the property owned by the debtor at the time, the conveyance should not be held to be fraudulent. *Canada Supply Co.* v. *Robb*, 20 M.R. 33.

20. Purchaser without notice — *Queen's Bench Act*, 1895, *Rules* 803 *to* 807—*Bona fide purchaser—Garnishment—Land, interest in—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 on the return of the motion that the wife had entered into an agreement for the sale of the land to a *bona fide* purchaser who had paid a part of his purchase money and entered into 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 plaintiffs' 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: *Parke* v. *Riley*, 3 E. & A. 215; *Perry on Trusts*, section 238; *Overton on Liens*, section 612. 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 M.R. 366.

21. Purchaser without notice—*Interpleader issue—Sale of lands to daughter of judgment debtor—Family transactions.*

The judgment debtor having received notice of the judgment creditor's intended suit against her went to Winnipeg, where her daughter was living, and sold her farm to her for the purpose of defeating her creditor's claim, but the daughter was not aware of her mother's purpose in selling and, not being informed of the threatened suit, paid her money in good faith and received a conveyance of the land. The daughter then leased the land to her brother, and the Judge found that this lease was also in good faith. The brother cropped the land for himself and afterwards the crops were seized in execution against the mother.

Held, that any such crops must be deemed to be the property of the son and not of his mother as against the execution creditor. Although family transactions by which creditors are defeated are ordinarily looked upon by the Court with a good deal of suspicion, yet when the evidence is clear and satisfactory they will not be set aside. *McDonald* v. *McQueen*, 9 M.R. 315.

22. Voluntary settlement—27 *Eliz.*, *c.* 4—*Consideration—Subsequent purchaser for value.*

The wives of the defendants were sisters and, on the death of Nicastro's wife, the defendant Pinaro, from motives of humanity and relationship, took over and afterwards maintained the infant children of Nicastro, with his consent, as the latter was, through habitual and excessive drinking, unable to take care of them. About eight months afterwards, Nicastro conveyed to Pinaro the property in question, being all he had in the world, in trust for the maintenance of the children and Pinaro continued to support and maintain them. One year later, Nicastro gave an agreement of sale of the property to the plaintiff for a valuable consideration.

Held, (1) At the time of the conveyance to Pinaro, he had a good cause of action against Nicastro on the implied contract to pay for the support and maintenance of the children; and, as a pre-existing debt may be a valuable consideration, the deed was not voluntary in its inception.

Cracknall v. *Janson*, (1879) 11 Ch.D. 10, followed.

(2) There was, at all events, an *ex post facto* consideration sufficient to support the deed, in that Pinaro continued to maintain the children for a year before the conveyance to the plaintiff.

Prodgers v. *Langham*, (1675) Sid. 133; *Johnson* v. *Legard*, (1822) T. & R. 294, and *Bayspoole* v. *Collins*, (1871) L.R. 6 Ch. 292, followed. *Eggertson* v. *Nicastro*, 21 M.R. 255.

See EXEMPTIONS, 7.
— GARNISHMENT, III, 3.
— PARTIES TO ACTION, 2.
— PLEADING, IV, 1, 2.
— PRACTICE, XVII, 2.
— VOLUNTARY CONVEYANCE.

FRAUDULENT DISCHARGE.

See GARNISHMENT, VI, 3.

FRAUDULENT JUDGMENT.

1. Collusive judgment for valid claim—*Confessing judgment—Fraudulent preference.*

In pursuance of an agreement made between the defendant H. (who was then in insolvent circumstances) and certain of his creditors, two documents were executed. By the first the creditors released H. from all liability in respect of notes held for his indebtedness to them, and undertook to indemnify him against the payment of any such notes as might be under discount. By the same instrument the original debts were revived, and became immediately payable.

By the second instrument the creditors assigned all their claims to the defendant D. in order that an action might be brought for the recovery of all the claims.

It was at the same time verbally agreed that such an action should at once be brought, and that defendant H. should facilitate the obtaining of the judgment.

On the day after the execution of these documents, a writ was issued. Service was at once accepted by an attorney for H. Declaration and pleas were filed on the same day. On the day following, the defendant was examined on his plea, and on the next an order was made striking out the pleas, upon which judgment was signed and execution issued.

Upon a bill filed by a subsequent judgment creditor,

Held, upon re-hearing, reversing the judgment of TAYLOR, J., 1 M.R. 135, and following *McDonald* v. *Crombie*, 11 S.C.R. 107, that the judgment was not void as a fraudulent preference. *Union Bank* v. *Douglass*, 2 M.R. 309.

2. Evidence to prove the fraud—*Judgment where no debt owing—Interpleader—Form of issue—Admissibility of evidence under.*

The fact that a debtor facilitates one creditor in obtaining speedy judgment in a mode other than those prohibited by section 122 of The Administration of Justice Act, 1885, (R.S.M., c. 1, s. 60) does not, of itself, render the judgment void as against other creditors.

An interpleader issue provided for the trial of the question whether the writs of execution of the plaintiffs against L., or some or one of them, were entitled to priority over the writ of execution of the defendant against L., with respect to the proceeds of the sale of the goods and chattels of the said L. realized by the sheriff.

Held, that it was open to the plaintiffs on this issue to show at the trial that there was no debt owing from L. to the defendant, and that the judgment was merely a fraudulent device to defeat, delay or defraud creditors, and so void as against the plaintiffs.

L. was in financial difficulties and several actions had been begun against him by creditors, when the defendant, his wife, brought an action on two sums of money alleged to have been lent by her to L.—$1,000 lent in 1888 and $1,200 lent in 1889. L. was at that time heavily in debt. The first sum was paid for loss under a policy of fire insurance. The insurance, it was alleged, was on goods partly the property of L. and partly of his wife. The insurance was mostly on hotel furniture, which was paid for by L. The wife claimed part of the insurance to have been on her wardrobe, but there was no evidence to shew its value or the amount for which it was insured. L. effected the insurance, paid the premiums, and received the insurance money after the loss. The second sum was derived from property that had belonged to the husband and was conveyed to the wife without consideration.

The trial Judge found that the debts that L. owed at the time of these transactions were subsequently paid, and before any indebtedness to the plaintiffs arose. It appeared, however, that L. during this time was not succeeding in his business, but running into greater debt.

Held, that these transactions were only so many devices to protect the property of L., both from existing and future creditors. *Newman* v. *Lyons*, 8 M.R. 271.

3. Husband and wife—*Loan to husband—Evidence—Burden of proof—Possession by husband of wife's separate estate.*

The plaintiffs, creditors of the defendant E. D., filed a bill to set aside as fraudulent and void a judgment recovered by the other defendant, E. D.'s wife, against her husband, claiming that the husband really did not owe his wife the money for which she sued him. The defendants in their sworn answers both stated that the husband did owe the wife the money for which the suit had been brought. At the hearing the only evidence for the plaintiffs was the testimony of some of the creditors of the husband, who showed that the debtor in giving statements of his affairs from time to time had not included the alleged indebtedness to his wife, and evidence of certain statements made by the husband respecting the wife's suit against him.

Held, that the statements made by the husband were not evidence against his wife and, there being no evidence to displace the sworn statements of the defendants in their answers, that the bill must be dismissed with costs.

One of the witnesses at the trial, Mrs. D. being present, gave evidence of an alleged statement of her husband that her judgment was got for a cloud, and plaintiffs' counsel contended that she was bound to deny this, relying on *Barber* v. *Furlong*, [1891] 3 Ch. 184.

Held, that such a rule as was applied in that case was not applicable in the present case, and especially since the defendant, although sitting in Court, did not understand the language spoken by the witnesses, but only French.

While there may be a presumption that the income of a wife's separate property received by the husband is to be regarded in the light of a gift, there is no such presumption where he has received the corpus, (R.S.M. c. 95, s. 5), and the wife can, without any evidence of a bargain or agreement for a loan, recover back the corpus of her separate estate even after it gets into the husband's possession. *Thompson* v. *Didion*, 10 M.R. 246.

4. Indicia of fraud—*Corroborative testimony—Circumstances sufficient to shift onus of establishing consideration.*

I. M. M. trading as M. & Co., having been carrying on a business of which J. A. M., her husband, was the manager, became insolvent. The defendant C., a confidential friend of J. A. M., recovered a judgment for $3,468.22 against I. M. M. and J. A. M. This suit was brought by the plaintiffs—large creditors of M. & Co.—to set this judgment aside. I. M. M. and J. A. M. refused to attend to give evidence at Winnipeg and afterwards at Spokane Falls, Wash., U. S. A. The consideration for the judgment was alleged to be $1,450 accommodation paper endorsed by the defendant C., and $2,000 advanced in cash in varying amounts for which no receipts had been given and of which no entries had been made.

Held, 1. That the transaction, being one surrounded by the greatest doubt and suspicion and being contrary to the ordinary rules of business, could not be upheld on the bare evidence of the defendant C. alone.

2. That it was incumbent upon the defendant C. to have procured the evidence of the M's or to have shewn that he had taken steps to procure it. *Gowans* v. *Chevrier*, 7 M.R. 62.

5. Injunction to stay proceedings upon—*Fraudulent preference—Judgmen obtained by consent.*

The defendant N. being indebted to the defendants C. and S., they commenced an action against him to recover the amount due. An acceptance of service was given, appearance entered, declaration and pleas filed, an order to strike out the pleas obtained, judgment signed and execution issued all on the same day. Plaintiffs had also obtained judgment and execution against N., and now filed their bill to set aside the judgment and execution obtained by defendants C. and S.

On an application to continue an interim injunction to restrain proceedings upon the judgment of the defendants C. and S,

Held, that the injunction should be continued till the hearing. *Whitham* v. *Cooper*, 2 M.R. 11.

See EXAMINATION OF JUDGMENT DEBTOR,6.

FRAUDULENT PREFERENCE.

I. Assignee for Creditors, Rights of.

Bankruptcy and insolvency—*Chattel mortgage—Satisfaction of first by second—Secrecy, evidence of fraud—Official assignee.* W. became indebted to defendant, in 1886, for moneys advanced; in January, 1887, defendant pressed W. for security, when he gave defendant a chattel mortgage on his stock-in-trade; at that time he was insolvent. In January, 1889, W. gave defendant a second chattel mortgage. The two mortgages were identical, except in their dates and the times when the money was to be paid. The first mortgage was never filed; the second was. Shortly afterwards W. made an assignment to the official assignee under 49 Vic., c. 45 (R.S.M., c. 7).

Upon a bill filed by the official assignee praying that the mortgages might be declared fraudulent and void as against him,

Held, that, under the circumstances, the first mortgage could not be held void as a preference, even if the mortgagor was insolvent when it was given. To render a transaction void as a preference, it must be the result of the pure voluntary act of the debtor.

The Molson's Bank v. *Halter*, 18 S.C.R. 88, and *Stephens* v. *McArthur*, 19 S.C.R. 446, followed.

Held, also, that the assignment took priority over the first mortgage by virtue of its prior filing.

The first mortgage was a good consideration for the second. The first was given in pursuance of a demand from the mortgagee that he must have the money or security, and that demand must be taken as continuing to be made until payment. The second mortgage given in substitution for the first must be equally as good as the first. The second mortgage was not void on account of the agreement to postpone registration.

As soon as the fact of an assignment for creditors has been communicated to a creditor who, though he may not execute it, does not repudiate it, a binding, irrevocable trust is created which constitutes the trustee a purchaser for value. *Bertrand* v. *Parkes*, 8 M.R. 175.

II. Assignment of Chose in Action.

Pleading.

Plaintiff, as assignee of M. & G., under an assignment for the benefit of their creditors, sued defendant to recover the amount of an account due by him to M. & G. Defendant pleaded that, prior to the assignment to the plaintiff, M. & G. had assigned the accounts in question to S. by instrument in writing. Plaintiff replied, setting up facts showing that the assignment to S. was void as a fraudulent preference.

Held, on demurrer, that this replication was bad because the assignment to S. could not be declared fraudulent and void in this action, as S. was not a party to it. *Bertrand* v. *Hooker*, 10 M.R. 445.

Not followed. *Clay* v. *Gill*, 12 M.R. 465.

III. Assignments Act.

1. Assignments Act, R.S.M., 1892, c. 7, s. 33—63 & 64 *Vic.* (*M.*), *c.* 3, *s.* 1—*Trust assignment made to a creditor—Pressure—Creditor's knowledge of the debtor's insolvency.*

Under section 33 of The Assignments Act, R.S.M., c. 7, a mortgage given by a debtor to a creditor to secure his claim may be set aside as a preference although it has been obtained by pressure and was given by the debtor without any active desire to prefer the mortgagee to his other creditors, if the debtor knew or ought to have known that such would be the result of giving the mortgage.

When an assignment in trust for creditors is made to one of the creditors of the assignor, the assignee may under section 39 of the Act bring an action to set aside a fraudulent preference without showing the acceptance of the benefit of the assignment by any other creditor or communication of it to any other: *Mackinnon* v. *Stewart*, (1850) 1 Sim. N.S. 76; *Siggers* v. *Evans*, (1855) 5 E. & B. 367.

An assignment of property made by a debtor for the benefit of his creditors generally is, by virtue of section 2 (*a*) of the Act, an "assignment under this Act," although the description of the property may not be in the words set forth in section 3 or in words to the like effect.

Held, also, following *Stephens* v. *McArthur*, (1890) 6 M.R. 496, notwithstanding the decisions of the Ontario Court of Appeal in *Johnson* v. *Hope*, (1889) 17 A.R. 10, and *Ashley* v. *Brown*, (1890) Id. 500, that it is not necessary to show notice to the transferee of the debtor's insolvent condition; but that, in any case, if the transferee had such a knowledge of the debtor's financial position that an ordinary

business man would conclude from it that the debtor was unable to meet his liabilities, constructive notice of the insolvency should be imputed to him.

National Bank of Australasia v. *Morris*, [1892] A.C. 287, followed. *Schwartz* v. *Winkler*, 13 M.R. 493.

2. Assignments Act, R.S.M., 1892, c. 7, s. 33—63 & 64 *Vic.* (*M.*), *c.* 3, *s.* 1—*Motive actuating debtor in giving security to preferred creditor—Pressure.*

In giving the chattel mortgage impeached in this action it appeared that the dominant motive of the debtor was to make an arrangement for continuing his business, the defendant having induced him to give it by promises of assistance in carrying him along and in arranging with other creditors, although not in any definite way enforceable in a court of law.

Held, that, under section 33 of The Assignments Act, R.S.M., c. 7, as amended by 63 & 64 Vic., c. 3, s. 1, there must still be the intent on the part of the debtor to prefer the particular creditor in order to set aside the impeached conveyance; and, while the effect of it may be to place that creditor in a more advantageous position than other creditors and the debtor may recognize at the time that such will be the effect, yet if he gave it for some other purpose or in the hope that he might thus be enabled to avoid insolvency, it cannot be considered that he gave it with intent to give a preference and the security should stand.

Stephens v. *McArthur*, (1891) 19 S.C.R. 446; *New Prance & Garrard's Trustee* v. *Hunting*, [1897] 2 Q.B. 19; S. C. *sub nom. Sharp* v. *Jackson*, [1899] A.C. 419; *Lawson* v. *McGeoch*, (1893) 20 A.R. 464, and *Armstrong* v. *Johnson*, (1900) 32 O.R. 15, followed.

Although the amending Act declares that a *prima facie* presumption of an intent to prefer is to arise from the effect of such a transaction, this does not justify the Court in looking only to the effect and refusing to attach any weight to the proved facts as to the actual intent. The presumption, being only *prima facie*, may be rebutted by evidence.

Held, also, that the Court need not determine whether the preferred creditor was acting *bona fide* or really anticipated that the other creditors could be arranged with and the business continued, it being only the debtor's mental attitude that should be considered

Per RICHARDS, J., dissenting.—The security having been obtained by deceitful representations of the defendant's agent, it should not be allowed to stand. *Codville* v. *Fraser*, 14 M.R. 12.

3. Assignments Act, R.S.M. 1902, c. 8, ss. 40, 48—*Action by creditor to set aside preference when no assignment under Act—Amendment of statement of claim after expiration of time limited for suit.*

Action commenced on 2nd November, 1903, to set aside, as a fraudulent preference, an assignment to defendant, dated 5th September, 1903, by one Cockrill, of certain moneys payable under fire insurance policies to secure defendant's claim against Cockrill.

No assignment having been made by Cockrill under The Assignments Act, R.S.M. 1902, c. 8, plaintiffs alleged in the statement of claim that they brought the action on "behalf of themselves and all other creditors of Cockrill . . . who are willing to join in and contribute towards the payment of the expenses thereof."

Section 48 of the Act provides that, when there has been no assignment under the Act, an action to impeach a transaction as a fraudulent preference must be brought "for the benefit of creditors generally, or for the benefit of such creditors as have been injured, delayed or prejudiced," and section 40 requires that such an action should be brought within sixty days from the time the transaction impeached took place.

On 4th December following, plaintiffs amended the statement of claim by adding, after the words first above quoted, the words, "and the same is brought for the benefit of the creditors generally of the said debtor."

Held, that there was no suit brought for the benefit of the creditors generally, or of such as had been injured, delayed or prejudiced, to impeach the transaction in question until the amendment of 4th December was made, which was more than sixty days after the date of the impeached transaction; and that this objection was fatal, notwithstanding the provision in section 48 (*b*) that, "in case any amendment of the statement of claim be made, the same shall relate back to the commencement of the action for the purpose of the time limited by the 40th section hereof."

The right to sue and the relief to be given are created by the statute and must

be construed strictly. The amendments referred to in that provision must, in strict construction, be confined to allegations of law or fact upon which the relief is to be founded, and that provision pre-supposes an action to have been commenced in the form provided within sixty days.

Byron v. *Cooper*, (1844) 11 Cl. & Fin. 556; *Dedford* v. *Boulton*, (1878) 25 Gr. 561; *Weldon* v. *Neal*, (1887) 19 Q.B.D. 394, and *Davidson* v. *Campbell*, (1888) 5 M.R. 250, followed.

On the merits, also, the findings of fact were that the impeached assignment was not a fraudulent preference within the meaning of the Act, as it was only the last of a series of transactions all connected together which should be treated as a whole and, so treated, were not open to attack. *Ferguson* v. *Bryans*, 15 M.R. 170.

4. Assignments Act, R.S.M. 1902, c. 8, ss. 41, 44, 45, 46—*Sale of stock to person who assumes liability of insolvent to creditor.*

A trading firm being indebted to G. in a large amount and G. being dissatisfied with the payments received and the manner in which the firm carried on its business, but not knowing or having reason to believe that they were unable to meet their liabilities, an arrangement was made and carried out whereby the traders sold their stock in trade to L. and received the price in cash less the amount of G.'s claim which was assumed by L., G. giving time to L. for payment, and releasing the traders. Within sixty days the trading firm made an assignment to the plaintiff under The Assignments Act, R.S.M. 1902, c. 8, for the benefit of creditors generally.

Held, that, as the sale to L. was not impeached, the agreement whereby L. was to pay the insolvent's debt to G. could not be set aside as a fraudulent preference under section 41 of the Act; that the effect of it was the same as if L. had paid the full purchase money to the insolvents and they had paid G. in full out of it, and so the case came within the saving clause of the Act, section 44, protecting payments of money, and that there was no assignment or transfer of anything by the insolvents to G. which could be declared fraudulent and void under section 41.

Gibbons v. *Wilson*, (1890) 17 A.R. 1, and *Johnson* v. *Hope*, 17 A.R. 10, followed.

Burns v. *Wilson*, (1897) 28 S.C.R. 207, explained.

Held, also, that the transaction attacked could not be held void under section 45 of the Act, which is limited in its scope to transfers of considerations other than money, such as bills, notes or goods.

Quære, whether, if the plaintiff had been held entitled to the relief asked for, G. would then have had the right, under section 46 of the Act, to have restored to him the claim he had previously held against a surety for the insolvents, it being urged that the discharge of the insolvents discharged the surety also. *Newton* v. *Lilly*, 16 M.R. 39.

5. Assignments Act, R.S.M. 1902, c. 8, s. 41—*Chattel mortgage—Exemptions.*

A chattel mortgage, although given under circumstances entitling a creditor to have it set aside as a fraudulent preference under section 41 of the Assignments Act, R.S.M. 1902, c. 8, will, nevertheless, be held valid as to any goods covered by it which would, under section 29 of the Executions Act, R.S.M. 1902, c. 58, be exempt from seizure under execution.

Field v. *Hart*, (1895) 22 A.R. 449, followed. *Bates* v. *Cannon*, 18 M.R. 7.

6. Assignments Act, R.S.M. 1902, c. 8, ss. 40, 44, 48 (b)—*Knowledge of solicitor, when imputed to client—Action by judgment creditor of grantor to set aside—Parties to action.*

1. A judgment creditor has a right to bring an action to set aside a fraudulent preference given by the judgment debtor without setting up that his action is on behalf of all the creditors; and, if the action was commenced within sixty days after the date of the alleged fraudulent preference, the plaintiff is entitled to the benefit of the legal presumption created by section 40 of The Assignments Act, R.S.M. 1902, c. 8, in such a case, viz., that a conveyance which has the effect of giving a preference over creditors or over one or more of them shall be utterly void as against such creditor or creditors.

Ferguson v. *Bryans*, (1904) 15 M.R. 170, distinguished.

2. Sub-section (*b*) of section 48 of the Act, providing that one or more creditors may sue on behalf of all the creditors to set aside a fraudulent preference, has not taken away the right of a judgment creditor to sue on his own behalf.

3. When it is the duty of the solicitor of the alleged fraudulent grantee to divulge a fact as to the title, if he is aware of it, there is an irrebuttable presumption that he gave his client notice of that fact.

Rolland v. *Hart*, (1871) L.R. 6 Ch. 678; *Real Estate* v. *Metropolitan*, (1883) 3 O.R. 490, and *Schwartz* v. *Winkler*, (1901) 13 M.R. 505, followed.

New trial ordered so that the question whether the defendant was entitled to the protection of section 44 of the Act, by reason of having made "any present actual *bona fide* payment in money," might be determined. *Gunn* v. *Vinegratsky*, 20 M.R. 311.

7. Assignments Act, R.S.M. 1902, c. 8, ss. 40, 42 and 44—*Insolvency, what constitutes—Security valid as regards fresh advances, though void as regards existing debt—Pressure by creditor—Bills of Sale and Chattel Mortgage Act, R.S.M.* 1902, *c.* 11—*Pleading—Simple contract creditor.*

1. A debtor should be held to be "in insolvent circumstances" within the meaning of section 40 of The Assignments Act, R.S.M. 1902, c. 8, if he does not pay his way and is unable to meet the current demands of his creditors and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent, or when he is not in a condition to pay his debts in the ordinary course as persons carrying on trade usually do.

Review of authorities upon question of insolvency.

2. Under section 42 of the Act, a security for a debt given to a creditor which has the effect of giving him an advantage over other creditors will be declared void, notwithstanding that it has been secured by pressure on the part of the creditor and whether or not the creditor knew of the debtor's insolvency.

3. Under section 44 of the Act, a chattel mortage security given to a creditor for an existing debt and also to cover fresh advances, although void as to the existing debt as being a fraudulent preference, should be held good as regards any fresh advances made to the debtor on the strength of it.

Mader v. *McKinnon*, (1892) 21 S.C.R. 645, and *Goulding* v. *Deeming*, (1888) 15 O.R. 201, followed.

4. A simple contract creditor cannot make an attack upon a chattel mortgage under The Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11.

Parkes v. *St. George*, (1884) 10 A.R. 496, and *Hyman* v. *Cuthbertson*, (1885) 10 O.R. 443, followed.

5. When the plaintiff's statement of claim is based entirely upon the provisions of The Assignments Act, it is a departure in pleading to set up in the reply a case based upon The Bills of Sale and Chattel Mortgage Act and such case should not be recognized: *Odgers on Pleading*, 6th ed. 249, 250. *Empire Sash and Door Co.* v. *Maranda*, 21 M.R. 605.

IV. 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 *Molsons Bank* v. *Halter*, 18 S.C.R. 888, 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.

Decision of Parke, B., in *Van Casteel* v. *Booker*, 2 Ex. 691, followed.

Per Bain, J.—The evidence showed 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 defendant should stand. *Colquhoun* v. *Seagram*, 11 M.R. 339.

V. Insolvent Circumstances.

Intent to prefer.

The plaintiff, being the assignee of one Lamonte under an assignment for the benefit of his creditors, brought this action to set aside a chattel mortgage on Lamonte's stock-in-trade made in favor of the defendants, on the ground that Lamonte was at the time in insolvent circumstances and unable to pay his debts in full, and gave the defendants the mortgage as a preference over his other creditors.

At the date of the mortgage, Lamonte, who was a retail merchant, had a surplus upon his valuation of his stock of about $1,000, besides a piece of land valued by him at $750. He was carrying a stock of $900 or $1,000, and had a profitable and increasing business. Another creditor, as his claim was about maturing, notified Lamonte that he insisted upon payment; other considerable sums were already overdue or about maturing which it was impossible for him to meet at once; and taking all the circumstances into consideration the proper inference was that, even upon the terms of credit on which the sale was eventually made, Lamonte could not at the time of making the mortgage dispose of his assets for sufficient to meet his liabilities.

Held, that he must be deemed to have been then in insolvent circumstances, and, as the giving of the mortgage was entirely at his suggestion and there was no pressure on the part of the mortgagees, it must be declared that the mortgage was void as against the plaintiff.

Davidson v. *Douglas*, (1868) 15 Gr. 347, and *Warnock* v. *Kloepfer*, (1887) 14 O.R. 288, followed; the latter qualified to meet the case of a man whose liabilities are not wholly matured and who could sell his property on terms which will enable him to pay those which have matured and the others as they mature. Such a man should not be deemed to be in insolvent circumstances within the meaning of the statute. *Bertrand* v. *Canadian Rubber Co.*, 12 M.R. 27.

VI. Pressure and Intent to Prefer.

1. Chattel mortgage.

The mortgagor was indebted to the bank on promissory notes which had been renewed from time to time and partly reduced. The manager refused to renew again, and insisted on security, and the mortgagor gave a chattel mortgage under the pressure. The manager swore that he did not know that the mortgagor had other creditors at the time, and the mortgagor swore that he gave the mortgage solely on account of the pressure and to gain time.

Held, that the mortgage was valid. *Ontario Bank* v. *Miner*, T.W., 167.

2. Chattel mortgage—*Debt secured by transferred notes—Statutes—Construction—49 Vic., c. 45, s. 2—Locus standi of creditor.*

The Manitoba statute, 49 Vic., c. 45, enacted that certain conveyances should be fraudulent against creditors; provided for voluntary assignments for the benefit of creditors, and declared that the assignee should have the exclusive right to sue for the rescission of such conveyances; and, by section 2, "Every gift, conveyance, etc., of goods, chattels or effects * * * * made by a person at a time when he is in in insolvent circumstances * * * * with intent to defeat, delay or prejudice his creditors, or to give to any one or more of them a preference over his other creditors or over any one or more of them, or which has such effect, shall as against them be utterly void."

Held, 1. That the statute was *intra vires* of the Legislature.

2. That the conveyances might be attacked by creditors, where no assignment had been made by the debtor.

A creditor in good faith, and without knowledge that the debtor was insolvent, took from him a chattel mortgage. The transaction was straightforward and honest, but the "effect" of it was to give the mortgagee a preference over other creditors.

Held, that the mortgage was void as against creditors.

A chattel mortgage was expressed to be to secure payment of $870.34, which was the amount owing by the mortgagor to the mortgagee. A large portion of it, however, was represented by notes which the mortgagee had, previous to the date of the mortgage, transferred to a bank as collateral security for his own debt.

Held, that the mortgage was not upon that account invalid.

Fish v. *Higgins*, 2 M.R. 65, followed.

Per Killam, J.—The section of the Act declaring certain conveyances fraudulent against creditors may be treated apart from the other provisions of the statute, as an independent enactment; and not, therefore, *ultra vires* by reason only of its

association with other statutory provisions.

Held, on appeal to the Supreme Court, (PATTERSON, J., dissenting), that the word "preference" in this Act imports a voluntary preference and does not apply to a case where the transfer has been induced by the pressure of the creditor.

Held, further, that a mere demand by the creditor, without even a threat of legal proceedings, is sufficient pressure to rebut the presumption of a preference.

The words "or which has such effect" in the Act apply only to a case where that had been done indirectly which, if it had been done directly, would have been a preference within the statute. The preference mentioned in the Act being a voluntary preference, the instruments to be avoided as having the effect of a preference are only those which are the spontaneous acts of the debtor. *Molsons Bank* v. *Halter*, 18 S.C.R., approved and followed. *Stephens* v. *McArthur*, 6 M.R. 496, 19 S.C.R. 446.

3. Chattel mortgage—*Description—Interpleader—Misnomer.*

One of the plaintiffs in an interpleader issue was misnamed, being named "Robert Mar Fisher," instead of "Robert Mar Shaw."

Held, that this variance was not a ground of non-suit, but merely a question of identity, which could be shewn at the trial.

Per DUBUC, J.—The amendment could be made at the trial under section 222 of the C.L.P. Act, 1852.

The goods in a chattel mortgage were described as "all and singular the goods and chattels hereinafter mentioned and described, being all the goods, chattels and effects set forth and mentioned in the paper writing hereunto annexed, marked 'A,' which goods, chattels and effects are situate in a certain building occupied as a store by the mortgagor on . . . . together with all the goods, chattels and effects, stock-in-trade and merchandise which the said mortgagor shall hereafter purchase from the mortgagees, and place in and upon the said premises during the currency hereof."

The schedule annexed was in the form set out in the judgment of KILLAM, J.

Held, (KILLAM, J., dissenting), that this was a sufficient description of the goods intended to be mortgaged.

Hovey v. *Whiting*, 14 S.C.R. 515, followed.

49 Vic., c. 45, s. 2 (R.S.M., c. 7, s. 33), provides that "every gift, conveyance, etc., of goods, chattels or effects . . . . made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay or prejudice his creditors, or to give any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall, as against them, be utterly void."

Held, that the preference provided against in the statute is a voluntary preference, and does not apply to a chattel mortgage given under pressure from a creditor, and a mere demand without threatening legal proceedings is a sufficient pressure.

The Molson Bank v. *Halter*, 18 S.C.R. 88, and *Stephens* v. *McArthur*, 19 S.C.R. 446, followed. *Fisher* v. *Brock*, 8 M.R. 137.

4. Insolvency—38 *Vic., c. 5, s. 59 (Man.)*—13 *Eliz., c. 5—Practice—Power of Judge to review his own order.*

On 29th November, 1876, Y., being in insolvent circumstances, but not to the knowledge of M. & T., to whom he owed a debt, made an assignment to them, under pressure, of moneys coming to him from H. on a building contract. On 1st December following a stop order in this action was made and on 2nd December served upon H. In an issue between M. & T., the claimants, and the execution creditor,

Held, that choses in action are within 38 Vic., c. 5, s. 59 (Man.), but that the assignment was not void within the provisions of that Act.

Upon the construction of that section,

Held, (i) that there is no difference between it and 13 Eliz., c. 5, except as to the preference clause in the former; (ii) the questions of *bona fides*, valuable consideration, preference and fraud are for the jury, and are not questions of law; (iii) pressure by the creditor upon the debtor removes the transaction from the operation of the Act; (iv) to bring the transaction within the Act both parties must be implicated in the attempted fraud; (v) the transaction is not fraudulent, though its effect may be to defeat or delay creditors, if that be not its object.

Held, that, though it is usual for a Judge to review his own order only when obtained through mistake, or by unfair or fraudulent means, his power to do so

extends to all orders made by himself, however deliberately made. *Tucker* v. *Young*, T.W. 186.

5. R.S.M., 1892, c. 7, s. 33—*Chattel mortgage.*

49 Vic., c. 45, s. 2 (R.S.M., c. 7, s. 33) does not make void a conveyance or mortgage merely because its effect is to give one creditor a preference over other creditors, but there must be an intent to prefer.

Semble, the addition of the words, "or which has such effect," has not extended the operation of the statute beyond what it would have had without them.

Where a chattel mortgage effected a preference, but it was given for valuable consideration and in response to a *bona fide* demand from the mortgagee,

Held, that the fraudulent intent was rebutted.

Molsons Bank v. *Halter*, 18 S.C.R. 88, and *Stephens* v. *McArthur*, 19 S.C.R. 446, followed. *Roe* v. *Massey Manufacturing Company*, 8 M.R. 126.

6. Interpleader issue—*Appeal from Judge's finding of fact.*

Since the passing of the Act 47 Vic., c. 53, no chattel mortgage can, upon an interpleader issue, be declared void under Con. Stat. Man. c. 37, s. 96. (Now obsolete.)

Circumstances surrounding the execution of a chattel mortgage, in their tendency to show a fraudulent preference, discussed; and the trial Judge's finding thereon reversed. *McMillan* v. *Bartlett*, 2 M.R. 374.

See ADMINISTRATION, 2, 6.
— FRAUDULENT JUDGMENT, 1.
— JURISDICTION, 10.

FRAUDULENT REMOVAL OF GOODS.

See CRIMINAL LAW, VI, 4.

FRAUDULENT REPRESENTATIONS.

See MISREPRESENTATION.
— UNDUE INFLUENCE.
— WARRANTY, 5.

FUNCTUS OFFICIO.

See ARBITRATION AND AWARD, 13.
— COSTS, XI, 7.
— RAILWAYS, I, 1.

FUND IN COURT.

See SOLICITOR'S LIEN FOR COSTS, 5.

FUNERAL EXPENSES.

See ADMINISTRATION, 7.
— WORKMEN'S COMPENSATION FOR INJURIES ACT, 4.

FURTHER DIRECTIONS.

See COSTS, X, 4.
— PRINCIPAL AND AGENT, V, 9.

FURTHER EVIDENCE, ADMISSION OF.

See REAL PROPERTY ACT, I, 7.

FURTHER EVIDENCE ON APPEAL.

See TRESPASS AND TROVER, 1.

FURTHER RELIEF.

See ELECTION PETITION, VI, 1.
— VENDOR AND PURCHASER, VI, 11, 12.

GAME PROTECTION.

See CONSTITUTIONAL LAW, 4.

GAMING.

See CRIMINAL LAW, XV, 1, 2, 3.

GAMING HOUSE.

See CRIMINAL LAW, XVI, 3.

GARNISHMENT.

I. AFFIDAVIT FOR, REQUISITES OF.

1. By whom to be made—*Garnishing proceedings—Affidavit by "Servant or Agent."*

Held, an affidavit for a garnishing order must be made by the plaintiff himself, or by his attorney, or by some one in the plaintiff's employment, conducting his business, and in that way having a knowledge of his affairs. *Lee* v. *Sumner*, 2 M.R. 191.

2. Form and contents—*Debt due—Action pending.*

Held, that the omission to state in terms that "the action is pending," in an affidavit on which a garnishing order is made, is a fatal objection to the order. *Shorey* v. *Baker, City of London Fire Insurance Co., Garnishees*, 1 M.R. 282.

3. Form and contents—*Garnishees "reside" within the jurisdiction.*

An affidavit upon which a garnishing order issued stated that the garnishees *reside*—not that they *are*—within the jurisdiction.

Held, sufficient. *Hamilton* v. *McDonald*, 2 M.R. 114.

4. Form and contents—*Sufficiency of—Locus standi of judgment debtor.*

An affidavit for a garnishing order stated:—"I have reason to believe that the City of Winnipeg is indebted to, liable to, or under some obligation to the defendants."

Held, 1. Sufficient.

2. That all objections to the validity of garnishing orders are open to the judgment debtor. *St. Boniface* v. *Kelly, City of Winnipeg, Garnishees*, 2 M.R. 219.

5. Form and contents—*Evidence of indebtedness.*

Held, an affidavit for a garnishing order must either state positively that the garnishee is indebted or liable to the defendant, or it must follow the exact wording of the amending statute, 46 Vic., c. 49, s. 12, that deponent "has reason to believe." It is not sufficient to state that the deponent is "informed and verily believes." *Grant* v. *Kelly, Blanchard, Garnishee*, 2 M.R. 222.

6. Form and contents—*Setting aside order.*

Held, 1. The greatest strictness is required as to the material upon which a garnishing order before judgment is obtained.

2. The omission of the words "after making all just allowances" is fatal, although the action be for malicious prosecution.

3. A statement that the garnishees (an incorporated bank) have an agency and branch establishment for the transaction of all business of the bank at the City of Winnipeg, is not a positive statement that the garnishees are within the jurisdiction, and is insufficient.

4. *Quære*, can a garnishing order be obtained in an action for malicious prosecution? *Nagengast* v. *Miller*, 3 M.R. 241.

See now *McIntyre* v. *Gibson*, 17 M.R. 423, and *Hart* v. *Dubrule*, 20 M.R. 234.

7. Form and contents—*Style of cause.*

Upon an application to set aside a garnishee attaching order obtained after judgment:—

1. Upon the ground that in the affidavit upon which it was granted the names of the garnishees appeared in the style of cause.

Held, although irregular, these names were surplusage.

2. Upon the ground that in the style of cause in the order the plaintiff and defendant were not called "judgment creditor" and "judgment debtor" but "plaintiff" and "defendant."

Held, not a fatal objection.

3. The affidavit as to the garnishees being within the jurisdiction was as follows: "I am informed and have reason to believe" that so and so, naming them, are indebted, &c., to the extent of about $120, "And the above named garnishees reside within," &c.

Held, sufficient.

4. The order attached debts to answer a judgment "to be recovered," whereas the judgment had already been recovered.

Held, amendable.

A judge has power to rescind the *ex parte* order of another judge. *Ontario Bank* v. *Page*, 3 M.R. 677.

8. Form and contents—*Residence of garnishee—Procedure prescribed by statute.*

An affidavit, on which a garnishing order was obtained, stated that: "I have reason to believe that G., as the Clerk of the Executive Council of Manitoba, is indebted or liable to M., one of the above-named judgment debtors, in the sum of $200;" but omitted to state that the garnishee "is within the jurisdiction of the Court."

Held, that the affidavit was defective, and that the order issued on it was a nullity.

Enactments prescribing procedure in the Courts are to be construed as imperative.

McKay v. *Nanton*, 7 M.R. 250, followed. *French* v. *Martin*, 8 M.R. 362.

9. Form and contents—*King's Bench Act, Rule 760—Substitution of words "to the like effect" for words in form.*

The substitution, though by an error in type-writing, of the word "jointly" for the word "justly" in an affidavit to lead a garnishing order is not cured by Rule 760 of the King's Bench Act, permitting the use of language "to the like effect" of the forms prescribed, and is such a defect as cannot be amended; but the use of the word "deductions" instead of "discounts" in such affidavit is permissible under the Rule, as the two words mean practically the same thing in that connection. *Johnson* v. *Chalmers*, 19 M.R. 255.

10. Statement of cause of action—*Attachment of money in hands of County Court Clerk to which debtor entitled—County Courts Act, R.S.M.* 1902, *c.* 38, *s.* 265—*Affidavit for garnishing order, sufficiency of, under Form* 30—*Statement of cause of action.*

Per CUMBERLAND, Co. J., in 1894.

1. A statement in an affidavit under section 265 of the County Courts Act, R.S.M. 1902, c. 38, to found a garnishing order, "That the said primary debtor is justly and truly indebted to me in the sum of ——— for an account due T & R. and assigned to me," does not sufficiently comply with the requirement. "Here state shortly the cause of action in common, plain and concise language," as printed in italics in Form 30 appended to the Act, as it neither shows the defendant clearly what he is being sued for nor that the cause of action is one "for which suit may be entered" in the County Court, which is necessary under the wording of section 265.

2. Money paid into a County Court for the benefit of one of the parties to a suit in that Court is not attachable in the hands of the Clerk of the Court by garnishing process at the suit of a creditor of such party. *Ross* v. *Goodier*, 5 W.L.R. 393.

II. CASES IN WHICH NO GARNISHING ORDER CAN BE OBTAINED BEFORE JUDGMENT.

1. Action for unliquidated damages—*Attachment of debts—King's Bench Act, Rule* 759.

The right to proceed under Rule 759 of the King's Bench Act for the attachment of debts before judgment is confined to cases in which the amount of the plaintiff's claim can be definitely ascertained at the time the action is brought and the Rule does not apply where the claim is for unliquidated damages whether arising from tort or breach of contract.

Where, therefore, the plaintiff's claim was obviously partly made up of unascertained damages and neither the statement of claim nor the affidavit contained any definite allegation of a certain amount having been earned by plaintiff at the time the action was brought, an order attaching debts before judgment was set aside with costs.

McIntyre v. *Gibson*, (1908) 17 M.R. 423, followed. *Hart* v. *Dubrule*, 20 M.R. 234.

2. Action of tort—*King's Bench Act, R.S.M.* 1902, *c.* 40, *r.* 759.

The words "claim or demand" used in Rule 759 of the King's Bench Act, R.S.M 1902, c. 40, are limited by the following words "due and owing" and do not extend to a claim in tort for unascertained damages before judgment recovered therefor, so that a plaintiff having only such a claim is not entitled under that Rule to an order attaching moneys due by a third party to the defendant to answer the judgment of the plaintiff to be recovered.

Grant v. *West*, (1896) 23 A.R. 533, followed. *McIntyre* v. *Gibson*, 17 M.R. 423.

See also V. post.

III. Jurisdiction of County Court Judge.

1. To make and set aside orders in Queen's Bench action.

A County Court Judge has power not only to grant a garnishee attaching order in a Queen's Bench case, but also to set the order aside if improperly issued. *Thompson* v. *Wallace*, 3 M.R. 686.

2. To set aside order in Queen's Bench action—*Garnishee out of jurisdiction.*

A County Court Judge has power to set aside a garnishing order made in a Queen's Bench action.

A garnishing order was set aside upon it appearing that the garnishee did not reside within the jurisdiction, but was there, when served, only temporarily. *Dick* v. *Hughes*, 5 M.R. 259.

3. To enforce trust of money attached—*County Courts Act, R.S.M.*, 1902, *c.* 38, *ss.* 60 (*d*), 61—*Injunction—Fraudulent conveyance.*.

Under the County Courts Act, R.S.M., 1902, c. 38, a County Court has no jurisdiction to make an order in garnishee proceedings attaching and prohibiting the payment over of moneys owing or accruing due from the garnishee to a person other than the primary debtor, upon the allegation that such moneys would, when paid over, be held by such other person in trust for the debtor in consequence of some transaction alleged to be fraudulent and void as against the creditors of the debtor, or to make an order for the trial of an issue to determine whether such moneys were an asset of the debtor or not.

Donohoe v. *Hull*, (1895) 24 S.C.R., 683, followed. *Adams* v. *Montgomery*, 18 M.R. 22.

IV. What May be Garnished.

1. Claim for damages.

A claim against a railway company for damages for injuries sustained may be attached by a creditor of the person injured.

The fact that a defendant has assigned his claim against the garnishee is no reason for setting aside the attaching order.

Although an assignee of a *chose* in action may sue in the name of his assignor, and not be affected by acts of the assignor, yet a *cestui que trust* cannot, either in an application at law or by proceedings in equity, intervene to prevent the effect of a waiver by his trustee of an irregularity in proceedings at law to which the trustee is a party. *Gerrie* v. *Rutherford*, 3 M.R. 291.

2. Liability of purchaser of shares to indemnify original subscriber against future calls on stock—*Manitoba Joint Stock Companies Act, R.S.M.*, 1902, *c.* 30, *s.* 68—*King's Bench Act, Rules* 759, 761—*Objection not raised at trial.*

1. The purchaser of the assets of a company incorporated under The Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, who agrees to assume the liabilities of the company, is bound to indemnify the company against its liability for payment of future calls on shares of stock held by it in a fire insurance company which were only partly paid up at the time of the sale, although no mention of such liability was made at the time but the purchaser was aware thereof; and such liability is attachable at the suit of the fire insurance company under Rules 759 and 761 of the King's Bench Act for the purpose of realizing on a judgment obtained for the amount of unpaid arrears of subsequent calls on the shares.

2. *Per* Dubuc, C.J. An objection based on section 68 of the Joint Stock Companies Act, that no company incorporated under that Act can use any of its funds in the purchase of stock in any other corporation unless expressly authorized by a by-law confirmed at a general meeting, and that there was no evidence of any such by-law having been passed, cannot be given effect to on the hearing of an appeal when it was not raised at the trial.

Proctor v. *Parker*, (1898) 12 M.R. 528, and *Hughes* v. *Chambers*, (1902) 14 M.R. 163, followed.

Per Perdue, J., dissenting. Although not raised at the trial, such objection should be given effect to on this appeal. Cases cited distinguished on the ground that here the evidence all went to show that no such by-law had ever been passed and if the objection had been raised at the trial the plaintiffs could not have given any evidence to overcome it.

3. *Per* Dubuc, C.J. The statute does not prohibit a joint stock company from holding stock in another corporation, it provides only that its funds shall not be used for such purpose unless expressly authorized by by-law confirmed at a general meeting; and, if it were shown that

such shares had been acquired otherwise than by using any of the funds of the company, the holding would be legal.

4. *Per* PERDUE, J. The recovery of the judgment by the plaintiffs against the company did not estop the garnishee from setting up the defence arising out of section 68 of the Joint Stock Companies Act. *Everest & Strode on Estoppel*, p. 55. *Victoria Montreal Fire Ins. Co.*, v. *Strome Whyte Co.*, 15 M.R. 645.

3. Moneys in bailiff's trust account in bank—*Garnishing order—Trust funds—Bailiff.*

Moneys collected by a County Court bailiff under executions, and paid into what was called a trust account in a bank,

Held, to be attachable by the bailiff's creditors, it appearing that the same account was used for his own private purposes. (*a*)

A bailiff is debtor to an execution creditor on whose execution he receives money; not a trustee for him of the particular fund.

Decision of Taylor, J., 3 M.R. 145, affirmed.

For a statement of the facts, see the former report, 3 M.R. 145.

Re Monkman & Gordon, Merchants Bank, Garnishees, 3 M.R. 254.

(*a*) See however, *Stobart* v. *Axford*, 9 M.R. 18.

4. Moneys held in trust—*Assignment of future income and profits.*

The plaintiffs, by a garnishee order, attached moneys in the hands of the garnishees owing to the defendants. The defendants had previously assigned to trustees for bondholders all the profits and income of the concern, and the trustees therefore claimed the moneys as against the plaintiffs. The deed of assignment provided that the defendants might use the income assigned in carrying on their business until default in payment of the bonds, and the plaintiffs' claim was for goods required by the defendants in the ordinary course of their business.

Held, that the defendants, if the moneys attached had come to their hands, might properly have applied them in payment of the plaintiffs' claim and that the claimants were not entitled to them as against the plaintiffs. *National Electric Manufacturing Co.* v. *Manitoba Electric and Gas Light Co.*, 9 M.R. 212.

V. WHAT MAY NOT BE GARNISHED.

1. Agreement to account for excess on re-sale of property—*Queen's Bench Act*, 1895, *s.* 39, *s-s.* 11, *Rule* 742—*Equitable execution.*

Where A has sold and conveyed land to B under an agreement that if B could at any time resell the property for a larger amount he would account to A for the excess, there is nothing upon which to base a garnishing order at the instance of a creditor of A, as there is neither any debt owing or accruing from the garnishee to the debtor, nor any claim or demand arising out of trust or contract which could be made available by equitable execution, nor would it be proper in such a case to appoint a receiver under section 39, sub-section 11, of The Queen's Bench Act, 1895.

The claims and demands referred to in Rule 742 of the Act as re-enacted by 60 Vic., c. 4, are those that would be available by equitable execution at the suit of the judgment debtor himself, and not at the suit of the judgment creditor.

Central Bank v. *Ellis*, (1893) 20 A.R. 364, followed.

Explanation of the term "equitable execution." *McFadden* v. *Kerr*, 12 M.R. 487.

2. Claim under fire insurance policy before proofs of loss furnished—*Option to replace destroyed property—Queen's Bench Act*, 1895, *Rule* 741, *as amended by* 60 *Vic.* (*M.*), c. 4, *Rule* 742—*Equitable execution.*

1. Under Rules 741 and 742 of The Queen's Bench Act, 1895, as amended by 60 Vic., c. 4, the claim of the assured, under a policy of insurance against loss by fire which provides that the loss should not be payable until thirty days after the completion of the proofs of loss usually required, can not be attached by garnishing order before such completion, although the property insured has been burnt.

Howell v. *Metropolitan District Co.*, (1881) 19 Ch.D. 508, and *Central Bank* v. *Ellis*, (1893) 20 A.R. 364, followed.

Canada Cotton Co. v. *Parmalee*, (1889) 13 P.R. 308, not followed.

2. The only kind of liability which may be attached under the above Rules is a purely pecuniary one and must be absolute and not dependent upon a condition which may or may not be fulfilled; and, therefore, where a policy of fire insurance contained a condition giving an option to

the company to replace the destroyed property instead of paying the insurance money, if they should so decide within a certain time, a garnishing order would be of no avail, if served before the expiration of that time, as an attachment of the insurance money, since it would not then be certain that any pecuniary liability would ever arise under the policy: *Simpson* v. *Chase*, (1891) 14 P.R., *per* Osler, J.A., at p. 286.

3. The provision in the Rules as to claims and demands which could be made available under equitable execution have not the effect of making such a liability subject to attachment thereunder. *Lake of the Woods Milling Co.* v. *Collin*, 13 M.R. 154.

3. Debts due to defendant and another jointly—*Jurisdiction, what corporations are within it.*

Moneys due to the defendant and another person jointly cannot be attached under The Garnishment Act, R.S.M. c. 64, to meet the plaintiff's claim.

Where it is sought to attach moneys in the hands of a corporation, it must be shown that the Company has an office in this Province, and is carrying on business through some branch or agency here.

In the case of The Northern Assurance Company, garnishees, it appeared that the head office was in Montreal, and that it had no office in this Province, although there were persons here who received applications for insurance and, pending the reference of these to Montreal, were empowered to grant temporary insurance for 30 days, but all applications had to be sent to the head office, where they were accepted or rejected; the policies were issued at Montreal, the premiums were payable there, and the amount assured was, in case of loss, payable there also.

Held, that this Company could not be said to carry on business in this Province, or to be within the jurisdiction, so as to admit of moneys due by them being garnished.

McArthur v. *Macdonell*, 1 M.R. 334, and *Parker* v. *Odette*, 15 P.R. 69, followed. *Braun* v. *Davis, Northern Ass. Co., Garnishees*, 9 M.R. 534.

4. Debtor a trustee—*Chattel Mortgage Act.*

Plaintiff sold a stock of goods to defendant and took a mortgage upon it, and all goods which might be afterwards added to it, as security for payment. At the same time an agreement was entered into whereby the defendant was to carry on business with the stock, and, after making deductions for expenses, &c., was to remit the receipts to the plaintiff daily.

Creditors of the defendant having attached, by garnishee orders, certain debts due to the defendant for goods sold in the business,

Held, that such creditors were not entitled to such debts as against the plaintiff.

Garnishee orders take effect only as against that which the debtor can properly, and without violation of any other rights of any one else, grant.

The Chattel Mortgage Act does not apply to such a case. *Campbell* v. *Gemmell*, 6 M.R. 355.

5. Money in hands of County Court Clerk—*County Courts Act, R.S.M.* 1902, *c.* 38—*Charging order or appointment of receiver in County Court.*

Money paid into a County Court for the benefit of one of the parties to a suit in that Court is not attachable in the hands of the Clerk of the Court by garnishee process at the suit of a creditor of such party.

Dolphin v. *Langton*, (1879) 4 C.P.D. 130, followed, in preference to *Bland* v. *Andrews*, (1880) 45 U.C.R. 431.

Ross v. *Goodier*, decided by Cumberland Co., J., in 1894, approved.

See I., 10, *ante*.

Quære, whether the money could not be reached by way of charging order or equitable execution as by the appointment of a receiver. *Otto* v. *Connery, Betourney, Garnishee*. 16 M.R. 532.

6. Moneys of a municipality in the hands of its treasurer—*Municipal taxes.*

The treasurer of a municipality is not, as such, a "third person indebted or liable" to it within the meaning of section 8 of the Garnishment Act, R.S.M., c. 64, and its funds in his hands cannot be attached to answer a debt of the municipality.

Seymour v. *Brecon*, 29 L.J. Ex. 243, not followed. *London and Canadian Loan and Agency Co.* v. *Rural Municipality of Morris and Whitworth, Garnishee*, 9 M.R. 431.

7. Moneys in trust account in bank—*Onus of proof where account a mixed one.*

Defendant F. A. was, at one time, carrying on business in partnership with his brother, and plaintiffs recovered a judgment against the firm. He was also a

County Court Clerk, and acted as an agent for two insurance companies and two loan companies. In connection with these employments he opened an account in a bank which was styled, "Frederick Axford, trust," in which were deposited trust moneys or moneys representing trust moneys. Plaintiffs, judgment creditors, obtained an order garnishing the amount at the credit of the account, and then applied to have the money paid over to them. The evidence showed that F. A. drew out from this account moneys for his own purposes, or moneys to repay other trust moneys received by him before the opening of this account, which he had used.

Held, that the improper withdrawal by a trustee of moneys from a trust account and the improper use by him of moneys so withdrawn can never deprive other trust moneys lying at the credit of the account of their trust character.

Unless the money is money with which the debtor can deal as his own, it cannot be garnished.

Where the account is a mixed one, the *onus* is on the party seeking to attach it, to show that the money is the debtor's with which he can deal and, in the absence of proof that the account or so much of it is his, the money will be treated as all trust money.

In the absence of clear evidence that the balance in the account did not consist of trust moneys, it should be held to be so. *Stobart* v. *Axford*, 9 M.R. 18.

8. School taxes unpaid—*School taxes not attachable by creditor of School District—Public Schools Act—Effect of repeal—Interpretation Act, R.S.M.* 1892, *c.* 78, *ss.* 11 *&* 12, *construction of—Public policy.*

The plaintiffs having recovered a judgment against a School District sought to attach the amount levied on the garnishee for rates or taxes imposed for school purposes for the years 1884 to 1892, inclusive, in respect of lands of the garnishee within the school district.

Held, that these rates or taxes did not constitute a debt, obligation or liability which could be attached under the Garishment Act, R.S.M., c. 64, to answer a claim against the School District.

Per TAYLOR, C.J.—The repeal of all former School Acts by the Public Schools Act of 1890 put an end to the right of a School District to collect any arrears of such taxes and, since the passing of the latter Act, School Districts in Manitoba have no power to levy or collect taxes, but it must be done for them by the municipal councils. The Interpretation Act, R.S.M., c. 78, ss. 11 & 12, cannot be relied on to save the right of collecting arrears of taxes, because trustees have not under the repealing Act any such right.

Per DUBUC, J.—It would be against public policy to allow the taxes levied by a School District to be intercepted by an attaching order in favor of a creditor, because the trustees might thereby be prevented from carrying on the work for which the corporation was created, especially since the Act provides by section 234 an adequate remedy enabling a creditor to issue an execution with an indorsement directing the sheriff to levy an additional rate on property owners to pay off the judgment.

Per KILLAM, J.—Without an express provision in the statute to that effect, a public corporation cannot sue in a Court of law to recover taxes levied on a ratepayer under the powers conferred by the statute, and, although the former School Acts enabled the trustees to take proceedings before certain tribunals to enforce payment of the taxes, the ordinary relation of debtor and creditor was not thereby created, nor were the taxes thereby constituted a debt, obligation or liability within the meaning of section 8 of the Garnishment Act, such as can be attached in the hands of a ratepayer to meet a debt of the corporation. *Canada Permanent Loan & Savings Co.* v. *School District of East Selkirk*, 9 M.R. 331.

VI. OTHER CASES.

1. Costs—*Affidavit disputing liability—Form of.*

A garnishee, upon the first return of a summons to pay over, filed an affidavit alleging an assignment of the debt by the judgment debtor previous to attachment, and also denying the existence of the debt, but this denial was not in sufficient form.

Held, that the plaintiff might elect to abandon the proceedings without costs. *North West Farmer* v. *Carman*, 6 M.R. 118.

2. Execution creditor enforcing judgment recovered by debtor against garnishee.

Held, (affirming KILLAM, J.), that the service of a garnishee attaching order binds the debt due by the garnishee, but does not transfer to the plaintiff the securities held for the debt or give any right to

take advantage of the position of the debtor in respect of such securities.

An execution creditor cannot, under a *fi. fa.* lands, sell the charge which the judgment debtor may have upon the lands of a third party by virtue of a registered judgment.

If the interest which a judgment debtor might acquire in such lands, by docketing his judgment under the English statutes, could be sold under execution, it would only be after such lands had been "delivered in execution by virtue of a writ." *Abell* v. *Allan*, 5 M.R. 25.

3. Fraudulent discharge given to defeat creditors—*Chattel mortgage—Discharge not under seal—Debt not paid.*

I. B. was indebted to J. B. in the sum of $500. More than six years after the cause of action arose, and when the debt was barred by the Statute of Limitations, I. B. executed a chattel mortgage under seal in which he covenanted to pay J.B. the $500 with interest. Afterwards I. B. learned that this debt could be garnished by J. B.'s creditors and, with a view of preventing this, he induced J. B. to execute a discharge of the mortgage, but no money was paid. The discharge was in the statutory form but not under seal.

The plaintiffs obtained a judgment against J. B. and garnished I. B.

On the return of a summons to pay over, an interpleader issue was directed to determine the validity of the discharge. On the trial of the issue,

Held, that the discharge was fraudulent and void as against creditors. *Manitoba & N. W. Loan Co.* v. *Bolton*, 9 M.R. 153.

4. Interpleader upon suggestion of another claimant—*Payment into court—Suggestion of third party.*

Garnishees paid the money attached into court, making no suggestion of the existence of any other claimant. Upon plaintiff's motion for payment out, two of the defendants contended that the garnishees were not indebted to the defendants at all, but to another firm of which the defendants and another were members, and of which one M. was assignee. An order was therefore made for the trial of an issue between the plaintiffs and the assignee as to whether the garnishee was indebted to the defendants. The plaintiff appealed.

Held, that, inasmuch as the garnishees had not made any suggestion of another claimant, the order should have directed payment to the plaintiffs, and the assignee be left to his action against the garnishees.

Roberts v. *Death*, 8 Q.B.D. 319, distinguished. *Ontario Bank* v. *Haggart*, 5 M.R. 204.

5. Judgment creditor enforcing judgment recovered by debtor against garnishee.

B. & P. had a judgment against A., McA. obtained a judgment against B. & P. and garnished A.

Held, that McA. had no right to enforce the judgment of B. & P. against A., nor to rank under that judgment as against the lands of A. in a contest for priority among his judgment creditors. *Abell* v. *Allan*, 3 M.R. 467.

Affirmed, 5 M.R. 25.

6. Liability of purchaser of land after assignment of agreement to third party—*Order as to payments still to fall due—King's Bench Act, Rule 764.*

1. A purchaser of land from a defendant, under an agreement providing for payment by successive annual instalments, cannot escape liability under a garnishing order, served upon him in a suit by a creditor of the defendant, by subsequently assigning his interest in the land to another person and procuring the latter to assume liability for the remaining instalments; and, although none of the instalments are due when the order is served, yet they are all covered by it to the extent necessary to satisfy the plaintiff's claim.

2. After the maturity of one of the instalments, the plaintiff is entitled, under Rule 764 of the King's Bench Act, to an order for payment not only of the overdue instalment, but also, when due, of those still to fall due, until the judgment is satisfied. *Smith* v. *Van Buren*, 17 M.R. 49.

7. Non-resident garnishee—*Garnishee (a corporation) not within the Province.*

Application by defendant to set aside a garnishing order. The debt alleged to be due by the garnishees was in respect of a life insurance policy. The Insurance Company (the garnishees) had no office in the Province. L. & K. acted as its agents in Winnipeg, having power merely to receive applications for insurance. The premiums were payable at Montreal,

and the amount insured in case of death was also payable at Montreal.

Held, that, as the Insurance Company could not be sued in this Province, the garnishing order should be discharged. *McArthur* v. *Macdonell*, 1 M.R. 334.

8. Payment by garnishee after notice of assignment—*Landlord and tenant —Setting aside order—Parties—Amendment—Notice of assignment under* 4 & 5 *Anne, c.* 16, *s.* 10.

One Henry Foulds, having leased a parcel of land to the defendant, assigned the reversion to trustees for the plaintiff. On the first of April, 1895, the defendant owed $90 for rent of the premises, and soon afterwards a judgment creditor of Henry Foulds obtained an order attaching this rent. In May following an order was made for the payment of the $90 to the judgment creditor, no one appearing to show cause so far as the order showed. Thereupon the defendant paid the rent as required by the order, although he had notice of the assignment, as the Judge at the trial found, before the service of the attaching order. The plaintiff then brought this action to recover the $90.

Held, 1. That the payment to the garnishing creditor was no defence, notwithstanding that the order had not been set aside: *In re Smith*, 20 Q.B.D. 321, distinguished.

2. That it was not necessary for plaintiff before suing to take proceedings under Rule 425 of the Queen's Bench Act, 1895, to set aside the attaching order.

3. That plaintiff was not entitled to bring this action in his own name, but that leave to amend by adding the trustees as plaintiffs should be allowed under Rule 338, Queen's Bench Act, 1895. *Gandy* v. *Gandy*, 30 Ch.D. 57; *Woodward* v. *Shields*, 32 U.C.C.P. 282, and *McGuin* v. *Fretts*, 13 O.R. 699, followed.

4. That notice of the assignment should have been given by the trustees, as required by the statute 4 & 5 Anne, c. 16, s. 10, but as defendant had received notice no effect should be given to this objection, following *Lumley* v. *Hodgson*, 16 East, 99.

Ordered, that, upon plaintiff filing within a week the written consent of the trustees to be added as co-plaintiffs, the statement of claim be amended accordingly, and judgment entered for the amount sued for and costs, except any costs of making the amendment. *Foulds* v. *Chambers*, 11 M.R. 300.

9. Priority—*Sheriff and deputy sheriff.*

A garnishee order was taken out in the first suit in the County Court at Emerson, and served on sheriff's bailiff at Emerson and the deputy sheriff at Winnipeg.

In the second suit a garnishee order issued out of the Court of Queen's Bench was served on the sheriff personally, subsequently to the service effected in the first suit.

Plaintiff in the first suit took out a summons to settle the priorities.

Held, that service on the deputy sheriff in his office during office hours was good service on the sheriff, and therefore an order so served had precedence over an order subsequently served on the sheriff. *Beach* v. *Graves*, *Dominion Type Co.* v. *Graves*, 1 M.R. 26.

10. Privity between debtor and garnishee.

The defendant was an Indian agent in Manitoba of the Government of Canada, and was paid his salary through the branch of the Ontario Bank at Winnipeg. The Bank, without any communication with the defendant, placed two successive months' salary at his credit when due, against which attaching orders were issued by M., the assignee of a judgment obtained by the Bank against the defendant.

Held, that, notwithstanding what was done by the Bank, no privity having been established between it and the defendant, the money still remained under control of the Crown and could not be attached. *McMicken* v. *Clarke*, T.W. 157.

See Arbitration and Award, 8.
— Banks and Banking, 2.
— Bills and Notes, VII, 2.
— Company, IV, 4.
— Conflict of Laws, 1.
— Evidence. 1, 2.
— Fi. Fa. Goods, 4.
— Fraudulent Conveyance, 20.
— Interpleader, V.
— Mortgagor and Mortgagee, VI, 7.
— Practice.
— Staying Proceedings, III, 2.

GAS INSPECTION ACT.

R.S.C. 1906, c. 87, ss. 31, 34, 44, 59, 60 —*Liability of consumer to pay for gas when no certificate posted up as required by section*

44 and no test made as provided by section 34 —Obligations of company supplying gas in a place for which there is no local inspector.

1. Section 34 of the Gas Inspection Act, R.S.C. 1906, c. 87, only makes the sale of gas illegal after notice to the undertaker of the location of the testing place prescribed by the Department of Inland Revenue and until the connections specified in that section are made.

2. Section 44, requiring the posting up of the certificates of tests made by the inspector, does not become operative till section 34 has been acted on and a testing place prescribed and notified by the undertaker.

3. The penalties provided for by sections 59 and 60 for failure to procure and post up the certificates of tests required by section 44 and for selling gas before connections have been made with the testing place, &c., are not incurred when section 44 has not become operative by notification to the undertaker of the prescribing of a testing place.

Per PHIPPEN, J.A., Sections 34 and 44 are both subsidiary to section 31, which limits the obligations therein imposed to undertakers "in any city, town or place for which there is an inspector of gas," and the provisions of sections 31 to 47, inclusive, are not applicable to places for which there is no local inspector. *Carberry Gas Co.* v. *Hallett*, 17 M.R. 525.

See also *Man. Elec. & Gas Light Co.* v. *Gerrie*, 4 M.R. 210.

GAS METER.

See ILLEGALITY, 2.

GIFT.

1. Delivery.

Actual delivery of the thing is a necessary ingredient of a valid parol gift or, in other words, a gift is a transaction consisting of two contemporaneous acts, the giving and the acceptance, and these acts cannot be completed without an actual delivery of the subject of the gift.

Under the circumstances set out in the judgment, there was not a sufficient delivery of the chattel claimed to have been given away by the plaintiff.

Irons v. *Smallpiece*, (1819) 2 B. & Ald. 551; *Cochrane* v. *Moore*, (1890) 25 Q.B.D. 57, and *Re Bolin*, (1892) 136 N.Y. at p. 180, followed. *Hardy* v. *Atkinson*, 18 M.R. 351.

2. Possession—*Acceptance.*

Plaintiff's father in his lifetime purchased a piano which, after delivery at his home, he gave to the plaintiff then living with him. She accepted the gift and it was afterwards treated as her property.

Held, following *Winter* v. *Winter*, (1861) 4 L.T. 639, and *Kilpin* v. *Ratley*, [1892] 1 Q.B. 583, that the title to the piano was complete in the plaintiff, and she was entitled to recover it from the defendant in spite of an alleged subsequent sale by the father to the latter. *Tellier* v. *Dujardin*, 16 M.R. 423.

See INFANT, 7.

GOOD IN PART AND BAD IN PART.

See CHATTEL MORTGAGE, V, 3.
— CROWN PATENT, 5.
— DEMURRER, 3.
— ILLEGALITY, 4.
— LOCAL OPTION BY-LAW, I, 2.
— PLEADING, XI, 10.
— RAILWAYS, II, 2.
— SALE OF LAND FOR TAXES, III, 2.
— TAXES.

GOODS IN CUSTODIA LEGIS.

See STOPPAGE IN TRANSITU.
— TRESPASS AND TROVER, 2.

GOODS IN STORAGE.

See SALE OF GOODS, II, 3.

GRAND LARCENY.

See EXTRADITION, 1.

GRANT OF CROWN LANDS BY STATUTE.

See CROWN LANDS, 2.

GROWING CROPS.

Mortgage of—*Mortgage of crops to be grown—Equitable security—Bills of Sale Act, R.S.M.* 1892, *c.* 10, *ss.* 3 *and* 4—57 *Vic., c.* 1, *s.* 2, (*M*).

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 plaintiff's 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 Bills of Sale Act, R.S.M., 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 M.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 Vic., c. 1, s. 2, (M), 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 M.R. 503.

See CHATTEL MORTGAGE, II, 1, 2, 3.
— MORTGAGOR AND MORTGAGEE, VI, 5.
— PARTNERSHIP, 6.

GROWING HAY.

See CONTRACT, XV, 15.
— HAY.

GUARANTY.

1. Indemnity—*Oral promise to answer for the debt of another—Statute of Frauds*, 29 *Car.* 2, *ch.* 3, *s.* 4.

The plaintiff had supplied goods to the defendants, the Lindsay Co., in which the defendant Finn held most of the stock, and was pressing for payment, when Finn verbally promised to pay the debt or see it paid if plaintiff would extend the time for payment and continue to supply goods to the Company, and that he would "go good" for such past and future indebtedness.

Held, that this promise was a "promise to answer for the debt of another" within section 4 of the Statute of Frauds, and that, as it was not in writing, an action for the breach of it could not be maintained.

Beattie v. *Dinnick*, (1896) 27 O.R. 285, and *Harbury & Co.* v *Martin*, [1902] 1 K.B. 778, followed. *Shea* v. *George Lindsay Co.*, 20 M.R. 208.

2. Offer and acceptance—*Liability of debtor to guarantor who has paid creditor.*

A creditor offered to fill defendant's order for goods sent by the plaintiff, the creditor's agent, and to allow him an extra commission if he would guarantee the account. The plaintiff replied that he would guarantee the account for that season only.

Held, that the plaintiff was bound by the guaranty, whether he had notice of the shipment of the goods or not, and, being so bound, was entitled to recover from the defendant the amount paid under the guaranty which, as found upon the evidence by the trial Judge, had been given at defendant's request.

Brandt on Suretyship, par. 213, referred to.

Sleigh v. *Sleigh*, (1850) 5 Ex. 514, distinguished.

The terms of sale of the goods were "four months, or 5 per cent off 30 days," and the creditor had taken defendant's note at four months for the amount of the account, but the plaintiff knew the terms and had agreed to them.

Held, that, although the time of payment was thus postponed beyond the time

mentioned by plaintiff in his guaranty, yet he was bound by it as it should be presumed that he had guaranteed the account payable on the terms to which he, as the creditor's agent, had agreed. *Fraser* v. *Douglas*, 16 M.R. 484.

See CONTRACT IX, 3; XV, 8.
— PRINCIPAL AND SURETY, 3.

GUARANTY BOND.

See PRINCIPAL AND SURETY, 2.

GUARANTY INSURANCE.

See PRINCIPAL AND SURETY, 3.

GUARDIAN.

See INFANT, 10, 12.

HABEAS CORPUS.

See CONVICTION, 2,
— CRIMINAL LAW, XIII, 4; XV, 1, 2, 3, 4; XVI, 5, 6; XVII, 8, 16.
— INFANT, 5.
— MILITARY LAW.

HAIL INSURANCE.

See MUTUAL INSURANCE.

HALF-BREED LANDS.

See EQUITABLE ASSIGNMENT, 2.
— SALE OF LAND FOR TAXES, X, 7.

HALF-BREED LANDS ACT.

1. **Conveyances by half-breed children**—*Construction of Con. Stat., c. 42, s. 3.*

In answer to a question submitted by the Registrar-General, for the opinion of the Court as to the construction of Con. Stat., c. 42, s. 3, the following report was returned.

KILLAM, J.—(After discussing the matter at some length), I shall therefore certify to the Registrar-General that, in my opinion, the third section does not apply to a half-breed minor between 18 and 21 years of age, or empower him to convey or otherwise dispose of any portion of the 1,400,000 acres of land that he may be entitled to by inheritance or purchase, but that it empowers such half-breed child merely to convey or dispose of such specific portion of the 1,400,000 acres as may have been allotted to him by the Crown as his own share of those lands. *Re Campbell*, 5 M.R., 262

2. **Conveyance by infant**—*Consent of husband of illegitimate infant—Construction of Man. Stat. 46 & 47 Vic., c. 29, s. 1—Infant, conveyance by, voidable—Champerty.*

The Statute of Manitoba, 46 & 47 Vic., c. 29, s. 1, which was passed to remove doubt as to the proper interpretation of section 3 of the Half-Breed Lands Act in the C.S.M., did not apply to married illegitimate children, so as to obviate the necessity of procuring the consent of the husband or wife of such child to a conveyance made during minority.

Held, also, that a conveyance to the defendant made by an infant was not binding on her when she came of age, and was voidable at her option, and that she effectually avoided such conveyance by a conveyance of the lands to the plaintiff, executed a few months after she came of age.

Held, also, that, although the plaintiff knew of the former sale to defendant and the transaction on his part was disreputable, it was not champerty for him to purchase the land as he did. *Robinson* v *Sutherland*, 9 M.R., 199.

3. **Infant's Land, sale of**—*Order for sale—Complying with conditions of—Conveyance before order made — Purchase money—Payment into court of—Condition precedent.*

In an issue under the Real Property Act, the plaintiffs claimed title under a sale of a half-breed infant's lands alleged to have been made pursuant to an order of the Court. The order, purporting to be made in the matter of N.D., an infant, and dated 9th November, 1880, directed that the lands be sold to St. P. for $200, and that, upon payment into court of the purchase

money to the credit of the matter, A. D., the father and next friend of the infant, be empowered to make and execute a proper deed of conveyance to the purchaser. A deed to St. P. was produced at the trial, which recited that it was made pursuant to an order of the Court. It was executed by the infant by his next friend for the expressed consideration of $200, and there was a receipt for the money endorsed thereon and signed in the same way. The deed was dated the 11th October, 1880, and there was no other evidence of the time of its execution. The money was not paid into court until the 23rd September, 1881, and on the 30th August, 1881, St. P. had re-sold the land for $546 to H., who appeared to have paid the money into court.

Held, 1. In the absence of evidence to the contrary, the deed must be assumed to have been executed on the day it bore date.

2. The deed of conveyance to St. P. was invalid, because it was executed without authority from the Court, and the order afterwards made did not provide for a conveyance already executed, and by its terms the payment of the money into court was a condition precedent to the exercising of the power to convey, and sections 10, 11 & 12 of the Half-Breed Lands Act, R.S.M., c. 67, did not cure these defects.

3. Section 11 pre-supposes the existence of some order, fiat or decree authorizing the sale. Its object is to cure defects, irregularities and omissions in connection with the doing of something authorized by the Court to be done, not to validate proceedings wholly unauthorized.

Barber v. *Proudfoot*, decided 30th November, 1889, unreported, followed.

4. The most restricted construction possible must be placed upon these enactments.

O'Brien v. *Cogswell*, 17 S.C.R. 420, and *Whelan* v. *Ryan*, 20 S.C.R. 65, followed.

The question of the necessary proof of an order of the Court for the sale of a half-breed infant's lands, where the order had been lost, considered. *Hardy* v. *Desjarlais*. *Kerr* v. *Desjarlais*, 8 M.R., 550.

HANDWRITING.

See WILL, III, 3.

HAUNTED HOUSE.

See SLANDER OF REAL ESTATE.

HAY.

Growing wild hay, whether goods or land, when purchaser is to cut and remove it—*Sale of Goods Act, R.S.M.*, 1902, *c.* 152, *ss.* 2 (*h*), 14.

Growing wild hay, when sold to a person who is to cut and remove it the same season, is "goods" within the meaning of paragraph (*h*) of section 2 of The Sale of Goods Act, R.S.M., 1902, c. 152, and there is, under section 14 of the Act, an implied warranty of title by the vendor of hay sold under such circumstances.

Marshall v. *Green*, (1875) 1 C.P.D. 35, followed. *Fredkin* v. *Glines*, 18 M.R., 249.

See CONTRACT, XV, 15.
— HUSBAND AND WIFE, I, 2.
— POSSESSION OF GOODS.

HIGHWAY.

1. Registry Act, R.S.M. 1902, c. 150. s. 68—*Municipal Act, R.S.M.* 1902, *c.* 116, *ss.* 662, 699—*Purchase and dedication of land for a public highway by the municipality—Priority as against subsequent purchaser who registered his deed first.*

When land is purchased by and conveyed to a municipality under The Municipal Act for a road and thereafter dedicated and used as a public highway, it becomes vested in the Crown by virtue of section 622 of the Act, and a subsequent purchaser, although he bought without notice of the prior conveyance or of the existence of the road and registered his deed before the registration of the deed to the municipality, acquires no title to the road as against the Crown notwithstanding section 68 of The Registry Act, R.S.M., 1902, c, 150, which does not apply to the Crown and notwithstanding the failure of the municipality to register the by-law establishing the road as required by section 699 of The Municipal Act.

Such purchaser, therefore, has no title to complain of the registration of the deed to the municipality as a cloud on his title. *Pulkrabek* v. *Russell*, 18 M.R., 26.

2. Width of highways in Manitoba—*Crown patent—Reservation of travelled road—Subsequent survey increasing width of road.*

The Crown patent under which the plaintiff held the land in question reserved all travelled roads crossing the same "existing as such on the 15th day of July, 1870, which by and under the laws of Assiniboia were or may be held to be legally public highways," and the evidence showed that the road in question had never extended south of a fence which the plaintiff had built along the south side of the road and he had been in undisturbed occupancy and enjoyment of the land south of the fence up to the time the defendants had removed it.

The defendants, however, relied on a survey of the road in question made in 1886 by a surveyor named Dufresne alleged to have acted under instructions from the Dominion Government, of which instructions no proof was given. It appeared that Dufresne had, by his field notes, made the road 99 feet wide on the plan prepared by him, but it was not shown by whom he was sent to make the survey or what authority he had to make it. It also appeared that the Provincial Government had, by order in council dated in 1899, approved of a report referring to the surveying and transferring to the Province of certain thoroughfares or trails, and amongst them the road in question as surveyed by Dufresne in 1886, and that the Dominion Government had, by order in council dated in 1900, approved the above report and directed the said trail to be transferred to and vested in the Province of Manitoba.

Held, following *Pockett* v. *Poole*, 11 M.R. 508, that the survey in question was not originally legal and binding and was not made so by the Dominion order in Council passed 14 years thereafter, and that the Dominion Government, after granting the patents for the lands, could not afterwards interfere with the private rights of parties holding under them. *Heath* v. *Portage la Prairie*, 18 M.R., 693.

3. Width of highways in Manitoba—*R.S.C.* 1906, *c.* 99, *s.* 9.

The plaintiff municipality contended that the public travelled road through the defendant's property, instead of 66 feet wide, should be 99 feet in accordance with a survey made in 1886 by a Dominion Land surveyor, pursuant to section 3 of 49 Vic. (D), now section 9 of chapter 99 of the R.S.C. 1906. In authorizing the surveyor to survey the road, the Surveyor-General had directed him to make the road 99 feet wide. This was done and, in 1900, an order-in-council was passed by the Dominion Government approving the survey and transferring to and vesting the road in the Province of Manitoba for the purposes of a public highway.

All the evidence, however, according to the finding of the trial judge, showed that the road in question was only 66 feet wide for many years prior to the survey referred to.

Held, that the Surveyer-General had no authority to make the road of a greater width than it had been or to deprive the defendant of any of his land by giving such a direction, that the Dominion Government could not by legislation interfere with the rights the defendant had acquired, nor could it attempt to do so by order-in-council, that the approval of the survey by the Dominion Government could not deprive the defendant of any of his land, and that he was not bound to move his fence back so as to make the road wider than 66 feet. *Rural Municipality of St. Vital* v. *Mager*, 19 M.R., 293.

See MUNICIPALITY, IV, 3, 6; VII, 5.
— RAILWAYS, IV, 3.

HIGHWAY CROSSING.

See RAILWAYS, VIII, 3.

HIRING AND SERVICE.

See CONTRACT, XV, 9.
— MASTER AND SERVANT, IV, 1, 2.
— STATUTE OF FRAUDS, 4.

HOLDER IN DUE COURSE.

See BILLS AND NOTES, III, 2; VI, C; VIII, 1, 8, 9, 10, 11, 12; X, 4.
— FRAUDULENT CONVEYANCE, 13.
— PARTNERSHIP, 1.
— SUMMARY JUDGMENT, I, 3.

HOLIDAYS.

See TIME, 1, 3, 5.

HOMESTEAD.

1. Agreement to convey—*Lien of vendee for purchase money—Laches—Issue to try facts—Costs.*

A statute declared that all assignments and transfers of homestead rights before the issue of the patent except, &c., shall be null and void. By another clause the homesteader might acquire a pre-emptive right to other lands, "but the right to claim such pre-emption shall cease and be forfeited upon any forfeiture of the homestead right."

A homesteader before patent agreed to sell both homestead and pre-emption; $50 was paid at once and the balance was to be paid when a deed given with a good title.

The vendor applied for a certificate of title to the pre-emption and the purchaser filed a caveat, and, on it, a petition claiming a lien for the purchase-money.

Held, 1. That the agreement was not illegal as to the pre-emption.

2. That, the Crown not having taken advantage of the forfeiture, but issued the patents, the purchaser acquired a lien upon the pre-emption, although probably not on the homestead.

3. The petition was defective in not showing the petitioner's claim of title.

4. Such a petition need not show upon its face that it is filed in time.

5. Lapse of time which would disentitle a purchaser to specific performance may not affect his lien.

6. A disputed question of fact not tried upon affidavit, but an issue directed and form given.

7. No costs of appeal given when point upon which case disposed of was not argued. *Clarke* v. *Scott*, 5 M.R., 281.

2. Assignment of homestead rights before recommendation for patent.

An assignment of homestead right previous to recommendation is void not only as between the homesteader and the Crown, but also as between the parties to the transaction, (*overruling* DUBUC, J., and WALLBRIDGE, C. J., *dissenting*). In such a case the assignee would not be entitled as against the assignor, even to a lien for improvements placed by the former upon the property.

A voluntary promise to transfer land will not be enforced in equity.

Therefore when a homesteader, free from debt, voluntarily promised before recommendation, to convey the land to his wife, and after recommendation did so convey;

Held, That such conveyance did not, by virtue of the previous promise, cut out a judgment registered before the execution of the conveyance. *Harris* v. *Rankin*, 4 M.R., 115.

3. Conveyance before recommendation—*Estoppel by conduct.*

Defendant C. homesteaded certain land in October, 1880. He was a clerk in plaintiffs' employ and, being desirous of obtaining a loan from plaintiffs upon the land, conveyed it to defendant W. on 1st January, 1883. At that time he had no recommendation for patent. On the 26th January, 1883, he purchased the land under 42 Vic., c. 31, s. 34, s-s. 15. On the 27th January W. executed a mortgage to the plaintiffs. C. received the money, made payments on accounts of interest, and asked time for other payments. The patent issued to C. on 9th June, 1883, and afterwards W. reconveyed to C., who was in reality, always the owner of the land.

Upon a bill to foreclose the mortgage—

Held, 1. That the mortgage was not void, for it was made after the land had been purchased from the Crown, and not while it was a homestead.

2. That C. was, by his conduct, estopped from saying that W. had no title at the date of the mortgage, and from claiming title in himself under the patent. *Manitoba Investment Association* v. *Watkins*, 4 M.R., 357.

4. Registered judgment as charge on—*Form of Certificate—Homestead land prior to patent.*

Homesteads, although prior to patent and subsequent to recommendation exempt from seizure under *fi. fa.*, are subject to be charged by registered judgments.

A certificate of judgment in the form referred to in this case (4 M.R. 115), but having the date correct and its amount such as would shew the judgment to be of record in the Queen's Bench, is valid. *Harris* v. *Rankin*, 4 M.R., 512.

5. Registered judgment as charge on—*Patent, effect of.*

After the registration of a judgment against a homesteader who had obtained his recommendation, he assigned the land to a third party to whom the patent issued.

Held, That the land was liable, notwithstanding the patent, to answer the judgment. *Harris* v. *Rankin*, 4 M.R., 115.

6. **Unpatented Dominion Lands**—*"Transfer"—Incumbrance—Charge to secure debts—Sanction of Minister—Absolute nullity—Construction of statute*—60 & 61 *Vic., c.* 29, *s.* 5.; *R.S.C.* (1906), *c.* 55, *s.* 142.

On 6th August, 1904, the holder of rights of homestead and pre-emption in Dominion lands in Manitoba, which had not then been patented or recommended for patent, assumed to "incumber, charge and create a lien" upon the lands as security for the payment of a debt by an instrument executed without the sanction of the Minister of the Interior.

Held, affirming the judgment appealed from (19 M.R. 97; *ante*, col. 347), that the instrument was in effect a "transfer" and was absolutely null and void under the provisions of the "Dominion Lands Act." *American-Abell Co.* v. *McMillan*, 42 S.C.R. 377.

See DESCRIPTION OF LAND, 1.
— DOMINION LANDS ACT, 1, 2.
— EXEMPTIONS, 1, 3, 7.
— REGISTERED JUDGMENT, 4.

HORSES RUNNING AWAY.

See NEGLIGENCE, VI, 2; VII, 1.

HOTEL KEEPER.

Loss of property of guest — *Negligence—Contributory negligence.*

Appeal from verdict of County Court in favor of plaintiff.

The plaintiff arrived at the City of Winnipeg, by train, and, intending to put up at defendants' hotel, delivered some of his luggage to the driver of a Baggage Transfer Company to be taken there. He then walked to the hotel, registered his name and was assigned a room where he left his valise which he had carried with him. Later in the same day, the Transfer Company's driver brought the plaintiff's parcels to the hotel, left them in the hall with other luggage and informed the hotel clerk in the office that he had done so.

The part of the hall where the parcels were left was not visible from the office.

The hotel was crowded, the City was unusually full of visitors, persons going to and from the hotel bar passed the place where the parcels were and it was not a safe place for unwatched luggage to be left in.

The plaintiff noticed his parcels there about eleven o'clock the same night, but did not remove them or draw the attention of the hotel servants to them. The next day he noticed that the parcels were not in the hall, but said nothing about it until the third day after, when he asked for the parcels. They could not then be found and the presumption was that they had been stolen.

Neither the defendants nor any of their servants had paid any attention to the parcels or moved them in any way.

Held, per RICHARDS, J., that the parcels got into the custody of the defendants when the driver who brought them reported to the hotel clerk that he had done so, that the plaintiff was justified in assuming, when he saw his parcels in the hall, that they were being cared for by the defendants, and that, when he missed them the next day, he had a right to suppose that they had been put into the defendants' baggage room, and that he had not been guilty of such negligence as to disentitle him to recover their value from the defendants.

Per PERDUE, J.—The plaintiff was guilty of such gross negligence, under the circumstances, in not calling the attention of the hotel keepers to his parcels, when he saw them lying in the hall, and taking no steps to have them removed to a safer place, as to relieve the defendants from their common law liability as innkeepers. *Oppenheim* v. *White Lion Hotel Co.*, (1870) L.R. 6 C.P 515; *Cashill* v. *Wright*, (1856) 6 E. & B. 890, and *Jones* v. *Jackson*, (1873) 29 L.T. N.S. 399.

The Court being divided the appeal was dismissed without costs. *Barrie* v *Wright*, 15 M.R. 197.

See LIQUOR LICENSE ACT, 11.

HUDSON'S BAY COMPANY.

See TITLE TO LAND, 3.

HUSBAND AND WIFE.

I. Ownership of Crops Grown on Wife's Land.

1. Husband working wife's farm—*Execution—Notice of.*

A judgment debtor worked a farm belonging to his wife. The seed grain had been purchased partly by each. The husband paid for a portion of the threshing by his labor. He did all the work, and the horses and implements used were his.

Held, That the crop belonged to the husband and could be seized under an execution against him (overruling Dubuc, J.).

Upon the evidence, *Held*, That the plaintiff who had purchased the crop from the wife had notice of an execution against the husband prior to his purchase.

Per Dubuc, J.—(In judgment appealed from.) The Chattel Mortgage Act does not apply to a sale of grain in the stack when the bargain requires the vendor to thresh and afterwards deliver it.

Parenteau v. *Harris*, 3 M.R. 329.

2. Married Women's Act — *Interpleader—Distinction between hay and other crops.*

In an interpleader issue to determine the ownership of a quantity of grain and hay seized by the sheriff under the defendant's execution against the plaintiff's husband, the evidence showed that the husband had previously been engaged in farming on his own account, but had failed; that afterwards the plaintiff leased in her own name the two farms on which the seized crops were grown and went with her husband and family to live on one of them, with the *bona fide* intention, as the trial judge found, of carrying on the farming business for her own benefit; but that the husband did the farm work with the help of the children and a hired man, in much the same way as any farmer does, although his health was not so good and he could not do as much work as formerly, and the plaintiff gave a little assistance.

Held, following *Ady* v. *Harris*, 9 M.R. 127, and *Streimer* v. *Merchants' Bank*, 9 M.R. 546, that, although the wife was the *bona fide* tenant of the land, yet it was the husband who had occupied it and raised the crops in question, and that such crops, except the hay, must be treated as the property of the husband in an issue between his execution creditors and his wife.

As to the hay, however, the majority of the Court (Bain, J., dissenting):

Held, that, being the natural product of the land of which the wife was the tenant, it came under the description of issues and profits of her separate estate referred to in section 5 of The Married Women's Act, R.S.M., c. 95, and that the plaintiff was entitled to it as against the defendants. *Slingerland* v. *Massey Manufacturing Co.*, 10 M.R. 21.

3. Married Women's Property Act—*Interpleader.*

The crops seized under the defendants' execution were raised on the land of the plaintiff, the wife of S. the execution debtor, chiefly by the labor of S. and the children under S.'s superintendence.

The horses and implements used in doing the work were the property of S. At the close of the previous season S. had had the crops on his own farm seized and sold under execution, and the farm was taken from him for a mortgage debt. The plaintiff then arranged to purchase, on credit, the land on which the crops now in question were raised, and to carry on farming operations on her own account, in order, as the Judge found, to support the family and with no intention of defrauding her husband's creditors as they had nothing left that would be available for the latter under execution.

Held, nevertheless, following *Ady* v. *Harris*, 9 M.R. 127, and *Parenteau* v. *Harris*, 3 M.R. 329, that the crops in question must, under all the circumstances, be held to be the property of the husband and not of the plaintiff as against the execution creditors of the former.

Striemer v. *Merchants' Bank*, 9 M.R. 546.

4. Separate business—*Farming business—Onus of proof.*

Held, that, where the husband ostensibly carries on upon the land of his wife the work of farming, it should be presumed, in the absence of evidence to the contrary, that his wife allows him the use of her land for the purpose and that the crops are his, and that, where he does the work with the assistance of a hired man, the *onus* is upon the wife, notwithstanding

her ownership of the land, to establish that the husband is her servant, and the farming business really hers.

Held, also, that such evidence as was presented in this case, (being that of the husband and wife solely) not corroborated by independent evidence, and contradicted by the independent and written evidence, as far as it went, ought not to be taken as sufficient to establish that the farming business was carried on by the wife, although, if the *onus* of establishing this were not upon the wife, it would not sufficiently show that it was not the business of the husband. *Ady* v. *Harris*, 9 M.R. 127.

Distinguished, *Douglas* v. *Fraser*, 17 M.R. 439.

5. Separate business.

At the trial of an interpleader issue between the plaintiff, the wife of the execution debtor, and the defendants, execution creditors of the husband, the Judge found on the facts as follows:—

That the lands on which the crops seized had been grown were mortgaged to the Trust and Loan Company; that the mortgagor, the debtor, had failed in 1893, most of the crops of that year and his stock and farming implements having been seized and sold under execution and chattel mortgage; that, interest being in arrear, the officers of the Loan Company in the spring of 1894, leased the property to the plaintiff for three years, whether by the authority of the Company or not did not appear; but that the plaintiff entered into the lease in good faith, and that both the husband and wife intended and understood that there should be and was a lease to the wife, and that she should and did carry on the work of farming on the said lands for her separate profit and as her separate business; also that the horses and cattle by the work of which the farming operations were carried on had been sold to the plaintiff by the mortgagee under chattel mortgage given by the husband, and that such sale was not fraudulent as against the creditors; that the plaintiff entered into a covenant to pay the rent under the lease and incurred a heavy liability to an implement company for seed grain and implements and binder twine, and also hired the men who were employed to conduct the farming operations; and that she assumed to make a contract with her husband to act as her servant for wages; that she was actually the farmer, and that it was intended and understood between herself and her husband and the Loan Company that she should have the possession and use of the premises; that the farming operations carried on in 1894 under such circumstances constituted a separate occupation by her, and were her separate business; and that on the whole the amounts which she covenanted to pay for the three years of the lease represented the fair rental value of the property for that period; and he entered a verdict for the plaintiff.

On motion to the Full Court to reverse this verdict, the majority of the judges considered that the following additional circumstances appeared by the evidence:—The plaintiff, when she undertook to farm for herself, had no means of her own. The lands on which the crops claimed were grown had in the preceding autumn been ploughed and prepared for planting by the husband, and some of the seed sown in the spring belonged to him. After she leased the land, the plaintiff and her husband and the family continued to live on the homestead as before, and the actual farming work on the land was done for the most part by the husband and two men who had worked for him before the lease was made to the plaintiff.

The majority of the Court considered, also, that clear and unequivocal evidence should be required of the reality of the alleged separate occupation on the part of the wife, and of the hiring of the husband as a farm servant by the plaintiff; and, there being no other evidence as to these matters except that of the plaintiff and her husband, with which they did not feel satisfied;

Held, (DUBUC, J., dissenting), that the evidence was insufficient to establish any separate occupation of the lands by the wife, or that the hiring of the husband as a farm servant was more than an empty form and colorable, or that the farming business carried on was her separate business, and that the verdict entered for the plaintiff should be set aside and a verdict entered for the defendant.

Per DUBUC, J., There was sufficient evidence to support the findings of the trial Judge on the facts; and this case should be decided on the principles laid down in *Murray* v. *McCallum*, 8 A.R. 277; *Dominion Loan and Investment Company* v. *Kilroy*, 14 O.R. 468; *Lovell* v. *Newton*, 4 C.P.D. 7; and *Ingram* v. *Taylor*, 46 U.C.R. 52; and the verdict should not be disturbed. *Goggin* v. *Kidd*, 10 M.R. 448.

Distinguished, *Nichol* v. *Gocher*, 12 M.R. 178.

II. Ownership of Goods in Business Carried on in Wife's Name.

1. Separate property of wife—*Interpleader—Married Women's Act.*

In August, 1890, the judgment debtor who carried on a jewelry business was sold out under execution, and he remained indebted and ceased carrying on business. In March, 1891, his wife opened a jewelry store in her own name. All goods purchased for the business were sold to her and the wholesale dealers would not have sold on credit to the husband. The invoices, drafts, receipts, &c., were all made, and the correspondence conducted, in the name of the wife. She was the tenant of the premises, and paid the rent. The husband was employed in the store,attending to the correspondence and the financial part of the business under a power of attorney from his wife, and he did most of the repairing and assisted in the selling and buying.

The wife was in the shop most of the time, selling, buying and doing some of the repairing. She claimed to have been sixteen years in the jewelry business and to have had a good deal of experience, and she had abandoned keeping house to attend to the business.

Held, that under these circumstances the goods in the shop were the property of the wife as against execution creditors of the husband.

Dominion Savings Co. v. *Kilroy*, 15 A.R. 487, followed. *Doll* v. *Conboy*, 9 M.R. 185.

2. Separate property of wife—*Married Women's Property Act, R.S.M.*, 1902, *c.* 106, *s.* 2 (*b*).

1. The proceeds of the sale by the husband of a parcel of real estate owned by the wife, though they came into the husband's hands prior to 21st May, 1900, when it was enacted that all property standing in the name of a married woman on that date should be deemed to be her property until the contrary is shown, and although the land had been conveyed to her by the husband during coverture, belonged to the wife; for, apart from section 21 of R.S.M., 1892, c. 95, which provided that a man might make a valid conveyance or transfer of land to his wife without the intervention of a trustee, a husband may make a gift of property to his wife, which property, if the gift be completed, will in equity be considered as her separate property, provided that the husband is at the time in a position financially to make the gift, and does not do it with any intention of defrauding his creditors: *Kent* v. *Kent*, (1892) 19 A.R. 352.

2. The profits made in the fur business started with such proceeds and carried on from the first in the wife's name, though managed chiefly by the husband, (all the goods required for the business having been sold to her and on her credit only as the husband had unsatisfied judgments against him) belonged to the wife and so did all goods purchased out of such profits and put into such business.

Dominion Loan, etc. Co. v. *Kilroy*, (1887) 14 O.R. 468, followed.

Ady v. *Harris*, (1893) 9 M.R. 127, and other "farm" cases distinguished.

3. Such profits are protected for the married woman by the definition of the word "property" in sub-section (*b*) of section 2 of R.S.M., 1902, c. 106, as meaning "any real or personal property of every kind and description whether acquired before or after the commencement of this Act, and shall include the rents, issues and profits of any such real or personal property," and by section 5 of the same Act; and such protection is not taken away by the further clause in said sub-section (*b*) reading:—"and includes also . . . all wages, earnings, money and property gained or acquired by a married woman in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband, and in which her husband has no proprietary interest," although it was admitted that the business was not carried on by the wife separately from her husband. The word "profits" as used in those sections should be held to cover gains arising from a combination of skill or work with the earning property or capital as well as those arising only from investments without such combination. *Douglas* v. *Fraser*, 17 M.R., 439.

Affirmed, 40 S.C.R. 384.

III. Separate Business.

1. Liability on contract—*Separate estate—Interest.*

The plaintiff was employed as the servant of the defendant in managing a farm owned by her, and it was understood between them and defendant's husband

that the farming operations, as also a banking business carried on at the same time, were hers. The negotiations for the employment of the plaintiff were conducted by the husband, though partly in the defendant's presence, and it was the husband who was consulted by the plaintiff in all matters of importance relating to the farm as well as to the bank, though at times the defendant was present. The husband gave defendant the benefit of his advice and assistance and also acted as book-keeper for her in the banking business, but it did not appear that he had any fixed salary or what was the arrangement, if any, between him and defendant.

Held, that such participation by the husband would not, in the case of an outsider contracting with his wife, absolutely prevent the finding that the business was carried on by the wife separately from her husband, and that on the evidence such finding was the proper one in this case. If, however, the defendant, on the same state of facts, were claiming the profits or proceeds of the farming operations as against her husband's creditors, it would be impossible to hold it sufficiently proved that the business was *bona fide* intended to be that of the wife alone. It depends on the circumstances of each particular case what is the degree or nature of the participation by the husband which prevents the finding of a separate business.

Merchants' Bank v. *Carley*, (1892) 8 M.R. 258, and *Goggin* v. *Kidd*, (1895) 10 M.R. 448, distinguished.

To be entitled to interest before action a plaintiff must show (1) an express contract for interest, or (2) that the nature of the claim is such that the contract can be implied, or (3) that the debt is payable by virtue of a written instrument, or (4) that there was a demand with notice that interest would be claimed under 3 & 4 Wm. 4, c. 42, s. 28. *Nichol* v. *Gocher*, 12 M.R. 177.

2. Liability of goods for husband's debts—*Onus of proof—Not necessary to prove judgment and execution in interpleader issue.*

The goods of the plaintiff were seized under an execution against her husband. She claimed that she had purchased the goods from a brother of her husband. The original stock of goods had belonged to a former wife of the judgment debtor, and the husband's brother was trustee of her estate. The plaintiff did not satisfactorily show how she became possessed of the separate estate with which the purchase was made.

Held, (Affirming the decision of KILLAM, J.),

1. That the onus of proof was on the plaintiff and that the evidence must be clear and satisfactory as to how she became possessed of her separate estate, and that her own uncorroborated evidence was not sufficient.

2. That, on a sheriff's interpleader, it is not necessary for the execution creditor to prove the judgment and execution. *Ripstein* v. *British Canadian Loan & Investment Co.*, 7 M.R. 119.

IV. OTHER CASES.

1. Liability of husband for goods supplied to household.

When goods are ordered by a married woman living with her husband for use in the household, the presumption of law is that the wife is acting as the agent of her husband, and such presumption is not displaced by the fact that the merchant kept the account in the name of the wife and rendered statements of it from time to time to her instead of to her husband.

Paquin v. *Beauclerk*, [1906] A.C. 160, distinguished. *Vopni* v. *Bell*, 17 M.R. 417.

2. Married women's separate property—*Interpleader—Estoppel.*

Interpleader issue between an execution creditor and the wife of the judgment debtor as to the ownership of horses and cattle.

The evidence showed the wife had money of her own before she married, that with that money she, after the marriage, bought cattle, that she exchanged part of the increase of these cattle for other cattle and for horses, and that in that way, between purchases, exchange and increase, she had acquired the animals in question.

The evidence also showed, however, certain isolated instances of the husband dealing with some of these animals, amongst others that he had given a chattel mortgage on some of them with the wife's consent, and that the farm was the property of her husband.

Held, that the wife was entitled to a verdict upon such evidence, and there would be no estoppel as against her except in favor of the chattel mortgagee.

Haffner v. *McDermott*, K.B. Manitoba, unreported, followed. *Simpson* v. *Dominion Bank*, 19 M.R. 246.

3. Wife suing for personal services—*Corroboration in suit against estate of deceased—Joinder of parties—Notice by administrator disputing claim—R.S.M., c.* 146, *s.* 31.

1 A married woman has no right of action for nursing a person boarding with her and her husband, unless there has been a special agreement with her to pay her for such service; and in that case she should sue for it alone.

Young v. *Ward*, (1897) 24 A.R. 147, distinguished.

2. The claim of a creditor against the estate of a deceased person whose domicile was in Manitoba is not barred in a Manitoba court by failure to sue within six months after a notice under section 31 of R.S.M., c. 146, repudiating the claim given by an administrator of such estate appointed by a foreign court, though the letters of administration be afterwards re-sealed in Manitoba pursuant to The Surrogate Courts Act. Such a notice, to be effectual, must be given by the person who is at the time the duly appointed administrator of the estate in Manitoba.

3. Whilst the evidence of a claimant against the estate of a deceased person should be clear and convincing and, if not corroborated, will not be readily acted on, there is no absolu e rule of law requiring such corroboration in this Province.

In re Garnett, (1885) 31 Ch. D. 1, and *In re Hodgson*, (1885) *ib.* 177, followed. *Doidge* v. *Mimms.*, 13 M.R. 48.

See Administration, 7.
— Alimony, 1.
— Deed of Settlement.
— Examination of Judgment Debtor, 12.
— Fraudulent Conveyance, 11, 14, 19.
— Fraudulent Judgment, 3.
— Fraudulent Preference, IV.
— Landlord and Tenant, I, 2, 4.
— Lunatic, 1.
— Married Woman.
— Principal and Agent, V, 3.
— Principal and Surety, 4.
— Real Property Limitation Act, 4.
— Title to Land, 2.
— Voluntary Conveyance.

HYPOTHECATION OF GOODS.

See Banks and Banking, 5.
— Warehouse Receipt.

ICE AND SNOW ON SIDEWALK.

See Municipality, IV, 3.

IDENTITY.

See Criminal Law, VI, 3.
— Evidence, 11, 26.
— Liquor License Act, 6.

IDENTITY OF CHARGE.

See Extradition, 5.

IDENTITY OF GOODS.

See Practice, XXVIII, 32.

IDENTITY OF PARTIES.

See Staying Proceedings, I, 6.

ILLEGAL CONSIDERATION.

See Bond.

ILLEGAL DISTRESS.

See Distress for Rent, 1, 2, 3.

ILLEGAL SEIZURE.

See Jury Trial, I, 5.

ILLEGALITY.

1. Agreement between one creditor and the debtor to purchase debtor's stock from assignee—*Illegal contract.*

Held, that the declaration hereunder set out, did not disclose a contract void for illegality.

This was a demurrer by the defendant to the following declaration: "For that the plaintiffs had prior to the month of December, 1882, been carrying on business as general provision merchants at the City of Winnipeg; and in the said month of December the plaintiffs assigned to one William Georgeson, the manager of the defendant's business at the said City of Winnipeg, all the stock in trade of the plaintiffs in connection with their said business for the benefit of all the creditors of the plaintiffs, including the defendants; that the said Georgeson thereupon proceeded to try and procure a purchaser for the said stock and assets and the plaintiffs were desirous of buying the said stock and assets, and through the assistance of friends intended making an offer for the purchase of the same, as the defendants well knew; and the defendants in furtherance of the plaintiffs' desire to purchase the said stock and assets, proposed to the plaintiffs that the defendants should purthe same at as small a figure as possible for the benefit of the plaintiffs, and that the plaintiffs should thereafter enter into possession of the said stock and sell and dispose of the same in the ordinary course of business, and that out of the proceeds thereof the defendants should be paid from time to time the weekly receipts, less the living expenses of the plaintiffs, until the amount so to be paid by the defendants for the purchase of the said stock and interest thereon, and in addition thereto such a sum as, if added to the amount which the defendants should receive from the said Georgeson as the assignee of the plaintiffs as aforesaid, would pay to the defendants the whole amount of the then indebtedness to them of the plaintiffs, should be fully paid; and, in consideration that the plaintiffs would not make a bid for the said stock and would exercise their influence to prevent their friends from bidding therefor, the defendants promised the plaintiffs that they, the defendants, would purchase the said stock at as small a figure as possible, and would allow the plaintiffs to enter into possession and sell and dispose of the same until the amount paid by the defendants, together with interest thereon and the further amount aforesaid, should be repaid to them out of the proceeds as above set forth; and that the plaintiffs should be entitled to the balance of said stock, or the proceeds thereof for their own use and benefit; and the plaintiffs did refrain from bidding on the said stock, and did exercise their influence to induce their friends to refrain from bidding thereon; in consequence of which, and in consequence of it being known to the other creditors of the plaintiffs that the defendants were in reality purchasers for the benefit of the plaintiffs, and in pursuance of the said agreement, the defendants were enabled to and did purchase the said stock at a price very much below its value." The declaration then alleged a breach of the agreement. *Toussaint* v. *Thompson*, 3 M.R. 504.

Affirmed, 4 M.R. 499.
As to costs, see 5 M.R. 53.

2. Gas meters not inspected—*Illegal contract.*

A statute, after reciting that it was expedient "that the measurement of gas sold and supplied . . . should be . . . regulated by one uniform standard, . . . and that all gas meters should be inspected and stamped," provided that it should "not be lawful to fix for use any gas meter which has not been verified or stamped as hereinafter provided," and imposed a penalty for so doing.

In an action by a gas company for the price of gas supplied through an uninspected and unstamped meter,

Held, that there must be implied, from the prohibition against fixing a meter for use, a prohibition against supplying gas through it, and that the plaintiff could not recover. *Manitoba Electric & Gas Light Co.* v. *Gerrie*, 4 M.R. 210.

Distinguished, *Ferris* v. *C.N.R.*, 15 M.R. 134.

3. Recovery of lands conveyed to defeat prior purchaser—*Pleading—Illegal transaction.*

A defendant who wishes to rely on the illegality of a transaction "must clearly put forward his own scoundrelism" in his answer, KILLAM, J., dissenting.

Where land has been voluntarily conveyed to the grantee to hold it for some illegal purpose, and that purpose has not been carried out, the grantor is not prevented from taking proceedings to recover back the land. KILLAM, J., dissenting. *Mulligan* v. *Hubbard*, 5 M.R. 225.

4. Sale of whiskey to be taken to N. W. T.—*Illegal contract.*

Plaintiff agreed to put on board the cars at B. a certain quantity of whiskey and potatoes; he knew that it was the defendant's intention to ship them through the North-West Territories without obtaining a permit, and that to do so was illegal; and he assisted in the transaction by concealing the whiskey among the potatoes. The defendants agreed to pay the price of the articles when placed on the cars.

In an action for the price of the goods—

Held, 1. That, even if the plaintiff had agreed to ship the goods, their acceptance by the railway was a performance of the contract, although the railway might have subsequently refused to give a shipping bill.

2. A contract lawful in itself is illegal, if it be entered into with the object that the law should be violated.

3. As a matter of public policy courts should refuse to enforce contracts projected in violation or intended violation of Dominion legislation, although that legislation may not apply to the Province in which the contract is made or is sought to be enforced.

4. The fact that the illegal purpose was not carried out is immaterial.

5. The contract for the potatoes and whiskey being an entire contract, the plaintiff could not recover for the potatoes, the defendants not having accepted or received them. *Hooper* v. *Coombs*, 5 M.R. 65.

See Bills and Notes, VIII, 9, 11.
— Chose in Action, 1.
— Conspiracy in Restraint of Trade.
— Dominion Lands Act, 1.
— Gas Inspection Act.
— Injunction, I, 7.
— Liquor License Act, 11.
— Municipality, VIII, 4.
— Pleading, I, 2.
— Replevin, 6.
— Sale of Land for Taxes, IV, 3; IX, 2.
— Weights and Measures Act.

ILLEGITIMATE CHILD.

See Half-Breed Lands Act, 2.
— Infant, 4.
— Seduction, 2.

ILLITERATE PERSON.

See Contract, XV, 16.
— Vendor and Purchaser, VI, 5.

ILLITERATE VOTERS.

See Municipal Elections, 4.

IMPLIED AUTHORITY.

See Liquor License Act, 2.

IMPLIED CONDITION.

See Contract, XII, 1; XIV, 2.
— Sale of Goods, V, 2.

IMPLIED CONTRACT.

See Infant, 8.
— Railways, II, 1.
— Right of Action.

IMPLIED COVENANT.

See Contract, XV, 5.
— Indemnity, 4.
— Landlord and Tenant, IV, 2.
— Mortgagor and Mortgagee, VI, 6.
— Rectification of Deed, 1.

IMPLIED OBLIGATION.

See Evidence, 19.

IMPLIED POWER.

See Expropriation, 2.

IMPLIED WARRANTY.

See Contract, XII, 1; XIV, 1.
— Costs, XI, 9.
— Sale of Goods, V.
— Vendor and Purchaser, VII, 12.

IMPOSSIBILITY OF PERFORMANCE.

See ACCIDENT INSURANCE, 2.
— MUTUAL INSURANCE, 2.
— REPLEVIN, 1.

IMPRISONMENT.

See CRIMINAL LAW, XVII, 19.

IMPROVEMENTS UNDER MISTAKE OF TITLE.

See WILL, I, 1.

IMPROVIDENCE.

See CROWN PATENT, 5.
— DEED OF SETTLEMENT.

INADVERTENCE.

See PRACTICE, XIV, 2.

INCUMBRANCES.

See PARTIES TO ACTION, 6.
— REAL PROPERTY LIMITATION ACT, 1.
— VENDOR AND PURCHASER, III; VI, 6.

INDECENT ASSAULT.

See CRIMINAL LAW, IV, 2.

INDEMNITY.

1. Covenant to pay off mortgage—*Quia timet—Parties—Trustees—Relief over against cestuis que trustent—Evidence of parol agreement.*

In a conveyance of land the grantee covenanted "to save harmless and indemnified" the grantor from a mortgage previously executed by him and from all claims and demands in respect thereof.

Held, 1. That after demand made by the mortgagee for payment upon the grantor, and before the grantor had paid any money, he could obtain specific performance of the contract.

2. The mortgagee would not be a proper party to such a bill.

3. The grantor must rely upon the covenant and not upon any express or implied agreement to pay off the mortgage.

The answer set up that the defendant purchased not for himself but as the agent and trustee for five other persons. There was no proof of this fact other than a recital in a conveyance to which the defendant and two of the alleged *cestuis que trustent* were parties.

Held, 1. That the conveyance was no evidence against the plaintiff.

2. That the answer could not be read as evidence against the plaintiff.

3. That the allegations in the answer might be considered with a view to directing further investigation into particular facts.

4. That, as the *cestuis que trustent* lived out of the jurisdiction, the Court would not, in its discretion, allow further evidence to be given.

5. *Quære*, whether, in any case, the defendant would be entitled to have the *cestuis que trustent* made parties. *Horsman* v. *Burke*, 4 M.R. 245.

2. Covenant to indemnify—*Action on, before payment by covenantee.*

A., the owner of land subject to two mortgages, conveyed to B. subject to the mortgages, and B. covenanted "to pay off and discharge the above-recited mortgages and interest as the same shall become due, and forever save harmless the said party of the second part from any loss, costs, or expenses connected therewith."

Held, that an action might be brought upon this covenant and the amount due upon the mortgages recovered before payment of any part of them by the covenantee. *Cullin* v. *Rinn*, 5 M.R. 8.

Distinguished, *Grundy* v. *Grundy*, 10 M.R. 327, *Sutton* v. *Hinch*, 19 M.R. 705.

3. Covenant to indemnify—*Pleading.*

At the dissolution of partnership between plaintiffs and defendant, the plaintiffs covenanted with the defendant that they would pay the liabilities of the firm to a bank, but no time was fixed for payment.

Defendant, by way of counterclaim against the plaintiffs' declaration, claimed damages under this covenant, and alleged

that plaintiffs had failed to pay the debt, and that the bank held defendant liable for it and had threatened to sue him, and that his credit was unfavorably affected by the fact of the said liability standing against him.

Plaintiffs replied that they had paid off about two-thirds of the original liability, and that the balance would be paid in the ordinary course of business in a short time, and that plaintiffs had given ample security to the bank for such balance, and that the bank had not in any way called on the defendant to pay or satisfy the debt, and had not threatened or intended to sue or harass the defendant therefor.

Held, that this replication was good. *Cullin* v. *Rinn*, 5 M.R. 8; *Leith* v. *Freeland*, 24 U.C.R. 132; *Lethbridge* v. *Mytton*, 2 B.& Ad. 772, distinguished. *Grundy* v. *Grundy*, 10 M.R. 327.

4. Implied undertaking to imdemnify grantor—*Security for debt—Estoppel—Recital as estoppel.*

The plaintiff filed his bill to compel the defendants to indemnify him in respect to a mortgage made by him upon certain land which he had conveyed to them subject to the mortgage, under the following circumstances:—

Plaintiff, being indebted to the defendants in a sum of about $16,000, executed a bill of sale to them of a large amount of personal property. This bill of sale contained a recital that the plaintiff had contracted and agreed with the defendants for the absolute sale to them of the same and of the equity of redemption in the land in question granted by him to them by deed of even date, in consideration of the release by the defendants from his indebtedness to them; and on the same day the plaintiff executed a conveyance of his equity of redemption in the lands mentioned to two of the defendants for the expressed consideration of $1,000.

The Chief Justice, who had heard the cause, found upon the evidence that there was no verbal agreement to indemnify the plaintiff against the mortgage referred to, and that the defendants had not purchased the lands in the ordinary sense of that word, but had merely taken the conveyance of the equity of redemption as security, intending to make good to plaintiff any surplus which they might realize out of the property transferred to them, and at the same time to release the plaintiff from all his liabilities to them.

Held, that, under such circumstances, there being no expressed stipulation on the subject, the right to indemnity arises from the sale of the incumbered land and not from the mere conveyance; and that such right does not arise where a conveyance is taken merely as security for a debt, and the grantee does not go into possession and receipt of the profits of the land; and that it is only as between a real vendor and a real purchaser, in the ordinary sense of the words, that such right of indemnity arises.

Held, also, that defendants were not estopped by the recital in the bill of sale from denying the fact of their having purchased the property, and that such a recital does not operate as an estoppel unless in an action directly founded on the instrument containing the recital or in one which is brought to enforce the rights arising out of such instrument. *Fullerton* v. *Brydges*, 10 M.R. 431.

See GARNISHMENT, IV, 2.
— GUARANTY, 1.
— MORTGAGOR AND MORTGAGEE, VI, 6, 8.
— PRACTICE, XXVIII, 13.
— RECTIFICATION OF DEED, 1.
— RIGHT OF ACTION.
— VENDOR AND PURCHASER, III, 1.

INDEPENDENT ADVICE.

See ALIMONY, 6.
— DEED OF SETTLEMENT.
— UNDUE INFLUENCE.

INDIAN ACT.

See CRIMINAL LAW, XVI, 4.

INDIAN AGENT.

See CRIMINAL LAW, XVI, 4.

INDIANS.

1. Indian Act, R.S.C. 1906, c. 81, s. 102—*British North America Act, s.* 91, *s-s.* 24—*Estoppel Act, R.S.M.* 1902, *c.* 56—*Vendors' lien—Dismissal of petition following caveat under the Real Property Act.*

Indians in Canada are British subjects and entitled to all the rights and privileges of such, except so far as those rights are restricted by statute, and, notwithstanding sub-section (24) of section 91 of the British North America Act, 1867, they are subject to all provincial laws which the Province has power to enact: *Reg. ex rel. Gibb* v. *White*, 5 P.R. 315, and *Rex* v. *Hill*, (1907) 15 O.L.R. 410.

An Indian has the same right to sell or dispose of land which has been allotted to him by the Dominion Government as his own individual property as any other British subject has and neither section 102 of the Indian Act, R.S.C. 1906, c. 81, which prevents any person acquiring any lien or charge on real property of an Indian not subject to taxes under the last three preceding sections, nor any other provision of the Act imposes any restriction on the right of selling outright any of his individual property.

Totten v. *Watson*, (1858) 15 U.C.R. 392, followed.

The Estoppel Act, R.S.M. 1902, c. 56, applies to conveyances made by Indians as well as others, and, where an Indian has given a deed of his land with the covenants mentioned in that Act, the subsequent issue of the Crown patent to him vests the title in the grantee in fee simple.

Dismissal of petition following caveat under the Real Property Act delayed to enable petitioners to take preceedings to establish a vendor's lien for unpaid purchase money under prayer for general relief. *Sanderson* v. *Heap*, 19 M.R. 122.

2. Mortgage on land in reserve—*Ejectment thereon.*

A mortgage made by an Indian living on a reserve of land in the reserve is void, and judgment in ejectment recovered thereon is also void, and a sheriff is not bound to execute a writ issued thereon. *Black* v. *Kennedy*, T. W., 144.

INDICTABLE OFFENCE.

See SOLICITOR, 2, 6.

INDICTMENT.

See CRIMINAL LAW, IV, 1; VI, 4; VII, 1, 2; X, 1; XI.
— CRIMINAL PROCEDURE, 1.
— MUNICIPALITY, IV, 1.

INDORSEMENT.

See BILLS AND NOTES, VIII, 10.

INFANT.

1. Agreement to purchase land—*Specific performance—Damages in lieu of—Agent.*

1. The appointment by an infant of an agent to act for him is not void but only voidable if it is to his advantage, and an infant may elect to ratify and take advantage of a contract entered into by an agent for him and the Court will, in the exercise of its equitable jurisdiction, assist the infant in enforcing his rights.

2. An infant can purchase land and enforce the contract against the vendor, at least to the extent of recovering damages against the vendor for breach of the contract.

Warwick v. *Bruce*, (1813) 2 M. & Sel. 205, followed.

3. The fact that the statement of claim asks for specific performance of a contract of sale, when specific performance cannot be granted, does not bar the plaintiff from recovering damages for breach of the contract, when these are also claimed in the alternative.

Hipgrave v. *Case*, (1885) 28 Ch. D. 356, distinguished. *Johannson* v. *Gudmundson*, 19 M.R. 83.

2. Avoidance of contract made by—*Repudiation during infancy—Conduct after attaining majority—Action to rescind contract—Laches—Failure to return or offer to return money received under contract—Non-suit without prejudice to subsequent action.*

The repudiation by an infant during infancy of a contract previously entered into will have the same effect as such repudiation would have if made after attaining majority, provided nothing is done since attaining majority to ratify the contract, and a delay of 17 months in commencing an action to rescind should not be treated as a ratification.

The plaintiff in such an action, however, to whom during infancy the greater part of the consideration for the contract has been paid, should return or offer to return the money received with interest and, if this has not been done, a non-suit should be entered, without prejudice to the bringing of another action.

Phillips v. *Sutherland*, 15 W.L.R. 594, 22 M.R. 491.

3. Custody of—*Habeas Corpus—Application by father for custody of child—Misconduct—Onus of establishing.*

It is *prima facie* the right of a father to have the custody of his infant child, and the care of its education and bringing up.

The *onus* of proving him unfit for such a charge rests upon the person who seeks to take the child away, or to keep it away from him.

The Court is always unwilling to interfere with the Common Law rights of the father.

That the conduct of a husband is such that his wife cannot live happily with him, is not a sufficient cause for interfering with his right to the custody of the children. *Re Foulds*, 9 M.R. 23.

4. Custody of—*Right of mother of illegitimate child to his custody.*

Although the mother of an illegitimate child has *prima facie* a right to his custody, notwithstanding any agreement she may have made to the contrary, yet the Court has a discretion to refuse to accede to her wishes if it is shown or appears to be likely that it would be detrimental to the best interests of the child to return him to her control.

Under the circumstances set forth in the judgment, it was held that such discretion should be exercised by leaving the child where the mother had originally placed him.

Reg. v. *Nash*, (1883) 10 Q.B.D. 454, and *Barnardo* v. *McHugh*, [1891] A.C. 388, followed. *Re Slater*, 14 M.R. 523.

5. Custody of—*Contest between father and mother—Infants' Act, R.S.M. 1902, c. 79, s. 32—Habeas corpus—Conditions attached to order.*

Application by the father for the custody of two children, aged seven and five respectively, who had been brought into Court by their mother under a writ of *habeas corpus*. The evidence showed, in the opinion of the Judge, that it was more in the interest of the children that they should remain with their mother than that the father should have the custody of them.

Held, that, under section 32 of the Infants' Act, R.S.M. 1902, c. 79, an order should, under the circumstances of this case, be made for the delivery of the children into the sole custody of the mother, notwithstanding the *prima facie* Common Law right of the father.

Re Foulds, (1893) 9 M.R. 23, referred to.

Conditions attached that, without leave of a Judge, the children should not be removed from the Province, and that they should not be taken out of the City of Winnipeg without the father being kept informed of their whereabouts.

Liberty to the father to apply again in any way in the matter, should he desire to do so, because of circumstances arising hereafter. *Re Tomlinson*, 21 M.R. 786.

6. Decree against infants—*Reserving a day for infants to show cause.*

Held, a decree against infants should not reserve a day to show cause after they come of age. *Scottish Manitoba Investment & Real Estate Co.* v. *Blanchard*, 2 M.R. 154.

7. Gift—*Money received by defendant to the use of the plaintiff—Presumption in case of money transaction between man and woman living together in adultery—Pleading.*

Action for money received by defendant for the use of the plaintiff. Plaintiff, an infant, and defendant lived together as wife and husband, though not married. Plaintiff handed to defendant various sums of money obtained by prostitution while they were thus living together. Part of this money defendant used in purchasing an interest in a hotel property.

Defendant simply denied the allegation in the statement of claim.

Held, 1 There was no presumption of a gift under the circumstances, and, as the defendant had set up no other defence than a denial of the debt, the plaintiff was entitled to judgment.

2 Plaintiff was entitled to a charge and lien on defendant's interest in the hotel property for the money and costs and to have the same sold to satisfy her claim. *Desaulniers* v. *Johnston*, 20 M.R. 64.

Appeal dismissed, 46 S.C.R. 620.

8. Maintenance of, action for—*No formal promise to pay—Request—Implied agreement.*

Action for maintenance of infant. Defendant's wife having died, defendant requested plaintiff's wife to take charge of the child, which she did for over three years, when the child was returned to her father. There was no formal promise by the defendant to pay for the keeping of the child.

Held, that, if there was no formal promise to pay by the defendant, there was no formal promise to keep the child without remuneration and, as there was a request, an agreement to pay should be implied.

Per KILLAM, J.—The mere fact of the maintenance by one person of the child of another does not imply a contract to pay for such maintenance.

Per BAIN, J.—Apart from contract, a father is under no obligation, that can be enforced in a civil action, to support his children. *Munro* v. *Irvine*, 9 M.R. 121.

But see now R.S.M. 1902, c. 107, s. 8.

9. Maintenance of children by father.

Held, 1. A father cannot, except under Con. Stat. Man., c. 39, s. 11, be ordered to pay a sum for maintenance of his child in another's custody.

2. A decree cannot be made against a father for past maintenance of his children, although payments might be made for that purpose out of funds of infants in court. *Wood* v. *Wood*, 2 M.R. 198.

10. Guardian or next friend—*County Court.*

Although an infant may, perhaps, sue in the County Court and have a transcript of the judgment filed in the Queen's Bench, without a guardian or next friend being appointed; yet he cannot obtain an order to examine the defendant as a judgment debtor in the Queen's Bench without a guardian or next friend. *Becher* v. *McDonald*, 5 M.R. 223.

11. Next friend—*Staying proceedings—Delay in making application.*

Where an order is made for the trial of an interpleader issue between an infant claimant as plaintiff and an execution creditor, and the plaintiff in the issue desires to proceed, a next friend should be appointed, and proceedings will be stayed on application of the defendant in the issue until such appointment is made.

The infant claimant had unsuccessfully appealed to the Full Court against the interpleader order, and no application for the appointment of a next friend had been made until after the service of the issue under the interpleader order.

Held, that the present application was not too late, as it was not necessary that a next friend should be appointed to act for the infant before the present stage of the interpleader proceedings.

Campbell v. *Mathewson*, 5 P.R. 91; *Grady* v. *Hunt*, 3 Ir.C.L. 525, followed. *Grant* v. *McKay*, 10 M.R. 243.

12. Permission to sue by next friend in forma pauperis—*Practice.*

An infant cannot sue *in forma pauperis* by next friend, unless it is shown that he cannot procure as next friend a person who is willing to assume responsibility for costs, and unless the proposed next friend is also a pauper.

Lindsey v. *Tyrell*, 24 Beav. 124, followed.

The Court will not appoint the official guardian of infants to bring an action as next friend of a pauper infant without his consent to assume the ordinary responsibility attaching to that position. *Re Sturgeon*, 20 M.R. 284.

13. Registered judgment against infant will bind his lands.

Section 3 of The Judgments Act, R.S.M. 1902, c. 91, making a registered judgment a lien and charge upon the lands of the judgment debtor "the same as though charged in writing under his hand and seal," must be read as implying such a charge as an adult could create, so that an infant's lands will be bound by the registration of a certificate of judgment against him in the same way as those of an adult. *McDougall* v. *Gagnon*, 3 W.L.R. 387.

See HALF-BREEDS LANDS ACT, 2, 3.
— NEGLIGENCE, VII, 2.
— PARTNERSHIP, 8.
— PRACTICE, XX, B, 5.
— WILL, I, 1; III, 1.

IN FORMA PAUPERIS.

See INFANT, 12.

INFORMATION.

See CRIMINAL LAW, I, 1, 2; VII, 2; XVII, 18.
— EXTRADITION, 8.
— LIQUOR LICENSE ACT, 7, 8, 10.
— PROHIBITION, III, 2.

INFORMATION TO RESTRAIN NUISANCE.

Highway—*Dominion or Provincial Attorney-General—Demurrer—Multifariousness.*

Held, 1. There is no rule on the subject of multifariousness of universal application. Each case must be decided by a consideration of what will be convenient under its particular circumstances.

2. Although defendants have several and distinct rights, a demurrer for multifariousness may not lie.

3. Where an information was filed to remove obstructions to two intersecting streets against W., who owned the corner lot, and his lessees and mortgagee, some of whom were interested in one frontage and some in the other, a demurrer for multifariousness was overruled.

4. The Attorney-General for the Province is the proper informant in a suit to restrain the obstruction of highways.

5. It is not necessary that an information should disclose an interest in the relator. If the relator be also plaintiff he must have an interest. *Attorney-General* v. *Wright*, 3 M.R. 197.

INJUNCTION.

I. To Restrain Various Acts.
II. Against Breach of Contract.
III. Exparte Injunctions.
IV. Other Cases.

I. To Restrain Various Acts.

1. Blasting operations on adjoining land—*Evidence in reply going to strengthen the original case—Non-disclosure of material facts on application for injunction—Offer to accept bond as security against damages—Costs.*

1. When evidence is given to the satisfaction of the Judge that there is a strong probability of injury to the plaintiffs' building by the continuance of blasting operations for the loosening of frozen earth on adjoining land, it is proper, on motion to continue an *ex parte* injunction, to grant an interlocutory injunction restraining the contractor until the hearing of the action from carrying on such blastings in such a manner as to injure the plaintiffs' building, although there is no proof that any actual injury to such building has already resulted.

Fletcher v. *Bealey*, (1885) 28 Ch.D. 688, and *Atty.-Gen.* v. *Manchester*, [1893] 2 Ch. 87, followed.

2. There is a discretion in the Judge on the hearing of such a motion to allow affidavits in reply which contain statements going merely to strengthen the original case; and, when an opportunity is given to the defence to answer the affidavits in reply, the Full Court on appeal will not interfere with such discretion.

Peacock v. *Harper*, (1887) 7 Ch.D. 648, followed.

3. The non-disclosure of material facts on the application for an *ex parte* injunction for a limited time, although a ground for discharging it, will not necessarily disentitle the plaintiffs to succeed on a motion to continue the expiring injunction when both sides present their cases fully, and the Court is not bound to specifically discharge the interim injunction or to award costs to the defendants.

4. An offer or suggestion on the part of the plaintiffs, before commencing the action, to accept a bond to secure them against damages caused by the operations complained of, even if distinctly proved, would not necessarily preclude them from claiming an injunction afterwards, though it would be a fact to be taken into consideration in determining whether a remedy by action for damages would not be adequate.

Wood v. *Sutcliffe*, (1851) 2 Sim.N.S. 168, distinguished.

5. The appeal having failed, the appellant was ordered to pay the costs of the appeal upon the final disposition of the cause in any event of it. *Miller v. Campbell*, 14 M.R. 437.

2. Construction of railway crossing—*Fear of riot—Construction of statutes—Railway crossings—Constitutional law.*

The fact that the plaintiff will by force oppose a threatened trespass, and so possibly cause bloodshed, is no reason why the Court should grant an interlocutory application, if he is not otherwise entitled to it.

The Act incorporating the Northern Pacific and Manitoba Railway Company does not, of itself, supersede the power given to the Railway Commissioner by 51 Vic., c. 5, with reference to the building of the extension of the Red River Valley Railway to Portage la Prairie.

An *ex parte* injunction having been dissolved on the ground that the questions

involved were of such difficulty that they should be decided at the hearing only, the bill was amended and a new *ex parte* injunction granted. Upon motion to continue it,

Held, that the plaintiffs were entitled to have a full consideration of all the questions involved; and, a more deliberate argument having solved the difficulties, the injunction was continued.

The Dominion Parliament has power to provide that no Provincial railway shall cross a Dominion railway without making application to the Railway Committee of the Privy Council for Canada.

A statute provided that a certain thing should not be done "without application to the Railway Committee for approval of the place and mode," etc.

Held, that the Act required that the approval should be obtained and not merely applied for.

The Railway Commissioner for Manitoba is a "person," and may be enjoined from prosecuting the construction of a railway. *Attorney-General* v. *Ryan*, 5 M. R. 81, followed. *C. P. R.* v *N. P. & Man. Ry. Co.*, 5 M.R. 301.

3. Construction of subway under railway tracks along highway—*Privilege to raise grade of highway "or any part thereof"—Railway Commission, jurisdiction of—Interim injunction affirmed on appeal, effect of.*

For many years the defendants, by agreement with the City of Winnipeg, had occupied a portion of the width of Point Douglas Avenue in said City with the tracks of its main line. In 1904 a further agreement was made between the City and the Company, and ratified by the Legislature, whereby the Company obtained the right to raise the grade of Point Douglas Avenue or of any part thereof to a height not exceeding ten feet above the then existing grade upon certain conditions.

Held, that the words "or of any part thereof" related to a part of the breadth as well as of the length of the avenue, and that the defendants had a right to raise the grade of the southerly 45 feet in width of the avenue leaving 21 feet at its original height, although the result of that was to diminish the value of the plaintiff's lots on account of the construction of a subway alongside of them.

Held, also, that an order of the Board of Railway Commissioners granting leave to the defendants to construct such subway was valid and binding, although it had been made *ex parte* and in ignorance of the fact that the plaintiff had previously obtained an interim injunction against such construction, the plaintiff having made no application to rescind or vary the order as he might have done.

C. P. R. v. *G. T. R.*, (1906) 12 O.L.R. 320, followed.

The interim injunction granted in 1905 had been affirmed on appeal before the hearing of the cause.

Held, that that decision was not binding on the trial Judge and did not divest him of the responsibility of deciding the case upon the merits at the hearing. *Fraser* v. *C. P. R.*, 17 M.R. 697.

4. Dredging of sand from bed of river causing subsidence of bank.

Inconvenience to the public cannot be set up as against private rights and, where it is shown that the removal of sand from the bed of a river opposite the plaintiff's property has caused a subsidence of the bank and, if continued, is likely to cause irreparable damage, an injunction should be granted to stop the dredging, notwithstanding affidavits showing that contractors and the public would suffer loss and inconvenience if the sand could no longer be produced from that source for building purposes. *Patton* v. *Pioneer Navigation & Sand Co.*, 16 M. R. 435.

5. Dredging sand out of bed of navigable river causing subsidence of banks—*Riparian owner—Ownership of bed of non-tidal navigable stream.*

An injunction should be granted to prevent the continuance of the dredging of sand from the bed of a navigable river opposite or near the plaintiff's property on its bank, if it is shown that there is a real danger of the bank being worn away by such continuance, although the greater portion of the sand previously taken out had been carried down the river by the current and it is not proved that the dredging already done had caused any subsidence of the bank.

The plaintiff's patent from the Crown described his land as a portion of a parish lot as shown on a plan of survey of the Parish of St. Boniface. According to the plan referred to the parish lots run only to the Assiniboine River, but the patent contained a reservation of the free use, passage and enjoyment of, in, over and upon all navigable water, etc., and it was

not disputed that that river, at the place in question, is a navigable stream.

Held, that by the laws of England the title to the bed of a non-tidal navigable river is presumed to be in the riparian owner *ad medium filum aquæ*, that the reservation in the plaintiff's patent afforded a strong presumption of non-ownership by the Crown in the soil underneath the river, and that the plaintiff's title carried with it all the rights of a riparian owner, so that the plaintiff owned the bed of the river to the middle as claimed.

Bickett v. *Morris*, (1866) L.R. 1 H.L. Sc. 47; *Keewatin Power Co.* v. *Town of Kenora*, (1908) 16 O.L.R. 184, and *Servos* v. *Stewart*, (1907) 15 O.L.R. 216, followed. *Patton* v. *Pioneer Navigation & Sand Co.*, 21 M. R. 405.

6. Illegal acts of strikers—*Trade combination.*

An interim injunction restraining defendants (striking plumbers) from interfering in any manner with the non-striking workmen employed by plaintiffs (master plumbers) should be continued to the hearing, if the affidavits show that the defendants have endeavored to induce the employees of the plaintiffs to break their contracts with them and have entered into a conspiracy and combination to induce such employees to leave the plaintiffs' employ, and to prevent other workmen from entering into such employment, and have annoyed some of the plaintiffs' workmen who did not join the strike. Such an injunction, however, should contain the words, "except for the purpose of obtaining and communicating information," in the clause forbidding generally the besetting of the plaintiffs' premises. *Cotter* v. *Osborne*, 16 M.R. 395.

7. Levy of illegal tax by municipality —*Interim injunction—Other adequate remedy.*

A party who brings an action against a municipality for a declaration that he is not liable for a tax imposed upon him, and for an injunction to restrain the attempted levy of such tax, is not entitled to an interim injunction to restrain such levy, as he has another adequate remedy, namely, to pay the tax under protest and sue to recover it back.

Dows v. *City of Chicago*, (1870) 11 Wall. 108; *United Lines Telegraph Co.* v. *Grant*, (1873) 137 N.Y. 7, and *C.P.R.* v. *Cornwallis*, (1890) 7 M.R. 1, followed.

Central Vermont Railway Co. v. *St. Johns*, (1887) 14 S.C.R. 288, distinguished. *Dominion Express Co.* v. *City of Brandon*, 19 M.R. 257.]

8. Payment of life insurance to executor — *Executor — Foreign Assets—Multifariousness.*

An injunction will not be ordered to restrain a foreign life insurance company from paying the amount assured to an executor here, when the policy was issued in the foreign country, the premium payable there, the moneys assured payable there, and the company was not carrying on business here.

A bill is not multifarious which prays administration of an estate and also the cancellation of an assignment made by the executor of a portion of the estate to some of the defendants. *Cole* v. *Glover*, 16 Gr. 392, not followed. *Frontenac Loan & Sav. Co.* v. *Morice*, 3 M.R. 21.

9. Threatened trespass.

The plaintiff claimed to be tenant of the defendant B. of certain lands upon which he sowed a crop of wheat. Defendants threatened to reap the crop, whereupon the plaintiff filed a bill for an injunction. During the suit the defendants did harvest a portion of the crop, but did not otherwise interfere with plaintiff's occupation. The plaintiff's right was not very clearly established by the evidence.

Held, Injunction refused, but without costs. *Monkman* v. *Babington*, 5 M.R. 253.

10. Trespass by railway—*Plaintiff a puppet—Signification of disallowance.*

An Act was passed by the Provincial Legislature providing for the construction of the Red River Valley Railway. In pursuance of this Act a contract was entered into between Her Majesty and two of the defendants, and the contractors thereupon proceeded to build the road.

This Act was disallowed as was also an Act extending the operation of The Public Works Act of 1885.

The plaintiff, being aware that the route contemplated would cross certain lands, purchased them with a view of obstructing the building of the road. It was not contended that this would disentitle him to an injunction, but it was alleged that he was acting not for himself but in reality

for a rival railway whose hand he was. To show this, the plaintiff was examined and he refused to answer several proper and material questions. He appeared to have acted through the rival railway's officials and to have reported progress to them; to have made some agreement with that company, giving to it certain privileges in respect of the land purchased, but the nature of this agreement he refused to divulge; and in a letter he referred to "the party for whom I have purchased."

Held, 1. That after the disallowance the defendants were without merits or legal rights—The Public Works Act (without the disallowed amendment) not giving the right to expropriate lands for the purpose of the railway.

2. That nevertheless the plaintiff was not entitled to an injunction, he being the representative merely of the rival railway and not acting on his own behalf.

3. That to arrive at this conclusion it was proper to assume, as against the plaintiff, the answers he could have given, if he had answered fairly the questions put to him.

The disallowance of the Acts was signified by proclamation in the Gazette, but no reference was therein made to the certificate of the date of the receipt of the Acts.

Semble, that the certificate need not be signified, but the disallowance only. *Browning* v. *Ryan*, 4 M.R. 486.

II. Against Breach of Contract.

1. Breach of contract to sell bricks to plaintiff only—*Remedy by action for damages.*

Appeals from orders restraining defendants until the trial from delivering bricks manufactured by them except in accordance with the terms of a contract between the plaintiff and the defendants and other brick manufacturers who had severally agreed to sell to the plaintiff the outputs of their respective brickyards for the present season and not to sell any of such bricks to any one else.

The contract recited that the plaintiff, in conjunction with others, was forming a company to be incorporated and that the plaintiff was desirous of purchasing the bricks for the benefit of the proposed company, and set out the intention of the plaintiff to assign all his interest in the contract to the company upon its incorporation, and stipulated that, upon such assignment, the company should be substituted for the plaintiff in the contract; and the evidence showed that the defendants did not intend to enter into such an agreement for the benefit of the plaintiff and his associates personally, but that the formation of the company and its interests in the proposed purchases were material parts of the arrangements.

The orders had been only formally made, without argument, to facilitate the appeals, upon the understanding between counsel for all parties and the Court that they were not to be taken as made in the exercise of a judicial discretion, but were to be fully open to appeal on all points, as it was admitted that the trials of the actions could not, in the ordinary course, take place till after a great part of the brick-making season would have elapsed and the continuance of the injunctions would have been equivalent to granting orders for actual specific performance of the contract during that period.

The statement of claim in each case alleged that, relying upon the contract and upon the supply of bricks under it, the plaintiff, together with others, entered into a number of building contracts requiring the use of bricks, that the plaintiff would require for the purposes of his business during the present year all the bricks called for by the said contract, that the plaintiff and the said company were tendering for and expected to obtain a large number of other building contracts requiring bricks, that the plaintiff expected to sell bricks to other builders at a profit, and that, unless the defendants supplied the bricks called for by the contract, it would be impossible for the plaintiff to get bricks in time to carry out these contracts, or to complete the works in the manner and within the time mentioned in said contracts.

The evidence adduced supported these statements in the main, but did not show that the contracts referred to had been made for the benefit or on behalf of the company or that the company had acquired any interest or incurred any liability in respect of them.

Held, that the plaintiff should, under the circumstances, be left to his claim for damages, if any, arising from the alleged breach of the contract, and that the injunctions should be dissolved.

Appeals allowed. Costs reserved. *Cass* v. *Couture*, *Cass v. McCutcheon*, 14 M.R. 458.

2. Breach of contract to accept and exclusively use plaintiff's goods.

A contract entered into by the proprietor of a country newspaper to accept and use exclusively every week the "ready prints" furnished by a publisher may be enforced by an injunction restraining the defendant during the period covered by it from using or publishing any ready prints except those published by the plaintiff, who should not be limited to the recovery of damages for the breach of the contract.

Metropolitan Electric Co. v. *Ginder*, [1901] 2 Ch. 799, followed.

Whitwood Chemical Co. v. *Hardman*, [1891] 2 Ch. 417, distinguished. *Winnipeg Saturday Post* v. *Couzens*, 21 M.R. 562.

III. Exparte Injunctions.

1. On appeal after refusal by single Judge.

A motion for injunction to restrain a sheriff's sale was refused by a single Judge after argument. Upon motion *ex parte* to the Full Court, the plaintiff's counsel stating his intention to appeal, an injunction was granted until the re-hearing of the order or the hearing of the cause, whichever should first come on. *Lewis* v. *Wood*, 2 M.R. 73.

2. Mandatory Injunction — *Interim injunction.*

On a motion *ex parte* for an injunction all facts within the knowledge of the applicant and material to the application must be disclosed.

This was a mortgage suit and for an injunction to compel the defendants, who had removed buildings from the land, to restore them to their former foundations. An *ex parte* injunction to restrain further removal had been obtained, and a motion was now made to continue this injunction and for a mandatory injunction to restore the buildings removed.

The injunction was continued until the hearing but, as it remained to be decided whether or not the buildings formed part of the mortgage security, a mandatory injunction to restore them to their former foundations was refused in the meantime. *Stewart* v. *Turpin*, 1 M.R. 323.

3. Misrepresentation of facts.

Upon a motion to continue an *ex parte* injunction it was objected that the Court had been misled when granting the same.

Killam, J., said: "Nothing is of more importance than that a party obtaining an *ex parte* order for an injunction should deal with the utmost fairness and frankness with the Court; and, if it were shown that a party did so upon a false statement of information of a material fact, I should not hesitate to refuse to continue it, and to leave him in the position in which he was before getting the order, even though he showed other grounds sufficient to warrant its being continued." *Burbank* v. *Webb*, 5 M.R. 264.

4. Misrepresentation in obtaining—*Balance of convenience—Costs—Laches—Variance in charges of fraud.*

An *ex parte* order for an injunction to last for a few days, and until a motion to continue it had been disposed of, was obtained upon a misstatement of a fact material to one of the grounds upon which, in the bill, the plaintiff's right was founded. Upon an application to continue the injunction,

Held, that, having in view the great importance to the plaintiff of maintaining the *status quo* and the absence of damage to the defendant, the injunction might be continued, notwithstanding the misstatement in respect of a portion of the property in question upon an equitable ground not affected by the fact misstated; but the plaintiff was ordered to pay the costs of the motion. *Burbank* v. *Webb*, 5 M.R. 264, considered.

Laches as disentitling to interim injunction discussed.

Variance between misrepresentations as alleged and proved discussed. *Winnipeg and Hudson's Bay Co.* v. *Mann*, 6 M.R. 409.

IV. Other Cases.

1. Breach of injunction—*Costs of motion to commit.*

Although there may not have been such a wilful or contemptuous breach of an injunction as may call for punishment by committal, yet, where the defendant by his conduct invited the application to commit, he was ordered to pay the costs of the motion. *Hardie* v. *Lavery*, 5 M.R. 134.

2. Other adequate remedy—*Local option by-law—Liquor License Act, R.S.M. 1902, c. 101, s. 66—Failure to publish notice.*

The failure to publish the notice of the voting on a local option by-law required by section 66 of The Liquor License Act, R.S.M. 1902, c. 66, is good ground for an application under section 427 of the Municipal Act to quash the by-law if afterwards carried and passed by the council at the third reading: *Hall* v. *South Norfolk*, (1892) 8 M.R. 430; *In Re Cross* v. *Town of Gladstone*, (1905) 15 M.R. 528, but an injunction to prevent the council from submitting the by-law to the vote of the electors will not be granted by reason only of the failure to publish such notice, because of the existence of another adequate remedy in case the by-law should be carried, viz. an application to quash it.

Weber v. *Timlin*, (1887) 34 N.W.R. 29, followed.

Helm v. *Port Hope*, (1875) 22 Gr. 273, and *King* v. *City of Toronto*, (1902) 5 O.L.R. 163, distinguished on the ground that in those cases the councils had no jurisdiction to submit the questions to the vote of the people. *Little* v. *McCartney*. *Johnston* v. *Wright*, 18 M.R. 323.

3. Plaintiff's title to office—*Wrongful assumption of jurisdiction — Injunction where mandamus proper—Evidence.*

Plaintiff having been elected alderman, and taken his seat and having been unseated by order of the County Judge, for lack of property qualification, obtained an *ex parte* injunction to restrain the Mayor from proceeding to a new election, and from refusing to permit the plaintiff to sit and vote as a member of the Council, upon the ground that the County Judge had no jurisdiction. Upon a motion to continue the injunction,

Held, 1. That, the plaintiff not being in fact qualified, no injunction should be granted.

2. The Court interferes by injunction only to prevent or restrain injuries to civil property and in defence of, or to enforce, rights which are capable of being enforced at law or in equity. The Court has no jurisdiction to restrain persons from acting without authority.

3. Although, under section 9 of the Q. B. Act of 1886, the Court may issue an injunction in cases where the plaintiff would have been entitled to a mandamus at law, yet it must appear that the circumstances would have justified a mandamus; and, the only ground of complaint being that the defendant "threatens and intends and will unless restrained,"&c.

Held, that the right to mandamus had not been shown.

In any case, the absence of the jurisdiction of the County Judge would have to be very fully and clearly shewn. *Calloway* v. *Pearson*, 6 M.R. 364.

4. Practice—*Motion to commit—Court or Chambers.*

A motion to commit for breach of an injunction must be made in Court and not in Chambers. *Hardie* v. *Lavery*, 5 M.R. 135.

5. Prayer for injunction—*Motion for interim injunction—Statement of claim.*

An injunction cannot be granted where none is prayed for. *Reid* v. *Gibson*, 17 C.L.T. Occ. 226.

6. Staying foreign action—*Costs.*

The Court has power to stay an action brought in a foreign court, where the party bringing it is within the jurisdiction. But no order will be made unless a clear case of oppression be made out.

The plaintiff filed a bill against the defendant as administratrix of S. to set aside a policy of life insurance. After the commencement of the suit the defendant sued the plaintiffs in the Province of Ontario upon the policy. The insured had resided in Winnipeg, and the plaintiff and the witnesses were there. The policy was payable in Ontario and the head office of the company was there. The plaintiffs were willing to submit to such terms as the Court should think proper.

A motion for injunction to restrain the Ontario action was refused with costs. *North American Life Ass. Co.* v. *Sutherland*, 3 M.R. 147.

See Arbitration and Award, 3.
— Company, IV, 14; XV, 14.
— Contempt of Court.
— Costs, IV, 1, 2;—X, 3.
— Crown Lands, 1.
— Examination for Discovery, 13.
— Fraternal Order.
— Fraudulent Conveyance, 18.
— Fraudulent Judgment, 5.
— Garnishment, III, 3.
— Liquor License Act, 2.
— Local Option By-law, VI, 1, 5.
— Mortgagor and Mortgagee, III, 3.
— Municipal Elections, 3.
— Municipality, I, 1; VIII, 3, 4, 7.
— Nuisance, 2, 5.

See PARLIAMENTARY ELECTIONS, 3.
— PLEADING, IV, 2; VII, 1; X, 9.
— PRACTICE, V, 1.
— PRODUCTION OF DOCUMENTS, 5.
— PUBLIC PARKS ACT.
— REAL PROPERTY LIMITATION ACT, 8.
— RATIFICATION.
— RESTRAINT OF TRADE.
— SALE OF LAND FOR TAXES, I, 1; III; IX, 3.
— TRADE NAME.
— TRADE UNIONS.
— TREES ON HIGHWAY.

INNUENDO.

See LIBEL, 7.

INSANITY.

See ALIMONY, 6.
— CRIMINAL LAW, XVII, 18.

INSOLVENCY.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.
— FRAUDULENT CONVEYANCE, 17.
— FRAUDULENT PREFERENCE, I, 1; III, 1, 7; V; VI, 3.
— STOPPAGE IN TRANSITU.
— WINDING-UP, I, 1; IV, 6.

INSOLVENT BANK.

See WINDING-UP, II, 1; IV, 10.

INSOLVENT PLAINTIFF.

See SECURITY FOR COSTS, X, 3.

INSPECTION OF DOCUMENTS.

See PRACTICE, XXVIII, 9, 11.
— PRODUCTION OF DOCUMENTS, 9.

INSPECTION OF GOODS.

See SALE OF GOODS, II, 1.

INTENT.

See CONTRACT, XV, 10.
— CONVICTION, 1.
— ELECTION PETITION, IV, 5.
— FRAUDULENT PREFERENCE, III, 2; IV; V; VI, 4, 5.

INTENT TO DEFRAUD.

See CAPIAS, 2.

INTEREST.

1. Compound interest—*Construction of mortgage—Mortgage suit.*

Where a mortgage provides for payment of interest half-yearly and that, "on default in payment of any instalment of interest, such interest shall at once become principal and bear interest at the rate aforesaid," the account in the Master's office should be taken with half-yearly rests, the interest being compounded half-yearly. *Canada Permanent Loan & Sav. Co.* v. *Hilliard*, 3 M.R. 32.

2. Debt certain and time certain—3 & 4 *Wm.* 4, *c.* 42, *s.* 28 (*Imp.*).

To entitle a creditor to interest under 3 & 4 Wm. 4, c. 42, s. 28 (Imp.), the written instrument under which it is claimed must show by its terms that there was a debt certain payable at a certain time. It is not sufficient that the same may be made certain by some process of calculation or some act to be performed in the future. *Sinclair* v. *Preston*, 31 S.C.R. 408.

3. On judgment.

Held, on consultation of the Judges of the Court of Appeal, that, where any judgment of a Court below has been changed, interest should only be allowed on the judgment from the date of the judgment of the Court of Appeal, notwithstanding section 2 of The King's Bench Act. *Sheldon* v. *Egan*, 18 M.R. 221.

4. Rate of interest recoverable by Bank when more than seven per cent stipulated for—*Cheques as payment—Bank Act, ss.* 80, 81.

Defendant borrowed large sums of money from the plaintiff Bank by way of overdraft and on promissory notes. Having agreed to pay interest, first at 24 per cent, afterwards at 18 per cent per annum, defendant from time to time gave the Bank cheques on his current account to pay the interest at those rates respectively up to 31st January, 1902. When such cheques were given the account had already been overdrawn, but it was afterwards changed into a credit balance in defendant's favor by deposits or by collections made by the Bank for defendant's account.

Held, that such cheques should be deemed to have been payment of the interest, and that defendant could not recover back such interest or any part of it, although it was in excess of the seven per cent rate which the Bank Act permits a bank to charge.

Held, also, that, under sections 80 and 81 of the Bank Act, the Bank was not entitled to sue for and recover interest accruing after 31st January, 1902, at seven per cent per annum, but could only recover interest at the legal rate of five per cent per annum from that date on the principal then due. *Bank of British North America* v. *Bossuyt*, 15 M.R. 266.

See Administration, 1.
— Banks and Banking, 9.
— Constitutional Law, 5, 6.
— Contract, VIII, 4; IX, 4; XII, 1.
— Fire Insurance, 6.
— Foreign Judgment, 8.
— Husband and Wife, III, 1.
— Interpleader, VIII, 3, 4.
— Mortgagor and Mortgagee, II.
— Principal and Agent, II, F.
— Railways, V, 2.
— Receiver.
— Rectification of Deeds, 2.
— Sale of Goods, V, 1.
— Sale of Land for Taxes, IV, 3.
— Solicitor and Client, I, 2.
— Statutes, Construction of, 7.
— Summary Judgment, II, 2.
— Will, II, 1, 2.

INTEREST IN LAND.

See Fraudulent Conveyance, 20.
— Registered Judgment, 5.
See Sale of Land for Taxes, II.
— Vendor and Purchaser, IV, 1.

INTERIM INJUNCTION.

See Injunction, I, 7.

INTERLOCUTORY COSTS.

See Security for Costs, X, 4.
— Set Off, 1.

INTERLOCUTORY MOTION OR APPLICATION.

See Costs, X, 3.

INTERLOCUTORY ORDER.

See Appeal from County Court, VI, 2.

INTERLOCUTORY OR FINAL JUDGMENT.

See Foreign Court, 1.
— Foreign Judgment, 1.
— Fraudulent Conveyance, 19.

INTER-MUNICIPAL HIGHWAY.

See Municipality, II, 2.

INTERPLEADER.

I. By Common Carrier.

1. As between consignor and execution creditor of another person—*Con. Stat., c. 37, s. 65.*

Where goods delivered to a common carrier by F. were seized by the sheriff under an execution against P.

Held, that the carrier could not, under Con. Stat., c. 37, s. 65, call upon the execution creditor and sheriff to interplead with F. *Merchants' Bank* v. *Peters*, 1 M.R. 372.

2. Goods not within jurisdiction.

The Court has no jurisdiction under the Act relating to interpleader by carriers, when the goods are not within the jurisdiction.

Although no jurisdiction, yet the summons may be discharged with cost. *Re Brunswick Balke Co. & Martin*, 3 M.R. 328.

II. Costs.

1. Appeal as to costs.

Although the claimant upon the trial of an interpleader issue succeeds, yet the Court may, in its discretion, refuse to give him costs against the execution creditor.

The Court cannot, however, in such a case order the claimant to pay the sheriff his costs of taking possession of the goods claimed, or his possession money prior to the date of the interpleader order. *Massey Manufacturing Co.* v. *Gaudry*, 4 M.R. 229.

2. Appeal for costs—*Sheriff's costs.*

An execution creditor directed a sheriff to interplead between him and a claimant to some seized goods. Upon the return of the interpleader summons the creditor obtained an enlargement to examine the claimant. Upon the further return the creditor abandoned.

Held, 1. That the creditor ought to pay the sheriff's costs of the proceeding.

2. That the refusal of the Referee to allow such costs might be appealed from. *Stephens* v. *Rogers—Ex parte Livingstone*, 6 M.R. 298.

Distinguished, *Blake* v. *Manitoba Milling Co.* 8 M.R. 427.

3. Claimant abandoning — *Costs of sheriff.*

Held, that where a plaintiff examines a claimant upon his affidavit, and the claimant subsequently abandons his claim and is barred, and ordered to pay the costs of the sheriff and the plaintiff, the proper order is that the sheriff's costs be taxed to him and an *allocatur* served on the plaintiff, that the plaintiff add them to his costs, and upon receipt of the amount pay the sheriff.

The facts appear from the judgment. *Patterson* v. *Kennedy*, 2 M.R. 63.

4. Claimant abandoning — *Sheriff's costs.*

A person served a notice upon a sheriff claiming, as his, goods seized under writ against another. Upon the return of an interpleader summons the claimant appeared, obtained two enlargements and, doing nothing to substantiate his claim, was barred.

Held, that the claimant should pay the sheriff's costs. *Cochrane* v. *McFarlane*, 5 M.R. 120.

5. Defendant interpleading.

After declaration defendants obtained a summons, under 48 Vic., c. 17, s. 54, calling upon various claimants to the fund sued for to maintain or relinquish their claims. All the claimants abandoned except the Imperial Bank, and an order was pronounced directing the defendants to pay the fund into court, after deducting their costs; that there should be no costs as to those who abandoned their claims; and that an issue should be tried between the plaintiff and the Bank. Upon settling the terms of this order the Bank also abandoned, and the order, instead of providing for an issue, directed the Bank to pay the plaintiff's costs of the application, and the defendant's costs deducted out of the fund. The claim of the Bank was under two garnishee attaching orders, one issued in a suit against D., K. & A., and the other in a suit against T. K. & M. K., the Hudson's Bay Co. in both suits being the garnishees. The plaintiffs in the present suit were T. K. & A.

Held, that the statute was applicable to the Bank's claim, and that an issue might therefore have been directed.

The defendants were entitled to deduct their costs, both of the suit and also of the application, so far as related to the Bank, but not of calling in the other abandoning claimants.

Where a claimant does not appear, or appears and abandons, no costs are awarded. *Armit* v. *Hudson's Bay Co.*, 3 M.R. 529.

6. Defendant interpleading — *Payment into Court.*

The defendant, being indebted to Cr., M., a creditor of Cr., obtained a garnishing order against S. Instead of paying the money into court, S. retained it and was afterwards sued for the same amount by the plaintiff, who claimed as assignee of Cr. The defendant after issue joined obtained an order requiring M. and the plaintiff to interplead. The plaintiff succeeded upon the issue.

Held, 1. The defendant should pay the whole costs of the action down to the interpleader order.

2. M. should pay to the plaintiff the costs of the issue.

3. No costs allowed to any party connected with paying in or paying out the money. *Clougher* v. *Scoones*, 3 M.R. 238.

7. Discretion of Judge.

Held, 1. In an interpleader issue, where each party succeeds as to part of the goods, there should be a division of costs, and the ratio of that division is in the discretion of the Judge.

2. The Court has power to review the discretionary order of a Judge, but does not exercise it, unless in a strong case where the discretion has been exercised on a wrong principle. *Burnham* v. *Walton*, 2 M.R. 180.

8. Sale by sheriff.

An execution creditor, consenting to be barred after an interpleader order has been made, must pay the costs of a sale by the sheriff of the goods seized as well as the costs of the application for the interpleader order, possession money, &c. *Manitoba and N. W. Loan Co.* v. *Routley*, 3 M.R. 296.

9. Several issues.

Disposition of costs in interpleader proceedings where distinct issues taken by several execution creditors, the claimant being the same in all. *Brown* v. *Portage la Prairie Manf. Co.*, 3 M.R. 245.

III. Evidence at Trial of Issue.

Proof of judgment at trial of interpleader issue—*Attaching order.*

1. When a third person claims goods seized by the sheriff under an attaching order and the sheriff applies for an interpleader order, any objection by the claimant as to the want or insufficiency of the material on which the attaching order was obtained should be raised in answer to the sheriff's application, and it will be too late to raise such objection at the trial of the interpleader issue.

2. It is not necessary at the trial of such an interpleader issue for the plaintiff, although he is plaintiff in the issue, to prove the defendant's indebtedness, at least in the absence of evidence on the part of the claimant to show that it did not exist.

Holden v. *Langley*, (1861) 11 U.C.C.P. 407; *Ripstein* v. *British Canadian*, (1890) 7 M.R. 119; *Plummer* v. *Price*; (1878) 39 L.T. 658, and *Edwards* v. *English*, (1857) 7 E. & B. 564, followed.

The attaching order having been set aside by the referee after the making of the interpleader order and the sheriff having relinquished possession of the goods, the claimant contended that the latter order then lapsed; but the attaching order had been reinstated on appeal to a Judge, when the sheriff again took possession of such of the goods formerly seized as he found to be still in the claimant's possession.

Held, that the plaintiff had a right to have the interpleader issue disposed of and that, as the merits were in his favor, the verdict for him should stand, but limited in its effect to the goods seized by the sheriff after the attaching order was restored.

Howe v. *Martin*, (1890) 6 M.R. 616, followed. *Turner* v. *Tymchorak*, 17 M.R. 687.

IV. Form of Order.

1. Giving back possession to claimant.

The ordinary form of an order directing an interpleader issue had been drawn up and came before the Judge for settlement.

Held, 1. That, where an interpleader issue is directed at the instance of a sheriff, the general rule is that the order should direct the sheriff to withdraw from possession upon payment to the sheriff by the claimant of the possession money from the date of the order, not from the date of the seizure or of the making of the claim.

2. Under 46 and 47 Vic., c. 30, the proper issue to direct is "Whether at the time of the seizure of the goods by the sheriff the goods were the property of the claimant as against the execution creditor." *Keeler* v. *Hazlewood*, 1 M.R. 31.

2. "The goods or any part thereof."

It is immaterial whether an interpleader issue refers to "the goods seized," or "the goods seized, or any part thereof." Under the former words the claimant may prove for a portion of the goods seized. *Stephens* v. *McArthur*, 6 M.R. 111.

3. Power to direct sale of goods in default of claimant giving security—*Discretion in Referee.*

Under an execution against the defendant, the sheriff seized certain goods which were claimed by D. H. & Co.

Thereupon the Referee, on the application of the sheriff, made an order that upon the claimants paying into court $100, or giving security for that amount, the sheriff should withdraw from possession, but in default of making such payment, or the giving of such security, that the goods should be sold and the proceeds, after deducting expenses, paid into court to abide further order.

Held, that the Referee had jurisdiction to make the order, and that the discretion vested in him was properly exercised. *Bank of Nova Scotia* v. *Hope*, *Hope & Co., Claimants*, 9 M.R. 37.

V. By Garnishee.

1. Garnishee claiming interest in fund.

A garnishing order having been served by plaintiffs, the garnishees paid $667.46 into court, suggesting the names of several claimants to the fund. One of these, F., had commenced an action against the garnishees, claiming $1,000 to be the amount due. Upon a summons taken out by the plaintiffs an order was made barring all the claimants except the plaintiffs and F. (including the assignors of F.), staying F.'s action and directing interpleader between F. and the plaintiffs. Upon appeal,

Held, 1. That the order might properly have barred the other claimants.

2. That the interpleader order could only be made at the instance of the garnishees.

(*a*) 3. There being a dispute as to the amount due by the garnishees, they could not obtain an interpleader order. *Merchants' Bank* v. *McLean*. *Henderson & Bull, Garnishees*, 5 M. R. 219.

(*a*) Overruled in *McIntyre* v. *Woods*, 5 M. R. 347. See next case.

2. Dispute as to amount due by Garnishees—*Procedure.*

Under 49 Vic., c. 35, s. 10, a garnishee may have an interpleader as to the amount he admits to be due, although a larger amount may be alleged by the attaching creditor to be owing. *Merchants' Bank* v. *McLean*, 5 M.R. 219, overruled.

The garnishee should, however, upon affidavit, express his readiness to bring into court the amount truly owing, whatever that may be found to be. Such an affidavit was allowed to be supplemented.

An issue may be directed to ascertain what is the true amount due. *McIntyre* v. *Woods*. *C. P. R. Garnishees*, 5 M.R. 347.

3. Money deposited in Bank—*Garnishee order—Assignment of deposit receipt—Refusal of Bank to pay to assignee—Delay in making application.*

Application of Bank to compel garnishing creditor of defendant and the assignee of defendant's deposit receipt to interplead.

Defendant had assigned the deposit receipt to his wife who had demanded the money. The Bank delayed payment on various pretexts for five days when plaintiff's garnishing order was ser ed. Plaintiff eight days afterwards took out a summons to pay over and the Bank after seven more days took out the interpleader summons.

Held, that the interpleader order should go, as the delay was not unreasonable, and the claimants' rights had not been prejudiced. *Schmidt* v. *Douglas*, 14 C.L.T. Occ. N. 515.

VI. Practice.

1. Notice of trial.

Held, that, if on an interpleader issue the plaintiff does not give notice of trial, the defendant's proper course is to apply to the Court for an order to bar the plaintiff. *Plaxton* v. *Monkman*, 3 M.R. 371.

2. Who should be made plaintiff in issue—*Goods seized in possession of mortgagee.*

In April, 1892, the plaintiff placed a writ of *fi. fa.* against the goods of defendant in the sheriff's hands. The sheriff seized certain goods as the property of defendant, but they were claimed by the Commercial Bank. They had been mortgaged to the

Bank in January, 1892, and were taken possession of by the Bank a few days before the seizure, and at that time were in the actual possession of the Bank. An interpleader issue was directed and the question was which party should be made plaintiff in the issue.

Held, that the execution creditors should be made plaintiffs. *Union Bank of Canada* v. *Tizzard*. *Commercial Bank of Manitoba, Claimants*, 9 M.R. 149.

VII. Security for Costs.

1. Application for—*Style of cause.*

An application for security for costs of interpleader proceedings, made after the issue of the interpleader order, must be styled not in the original cause, but in the interpleader issue. *McMaster* v. *Jasper*, 3 M.R. 605.

2. Barring claimant in default of.

The defendant in an interpleader issue was ordered to give security for costs. After long delay an order was made that he do give security within a limited time or that his claim be barred. *C. P. R.* v. *Forsyth*, 3 M.R. 45.

3. Plaintiff in issue out of the jurisdiction.

A garnishee admitted his liability to the judgment debtor, but suggested that one B. claimed the money under an assignment made to him by the judgment debtor. Upon settling the form of the order for an issue,

Held, 1. That B. the claimant ought to be the plaintiff.

2. That it did not, from this, and from the fact that he resided without the jurisdiction of the court, necessarily follow that he should give security for co ts, that the Court could exercise its discretion, and would not order security unless the applicant showed circumstances warranting that direction. *McPhillips* v. *Wolf*, 4 M.R. 300.

VIII. By Sheriff.

1. Delay in applying—*Defending action not necessarily a bar.*

Giving relief to a sheriff by interpleader is a matter of judicial discretion and mere delay, even if imperfectly accounted for, will not be a bar to a sheriff obtaining an order, if the parties have not been prejudiced by the delay, and there has been no misconduct or collusion.

Defending an action brought by the claimant against him will not necessarily disentitle a sheriff to relief.

Remarks on the duty of the sheriff to come promptly for an interpleader without exercising any discretion.

Holt v. *Frost*, 3 H. & N. 821; *Winter* v. *Bartholomew*, 11 Ex. 704, followed. *Macdonald* v. *G. W. Central Ry. Co.*, 10 M.R. 83.

2. Exercise of discretion by sheriff—*Laches—Protection of sheriff.*

A sheriff seizing goods under an execution, and having notice that a third party claims the goods seized, if he desires to interplead, must apply to the Court promptly, and not exercise a discretion by selling or otherwise dealing with the goods.

Boswell v. *Pettigrew*, 7 P.R. 393, followed.

Darling v. *Collatton*, 10 P.R. 110, considered.

Protection will be given to the sheriff only when he has not abused his power, or caused substantial grievance, and has not been guilty of misconduct or neglect, the object of the statute being to protect him when it is unjust that he should be sued. *Harris* v. *York*, 8 M.R. 89.

3. Interest on money in sheriff's hands.

Held, as between two execution creditors, the first is entitled to interest on his judgment out of moneys remaining with sheriff pending the trial of an interpleader issue. *Wolff* v. *Black*; *McKinnon* v. *Black*, 1 M.R. 243.

4. Interest upon moneys in sheriff's hands.

A sheriff made money upon a number of writs against the same debtor, and held it during a contest between the various execution creditors for priority.

Held, that the creditors obtaining priority were not entitled to interest upon their respective claims out of the fund. *Burnham* v. *Walton*, 3 M.R. 204.

5. Rescission of interpleader order because of sheriff giving up possession.

An interpleader order, besides providing for an issue, required the execution creditor to give security for costs by a certain day, otherwise he should be barred, and directed the sheriff to sell unless the claimant gave security for the goods. After lapse of the prescribed period the Referee made an

order enlarging the time. Upon appeal a Judge discharged this order, holding that the creditor had become barred, and that there was no jurisdiction to extend the time. The Full Court, however, restored the Referee's order. After the order of the single Judge the sheriff withdrew from possession and the goods were dissipated. The creditor, then finding it useless to proceed with the issue, moved to rescind the interpleader order.

Held, that the order should not be rescinded, but that the creditor's remedy was by action against the sheriff if he had done wrong. *Howe* v. *Martin*, 6 M.R. 615.

6. When refused.

A sheriff must exercise a sound judgment with respect to applying for an interpleader order and, where the claimant to the goods seized has clearly no right, the order will not be granted. *Monitor Plow Works* v. *Allen*, T. W. 165.

IX. Other Cases.

1. Claimant's bond, form of—*Sheriff's costs.*

1. Form of claimant's bond given and discussed.

2. An interpleader order may direct payment of the sheriff's costs. *Ashdown* v. *Nash*, 3 M.R. 37.

2. Commission on sale claimed by two agents—*King's Bench Act, Rule* 899.

Relief by way of interpleader may be granted, under Rule 899 of the King's Bench Act, to a vendor of land as between two agents each claiming the same amount as commission on the sale of land, the vendor admitting that the amount is due to one or other of the agents.

Greatorex v. *Shackle*, (1895) 2 Q.B. 249, distinguished. *Webb* v. *Rodney*, 19 M.R. 120.

3. Jurisdiction of Referee—*Barring parties.*

Where an interpleader application before the Referee falls to be disposed of upon a matter of practice, as where the sheriff by his delay or having taken indemnity from one of the parties is not entitled to relief; where either the execution creditor or the claimant fails to appear on the return of the summons; where either of them, though appearing, declines to take an issue; where the claimant, though appearing, fails to support his claim by any evidence which can be looked at; or where there is some such state of circumstances, the Referee may dispose of the whole question. But where the claimant does support his claim, and the question is whether he has merits or not, then the Referee should order an issue or refer the matter to a Judge. *Galt* v. *McLean*, 6 M.R. 424.

4. Money paid to sheriff, by purchaser from trustee, upon fi. fa. against trustee—*Rights of cestui que trust.*

Upon a sale of lands by a trustee, the purchaser paid a portion of the price to a sheriff who held a *fi. fa.* against the trustee. There was no evidence that the payment to the sheriff was other than in his official capacity. On the contrary, there was evidence that he refused to give a certificate to the purchaser that there were no executions in his hands until the money was paid to him.

Held, that the *cestui que trust* was not entitled to the money so paid as against the execution creditor.

Per Wallbridge, C.J.—The money could not properly be the subject of an interpleader issue. *Federal Bank* v. *Canadian Bank of Commerce*, 2 M.R. 257.

5. Trial of issue—*Interpleader issue an action—Trial of, on Tuesday.*

An interpleader issue is within the term "action," and may be entered for trial upon a Tuesday. *Plaxton* v. *Monkman*, 1 M.R. 371, considered. *Douglas* v. *Burnham*, 5 M.R. 261.

See Arbitration and Award, 8.
— Bills of Sale, 2.
— Costs, XIII, 11.
— County Court, II, 4.
— Evidence, 2.
— Examination of Judgment Debtor, 6.
— Fi. Fa. Goods, 1, 4.
— Fixtures, 4.
— Fraudulent Conveyance, 7, 21.
— Fraudulent Judgment, 2.
— Fraudulent Preference, VI, 5, 6.
— Garnishment, VI, 4.
— Growing Crops.
— Husband and Wife, I, 2, 3; II, 1; III, 2; IV, 2.
— Partnership, 6.
— Pleading, XI, 12.
— Practice, XXVIII, 12.
— Security for Costs, I, 2; X, 5.
— Sheriff, 7.
— Staying Proceedings, III, 2.

INTERROGATORIES.

See PRACTICE, IV, 2; VI; XVI, 5.

INTESTACY.

See REAL PROPERTY ACT, V, 3.

INTOXICATING LIQUOR.

See LIQUOR LICENSE ACT, 5, 10.

INTOXICATION.

See ACCIDENT INSURANCE, 1.
— CONTRACT, XI, 1.
— FRAUD, 1.

IRREGULARITY.

See ADMINISTRATION, 5.
— APPEAL FROM N. W. T.
— ARBITRATION AND AWARD, 9.
— ATTACHMENT OF GOODS, 3, 6.
— CRIMINAL LAW, X, 3.
— EJECTMENT, 2.
— ELECTION PETITION, III, 2.
— EVIDENCE ON COMMISSION, 7, 9.
— FOREIGN CORPORATIONS, 1.
— FOREIGN JUDGMENT, 4.
— GARNISHMENT, I, 7; IV, 1.
— LANDLORD AND TENANT, III, 2.
— MUNICIPAL ELECTIONS, 4.
— PRACTICE, III, 4; VII; XX, B. 1, 5; XXII, 1; XXVIII, 27.
— PROHIBITION, III, 1.
— REAL PROPERTY ACT, I, 6; III, 7.
— SALE OF LAND FOR TAXES, IV; VI, 2, 3, 4; IX, 1.

ISSUE UNDER REAL PROPERTY ACT.

See REAL PROPERTY ACT, I, 10; II.
— REAL PROPERTY LIMITATION ACT, 4.

JOINDER OF CAUSES OF ACTION.

See JURY TRIAL, I, 6.
— LANDLORD AND TENANT, I, 4.
See PARTIES TO ACTION, 8.
— PLEADING, I, 3; V.
— PRACTICE, IX.
— SALE OF LAND FOR TAXES, V, 2.

JOINDER OF DEFENDANTS.

See PLEADING, V, 2.
— PRACTICE, IX, 2.

JOINDER OF PLAINTIFFS.

See PARTIES TO ACTION, 3, 4.

JOINDER OF SEVERAL ACCUSED PERSONS.

See CRIMINAL LAW, XVII, 7.

JOINT CONTRACTORS.

See CONTRACT, XI, 1.

JOINT COVENANTORS.

See PARTIES TO ACTION, 4.

JOINT CREDITOR.

See GARNISHMENT, V, 3.
— STATUTE OF FRAUDS, 4.

JOINT DEBTORS.

1. Effect of taking judgment against one of two or more—*King's Bench Act, Rule 585, as amended by section 12 of chapter 12 of 7 & 8 Edward VII.*

Rule 585 of the King's Bench Act, as amended by section 12 of chapter 12 of 7 & 8 Edward VII, permitting judgment to be signed against such defendants *as do not defend* without prejudice to the right of the plaintiff to proceed with the action

against any other defendant or defendants, in so far as it is intended to abrogate the old rule that, in an action against two or more joint debtors, taking judgment against one is a release of the other or others, must be construed strictly, and cannot be applied in a case in which the judgment was entered against a joint debtor who had actually entered a defence, although such defence was afterwards struck out for default in making discovery. *Wilson* v. *Stuart*, 20 M.R. 507.

[But see now s. 4 of c. 14 of 1 Geo. V.]

2. Release of one by giving time to the other—*Release by accepting separate obligations of one joint debtor.*

Where one of two joint debtors furnished the other with money to pay his half of the debt, his position as to the balance does not become merely that of surety for the other, unless the creditor knew of the facts.

Rouse v. *Bradford Banking Co.*, [1894] 2 Ch. 32, [1894] A.C. 587, followed.

A creditor accepted the separate promissory note of one of two joint debtors for an unpaid balance of the debt, thereby giving him time. The creditor, at the same time, declared his intention to hold both debtors. The separate note was renewed several times.

Held, that the other joint debtor was not thereby released.

Swire v. *Redman*, (1876) 1 Q.B.D. 536; *Bresse* v. *Griffith*, (1894) 24 O.R. 492; *Cluff* v. *Norris*, (1909) 19 O.L.R. 457, and *Bedford* v. *Deakin*, 2 B. & Ald. 210, followed. *Schwartz* v. *Bielschowsky*, 21 M.R. 310.

See EXAMINATION OF JUDGMENT DEBTOR, 7.
— PLEADING, XI, 13.

JOINT LIABILITY.

See BAILMENT, 1.
— NEGLIGENCE, VII, 5.
— LICENSE TO TAKE POSSESSION OF GOODS.

JOINT PURCHASERS.

See VENDOR AND PURCHASER, IV, 4.

JOINT TORT FEASORS.

Liability for damages not necessarily the same in amount for all—*King's Bench Act, Rules* 219, 220.

Since the fusion of Common Law and Equity the damages assessed against a number of joint tort feasors need not always be the same for all, but, if one of them is responsible for only a part of the total wrong done and the liability, though joint as to all at the time of the commencement of the action, arose at different dates, there may, under Rules 219 and 220 of the King's Bench Act, R.S.M. 1902, c. 40, be a verdict against the one for that part and against the rest for the total amount of damage committed.

O'Keeffe v. *Walsh*, [1903] 2 I.R. 681, and *Copeland Chatterson Co.* v. *Business Systems Ltd.*, (1906) 11 O.L.R. 292, followed.

The defendant Teskee tortiously cut down and carried away a large number of trees from the plaintiff's land with the assistance of his co-defendants hired by him. The work occupied eight days, but the defendant K. was only engaged for two days upon it.

Held, that K. was not liable for anything beyond the amount of the damage done during the two days.

The plaintiff had failed to show what that amount was; but, as K. had joined with the others in paying $91 into Court to answer the plaintiff's claim, thus admitting his liability for that amount, the verdict of $1,000 against all in the trial Court was changed to one for $91 against K. and for the balance, $909, against the other defendants. *Stewart* v. *Teskee*, 20 M.R. 167.

JUDGE AND JURY—PROVINCES OF.

See SLANDER.

JUDGE—POWERS OF.

See FRAUDULENT PREFERENCE, VI, 4.
— JURISDICTION, 3.

JUDGE IN CHAMBERS—JURISDICTION.

See CAPIAS, 2.
— CERTIORARI, 1.

See PRACTICE, I, 1.
— PROHIBITION, II.
— SOLICITOR'S LIEN FOR COSTS, 2.

JUDGE'S CHARGE TO JURY.

See CRIMINAL LAW, VI, 4; IX, 2; XVII, 12.
— FALSE IMPRISONMENT, 2, 3.
— LANDLORD AND TENANT, I, 2.
— LIBEL, 6.
— MASTER AND SERVANT, I, 1; IV, 4.
— NEGLIGENCE, I, 3.
— SLANDER.
— TRESPASS AND TROVER, 1.

JUDGMENT.

See ADMINISTRATION, 5, 6.
— APPEAL TO PRIVY COUNCIL, 1.
— CHATTEL MORTGAGE, II, 2.
— CONTRACT, IX, 3.
— EVIDENCE, 9.
— EXAMINATION OF JUDGMENT DEBTOR, 3.
— EXECUTORS AND ADMINISTRATORS, 1.
— FI. FA. GOODS, 3, 4.
— FOREIGN JUDGMENT, I, 10.
— INTEREST, 3.
— JOINT DEBTORS, 1.
— NEGLIGENCE, VII, 5.
— NUL TIEL RECORD, 1, 2.
— PRACTICE, II, 1; III, 5; X, 2; XI, 1; XXVIII, 17.
— SUMMARY JUDGMENT, III, 1.

JUDGMENT BY DEFAULT.

See COSTS, VI, 2.

JUDGMENT CREDITOR.

See GARNISHMENT, VI, 5.
— REGISTERED JUDGMENT, 5.

JUDGMENT IN PERSONAM.

See JURISDICTION, 4.
— MECHANIC'S LIEN, X, 3.

JUDGMENT ON PRÆCIPE.

See PRACTICE, XI, 4.

JUDICIAL DISCRETION.

See PRACTICE, XX, B, 7.

JUDICIAL DISTRICTS.

See LIQUOR LICENSE ACT, 9.

JUDICIAL DISTRICT BOARDS.

1. Separation of Winnipeg from Selkirk—*Winnipeg's liability to Board—Equalized assessment—Judicial notice—Pleading—By-laws not under seal—Action for debt under statute.*

The charter of the City of Winnipeg (47 Vic., c. 78), separates the City from the County of Selkirk, but in a qualified manner only, and it may be liable to the Eastern Judicial District Board for debts and liabilities due by the City at the date of the Act.

The Court will take judicial notice of the territorial divisions of the Province.

An allegation that a by-law was passed is a sufficient allegation that it was sealed, if sealing was necessary.

By-laws of the Board, except those under which debentures are to be issued, need not be under seal.

Where an Act of Parliament casts upon a party an obligation to pay a specific sum of money to particular persons, an action of debt may be maintained for the amount; and that although a different remedy may be provided by the Act. A *mandamus* would not be granted.

An allegation that the amount was "on the basis of the equalized assessment and valuation of the real property, duly apportioned, and directed to be borne," is a sufficient allegation that the Board did exercise the discretion vested in it. *Eastern Judicial District Board* v. *City of Winnipeg*, 3 M.R. 537.

2. Equalized assessments—*Discretion.*

The Judicial District Boards, in apportioning among the municipalities the amounts necessary for the purposes of the Boards, have no discretion as to whether

the equalized assessment shall be of the real and personal estate or of the real estate alone. It must be upon the basis of both real and personal estate. Overruling Taylor, J., 3 M.R. 537. *Eastern Judicial District Board* v. *City of Winnipeg*, 4 M.R. 323.

JUDICIAL NOTICE.

See EVIDENCE, 14.
— EXTRADITION, 8.
— JUDICIAL DISTRICT BOARDS, 1.
— PROHIBITION, I, 5.

JURISDICTION.

1. Cause of action, where arising.

The writ was issued, specially endorsed for money payable on a mortgage of lands in Manitoba, executed by defendant in Ontario, and payable to the mortgagee or his assigns, but not at any particular place. The plaintiff, who was the mortgagee, resided in Manitoba.

Held, that the act of the defendant which gave the plaintiff his cause of complaint—the non-payment of the money—occurred within the Province, and that the Court had jurisdiction. *Bradley* v. *McLeish*, 1 M.R. 103.

2. Of County Court—*Statute of Frauds—Title to land—Pleading—Objection taken for the first time on appeal—Specific performance.*

In order to oust the jurisdiction of the County Court on the ground that some right or title to land is in question, it must be shown that there is a *bona fide* dispute; and, when the Judge has found a verdict for the plaintiff, it will be assumed that he had inquired into the matter and decided that there was no such dispute.

A Common Law action for a balance of the purchase money of land sold under a verbal agreement cannot be maintained, although the deed has been delivered.

Cocking v. *Ward*, 1 C.B. 858, followed.

The objection of the Statute of Frauds can be raised under the defence of never indebted, and can be insisted on before the Appellate Court, although it did not appear whether it had been raised at the trial or not.

A County Court Judge, having no jurisdiction to decree specific performance of an agreement for the purchase of land, cannot take notice of the doctrine that equity looks upon that as done which ought to be done, and give relief accordingly: *Foster* v. *Reeves*, [1892] 2 Q.B. 255. *McMillan* v. *Williams*, 9 M.R. 627.

Distinguished, *Holmwood* v. *Gillespie*, 11 M.R. 186.

3. Of Judge at Tuesday trial—*Issues on record—Action—Tender before action—Payment into court.*

Declaration on the common counts.

Pleas 1. Except as to $42.15, never indebted and payment.

2. Except as to $42.15, tender before action and payment into court.

Plaintiffs filed two replications.

1. Accepting the money paid into court in satisfaction.

2. Traversing the tender before action.

The record having been entered for Tuesday trial, the defendant objected that no judgment could be entered upon it.

Held, that the Judge had the powers and authorities of a Judge of Assize and *Nisi Prius*, and was bound to try the issues on the record.

Wells v. *Abrahams*, L.R. 7 Q.B. 554, considered. *Winnipeg Jewellery Co.* v. *Perrett*, 9 M.R. 141.

4. Land out of—*Action against non-resident for cancellation of agreement of sale of land not in jurisdiction—Provision for cancelling agreement by mailing notice to purchaser "at post office."*

In an action brought by a resident of the Province as vendor against the purchaser, although he is a non-resident, for specific performance of an agreement executed within the jurisdiction for the purchase of land though out of the jurisdiction under which the payments were to be made within the jurisdiction, the Court acts *in personam*, and, if there is default in payment of subsequent instalments, has jurisdiction to order that the purchaser perform his contract within a time to be fixed and that, in default, the contract be rescinded and any money already paid thereon forfeited to the plaintiff.

Piggott, 127, 128, and *Gray* v. *M. & N. W. Ry. Co.*, (1896) 11 M.R. 48, followed.

A provision for cancellation of an agreement of sale after default and forfeiture of money already paid by mailing a notice to the purchaser "at post office"

is ineffective and should be altogether disregarded. *Burley* v. *Knappen*, 20 M.R. 154.

5. Of Master—*Principal and agent.*

In a suit between principal and agent, upon the footing of an agreement by which the agent was to receive a commission of 20 per cent. on all sales of real estate, the decree directed the Master to take certain accounts, and ordered the agent to pay into court any balance found due by him, "less the defendant's commission of 20 per cent."

Held, that the Master had no jurisdiction to set aside the agreement.

Held, that the agent, in employing the services of an auctioneer, should have used diligence to make a reasonable bargain for his remuneration. The auctioneer, having retained out of the moneys received by him an excessive fee, the agent was charged with the excess. *Virian* v. *Scoble*, 1 M.R. 125.

6. Service of process within—*Action on promissory note—Domicile of defendant—Service of writ.*

Held, actions upon promissory notes and accounts are transitory, and a defendant may be sued thereon irrespective of his domicile, provided he be personally served with process within the Province where the suit is brought. *McKay* v. *Barber*, 3 M.R. 41.

7. Service of process within—*Action on promissory note—Domicile of defendant out of jurisdiction—Personal service within jurisdiction.*

An action on a promissory note is transitory, and a defendant may be sued thereon in Manitoba, although the cause of action arose, and the domicile of the defendant be, out of the jurisdiction, provided he be personally served with process within the Province.

McKay v. *Barber*, 3 M.R. 41, followed. *Rigby* v. *Reidle*, 9 M.R. 139.

8. Service of process within—*Action against non-resident upon cause of action arising out of Province—Personal service of statement of claim upon defendant while in the Province — King's Bench Act, Rule 172, and Rule 174 as re-enacted by 9 Edw. VII, c. 14, s. 1—Expressio unius est exclusio alterius.*

Rule 174 of The King's Bench Act, R.S.M. 1902, c. 40, as re-enacted by s. 1 of c. 14 of 9 Edward VII, was only intended to provide that, instead of all actions being transitory as before its passing, they should now, subject to the exceptions named, be local, and to require the commencement of an action to be in the judicial district in which the cause of action arose, or in which the defendant, or one of several defendants, resides or carries on business, subject to the said exceptions. The new Rule was not intended to take away the jurisdiction of the Court to entertain any action, wherever the cause of it arose, against any person, resident or non-resident, who could be personally served with process within the jurisdiction.

Appeal against the dismissal of an application by defendant to set aside the service of the statement of claim upon him personally in Manitoba in an action upon promissory notes made by him in the State of Colorado and payable there, on the ground that he was not a resident of the Province, dismissed with costs.

McKay v. *Barber*, (1885) 3 M.R. 41, and *Rigby* v. *Reidle*, (1893) 9 M.R. 139, followed.

The maxim, *"expressio unius est exclusio alterius,"* should not be applied when it would lead to inconsistency or injustice.

Lowe v. *Dorling*, [1906] 2 K.B. at p. 784, and *Colquhoun* v. *Brooks*, (1887) 19 Q.B.D. at p. 406, 21 Q.B.D. at p. 65, followed.

First National Bank of Idaho Springs v. *Curry*, 20 M.R. 247.

9. Service of statement of claim out of jurisdiction—*Writ of attachment—King's Bench Act, Rules 201, 202—Non-resident foreigner—Detention of goods pending result of suit respecting them—Substitutional service.*

Appeals from two decisions of MATHERS, J., upon an application to set aside an order of the Referee allowing substitutional service of the statement of claim and an application to set aside an order of attachment under which certain goods said to belong to the male defendant had been seized by the sheriff.

The statement of claim alleged that the male defendant had, while in the position of treasurer of one of the departments of the Government of Russia, stolen a large amount of moneys of the plaintiff which had come to his hands and had brought the money into Manitoba, where he had bought certain lands with it and also the goods seized under the attachment.

Amongst other things, the plaintiff asked for payment of the moneys stolen,

an order for the delivery or sale of the goods, a declaration that the defendants had no claim to the said lands as against the plaintiff, and an order for the sale of them.

It appeared that the defendants had left the Province about a month before the commencement of the action and their whereabouts were unknown to the plaintiff.

On the hearing of the appeals evidence was allowed in to show that the defendants had, about two weeks before the commencement of the action, executed powers of attorney to one Popoff of Winnipeg, in which each was described as "of Winnipeg, Man., Canada, who was in Chicago, Ill., on this date" and in which Popoff was authorized to sell and dispose of the defendants' property in Winnipeg.

Shortly after the defendants came to Manitoba the male defendant bought and furnished a house as a residence, rented a store and bought goods with which to carry on business and the defendants, up to the time of their leaving the Province, were probably domiciled or ordinarily resident within Manitoba; but it appeared from the material used by the plaintiff on the application that the Russian Government had discovered that the defendants were in Canada and was taking steps, in the month preceding their departure, to extradite Proskouriakoff, and that it was probable the defendants had heard of this and left the Province in consequence.

Held, per MATHERS, J.

1. That the facts did not bring the case within Rule 201 of the King's Bench Act, R.S.M. 1902, c. 40, or any of its sub-rules, so that it was not a case in which the statement of claim could be served out of the jurisdiction.

2. It could not be said that the defendants had committed a tort in Manitoba within the meaning of paragraph (c) of Rule 201. *Anderson* v. *Nobels*, (1906) 12 O.L.R. 644, followed.

3. A court has no right to enforce a personal money claim against a person who is neither domiciled nor resident within its jurisdiction unless he has appeared to the process or has expressly agreed to submit to the jurisdiction of such court: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670, and *Emanuel* v. *Symon*, [1908] 1 K. B. 302; and, therefore, apart from Rule 202 of the King's Bench Act, the possession by the defendants of property in Manitoba gave the Court no jurisdiction over the defendants in an action *in personam*.

4. If evidence had been given that the defendants were possessed of property in Manitoba to the value of $200, it would have been necessary to consider whether, under Rule 202, the statement of claim could be served out of the jurisdiction without previously obtaining leave to serve it: *Gullivan* v. *Cantelon*, (1907) 16 M. R. 744, and also whether the plaintiff's cause of action against the defendants was upon a contract within the meaning of that Rule.

5. The writ of attachment should be set aside with costs as having been issued without jurisdiction; but, as there was a possibility that the plaintiff might succeed in establishing a claim to the specific chattels seized, an order should be made for the detention of them by the sheriff until further order on condition that the plaintiff should always keep the cost of detaining, storing and insuring the goods paid in advance so as to protect defendants against loss in case the plaintiff should fail to establish his claim, with leave to either party to apply at any time to vary or rescind the order.

6. That substitutional service of the statement of claim should not be allowed in a case like the present when personal service out of the jurisdiction was not authorized.

Fry v. *Moore*, (1889) 23 Q. B. D. 395, and *Wilding* v. *Bean*, [1891] 1 Q. B. 100, followed.

Per HOWELL, C.J.A., and PERDUE, J.A. The evidence showed that the defendants were not, at the time of the commencement of the action, domiciled or ordinarily resident within Manitoba, and the case was, therefore, not within paragraph (c) of Rule 201, and, not being within any of the other paragraphs of that Rule or Rule 202, the Court had no jurisdiction and the appeals should be dismissed.

Per RICHARDS and PHIPPEN, JJ.A.

The defendants being shown to have acquired a domicile in Manitoba or to have been ordinarily resident here up to within about a month before the commencement of the action and having described themselves as of Winnipeg only two weeks before, the onus was upon them to show that they had ceased to be so ordinarily resident and had, at the time of the commencement of the action, no intention of returning, and they had not satisfied that onus, and the appeals should be allowed.

The Court being equally divided, the appeals were dismissed without costs. *Emperor of Russia* v. *Proskouriakoff*, 18 M.R. 56.

Appeal quashed, 42 S.C.R. 226.

10. Service of statement of claim out of the jurisdiction—*King's Bench Act, R.S.M.* 1902, *c.* 40, *Rule* 201 (*e*)—*Tort—Fraudulent preference—Chattel mortgage given within the jurisdiction to non-resident.*

The mere taking of a chattel mortgage, without taking possession of the mortgaged goods, although it may constitute a fraudulent preference under The Assignments Act, cannot be said to be a tort within the meaning of paragraph (*e*) of Rule 201 of The King's Bench Act, R.S.M. 1902, c. 40, and there is no jurisdiction to serve a statement of claim out of the jurisdiction in an action against a non-resident to set aside such a chattel mortgage, although given to him by a resident debtor on goods within the jurisdiction.

Emperor of Russia v. *Proskouriakoff*, *ante*, followed.

Clarkson v. *Dupre*, (1895) 16 P.R. 521, distinguished. *Anchor Elevator Co.* v. *Heney*, 18 M.R. 96.

See Administration, 4.
— Alimony, 4.
— Appeal from County Court, IV.
— Arbitration and Award, 7.
— Attachment of Goods, 3.
— C. P. R. Lands, 1.
— Conviction, 5.
— Costs, XI, 7.
— Counterclaim, 2.
— County Court, I.
— Criminal Law, XVII, 10.
— Crown Patent, 1.
— Foreign Judgment, 9.
— Injunction, IV, 3.
— Interpleader, I, 2.
— Liquor License Act, 12, 13.
— Parliamentary Elections, 2, 3.
— Patent of Invention, 1.
— Perjury.
— Pleading, IX, 2.
— Railways, IV, 3; XI, 3, 4.
— Real Property Act, V, 9.
— Solicitor's Lien for Costs, 4.
— Surrogate Court.
— Will, III, 4.

JURISDICTION IN LUNACY.

See Lunatic, 1.

JURISDICTION OF COUNTY COURT.

See County Court—Jurisdiction of.

JURISDICTION OF FOREIGN COURT.

See Contract, XIV, 2.

JURISDICTION OF JUSTICES.

See Liquor License Act, 7, 8.

JURISDICTION OF MAGISTRATE.

See Criminal Law, II, 2; XIII, 3; XVII, 8.
— Summary Conviction.

JURISDICTION OF N. W. T. COURT.

See Criminal Law, XVII, 18.

JURISDICTION OF REFEREE.

See Referee—Jurisdiction of.

JURISDICTION OF SINGLE JUDGE.

See Criminal Procedure, 2.
— Liquor License Act, 1.
— Practice, XXVIII, 3.
— Security for Costs, II, 1.

JURY FEES.

See Practice, XII, 2.

JURY TRIAL.

I. Miscellaneous Cases.
II. When Ordered.

I. Miscellaneous Cases.

1. Appeal from Referee—*King's Bench Act, s. 59 and Rule 682 (a)—Discretionary order.*

The plaintiff was a clerk in defendants' store at Winnipeg and claimed damages for injury received in falling on a floor which she alleged had been made slippery with oil owing to defendant's negligence. Not being entitled as of right to have the action tried by a jury, she applied, under sub-section (*b*) of section 59 of the King's Bench Act, for an order for trial by jury.

The Referee refused to make the order and Macdonald, J., dismissed an appeal to him from the Referee.

On appeal from the decision of Macdonald, J.

Held, per Howell, C.J.A., Richards and Cameron, JJ.A., that, under sub-section (*a*) of Rule 682 of the King's Bench Act, on an appeal from an order of the Referee though made in the exercise of a discretion conferred upon him, the Judge should consider the matter independently and exercise his own discretion.

Per Perdue, J.A. In such a case, the Judge should not reverse the order of the Referee unless satisfied that that officer had acted upon a wrong principle or upon a wrong ground in making his order.

Per Howell, C.J.A., and Cameron, J.A. There should be an order for trial by jury in this case.

Per Richards and Perdue, JJ.A. The discretion of the Referee was exercised properly in this case and there should be no order for trial by jury.

The Court being equally divided, the appeal was dismissed without costs. *Hewitt* v. *Hudson's Bay Co.*, 20 M.R. 320.

2. Challenging jurors.

A challenge lies both to the array of the grand jury and to the polls, as in the case of a petit jury.

Semble, that the reasons for quashing the panel (as for favour), which were founded on the discretion of the sheriff in selecting jurors, do not apply at the present time, as the sheriff empanels the jury from lists of selected jurors prepared for him. But a substantial departure of the sheriff from statutory directions might lay the panel open to challenge on the ground of default of the sheriff. *Reg.* v. *Anderson*, T.W., 177.

3. Counterclaim—*Action for breach of warranty—Queen's Bench Act, 1895, section 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 M.R. 461; *Woollacott* v. *Winnipeg Electric St. Ry. Co.*, 10 M.R. 482, followed. *Bergman* v. *Smith*, 11 M.R. 364.

[See now s. 17 of c. 12 of 7 & 8 Edw. VII.]

Distinguished, *Griffith* v. *Winnipeg Elec. Ry. Co.*, 16 M.R. 512.

4. Discretion of Judge as to mode of trial.

The Court of Appeal will not interfere with the discretion of the Judge in granting or refusing an application, made under sub-section (*b*) of section 59 of the King's Bench Act, for the trial of an action by a jury, unless that discretion has been exercised upon a wrong principle, as in *Jenkins* v. *Bushby*, [1891] 1 Ch. 484.

Swindell v. *Birmingham Syndicate*, (1876) 3 Ch.D. 127, and *Ruston* v. *Tobin*, (1879) 10 Ch.D. 565, followed. *McCormick* v. *C.P.R.*, 19 M.R. 159.

5. Illegal seizure—*Trespass.*

Under section 59 of The King's Bench Act, a party complaining of an illegal seizure of his goods has a right to have his action tried by a jury unless he expressly waives such right.

That the act complained of might have been properly characterized as a trespass will not affect the right to a trial by jury, for every illegal seizure is a trespass, although there may be a trespass without a seizure. *Bartlett* v. *House Furnishing Co.*, 16 M.R. 350.

6. Joinder of another cause of action.

Under section 59 of the King's Bench Act, a plaintiff suing under The Workmen's Compensation for Injuries Act has a right to have the action tried by a jury without an order to that effect, and he does not lose that right by adding a claim for damages at Common Law independ-

ently of the Act, though the latter cause of action is one of those in which an order of a Judge for a trial by jury must be obtained. *Schultz* v. *Lyall Mitchell Co.*, 20 M.R. 429.

7. Mixed jury—*Procedure to obtain at trial—Ultra vires.*

The prisoner, a Canadian speaking French, demanded a mixed jury. There were not upon the panel a sufficient number of persons qualified in the French language. Instead of fixing another day for the trial and having summoned the persons next upon the jury roll, the sheriff called upon a person then in court, who, without objection, acted as a juryman. The prisoner was found guilty. Upon a writ of error

Held, that the trial was a nullity and that the prisoner must be committed for trial. *Reg.* v. *Levesque*, 3 M.R. 582.

8. Practice in obtaining—*Jury notice—Withdrawal of replication in order to add—Prejudice of jury against defendant.*

Where by inadvertence replication is filed without a jury notice, leave may be given to withdraw it in order to refile it with a notice of jury; and the fact that the defendants allege that, owing to excited feeling, a fair trial cannot be had before a jury, will not be an answer to the application. *Rajotte* v. *C.P.R.*, 5 M.R. 297.

9. Questioning defendants' witness before jury as to whether the Company is not indemnified against loss in the event of an adverse verdict—*New trial.*

It is improper for plaintiff's counsel, at the trial before a jury of an action by an employee of a company for damages for a personal injury suffered by him in the course of his employment, to ask a witness for the defendants if the company is indemnified against loss in the event of an adverse verdict.

The mere asking of such a question, though the witness be not required to answer it and does not answer it, is sufficient to warrant the Court in setting aside a verdict for the plaintiff and ordering a new trial.

Loughead v. *Collingwood Shipbuilding Co.*, (1908) 16 O.L.R. 65, 12 O.W.R. 697; *Coe* v. *Van Why*, (1905) 3 Am. & Eng. Ann. Cas., 552, and *Cosselmon* v. *Dunfee*, (1902) 65 N.E.R. 494, followed. *Hyndman* v. *Stephens*, 19 M.R. 187.

10. Referee, jurisdiction of, to order jury trial.

Under Rules 27 and 29 of The King's Bench Act, R.S.M. 1902, c. 40, the Referee in Chambers may exercise the power of ordering the trial of an action by a jury given to a Judge by sub-section (*b*) of section 59 of the Act. *Cameron* v. *Winnipeg Elec. Ry. Co.*, 17 M. R. 475.

11. Special jury—*Order for—Time for application.*

An application for a special jury may be made in Chambers, but is more proper before the Assize Judge.

It is not necessary to give any reason for requiring a special jury.

A plaintiff may obtain an order for a special jury *ex parte*. A defendant should move upon summons, but not necessarily before entry of the record. *Molson's Bank* v. *Robertson*, 5 M.R. 343.

12. Striking out jury notice.

A jury notice will not be struck out unless there is some substantial reason for it. The mere assumption that a Judge could try it better without, than with, a jury is not a sufficient ground. *Manitoba Mortgage Co.* v. *Stevens*, 4 M. R. 410.

II. When Ordered.

1. Act respecting Compensation to Families of Persons Killed by Accident R.S.M. 1902, c. 31, s. 3—*Lord Campbell's Act.*

Section 3 of the Act respecting Compensation to Families of Persons Killed by Accident, R.S.M. 1902, c. 31, contemplates that an action by a representative of a person killed by accident against the person charged with negligence may be tried by a jury, and, if a jury trial would have been ordered in case the person injured had brought the action, then the order should not be refused because the person died and the personal representative brings the action. *Marion* v. *Winnipeg Elec. Ry. Co.*, 21 M.R. 757.

2. Grounds for, to be shown—*What is necessary to obtain order for.*

In order to obtain a trial by jury, it is not sufficient to shew that there are issues of fact between the parties, for, by the statute, issues of fact are not to be tried by a jury, unless an order be made for the purpose. Some ground must be shewn to warrant active interference by

making the order. *Morrison* v. *Robinson*, 8 M.R. 218.

Distinguished, *Griffiths* v. *Winnipeg Elec. St. Ry.* 16 M.R. 512.

3. What material is necessary to obtain order for—*Onus on party applying.*

54 Vic., c. 1, s. 33, provides that "all issues of fact in civil cases and proceedings at law shall be tried by a Judge without a jury, provided that an application may be made to a Judge in chambers, to have the issue tried by a jury."

Held, that the *onus* of satisfying the Judge that the action is one that should be tried by a jury, rather than by a Judge without a jury, lies on the party making the application, and an order for trial by a jury should not be made unless some substantial reason is shown for it.

Held, also, that an affidavit of the defendant's attorney that he believed the case to be one which could more properly be tried before a jury than a Judge, because at the trial questions of fact would arise in reference to which there would be a contradiction between witnesses, was immaterial in the absence of facts that would lead the Judge to the same belief. *Case* v. *Laird*, 8 M.R. 461.

Distinguished, *Griffiths* v. *Winnipeg Elec. St. Ry.*, 16 M.R. 512.

4. Action for malicious prosecution.

Since the statute 54 Vic., c. 1, s. 33, which enacted that all issues of fact in civil cases, except in actions of libel and slander, shall be tried by a Judge without a jury, but provided that an application may be made to a Judge in Chambers in any case to have the issue tried by a jury, special circumstances must be shown in order to have an action for malicious prosecution tried by a jury. By the repeal of the former statute the Legislature showed that they considered that an ordinary action for malicious prosecution should be tried by a Judge without a jury.

Harvie v. *Snowden*, 9 M.R. 313.

[But see, now, K. B. Act, s. 59].

Not followed. *Griffith* v. *Winnipeg Elec. Ry.* 16 M.R. 512.

5. Action for damages and negligence—*Assessment of damages.*

The former policy of the Legislature, which entitled parties to a trial by jury if they wished, was changed by the Act 54 Vic., c. 1., s. 33, and now the onus is thrown upon the party who wishes a jury, except in cases of libel and slander and the other causes of action named in section 49 of the Queen's Bench Act, 1895, of showing that the case should be tried by a jury and not by a Judge.

The plaintiff's claim was for damages for being knocked down and injured by a car of the defendants, which he alleged was being, by the negligence of their servants, run along the street at too high a rate of speed and without sufficient warning; and affidavits were filed to show that there would be a good deal of conflicting evidence, and difficulty in assessing the damages.

Held, that no sufficient reason was shown why a special order for a jury should be granted.

A Judge who has jurisdiction to try the issues of fact in any case may at the same time assess the damages, and it is not necessary to summon a jury for that purpose. *Woollacott* v. *Winnipeg Elec. St. Ry. Co.*, 10 M.R. 482.

Followed *Bergman* v. *Smith*, 11 M.R. 364.

Distinguished *Griffith* v. *Wpg. Elec. Ry.*, 16 M. R. 512.

6. Action for damages caused by alleged negligence—*King's Bench Act, R.S.M. 1902, c. 40, s. 59.*

The plaintiff's claim was for damages for the loss of an arm in consequence of being run over by a car of the defendants which he claimed was going at excessive speed, without a fender and without the gong being rung to warn him. On his application, under section 59 of the King's Bench Act, R.S.M. 1902, c. 40, a judge ordered that the action should be tried by a jury on the grounds that the principal issues to be tried were issues of fact and that a jury would be more likely to assess the proper damages in case of a verdict for the plaintiff than a Judge.

Held, that the judicial discretion exercised by the Judge in this case should not be interfered with.

Morrison v. *Robinson*, (1892) 8 M.R. 218; *Case* v. *Laird*, (1892) 8 M.R. 461; *Harvie* v. *Snowden*, (1893) 9 M.R. 313; *Woollacott* v. *Winnipeg Electric Street Ry. Co.*, (1895) 10 M.R. 482; and *Bergman* v. *Smith*, (1896) 11 M.R. 364, discussed and distinguished. *Griffiths* v. *Winnipeg Elec. Ry. Co.*, 16 M.R. 512.

7. Action for damages caused by negligence—*King's Bench Act, s. 59.*

It is proper to order, on the application of the plaintiff under section 59 of the King's Bench Act, R.S.M. 1902, c. 40, the trial by a jury of an action for damages caused by the alleged negligence of a street railway company resulting in the plaintiff being struck and injured by one of the company's cars. *Seymour* v. *Winnipeg Elec. Ry. Co.*, 19 M.R. 208.

See Accord and Satisfaction, 2.
— Criminal Law, IX, 2; XIV.
— Evidence, 24.
— Malicious Prosecution, 5.
— Practice, IX, 1; XXVIII, 29.
— Referee, Jurisdiction of, 1.

JURY—VERDICT OF.

See Banks and Banking, 6.

JUSTICE OF THE PEACE.

See Election Petition, VII, 1, 2, 3, 4; IX, 2.
See Malicious Prosecution, 4.
— Prohibition, III, 2.

JUSTIFIABLE HOMICIDE.

See Criminal Law, XVII, 3.

KING'S COUNSEL.

See Queen's Counsel.

LACHES.

See Alimony.
— Crown Patent, 5.
— Deed of Settlement.
— Fraudulent Conveyance, 3.
— Homestead, 1.
— Infant, 2.
— Injunction, III, 4.
— Interpleader, V, 3; VIII, 2.
— Misrepresentation, III, 1.
— Mortgagor and Mortgagee, IV, 1.
— Practice, XXIII, 2.
— Real Property Act, III, 8.
— Statute of Frauds, 1.
— Vendor and Purchaser, II, 3, 7; IV, 3; VI, 15.

LAND OUT OF THE JURISDICTION.

See Mechanic's Lien, X, 3.
— Mortgagor and Mortgagee, VI, 15.
— Railways, VII, 1.

LAND SCRIP.

See Replevin, 6.

LANDLORD AND TENANT.

I. Distress for Rent.

1. Appraisement—2 *W. & M., c. 5, s. 2*—*Damages for illegal distress.*

A sale of goods upon a distress for non-payment of rent is illegal under 2 W. & M., c. 5, s. 2, if there has not been an appraisement of the goods by two sworn appraisers, and the tenant will be entitled to recover the real value of the goods: *i.e.*, their full value to him, less the rent and expenses. That statute is still in force in Manitoba, not having been repealed in England until 1872 by 35 and 36 Vic., c. 92.

Rocke v. *Hills*, (1887) 3 T.L.R. 298; *Knight* v. *Egerton*, (1851) 7 Ex. 407, and *Foa on Landlord and Tenant*, 579, followed. *Dewar* v. *Clements*, 20 M.R. 212.

2. Excessive distress—*Trespass and trover—Not guilty by statute—Married woman—Joinder of husband in tort.*

Trespass or trover will not lie upon a distress where there is some rent due. The action should be upon the case for excessive distress, or for not accounting for the surplus moneys realized, or for not returning the balance of goods unsold.

After distress any surplus moneys should be paid to the sheriff, and unsold goods returned or placed in some convenient place, with notice to the tenant.

"Not guilty by statute" puts in issue the tenancy as alleged. If there be a variance as to the landlord alleged, an amendment may be allowed if the verdict be otherwise satisfactory.

Where the principle upon which the jury should proceed in estimating damages

was not made clear to them, a new trial was ordered without costs.

Per BAIN, J.—It may still be permissible to join a husband with his wife as plaintiff in an action of tort, for damage to her goods, notwithstanding the Married Women's Property Act. *Pettit* v. *Kerr*, 5 M.R. 359.

3. Mortgagee taking possession—*Replevin—Mortgagee.*

In an action of replevin, the defendant avowed the taking as distress for rent.

Held, that the plea of *non tenuit* put in issue, not merely the demise pleaded, but whether the plaintiff was tenant to the avowant at the time of distress.

The rule as to a tenant not being permitted to deny the landlord's title applies only where the tenant obtained possession from the landlord. Where a person having been in possession is persuaded to attorn under circumstances which do not warrant it, he may show that the rent was paid without sufficient ground.

After rent became due, the lessor mortgaged the property.

Held, that the mortgagor could not distrain, because he had parted with the reversion; nor could the mortgagee, because the rent was not due to him. *Dauphinais* v. *Clark*, 3 M.R. 225.

4. Notice of demand, etc.—*Husband and wife—Joinder of causes of action.*

A count by tenant against landlord for seizing and selling as for distress without giving the notice required by 46 & 47 Vic., c. 45, s. 6, whereby the tenant lost the difference between the value of the goods and the amount realized by their sale.

Held, bad on demurrer.

Counts in trespass to the goods of a husband cannot be joined with counts for unlawful distress of the goods of the wife, and such counts may be demurred to. *Vaughan* v. *Building & Loan Ass.*, 6 M.R. 289.

5. Rent payable in kind—*Distraining after six months from end of term—Liability of landlord for illegal act of bailiff.*

A distress for rent may lawfully be made where the tenant makes default under a lease providing that, in lieu of a money payment, he is to deliver to the landlord all the wheat grown upon the premises as soon as it should be threshed and that the landlord should sell it and retain one-half the proceeds for himself and pay over the balance to the tenant.

Thompson v. *Marsh*, (1832) 2 O.S. 389, and *Nowery* v. *Connolly*, (1869) 29 U.C.R. 39, followed.

The distress in this case was made more than six months after, but under a warrant given to the bailiff four weeks before, the expiration of the tenancy, and there was no direct evidence that the landlord was aware of the illegal act of his bailiff in seizing at the time he did; but he learned of the fact of seizure after it had been made and before the sale, which he allowed to go on without making any inquiry so far as the evidence showed, and afterwards accepted the proceeds of the sale.

Held, that the proper finding of fact was that the landlord either ratified the bailiff's illegal act with knowledge of the circumstances or meant to take upon himself without inquiry the risk of any irregularity the bailiff might have committed and to adopt all the bailiff's acts, and, following *Lewis* v. *Read*, (1845) 13 M. & W. 834, that the landlord was liable for the damages suffered by the tenant. *Dick* v. *Winkler*, 12 M.R. 624.

6. Reversion.

The Common Law right of distress for rent in arrear can only be exercised by the owner of the reversion which must be vested in him at the time of the distress.

Staveley v. *Allcock*, 16 Q.B. 636, and *Smith* v. *Torr*, (1862) 3 F. & F. 505, followed.

A tenant, therefore, who makes a sublease of the property for the whole of his term, without reserving to himself any right of distress, cannot distrain for rent in arrear due under the sub-lease, as he has parted with the reversion.

The payment of rent under the sublease does not operate as an estoppel so as to confer a right of distress for subsequent arrears of rent which otherwise does not exist.

Hazeldine v. *Heaton*, (1883) Cab. & E. 40, followed. *O'Connor* v. *Peltier*, 18 M.R. 91.

7. Second distress for rent due at date of first distress—*Appraisement—Appraisers not sworn.*

After a distress for a month's rent, it is not illegal to make another distress for the next month's rent, although it was due and in arrear at the time of the first distress.

Under 11 Geo. 2, c. 19, s. 19, the want of the sworn appraisement required by 2 W. & M., sess. 1, c. 5, is only an irregu-

larity, and the tenant can only recover such special damage as he can show to have resulted from it.

Lucas v. *Tarleton* (1858) 3 H. & N. 116, and *Rodgers* v. *Parker* (1856), 18 C.B. 112, followed. *McDonald* v. *Fraser*, 14 M.R. 582.

See, however, *Dewar* v. *Clements*, 20 M.R. 212, No. 1, *supra*.

8. Action by sub-tenant for wrongful distress—2 *W. & M., Sess.* 1, *c.* 5, *s.* 5—*Accelleration of rent—Abandonment of premises—Payment to landlord's clerk—Bailiff, liability of.*

Defendants demised the premises in question to one Lesk under a lease in which he covenanted that he would not assign or sublet without leave, also that, if any of the goods and chattels of the *lessee* should be at any time seized or taken in execution or in attachment by any creditor of the said lessee, or if the *lessee* should attempt to abandon said premises or to sell or dispose of his goods and chattels so that there would not in that event be, in the opinion of the lessors, a sufficient distress on the premises for the then accruing rent, then the current month's rent, together with the rent for the succeeding three months next accruing should immediately become due and payable, &c. The lease also provided that the word "lessee" should include the heirs, executors and administrators of the lessee, also his assigns, if he should assign with the consent of the lessors.

The plaintiff bought the stock in trade on the premises from Lesk and took possession, thereafter paying the rent to the defendants, but there was no consent to an assignment by Lesk.

Held, 1. The plaintiff was not the "lessee" within the meaning of the covenants in the lease and the defendants could not justify a distress for three months' accelerated rent under the covenant above set forth, by reason of any seizure of the goods and chattels of the plaintiff on the premises or any dealing by the plaintiff with such goods.

2. It could not be said that Lesk, the lessee, had, by selling out and turning over possession to the plaintiff, attempted to *abandon* the premises.

Mouson v. *Boehm*, (1884) 26 Ch.D. 405, followed.

3. The payment of a month's rent by plaintiff to a clerk of defendants authorized to receive it and the depositing of the amount to the credit of defendants in their bank account, though without their knowledge, was a good payment and defendants were not justified in proceeding further with a warrant of distress for that rent.

4. Section 5 of 2 W. & M., Sess. 1, c. 5, authorizes the recovery of double the value of goods and chattels illegally distrained and sold in an action by the owner of the goods, although he may not be the tenant.

5. The defendant Willis, who acted as the bailiff o the defendants Harrison in making the illegal distress and sale, was equally liable with them under the statute quoted.

Hope v. *White*, (1866) 17 U.C.C.P. 52, followed. *Choderker* v. *Harrison*, 20 M.R. 727.

II. Mortgagor and Mortgagee.

1. Distress for rent—*Eviction of purchaser of mortgaged premises—Landlords and Tenants Act, R.S.M.* 1902, *c.* 93.

The purchaser of mortgaged premises is not a tenant of the mortgagee or his assignee and cannot be dispossessed by the summary procedure provided for by The Landlords and Tenants Act, R.S.M. 1902, c. 93, although the mortgage contains clauses creating the relation of landlord and tenant between the parties and giving the mortgagee the right to distrain for arrears of interest as rent.

Neither can the mortgagee or his assignee, in such a case, distrain upon goods other than those of the mortgagor for such arrears of interest. *Chalmers* v. *Freedman*, 18 M.R. 523.

2. Excessive rent—*Appeal, grounds of.*

In an action for damages brought by the plaintiffs against a sheriff for seizure and sale of the goods of one Coulter under an execut on in his hands, and refusing to acknowledge the plaintiffs' 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 and 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 real *bona fide* one, and that the relation of landlord and tenant was not validly created thereby so as to affect third parties.

Held, also, that a party appealing from a County Court should be confined to the grounds stated in his precipe to set the case down for appeal under section 319, s-s. 2, of the County Courts Act, as amended by 59 Vic. c. 3, s. 2, and should not be allowed to urge any other grounds without consent or leave of the Court or a Judge. *Imperial Loan & Inv. Co.* v. *Clement, Re Coulter*, 11 M.R. 428.

3. 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 the plaintiffs had notice of Murray's financial difficulties.

Held, KILLAM, J., dissenting, 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.

Per KILLAM, J. The circumstances showed that the plaintiffs *bona fide* intended to make a lease and Murray to accept the position of tenant at the rental named, and the lease should be held to be valid notwithstanding the excessive amount of rent provided for. *Imperial Loan & Inv. Co.* v. *Clement, Re Murray*, 11 M.R. 445.

4. Landlord's claim for rent when goods seized under execution—*8 Anne, c. 14, s. 1—Lease by mortgagee to mortgagor in possession—Excessive rent.*

Interpleader issue as to the crops grown on the lands of Stevenson, the execution debtor, which had been seized by the sheriff under the defendant's writ of execution.

The plaintiff was a mortgagee of the land and had taken from Stevenson, the mortgagor in possession, a lease reserving a rent of two-thirds of the crops to secure past indebtedness and a further advance, and he claimed the right, under 8 Anne, c. 14, s. 1, to have the year's rent paid by the sheriff out of the crops seized.

Held, that to entitle a landlord to such right there must be a real lease and the rent reserved must be a real *bona fide* rent and not an excessive one, and there should be shown an intention of the parties to create a real tenancy at a real rent and not merely, under color and pretence of a lease, to give the mortgagee additional security, and that the verdict should be against the plaintiff on the issue in this case.

Hobbs v. *Ontario Loan & Debenture Co.*, (1890) 18 S.C.R. 483, and *Imperial Loan* v. *Clement*, (1896) 11 M.R. 428, followed. *Stikeman* v. *Fummerton*, 21 M.R. 754.

III. OVERHOLDING TENANT.

1. Color of right—*Summary proceedings.*

In answer to a summary proceeding under the Landlords and Tenants Act, R.S.M. 1902, c. 93, to recover possession of the premises in question, which were held under a written lease creating a tenancy from week to week, the tenant gave evidence tending to show that agents of the landlords had, prior to and at the time of the execution of the lease, agreed and promised verbally that the tenant would not be required to give up possession until the landlords would build on the land. This was denied by one of the agents and the tenant admitted that said agent had refused to put such a term in the lease although requested to do so.

Held, that the alleged promise, if proved, was of too indefinite a character to support the contention of the tenant that he was not holding over without color of right.

Price v. *Guinane*, (1889) 16 O.R. 264; *Gilbert* v. *Doyle*, (1874) 24 U.C.C.P. 71, and *Wright* v. *Mattison*, (1855) 59 U.S.R. 50, followed. *C. P. R.* v. *Lechtzier*, 14 M.R. 566.

2. Demand in writing unsigned—*Service of copies annexed to notice under section 5—Preliminary objections.*

In proceeding for an order for possession under The Overholding Tenants Act, R.S.M., c. 112, the demand in writing

served by the landlord under section 3 of the Act requiring the tenants to go out of possession was unsigned, but was otherwise sufficient in form. When it was served, its purport was verbally explained to the tenants who were told that it was from the landlord's agent, and one of them then went to see the latter about it.

Held, that the demand was sufficient under the circumstances, though unsigned. *Morgan* v. *Leach*, (1842) 10 M. & W. 558, followed.

During the hearing it was objected that the copies served with the notice of the application as required by section 5 were not annexed to the notice.

Held, that delivery of the copies with the notice was probably sufficient compliance with the Act, but at any rate the objection should have been taken as a preliminary objection. *Re Sutherland, Landlord, and Portigal, Tenant*, 12 M.R. 543.

3. Forfeiture for breach of covenant—*Summary proceedings to evict—Landlords and Tenants Act, R.S.M. 1902, c. 93, ss. 15 and 17, as amended by 3 and 4 Edw. VII, c. 29, ss. 1, 2.*

This was an application by way of summary proceedings under sections 11-17 of the Landlords and Tenants Act, R.S.M. 1902, c. 93, as amended by 3 & 4 Edw. VII, c. 29, ss. 1, 2, to recover possession of a hall let to defendants for five years, from 1st November, 1931, at a rental of $15 per month. The lease was in writing under seal, and the lessees by it covenanted that they would not permit the hall to be used for the purposes of dancing, except to lodges renting the hall, and that any breach of that covenant should at once at the option of the lessor operate as a forfeiture of the lease.

The lessees having rented the hall to five young men not connected with any lodge for the holding of a dance, the lessor gave them a notice declaring the lease to be forfeited and demanded possession.

Held, following *Moore* v. *Gillies*, (1897) 28 O.R. 358, that, under the statute as amended, the Judge can now try the right of the tenant to hold over, and that defendants had forfeited the lease, and that a writ of possession should be issued in the landlord's favor. *Ryan* v. *Turner*, 14 M.R. 624.

4. Notice to quit—*Monthly tenancy—Landlord and Tenants Act, R.S.M. 1902, c. 93, ss. 11-17—Summary proceedings to recover possession.*

1. Where a lease expressly provides that the tenancy created by it shall be a monthly tenancy, the fact that it also provides what rent shall be paid for each of sixteen future months, and more for some months than for others, will not enlarge the rights of the tenant in any way, and the landlord may terminate the tenancy at the expiration of any month by giving a month's notice.

2. A notice to quit signed by one of two owners of the property with the approval of the other, such approval being known to the tenant, will be sufficient, although not expressed to be on behalf of anyone except the person giving it.

Aslin v. *Summersett*, (1830) 1 B. & Ad. 135; *Fox on Landlord and Tenant*, 560, followed.

3. To put an end to a tenancy at the end of May, a notice served on 30th April is good, although it be erroneously dated 1st May.

4. A notice to quit on or before the anniversary of the commencement of the tenancy is good: *Sidebotham* v. *Holland*, [1895] 1 Q.B. 378; although a notice to quit on the last day of the tenancy would also be good. *Burrows* v. *Michelson*, 14 M.R. 739.

5. Tenancy from year to year—*Contract to be implied when tenant holds over after expiration of term under lease.*

When a tenant holds over after the expiration of the term and nothing is agreed on as to the terms of the new holding, that new holding is not of necessity to be on the same terms as the former, but the landlord may be awarded an increased rent if there are circumstances to show that such was expected by him and that such expectation was known to and not repudiated by the tenant.

Elgar v. *Watson*, (1842) 1 Car. & M. 494, followed.

In such a case the tenant was notified in writing within a month that the rent would be increased after another month and paid two months rent at the increased rate without objection.

Held, that she was liable for rent at such increased rate for the remaining months of her occupancy, without deciding whether a new tenancy from year to year had been created or not. *Winnipeg Land and Mortgage Corp.* v. *Witcher*, 15 M.R. 423.

IV. Rent Payable in Kind.

1. Grain grown on farm leased to execution debtor—*Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, s. 39—Seizure of equitable interest under execution—Execution creditor.*

Interpleader issue between an execution creditor and the claimant of a quantity of grain seized in stack, unthreshed.

The claimant let to the execution debtor the farm on which the grain had been grown by an indenture reserving as rent "the ———— share or portion of the whole crop which shall be grown upon the demised premises as hereinafter set forth," and the lease provided that the lessor might retain from the share of the crop that was to be delivered to the lessee a sufficient amount to cover taxes and to repay advances and other indebtedness; that the lessee, immediately after threshing, should deliver the whole crop, excepting hay, in the name of the lessor, at an elevator to be named by the lessor; that all crops of grain grown upon the said premises should be and remain the absolute property of the lessor until all covenants, conditions, provisoes and agreements therein contained should have been fully kept, performed and satisfied; and that the lessor should deliver to the lessee two-thirds of the proceeds of the crop to be stored in the elevator, less any sum retained for taxes, advances, indebtedness or guaranties previously mentioned.

The grain in question had, until its seizure under the plaintiff's execution, remained on the farm in the possession of the lessee. The claimant claimed it as owner under the terms of the lease, and not for rent.

Held, 1. That the lease did not operate to prevent the lessee from ever having any property in the grain to be grown.

2. That, even if the legal ownership of the grain was to be in the lessor, it was still, as to two-thirds, held for the benefit of the lessee subject to the lessor's charge for taxes and advances, &c., and the lessee had an equitable interest in it, and the lessor's lien or charge would be void under the Bills of Sale and Chattel Mortgage Act, now chapter 11, R.S.M. 1902, s 39, as being a charge upon crops to be grown in the future.

3. That the interest of the lessee in the grain, whether legal or only equitable, was subject, under section 182 of The County Courts Act, R.S.M. 1902, c. 38, to seizure and sale under execution, and that the claimant's interest could not prevail over that of the plaintiff. *Campbell* v. *McKinnon*, 14 M.R. 421.

2. Implied covenants in lease—*Liability for failure to raise crops on leased farm.*

In April, 1898, the plaintiff leased by deed to defendant's husband a half section of land for five years at a rental of one-third of the crop grown on the premises yearly. The lease was on a printed form of a farm lease and contained covenants by the lessee that he would during the term cultivate such part of the land as was then or should thereafter be brought under cultivation in a good, husbandlike and proper manner, and would plow said land in each year four inches deep and crop the same during the term in a proper farmer-like manner. Afterwards a new lease of the same land was made by deed, ante-dated so as to bear the same date as the first one, substituting the defendant as lessee instead of her husband. This was done, as found by the trial Judge, at the request of the defendant's husband who had reason to fear the action of a creditor in case the lease remained in his name, and it was intended that the new lease should be a duplicate of the other in all respects except as to the name of the lessee. The new lease, by mistake of the solicitor who prepared it, was written on a printed form of "statutory lease," not containing the special clauses applicable to farm land. It provided for the same rental as the other lease, payable in the same way and at the same times, and contained the same covenant to plow four inches deep in each year written into it, but no express covenants to cultivate or crop the land.

By the end of 1901 the cultivated portion of the farm was 117 acres, but in 1902 the defendant only ploughed and cultivated four acres out of the 117, and weeds grew up all over the rest.

The plaintiff's claim was for damages for breach of covenants to cultivate, crop and plough in 1902, which he contended should be implied in the lease to defendant under the circumstances.

In his statement of claim he had asked for a reformation of the lease by including the covenants to cultivate and crop that were in the first lease, but abandoned that claim on the argument.

Held, following *McIntyre* v. *Belcher*, (1863) 14 C.B.N.S. 654; *The Moorcock* (1889) 14 P.D. 68, and *Hamlyn* v. *Wood*

[1891] 2 Q.B. 491, that such covenants should, under the circumstances, be implied in the lease to defendant, and that she was liable for the estimated value of one-third of the crop that would probably have been produced on the 117 acres if it had been cropped in that year, and for the deterioration in value of the land on account of defendant having allowed it to grow up with weeds. *Dunsford* v. *Webster*, 14 M.R. 529.

V. Other Cases.

1. Liability of landlord to tenant for condition of premises—*Damage suffered by tenant of part of building caused by defective condition of another part.*

The plaintiff was tenant of a store on the ground floor of a building owned by the defendant and sued for damages to her goods caused by rain water entering by an unglazed fanlight over a door at the end of a hall extending from the head of a stairway leading to the second floor of the building. The water, flowing over the floor above the plaintiff's store, came through the ceiling, and caused plaster to fall, which damaged the plaintiff's goods.

The defect complained of existed at the time of the demise to the plaintiff.

Held, following *Humphrey* v. *Wait*, 1873, 22 U.C.C.P. 580; *Colebeck* v. *Gardiners' Co.*, (1875) 1 Q.B.D. 234 and *Gairdner* v. *Taylor*, (1871) L.R. 6 Ex. 217, that the defendant was not liable.

Miller v. *Hancock*, [1893] 2 Q.B. 177, distinguished on the ground that, in that case, the defect was the result of wear and tear and arose after the demise.

A tenant taking part of a building in other parts of which are defects likely to result in damage to him should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damages caused by such defects. *Rogers* v. *Sorell*, 14 M.R. 450.

2. Notice to quit—*Monthly tenancy—Acquiescence in invalid notice—Waiver—Meaning of "by" a certain date.*

When a monthly tenancy expires on the last day of the calendar month, a notice to quit must be served not later than that day in order to put an end to the lease at the end of the next calendar month. A notice to quit which requires a monthly tenant to vacate "by" the 30th of April, even if served on 31st of March, would not be sufficient, as it does not allow the tenant the whole of the last day of his term. In such a case the word "by" means "not later than," or "as early as."

A valid notice to quit cannot be waived by the party giving it, so as to restore the tenancy determined by it, except by acts or conduct of both parties, which amount to the creation of a new tenancy; and, conversely, when an insufficient notice to quit has been given, the mere acquiescence in it of the party receiving it cannot have the effect of putting an end to the tenancy.

Doe d. Murrell v. *Milward*, 3 M. & W. 328, and *Bessel* v. *Landsberg*, 7 Q.B. 638, followed.

Cartwright v. *McPherson*, 20 U.C.R. 251, dissented from. *Re Magee, Landlord, and Smith, Tenant*, 10 M.R. 1.

3. Surrender of lease—*Forfeiture of lease for breach of covenant—Eviction by notice.*

The plaintiff was tenant to defendant of a farm under a lease for three years, dated in March, 1903. The lease contained a covenant by plaintiff to buy three horses from defendant and to pay for them by breaking and cleaning of stone on the farm at a price per acre, and, in default, to pay in cash at the time of threshing.

About the first day of December following, plaintiff and defendant met and discussed terms on which plaintiff would abandon the lease and give up possession of the premises. Plaintiff told defendant that he was embarrassed financially and that, unless defendant would agree to guarantee the wages of the men for the next year's work and the store bills to be paid, he would be unable to go on with the working of the farm under the lease. The defendant seemed to be anxious to assist the plaintiff in this respect, and offered to guarantee the store bills up to $125, but refused to guarantee the men's wages. Negotiations having failed, defendant then told plaintiff that he would cancel the lease for non-fulfilment of some of the covenants. The plaintiff said he wanted that in writing, and the next morning defendant gave plaintiff the following written notice: "Take notice that I have this day cancelled lease of my farm to you on the grounds of non-fulfilment of terms of said lease." On the same day the plaintiff vacated the premises, after selling to defendant some oats, barley and feed he had there. Defendant resumed possession at once. A few days afterwards plaintiff came back and sold

to defendant his poultry and then left the farm altogether.

Held, that there had been no surrender of the lease and that defendant was liable in damages as for an eviction of the plaintiff.

Defendant also claimed that he was entitled to terminate the lease for breach of the covenant referred to. As to this, it appeared that plaintiff had done some of the work stipulated for and that there was a dispute over their accounts, but that at all events there was not more than about $38 due on the horses.

Held, that there was not such a clear breach of the covenant as to entitle the defendant to declare the lease forfeited on that ground. *Watson* v. *Moggey*, 15 M.R. 241.

See CHATTEL MORTGAGE, II, 3; V, 3.
— COVENANTS, 2.
— DISTRESS FOR RENT, 2.
— FIXTURES, 8.
— GARNISHMENT, VI, 8.
— MORTGAGOR AND MORTGAGEE, VI, 4.
— NEGLIGENCE, VIII, 3.
— PLEADING, II, 1.
— SHERIFF, 2.
— VENDOR AND PURCHASER, IV, 3; VI, 4.

LAPSE OF LEGACY.

See WILL, III, 6.

LAPSED APPLICATION.

See PRACTICE, XXVIII, 18.

LAWS IN FORCE IN MANITOBA.

See CONSTITUTIONAL LAW, 8, 9, 10.
— DESCENT OF LAND.

LAW SOCIETY.

Admission of retired Judge—*Fees*—*Visitors.*

The Law Society had no power in January, 1883, to exact admission fees from a retired Judge of the Court of Queen's Bench.

The Judges of the Court of Queen's Bench are visitors of the Law Society.

As such visitors they have the power to visit the Society upon every matter in respect of which their Act of Incorporation gives them the power to act. (TAYLOR, J., dissenting.) *Re Miller*, 3 M.R., 367.

LAW STAMPS.

1. Affidavit—*Papers annexed to affidavit.*

Papers annexed to an affidavit are not filings distinct from the affidavit, and do not require to be stamped. *Case* v. *Stephens*, 6 M. R. 552.

2. Constitutional law—*Taxation.*

The imposition of fees by law stamps is undoubtedly an indirect tax.

Under s-s. 2 of s. 92 of the B. N. A. Act the Provincial Legislature has not the power to impose such a tax in order to raise a revenue for the general purposes of the Province. *Dulmage* v. *Douglas*, 3 M.R. 562.

3. Constitutional law—*Taxation.*

The imposition of stamps upon law proceedings is *ultra vires*. The statute 49 Vic., c. 50, makes no difference in this respect. *Dulmage* v. *Douglas*, 4 M.R. 495.

4. Constitutional law — *Provincial Legislature — Taxation — Construction of statute.*

A provincial statute provided that "all duties and fees of office payable in law stamps on any search, filing, pleading, . . . in virtue of any statute, rule or order, now or hereafter in force, are hereby declared to be a direct tax and duty imposed upon the party directed to pay or paying the same, in order to the raising of a revenue for provincial purposes, and shall not be in any way taxable or recoverable as costs by the said party from any other party or person whatsoever."

Held, 1. That the Act was *intra vires* of the Legislature.

2. The words "now or hereafter in force" read as "which now or hereafter have been enacted or made and remain unrepealed." *Crawford* v. *Duffield*, 5 M. R. 121.

5. Jury fee.

The imposition of a fee of $12 in stamps upon filing a jury notice is *ultra vires*. *Plummer Wagon Co.* v. *Wilson*, 3 M.R. 68.

See CONSTITUTIONAL LAW.

LEADING QUESTIONS.

See EVIDENCE ON COMMISSION, 4.

LEASE.

See PLEADING, XI, 1.

LEASE BY MORTGAGOR.

See MORTGAGOR AND MORTGAGEE, VI, 7.

LEASEHOLD INTEREST.

See MUNICIPAL ELECTIONS, 6.

LEAVE TO APPEAL.

See APPEAL FROM ORDER, 4.
— APPEAL TO PRIVY COUNCIL, 1, 2.
— APPEAL TO SUPREME COURT, 5.
— COUNTY COURT, II, 1.

LEAVE TO DEFEND.

See PRACTICE, XIX, 3; XX, B, 4, 5, 7.
— SUMMARY JUDGMENT, I.

LEGACY.

See WILL, II.

LIABILITY OF SEVERAL TORT FEASORS.

See JOINT TORT FEASORS.
— NEGLIGENCE, VII, 5.

LIBEL.

1. Affidavit or affirmation under Newspaper Act—*Authority of commissioner—Truth of contents of affirmation—Pleading—Special damages—Benefit of an Act.*

50 Vic. (M.) c. 23, enacts that no person shall publish a newspaper until "an affidavit or affirmation . . . . shall have been delivered to the prothonotary." . . . . The affidavit or affirmation was to set forth truly certain particulars, and power was given to any justice of the peace or commissioner to take the affidavit or affirmation.

Held, that an affirmation was sufficient although made by a person not entitled to substitute an affirmation for an affidavit.

Such an affirmation was made by the managing director of a company. In the absence of evidence as to his duties,

Held, that the affirmation was sufficient.

The affirmation was entitled, "In the matter of The Manitoba Daily Free Press (a daily newspaper) and of chapter 23 of the statutes of Manitoba passed in the fiftieth Victoriæ;" commenced, "I, W. F. L., of ———, journalist, do solemnly declare and affirm;" and concluded, "and I make this solemn declaration, conscientiously believing the same to be true, and by virtue of 'The Act respecting Extra Judicial Oaths.'" The commissioner's certificate was as follows: "Solemnly declared and affirmed before me at the City of Winnipeg, in the County of Selkirk, this 19th day of December, A.D. 1887, John B. McKilligan, a commissioner, &c."

The authority of the commissioner to take the affirmation was derived, not from the Act respecting Extra Judicial Oaths, but from the Act above quoted or 49 Vic. (M.) c. 23.

Held, that the affirmation was, nevertheless, valid.

There was no proof that the person before whom the affirmation was taken was a commissioner.

Held, that the onus of proof was on the person asserting the lack of authority.

There was no proof of the truth of the affirmation.

Held, that such proof was unnecessary.

The Act 50 Vic. (M.) c. 22, provided that, "Except in cases where special damages are claimed, the plaintiff in all actions for libel in newspapers shall be required to prove either actual malice or culpable negligence in the publication of

the libel complained of." And the Act 50 Vic. (M.) c. 23, provided that, "No person . . . . . who has . . . . . not complied with the provisions of this Act shall be entitled to the benefit of any of the provisions of the" other Act.

Held, 1. That it was not necessary to plead compliance with chapter 23 in order, upon the trial, to obtain the benefit of chapter 22.

2. That "cases where special damages are claimed" means not merely claimed in the declaration, but also by evidence at the trial.

3. Allegations of loss of business are allegations of general damages only. Where special damages are claimed the names of the customers whose business has been lost must be set out. *Ashdown* v. *Manitoba Free Press Co.*, 6 M.R. 578.

Appeal dismissed, 20 S.C.R. 43.

2. Corporation—*Malice.*

The manager of one branch of the defendant company wrote certain letters to another branch, which might have constituted a libel on the plaintiff. There was no evidence that the corporation, or the directors, or the managing board authorized, or had any knowledge of the letters being written.

Held, that the defendants were not liable.

Quære—Can a corporation be guilty of malice? *Freeborn* v. *Singer Sewing Machine Co.*, 2 M.R. 253.

3. Costs in libel action when verdict for nominal damages only—*King's Bench Act, Rule* 926.

When the jury in an action for libel finds a verdict for plaintiff with only one dollar damages, the defendant should not be ordered to pay costs. *Manitoba Farmers' Hedge & Wire Fence Co.* v. *Stovel Co.*, 14 M.R. 55.

[But see, now, s. 3 of c. 12 of 7 & 8 Edward VII. *Shillinglaw* v. *Whittier*, 19 M.R. 149, and *Davis* v. *Wright*, 21 M.R. 716.]

4. Fair comment—*Embarrassing plea—Justification.*

To a count for libel the defendants pleaded as a second plea, in effect, that, before and at the time of the publication of the alleged libel, great public interest was felt in the subject matter thereof, that it was much discussed in newspapers, that the defendants were proprietors of a public newspaper, and the words complained of were part of an editorial article and were fair comment on the said matters of great public interest, and were published *bona fide* and without malice.

Upon an application to strike out this plea as embarrassing,

Held, that the plea was not embarrassing, and might be pleaded along with the general issue. *Martin* v. *Manitoba Free Press Company*, 7 M.R. 413.

5. Fair comment—*Defamation—Questions for jury—Admissibility of evidence in rebuttal—Weight of evidence—Wrongful rejection of evidence.*

In an action of libel against a newspaper publishing company, the declaration alleged that the defendant Company printed and published of the plaintiff the following words: "Another disgraceful piece of business which has never yet been explained, was the celebrated $50 a mile charge, which, had it not been for the watchfulness of the Free Press, would have put $90,000 into the promoters' pockets, and everybody knows that the Attorney-General was the principal promoter," meaning, as alleged in the innuendo, that the plaintiff, who was the Attorney-General of Manitoba, procured the Province to enter into a contract with the N. P. & M. Ry. Co. for raising a large sum of money for the Company, "a portion of which was to be dishonestly and corruptly received by the plaintiff for his own use and benefit, to the great detriment of the Province." To this the defendants pleaded not guilty, and fair comment on matters of great public interest.

At the trial the jury brought in a general verdict for the defendants. When the verdict was announced, the learned Judge, who had left certain questions to the jury, said: "Have you anything to say as to any of the questions? Do you find whether the publication has the meaning ascribed to it by the plaintiff?" To this the foreman replied, "We did not consider that at all. We found the article complained of was a fair comment on a matter of public interest, but the jury, while giving the verdict, desire to state that it would have been better if more temperate language had been used." The learned Judge then said, "If it imputed a specific act of misconduct to him (the plaintiff) it could not be fair comment, you understand that, do you?" To this the foreman replied, "I think we

understood your Lordship's directions thoroughly."

Upon a motion for a new trial,

Held, (DUBUC, J., dissenting). That, if the publication charged the plaintiff with what the innuendo alleged it did, viz., a specific act of misconduct, it could not be fair comment unless the jury found the charges to be true; and, as, from the answers given by the foreman, it was clear that the jury did not consider whether or not the words complained of had the meaning ascribed to them in the innuendo, there should be a new trial.

Campbell v. *Spottiswoode*, 3 B. & S. 776, and *Davis* v. *Shepstone*, 11 App. Cas. 187, followed.

Per TAYLOR, C.J., and BAIN, J. Under a plea of fair comment, when there is no plea of justification on the record, the defendant may prove that the facts commented on are true, but he may not adduce evidence to show that charges of specific misconduct or dishonesty he has made are true.

Per TAYLOR, C.J. The jury either misunderstood or disregarded the charge of the learned Judge.

Per DUBUC, J. The jury thoroughly understood the learned Judge's directions and had a perfect right to disregard the questions and bring in a general verdict.

The plaintiff, in his case in chief, proved the publication, and called a witness who proved that the plaintiff was acting as Railway Commissioner and his signature to a contract between the Government and the Northern Pacific and Manitoba Railway Company, and he also said that public discussion over this contract led him to apply the language of the alleged libel to a particular clause in that contract, and there was nothing else to which it could, in his mind, be attributed. The defendants called witnesses to prove the truth of the charges. The plaintiff then tendered in rebuttal the evidence of two witnesses to disprove the truth of these charges and the evidence was rejected.

Per TAYLOR C.J. This evidence was improperly rejected, as it was not gone into in the case in chief and was proper rebuttal evidence, and there should be a new trial on that ground.

Per DUBUC, J. This evidence should have been brought in the case in chief and not in rebuttal.

Per DUBUC, J., also. Even if the evidence should in strictness have been received, still that alone would not be sufficient, but the plaintiff must show that, if it had been received, the jury would have come to a different conclusion.

Per TAYLOR, C.J., and DUBUC, J. In an action of libel the Court will rarely grant a new trial on the ground of weight of evidence, and this is especially the case where the question for the jury was whether the matter complained of was, or was not, fair comment on the acts of a public man. *Martin* v. *Manitoba Free Press Co.*, 8 M.R. 50.

Appeal dismissed, 21 S.C.R. 518.

6. Proof of malice to rebut defence of privilege—*Evidence of falsehood of libel—Application for new trial because of alleged misdirection in Judge's charge to jury—Uncomplimentary and prejudicial references to one party in Judge's charge.*

1. At the trial of a libel action where the truth of the libel was not in issue, evidence showing that the statements complained of were false to the knowledge of the defendant was properly admitted for the purpose of showing malice in the defendant and rebutting the defence of privilege.

2. A new trial will not be granted because the trial Judge in his charge to the jury commented strongly upon the facts adduced to show such falsity, on the ground that the jury was thereby misled as to the issue to be tried, if it appears that in the same charge he clearly pointed out for what purpose the evidence was allowed in and that the falsity of the statements was only to be considered as an element in the consideration of the question of malice.

3. Neither should a new trial be ordered because of references in the charge to the plaintiff that were "calculated to secure for him the good will of the jury," and to the defendant that were "uncomplimentary and calculated to prejudice him in the regard of the jury," when the amount of the verdict was only $400 and the evidence seemed to warrant such references, because it did not clearly appear that any substantial wrong or miscarriage of justice had been occasioned by the use of the expressions complained of. *Schaefer* v. *Schwab*, 19 M.R. 212.

7. Privilege—*Mercantile agency reports to subscribers—Publication of true extract from a public record—Words not libellous per se—Special damage—Innuendo.*

A statement that a man has given a chattel mortgage is not libellous *per se*, and no action will lie for the publication of

such a statement without an innuendo to bring out some injurious meaning to be attached to the words: *Odgers on Libel and Slander*, 4th ed. pp. 110, 123. Special damage caused by the publication would also have to be alleged and proved in evidence, as actual damage is the very gist of such an action.

Ratcliffe v. *Evans*, [1892] 2 Q.B. 527, followed.

Held, also, *per* MATHERS, C.J., in the Court below.

1. The publication without malice, by a mercantile agency to its subscribers, of a true extract from a register kept by virtue of an Act of a Provincial Legislature, which was open to inspection by the public, for the purpose of giving to the subscribers information which the agency *bona fide* believed to be true, is privileged and an action for libel in respect of such publication will not lie, although the extract purported to show that the plaintiff had given a chattel mortgage when it should have shown only a lien note given on the purchase of chattels.

Fleming v. *Newton*, (1848) 1 H.L.C. 363; *Searles* v. *Scarlett*, [1892] 2 Q.B. 56, and *Annaly* v. *Trade Auxiliary Co.*, (1890) 26 L.R.Ir. 11, 394, followed.

Williams v. *Smith*, (1888) 22 Q.B.D. 134, and *Macintosh* v. *Dun*, [1908] A.C. 390, distinguished.

2. If what is published is not a true extract from the public record, even although it is furnished by the Government official in charge, it is not privileged: *Reis* v. *Perry*, (1895) 64 L.J.Q.B. 566; *Smith* v. *Dun*, 21 M.R. 583.

See CONTEMPT OF COURT, 3.
— CRIMINAL LAW, XVII, 11.
— CRIMINAL INFORMATION.
— PRACTICE, XVI, 4, 5.
— SECURITY FOR COSTS, VI, 1.

LIBEL ACT.

See LIBEL, 1.

LICENSE TO TAKE POSSESSION OF GOODS.

License to take possession of defendant's goods if in plaintiff's opinion he should be incapable of carrying on business—*If opinion formed bona fide, the Court cannot review it—Appeal from findings of trial Judge on conflicting evidence—Replevin suit—Joint liability.*

The defendant F., being indebted to the plaintiffs, had given them a license or power contained in an agreement under seal, which provided that, if he at any time in the opinion of the plaintiffs, or either of them, should become incapable of attending to his business, the plaintiffs might take possession of his stock in trade and sell it in payment of his indebtedness to them.

Plaintiffs afterwards, having formed such opinion *bona fide*, as the Judge at the trial found, seized the stock in trade of F. and placed an agent in charge, who employed F. as a substitute and left him for a few days in apparently sole possession. On attempting afterwards to resume actual possession, the plaintiffs were prevented by F. from doing so, and five days later F. made an assignment to his co-defendant B. for the benefit of his creditors. An employee of B. then took possession of the stock and the plaintiffs replevied it.

The defendants pleaded jointly, denying the taking of the goods as alleged and claiming them as their property.

Held, 1. That the evidence showed a joint conversion or taking, and, if the plaintiffs were entitled to succeed in their action against F., they were equally entitled as against B.

2. That, if the plaintiffs had really, in good faith, come to the conclusion that F. was incapable of attending to his business at the time when the seizure was made, as the Judge at the trial had found, they had a right to the goods: *Allcroft* v. *Bishop of London*, [1891] A.C. 666; and, although there might have been some doubt on the evidence as to whether such opinion was honestly entertained by the plaintiffs or sufficiently founded, and another Judge on merely reading the evidence might come to a different conclusion, yet the Court, following the principles laid down in *The Glannibanta*, 1 P.D., at p. 278, and *Ball* v. *Parker*, 1 A.R. 603, would not undertake to say that the trial Judge was wrong in believing the statements of the witnesses who were before him and whose demeanour could be observed by him only. *Turner* v. *Francis*, 10 M.R. 340.

Affirmed, 25 S.C.R. 110.

LIEN.

See CONTRACT.
— EVIDENCE, 16.

LIEN OF VENDEE FOR PURCHASE MONEY.

See HOMESTEAD, 1.

LIEN FOR DEBT.

See COMPANY, IV, 10.

LIEN FOR FREIGHT CHARGES.

See RAILWAY COMPANY, III, 6.

LIEN NOTE.

See CHATTEL MORTGAGE, V, 4.
— CONDITIONAL SALE.
— FIXTURES, 2.
— SALE OF GOODS, VI, 4.

LIEN ON CHATTELS.

See LIVERY STABLE KEEPER.

LIEN ON LAND.

See EXEMPTIONS, 10.
— MORTGAGOR AND MORTGAGEE, VI, 9.
— PRINCIPAL AND AGENT, V, 2.
— SALE OF LAND FOR TAXES, X, 9.

LIEN ON RAILWAY PROPERTY.

See RAILWAYS, IX, 1.

LIFE INSURANCE.

1. Benevolent Society—*Life Insurance Act, R.S.M.* 1902, *c.* 83—*Appropriation of insurance benefit by will.*

The destination of a benefit in the nature of life insurance conferred by membership in a benevolent society is to be determined solely by a consideration of the rules and regulations of the society and, when such rules and regulations make full and explicit provisions as to the destination of such benefit, the insurance is not subject to The Life Insurance Act, R.S.M. 1902, c. 83.

Re Anderson, (1906) 16 M.R. 177, followed.

The testator's beneficiary certificate in the Canadian Order of Chosen Friends was expressed to be payable to his wife in the manner and subject to the conditions set forth in the laws governing the life insurance fund. Those laws prevented a member diverting the benefit to anyone not related to or dependent upon him unless there were no such persons, and provided that, in case of the prior death of the beneficiary "and no further or other disposition be made thereof," the benefit should go to the surviving children of the deceased member in equal shares.

Held, that it was not competent to the testator to divert by his will the benefit to his executors as part of his estate, although they were to take it in trust for the children, and that the proceeds should go to the children free from the claims of creditors of the deceased. *Re Drysdale Estate*, 18 M.R. 644.

2. Benevolent Society—*R.S.M.* 1902, *c.* 18, *c.* 83—*Appropriation of insurance benefit by will—Election.*

Interpleader at the instance of a benevolent society incorporated under 40 Vic., c. 25 now R.S.M. 1902, c. 18, the subject matter being the proceeds of a life insurance certificate or policy which the insured had made payable to his wife. By his will the insured made other provision for her and directed that the money in question should fall into and form part of his general estate.

Held, 1. That the case was not governed by The Life Insurance Act, R.S.M. 1902, c. 83, and that the will did not operate as a good appointment of the fund under the rules of the society, which did not allow such an appropriation, that the direction of the will could not operate so as to make the money part of the general estate, and that the widow was entitled to it.

Leadlay v. *McGregor*, (1896) 11 M.R. 9, and *Johnston* v. *C. M. B. A.*, (1897) 24 A.R. 88, followed.

2. The widow was not put to her election, and was entitled to the full

benefit of the will as well as to the moneys payable under the certificate.

Griffith v. *Howes*, (1903) 5 O.L.R. 439; *Re Warren's Trust*, (1884) 26 Ch.D. 208, and *In re Beale's Settlement*, [1905] 1 Ch. 256, followed. *Re Anderson's Estate*, 16 M.R. 177.

3. Mutual Benefit Society.

The plaintiffs were the executors of the will of M., a member of an unincorporated society known as the Order of Scottish Clans, who had held a certificate of membership entitling the beneficiary named therein to the sum of $2,000, payable on M.'s death. By the rules of the society no member could assign his "bequeathment certificate" nor would any assignment be recognized by the society. The name of M.'s father, the defendant, had been inserted in the certificate by his request. After the date of the certificate and during the life time of M., the bequeathment laws of the society were amended, so as to provide that at the death of a member in good standing the amount of the bequeathment should be paid to the wife, affianced wife, or relative of, or person dependent upon, such member, as designated in his bequeathment certificate. By his last will and testament M. appointed the plaintiffs as his executors and trustees, and directed that his life insurance money should be paid to them for the purpose of carrying out the trusts of the will; and about the same time he indorsed a memorandum on the bequeathment certificate revoking the former direction as to the payment of the insurance due at his death, and authorizing and directing such payment to be made to the plaintiffs. The officers of the society refused to recognize this revocation, and on the death of M. they refused to pay the insurance money to the plaintiffs without the authority of the Court. The plaintiffs were not, nor was any of them, the wife, affianced wife, or relative of, or person dependent on, the deceased.

Held, that, in a case of a society having objects and a constitution similar to those of the society in question, the member has no interest in the fund raised or to be raised, but merely a power to appoint an object to receive the same, which power must be exercised in accordance with the regulations of the society; and that the defendant, the beneficiary named in the certificate, was entitled to the money, as against the executors of the deceased's estate.

In re William Phillips' Insurance, 23 Ch.D. 235, followed. *Leadlay* v. *McGregor*, 11 M.R. 9.

4. Policy payable to beneficiary in case of insured's death within named period—*Death of beneficiary before insured—Conflict of laws—Manitoba Insurance Act, R.S.M.* 1902, *c.* 82, *s.* 40—*Insurable interest in life.*

A life insurance policy, (not coming within the Act respecting Life Insurance for the benefit of Wives and Children, R.S.M. 1902, c. 83) and the money to become due under it belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries and there is no power in the insured by any act of his, by deed or by will, to transfer to any other person the interest of the beneficiary which is a vested right in him or her, and, therefore, when the beneficiary dies before the insured, the right to the money passes over to the personal representatives of the beneficiary to the exclusion of the insured or his personal representatives at his death.

Central Bank of Washington v. *Hume*, (1888) 128 U.S.R. 195, and *Am. & Eng. Ency.*, Vol. 3, p. 980, followed.

Wicksted v. *Munro*, (1886) 13 A.R. 486, distinguished because based on special Ontario legislation.

A policy may be made payable to a person or beneficiary who is without any insurable interest in the life of the insured.

North American Life v. *Craigen*, (1886) 13 S.C.R. 278, followed.

By virtue of s. 40 of The Manitoba Insurance Act, R.S.M. 1902, c. 82, the money payable under a policy of life insurance issued by a company licensed under the Act, when the insured resides in Manitoba, is payable there although the policy itself provides for payment at the head office of the company in another Province, and in such a case the contract of insurance is subject to the laws of Manitoba and the money must be distributed in accordance therewith. *Re McGregor*, 18 M.R. 432.

5. Revocation by assured of benefit declared in policy—*By what law governed—The Life Insurance Act, R.S.M.* 1892, *c.* 88, *s.* 12—62 & 63 *Vic., c.* 17, *s.* 1—*Revocation by will—Lien for premiums.*

A contract of life insurance entered into with a company whose head office is in Ontario, the policy having issued from the head office and providing for payment of the insurance money there, is an Ontario contract and must be interpreted and carried out in accordance with Ontario law, although the assured lived in Manitoba and made application there to a local agent for the insurance, but an assignment of or dealing with the benefits of the policy made by the assured in Manitoba will be governed by the law of this Province relating thereto.

Deceased, who was a resident of Manitoba, insured his life with the London Life Insurance Company of Canada, whose head office was in Ontario, and by the policy the insurance money was appropriated in favor of his wife, but by his will he absolutely revoked this appropriation and directed that the money should become part of his estate and should be paid to his executor. Section 12 of The Life Insurance Act, R.S.M. c. 88, as re-enacted by 62 & 63 Vic., c. 17, permits such a revocation and new disposition of the insurance money, but the corresponding statutory provision in Ontario (R.S.O., 1897, c. 203, s. 160,) forbids it.

Held, that the law of Manitoba must be applied to the determination of the question as to the right of the assured to make such new disposition, and that the insurance money must be paid to the executor as part of the deceased's estate.

Toronto General Trusts Co. v. *Sewell*, (1889) 17 O.R. 442, and *Lee* v. *Abdy*, (1886) 17 Q.B.D. 309, followed.

Held, also, that a will is an instrument in writing within the meaning of the Manitoba statute above referred to.

The widow was held entitled to a charge in her favor for insurance premiums paid by her to keep the policy in force. *National Trust Co.* v. *Hughes*, 14 M.R. 41.

See ACCIDENT INSURANCE, I.
— BILLS AND NOTES, IV, 2.
— INJUNCTION, I, 8.

LIMITATION OF ACTIONS.

1. Acknowledgment of debt—*Failure of consideration—Sale of goods—Rescission of contract—Re-taking possession on default in payment of price.*

The defendant on 24th March, 1888, gave an order for a binder and agreed to pay $150 for it, giving two promissory notes of $75 each, the last of which fell due on 1st January, 1891.

It was provided, both in the order and in the notes, that the property in the machine was not to pass to the defendant until payment of the price in full, and that on default in payment of either note the vendor should have the right to take possession of and sell the machine, the notes providing as follows: "The proceeds thereof to be applied on the amount unpaid of the purchase price."

On default in payment of the first note the vendors re-took the machine, sold it and realized about enough to pay the first note.

The notes were afterwards indorsed to the plaintiffs, and in 1893 they employed an agent to collect the amount of both. The agent wrote defendant a letter demanding payment, to which the defendant wrote in reply that the vendors had sold the machine for $70 or $75 before the notes came due, and continued: "I cannot see that I owe the firm for anything but the last note and interest on it."

Plaintiffs entered suit on the last note in 1898.

Held, 1. That the action of the vendors in re-taking the machine and selling it did not, under the terms of the agreement, operate as a rescission of the contract; and that there was no failure of consideration for the note sued on.

2. That the acknowledgment contained in defendant's letter to the collection agent warranted the inference of a promise to pay and was sufficient, under 9 Geo. IV. c. 14, to take the case out of the Statute of Limitations, although it was made to an agent of the plaintiffs and not to the original creditors.

Stamford Banking Co. v. *Smith*, [1892] 1 Q.B. 765; *Green* v. *Humphreys*, (1884) 26 Ch.D. 474, and *Tanner* v. *Smart*, (1827) 6 B. & C. 603, followed. *John Watson Manufacturing Co.* v. *Sample*, 12 M.R. 373.

2. Acknowledgment to take case out of statute—*Promise to "fix it up all right."*

A promise to "fix it up all right" in a week or two, in a letter written by the debtor in reply to a written demand for payment of the debt, is a sufficient acknowledgment to take the case out of

the Statute of Limitations and start it running anew.

Edmonds v. *Goater*, (1852) 21 L.J.Ch. 290, and *Collis* v. *Stack*, (1856) 1 H. & N. 605, followed.

A promise to pay the debt as soon as the debtor could get the money is conditional only, and, without evidence that the debtor had got the money, would not be a sufficient acknowledgment to prevent the statute running. *Egre* v. *McFarlane*, 19 M.R. 645.

3. Administration of estates—*Statute of Limitations—King's Bench Act, R.S.M.* 1902, *c.* 40, *s.* 39 (*a*)—*Manitoba Trustee Act, R.S.M.* 1902, *c.* 170, *s.* 42.

Application by the administrator of the estate for the advice and direction of a Judge under section 42 of the Manitoba Trustee Act, R.S.M. 1902, c. 170.

The intestate died in 1893 and the administrator in 1895 distributed amongst the creditors whose claims were filed and allowed by him the proceeds of all the assets of the estate of which he had any knowledge, such proceeds being only sufficient to pay the creditors a dividend of about 3.41 per cent.

In 1900, the administrator realized a further sum for the estate upon an asset then recently discovered.

There had been no payment on account or written acknowledgment made by the administrator to any creditor since 1896.

Held, notwithstanding sub-section (*a*) of section 39 of The King's Bench Act, R.S.M. 1902, c. 40, that the claims of the creditors were barred by the Statute of Limitations, that it would be the duty of the administrator to plead the Statute in any action by a creditor and that the administrator should forthwith distribute the remaining funds of the estate amongst the next of kin. Costs to all parties out of the estate. *Re Bedson Estate*, 19 M.R. 664.

4. Foreign judgment—*Statute of Limitations.*

In an action on a judgment recovered in Ontario more than six years old, but less than twenty, the defendant set up the Statute of Limitations of Ontario, which restricts the time to ten years for bringing actions to recover any sum of money secured by a judgment, etc., and chargeable upon or payable out of any land. After argument of a rule *nisi* to set aside the verdict for the plaintiff, upon which the foregoing were the only questions argued, the defendant applied *ex parte* for leave to plead that the remedy on the judgment in Manitoba was barred by the Statute of Limitations, 21 Jac. 1, c. 16, inasmuch as the judgment could only be regarded in Manitoba as a simple contract debt, and by the 39 Vic., c. 2, s. 8 (Man.), he was at liberty to plead any defence that might have been pleaded to the original action. The Court refused to allow the amendment, though of opinion that the proposed plea would have been a complete bar to the action. *Bank of Montreal* v. *Cornish*, T.W. 272.

5. Judgment—*Statute of Limitations—Transcript of judgment—County Courts Act, R.S.M.* 1892, *c.* 33, *s.* 193—*Real Property Limitation Act, R.S.M., c.* 89, *s.* 24.

Held, (1) That section 24 of The Real Property Limitation Act, R.S.M., c. 89, applies to any judgment whether charged on land or not, and that no proceedings can be taken to enforce a judgment after the lapse of ten years from the date of its recovery.

(2) That the filing in 1892 of a transcript of a County Court judgment in the Queen's Bench under section 193 of The County Courts Act, R.S.M., c. 33, since repealed, had not so far the effect of making the same a new judgment as to give a new point of time for the running of the statute.

Jay v. *Johnstone*, [1893] 1 Q.B. 25, and *McKenzie* v. *Fletcher*, (1897) 11 M.R. 544, followed. *Blanchard* v. *Muir*, 13 M.R. 8.

6. Action on promissory note of person who has never been a resident—*Meaning of expression "beyond the seas"*—*21 Jac. 1, c. 16—4 Anne, c. 16.*

The statute 4 Anne, c. 16, which declares that, in case a defendan was beyond the seas at the time the cause of act on accrued, the action may be brought against him within six years after his return, applies as against a debtor who has never been within the jurisdiction at all.

Lafond v. *Ruddock*, 13 C.B 813, and *Pardo* v. *Bingham*, L.R. 4 Ch. 735, followed.

The liability of a defendant to be sued after the six years in such a case is not affected by the plaintiff's absence from the jurisdiction or the fact that the plaintiff has never been within the jurisdiction.

The expression "beyond the seas" n 21 Jac. 1, c. 16, and 4 Anne, c. 16,

means "out of the territory," or "beyond the jurisdiction:" *Ruckmaboye* v. *Mottichand*, 8 Moore P.C. 4. *Kasson* v. *Holley*, 1 M.R. 1.

7. Several promissory notes—*General payment on account.*

Where a creditor holds two or more promissory notes made by the same debtor, a payment made generally on account has the effect of preventing the Statute of Limitations from running in respect of the whole indebtedness.

Taylor v. *Foster*, 132 Mass. 30, followed.

Burn v. *Boulton*, 2 C.B. 476, commented on. *Ashdown* v. *Montgomery*, 8 M.R. 520.

See AMENDMENT, 4, 5.
— BILLS AND NOTES, II.
— CHOSE IN ACTION, 1.
— CONTRACT, XV, 5.
— CONVICTION, 3.
— EJECTMENT, I, 5.
— EXECUTORS AND ADMINISTRATORS, 2.
— FOREIGN JUDGMENT, 4, 5, 8.
— FRAUDULENT CONVEYANCE, 3, 15.
— FRAUDULENT PREFERENCE, III, 3.
— HUSBAND AND WIFE, IV, 3.
— MECHANIC'S LIEN, VIII, 1.
— MUNICIPALITY, VIII, 2.
— NEGLIGENCE, II, 3.
— PRACTICE, XIX, 1.
— QUASHING BY-LAW.
— RAILWAYS, VIII, 5; XI, 2, 4.
— REAL PROPERTY LIMITATION ACT.
— RECTIFICATION OF DEED, 2.
— SOLICITOR'S LIEN FOR COSTS, 3.
— TITLE TO LAND, 2.
— WORKMEN'S COMPENSATION FOR INJURIES ACT, 1.

LIMITATION OF LIABILITY.

See PLEADING, XI, 8.

LIMITATION OF PROSECUTIONS.

See CRIMINAL LAW, I, 1, 2.

LIMITED PARTNERSHIP.

See PARTNERSHIP, 9.

LIQUIDATED DAMAGES.

See CONTRACT, XV, 12.

LIQUIDATED DEMAND.

See FOREIGN JUDGMENT, 11.

LIQUIDATOR.

See COSTS, XIII, 11.
— TAXATION, 1.
— WINDING-UP, II.

LIQUOR LICENSE ACT.

1. Cancellation of license—*R.S.M., c. 90, s. 35—Appeal from commissioners—Criminal procedure—Quashing conviction—Jurisdiction of a single Judge—Full Court.*

Held, following *Regina* v. *Beale*, 11 M.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 M.R. 373, Crothers, contending that the commissioners had cancelled his license improperly under section 35 of the Liquor License Act, R.S.M., 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 the Court, as no appeal is provided for against any decision of theirs. *Reg.* v. *Crothers*, 11 M.R. 567

2. Cancellation of license—*R.S.M. 1892, c. 90, s. 35—Prohibition—Implied authority.*

The 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.M. 1892, c. 90, to cancel his license. This proviso read

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. *Manteith*, 11 M.R. 373.

3. Conveyance of liquor between points in territory under local option —*Liquor License Act, R.S.M.* 1902, *c.* 101 —*7 & 8 Edw. VII, c.* 26, *s.* 32—*Construction of statute—Local option.*

The prohibition of carrying or conveying "liquor from *any point in the Province* to any point in any territory under a local option by-law except the same s consigned to a licensee therein," enacted by section 32 of chapter 26 of 7 & 8 Edward VII, in amendment of The Liquor License Act, R.S.M. 1902, c. 101, applies equally whether the point *from* which the liquor is conveyed is within or without the local option territory. *Rex* v. *Ritchie*, 21 M.R. 255.

4. Druggist selling liquor—*R.S.M.* 1892, *c.* 90, *ss.* 147, 149—*Evidence—Pharmaceutical Act, R.S.M., c.* 116, *s.* 38.

When a person charged, under section 147 of The Liquor License Act, R.S.M. 1892, c. 90, with having sold liquor without a license seeks to bring himself within the protection of section 149 of the Act, his stating on oath that he is a duly registered druggist is not sufficient evidence that he is a druggist duly registered under The Pharmaceutical Act, R.S.M., c. 116, to warrant the quashing of a conviction.

Per DUBUC, J. The granting of a *certiorari* to remove a conviction is a matter for the discretion of the Court; and, when a statute makes provision for an appeal from a summary conviction under it, that discretion should be exercised by refusing the writ, unless special circumstances are shown: *Queen* v. *Manchester, &c., Ry. Co.*, (1838) 8 A. & E. 413; *Ex parte Ross*, (1895) 1 Can. Crim. Cas. 153.

Per BAIN, J. Whether defendant was a registered druggist or not, it was quite open for the complainant to charge him under the general provision of section 147; and, if section 149 would have afforded him any defence to the charge, the *onus* lay on him to bring himself by proper evidence within its provisions: *Paley on Convictions*, pp. 130, 244; *Cathcart* v. *Hardy*, (1814) 2 M. & S. 534. *Reg.* v. *Herrell*, 12 M.R. 522.

5. Evidence of character of liquor.

Upon a charge of selling liquor without a license, there must be evidence that the liquor was intoxicating.

Where the charge is made against a licensee for some breach of the statute, it must be shown that he was a licensee, and the production of the license after sentence, for the purpose of being indorsed as required by the statute, is not sufficient.

The fine imposed by a conviction included a share of the expenses of bringing the prosecutor as a witness from a distance.

Held, that such inclusion vitiated the the conviction.

A conviction under section 56 of the Act is not bad because it does not direct distress previous to imprisonment.

Evidence that a certain act was done at, or in, Portage la Prairie will not be taken to apply to the town, rather than the municipality or county of that name.

A conviction will not be quashed upon the weight of evidence merely.

Semble, a joint conviction against two members of a firm for a breach of the statute is bad. *Reg.* v. *Grannis*, 5 M.R. 153.

6. Evidence of former conviction —*R.S.M.* 1892, *c.* 90, *ss.* 151, 180, 182, 200, 209, 210—*Amending conviction—Disqualification of magistrate—Certificate of conviction.*

1. Where there is any evidence in support of a conviction, the finding of the magistrate will not be interfered with, although the evidence may not be satisfactory in the opinion of the Court. *Regina* v. *Grannis*, (1888) 5 M.R. 153, followed.

2. Before a conviction for a second offence under The Liquor License Act, it is necessary to prove the identity of the defendant with the person named in the

certificate of the former conviction, and neither the similarity of names nor the personal knowledge of the magistrate will be sufficient for that purpose.

Queen v. *Lloyd*, (1873) 1 Cox C. C. 51, followed.

Regina v. *Brown*, (1886) 16 O.R. 41, distinguished.

3. Where the conviction is bad because it was for a second offence and the proof of the former conviction was insufficient, the Court will not amend the conviction under sections 209 and 210 of the Act, so as to make it a conviction for a first offence, when the evidence of the commission of that offence is not in itself satisfactory, as the powers of amendment given by sections 883 and 889 of The Criminal Code, made applicable by section 180 of The Liquor License Act and 56 Vic., c. 32, should be exercised only if the Court or Judge is satisfied upon perusal of the depositions that an offence of the nature described in the conviction has been committed.

4. A magistrate is not disqualified to sit upon a case under The Liquor License Act by reason of being honorary member of a Temperance Union which has taken active steps towards enforcing the Act before him and provided funds for that purpose; especially where the prosecution is not conducted by the Union, and the magistrate's connection with it has been merely nominal.

Regina v. *Deal*, (1881) 45 L.T.N.S. 439, and *Leeson* v. *Gen. Council, etc.*, (1889) 43 Ch.D. 366, followed.

Per BAIN, J. The certificate of the former conviction put in was insufficient because it nowhere stated that the conviction had been made under the provisions of The Liquor License Act.

Per KILLAM, J. Although the certificate of the former conviction omitted the word "intoxicating" before the word "liquor" in describing the offence, yet it was not defective on that account in view of sections 151 and 182 of the Act and the wording of the form in Schedule K (par. 2). *Reg.* v. *Herrell*, 12 M.R. 198.

7. Information laid before one justice only—*Quashing conviction.*

S. was convicted under The Liquor License Act of Manitoba, 1889, of selling liquor without a license.

The information was laid before one justice of the peace, but the prosecution was heard before two justices. The defendant was convicted, and a sum for witness fees was included in the costs awarded against him.

The defendant had given notice of appeal, perfected security, and taken out a summons under section 126 of The Liquor License Act, by way of appeal from the conviction, but had abandoned the summons before serving it.

Held, 1. That the defendant had appealed within the meaning of section 84 of The Summary Convictions Act, and that the right to *certiorari* was taken away, except as to objections going to the jurisdiction of the justices.

(*a*)2. That the bringing of the prosecution was the laying of the information, and that it ought to have been laid before two justices, and that the matter of the prosecution was not, therefore, properly before the two justices on the hearing of the case, and they had no jurisdiction to hear or determine it. *Reg.* v. *Starkey*, 7 M.R. 43.

(*a*) But see, now, R.S.M. 1902, c. 101, s. 187.

8. Information laid before one justice only—*Costs—Quashing conviction—Waiver—Right of Attorney-General to intervene and appeal in matters affecting rights of Province where parties to proceedings do not appeal—Right of appeal in criminal matters.*

S. was convicted under the Liquor License Act of Manitoba, 1889, of selling liquor without a license. The information was laid before one justice of the peace, but the prosecution was heard before two justices. The defendant was convicted, and a sum for witness fees was included in the costs awarded against him. The defendant obtained a rule *nisi* to quash the conviction. On its return, Taylor, C.J., made the rule absolute. At this stage the Attorney-General, although not a party to the proceedings, intervened and moved before the Full Court against this decision. The parties to the proceedings did not complain of the decision.

Held, 1. That the decision of the single Judge, notwithstanding this being a criminal matter, was subject to review by the Full Court.

2. That the Attorney-General was entitled to intervene.

(*a*)3. Affirming the decision of Taylor, C.J., reported 7 M.R. 43, (DUBUC, J., *dissenting*), that the laying of the information was the bringing of the prosecution, and that it ought to have been laid

before two justices, and that the matter of the prosecution was not, therefore, properly before the two justices on the hearing of the case, and they had no jurisdiction to determine it.

Per DUBUC, J., that the information was properly laid before one justice only.

Per BAIN, J., this object on to the jurisdiction must be taken at the hearing before the justices, otherwise it will be waived.

Per BAIN, J., as the statute authorizes the justices to award costs and does not fix any tariff, the justices may allow such costs as they consider reasonable. *Reg.* v. *Starkey*, 7 M.R. 489.

(*a*) But see, now, R.S.M. 1902, c. 101, s. 187.

9. Jurisdiction of County Court Judge to entertain application to cancel license—*R.S.M.* 1902, *c.* 101, *s.* 119—*County Court Judicial Division lying partly in one Judicial District and partly in another.*

Under section 119 of The Liquor License Act, R.S.M. 1902, c. 101, if the licensed premises do not lie within the Judicial District for which the County Court Judge is Judge, he has no jurisdiction to entertain an application to cancel the license, although he is the Judge for a County Court Judicial Division composed for the most part of territory in his Judicial District with the addition of a number of townships in the Judicial District in which are the licensed premises. *Re Somerville*, 19 M.R. 355.

10. Keeping liquor for sale without license—*Information—Conviction — Penalty.*

Magistrates have jurisdiction under The Manitoba Liquor License Act, 1886, upon a charge, under section 73, of keeping liquor for sale without a licence.

The information upon such a charge did not state that the liquor was intoxicating liquor,

Held, that such an allegation was not necessary.

An information was laid in proper form. Upon this a search warrant was issued. Afterwards another information was laid which omitted a necessary allegation. This allegation was, however, in the summons served upon the defendant.

Held, that the second information might be supplemented by the first; and in any case the information would be amended and not quashed.

A charge that the defendant kept liquor for the purpose of selling, or for the purpose of trading, or for the purpose of bartering, is only one offence.

Upon such a charge it is sufficient to allege that the offence was committed at a certain town without specifying the house or building.

Upon conviction for such an offence magistrates have power to award imprisonment for four months in default of payment of the fine imposed.

Evidence discussed as to whether the liquor was intoxicating. *Reg.* v. *Coulter*, 4 M.R. 309.

11. Promissory note given for liquor supplied on premises—*Illegality of—Action on—Hotel-keeper—Ultra vires.*

The Liquor License Act, R.S.M., c. 90, s. 134, provides that, "If any hotel-keeper receive in payment or as a pledge, for any liquor supplied in or from his licensed premises, anything except current money or the debtor's own cheque on a bank or banker, he shall for each such offence be liable to a penalty of twenty dollars, and, in default of payment, to one month's imprisonment."

Declaration on two promissory notes made by defendant payable to plaintiff. Pleas to each count.

1. That plaintiff was a licensed hotel-keeper, and that part of the consideration for which the note was given was for liquor supplied by plaintiff to defendant in his hotel.

2. That the note was received by the plaintiff as a pledge for liquor supplied by him to the defendant in his hotel.

On demurrer to these pleas,

Held, 1. That these pleas were good on the ground that, by the imposition of a penalty for taking anything but money in payment, or as a pledge, for liquors supplied in licensed premises, the Legislature had clearly intended to make it unlawful to take anything but money.

2. That the above provision was *intra vires* of the Legislature.

Hodge v. *The Queen*, 9 App. Cas. 117, and *Citizens Insurance Co.* v. *Parsons*, 7 App. Cas. 96, applied. *Benard* v. *McKay*, 9 M.R. 156.

12. Protest against license—*Application for license—Publication for two weeks—Time, computation of—Jurisdiction of Court to annul license.*

The statute 41 Vic., c. 14 (Man.), enacted that no license to sell intoxicating liquor should be granted except as provided by the Act; that, upon an application being made for a license, the License Commissioners should, before granting it, publish for two weeks in three weekly newspapers published in the Province, one being published in the French language, the name of the applicant and the place where he intended to sell intoxicating liquor; and that a protest in writing against the granting of any license, signed by five or more out of the twenty voters and householders nearest to the place proposed to be licensed, should prevent the issue of any license. The License Commissioners published the application of O'C. & W. in one weekly French newspaper on 30th October and 6th November, and in the weekly edition of one English newspaper on 1st and 8th November. They ordered the issue of a license to O'C. & W. on 10th November, and on the 11th November a protest, signed by five of the twenty voters and householders nearest to the place proposed to be licensed, was lodged with the Commissioners.

Held, that the Commissioners had no power to issue the license until after the lapse of two weeks from the first publication of the application; that the protest was lodged in time and deprived the Commissioners absolutely of any power to grant a license, and that the license granted was therefore void.

Held, also, that this Court had inherent jurisdiction to annul the license, as well as power under section 32 of the Act, which gave jurisdiction to any Judge sitting as a stipendiary magistrate in all prosecutions for offences against the Act. *Re O'Connor and Ward*, T.W., 284.

13. Protest against license—*Power of Commissioners—Jurisdiction of Court.*

Held, 1. That the granting of a license by the License Commissioners to sell intoxicating liquors is not an Act of the Crown which cannot be reviewed by the Court.

2. That, when a protest, signed by five of the twenty voters and householders nearest the place proposed to be licensed, is lodged with the Commissioners, they have no discretion as to proceeding, but are absolutely debarred from issuing a license.

3. That the Court of Queen's Bench has inherent in it plenary jurisdiction to annul a license, apart from the statutory jurisdiction of the Judges under the Act respecting Intoxicating Liquors.

An application for a license was recommended by eighteen persons, purporting to be eighteen of the twenty voters and householders nearest the place proposed to be licensed. W. signed the recommendation, but, after reconsidering his act, refused to acknowledge and, in fact, repudiated, his signature before a Justice. He, with six others, signed a protest against the issue of the license. Both the recommendation and protest were attested by a Justice. The Commissioners took some evidence as to W.'s signature, and as to the qualifications of the signers of the protest, and in their discretion held that W. had signed the recommendation freely and voluntarily, and that the protest was not signed by five of the twenty nearest voters and householders. Another signature to the recommendation was shown to be invalid. The remaining sixteen signatures were not sixteen out of the twenty nearest voters, etc., as required by the Act. The Commissioners issued the license.

Held, that they had no power to exercise any discretion as to the issue of the license, but were absolutely debarred therefrom by the protest, and therefore that the license was void.

Remarks as to the duties of the License Commissioners. *Re O'Connor and Chadwick*, T.W., 293.

14. Selling during prohibited hours—*Conviction—Proof of license—Amendment of conviction.*

In order to convict of the offence of selling intoxicating liquors during prohibited hours under section 143 of the Liquor License Act, R.S.M., c. 90, it is incumbent on the prosecution to prove that the defendant held a license for the premises where the liquor was sold, or that the premises were licensed premises.

On a motion to quash a conviction for selling during prohibited hours, where the existence of a license is not proved, the Court will not amend the conviction under R.S.M., c. 90, s. 209, so as to make it one for selling without a license. *Reg.* v. *Williams*, 8 M.R. 342.

See CONVICTION, 4.
— LOCAL OPTION BY-LAW.

LIS PENDENS.

See MECHANIC'S LIEN, X, 1.

LIVERY STABLE KEEPER.

1 Lien for board of horses—*Posting up of Act.*

In an action of replevin for the detention of horses the defendant avowed for money due for board of the horses. The plaintiff pleaded that "at the time of the said detention the defendants had not posted up in the office and in two other places in their said stable a copy of the Act of the Legislature of the Province of Manitoba, passed in the 47th year of Her Majesty's reign, chaptered 15."

Held, on demurrer, that the plea was bad:

1. Because, Con. Stat. Man., c. 56, s. 9, not being incorporated with 47 Vic., c. 15, the lien given by the latter Act does not depend upon the posting up of the Act.

2. And in any event the Act does not require the copies to be posted up when the goods are *detained*, but only when they are brought to the hotel.

Held, also, on exceptions to the avowry, that it was unnecessary to allege the posting up of the notices. *Dudley* v. *Henderson*, 3 M.R. 472.

2. Lien on horse for cost of stabling and feed—*Stable Keepers Act, R.S.M.* 1902, *c.* 159, *ss.* 2, 3—*Hotel Keepers Act, R.S.M.* 1902, *c.* 75—*Theft.*

A livery stable keeper has no lien on a horse for its stabling and keep as against the real owner, when the horse was stolen and placed with him by the thief. Section 2 of the Stable Keepers Act, R.S.M. 1902, c. 159, which gives a livery stable keeper a lien on animals for stabling and feeding them and the same rights and privileges for exercising and enforcing such lien . . . as hotel keepers may have or possess in virtue of The Hotel Keepers Act, R.S.M. 1902, c. 75, does not give the livery stable keeper the same right of lien which a hotel keeper has at Common Law in respect of goods or animals left in his charge by a guest who may have stolen the same, as the latter Act in its terms gives only a lien on the property of persons who may be indebted to the hotel keeper for board or lodging, whatever may be his rights independently of the Act. *Harding* v. *Johnston*, 18 M.R. 625.

LOAN.

See MONEY LENDERS' ACT.

LOCAL OPTION BY-LAW.

I. CHANGE OF BOUNDARIES OF MUNICIPALITY.
II. CONTENTS OF THE BY-LAW.
III. COUNTING REJECTED BALLOTS.
IV. FORM OF BALLOT.
V. NOTICE OF THE VOTING.
VI. PETITION TO COUNCIL.

I. CHANGE OF BOUNDARIES OF MUNICIPALITY.

1. Application to quash by-law for repeal of—*Vote taken in new municipality.*

The Municipality of North Dufferin passed a Local Option by-law, No. 64. Subsequently the Municipality of North Dufferin was divided, six of its eleven townships being included in the new Municipality of Dufferin, composed of twenty-five townships.

Later on the Council of the Municipality of Dufferin passed a by-law, No. 22, repealing by-law No. 64 of the former Municipality of North Dufferin. This by-law was submitted to all the electors of the new municipality and carried.

By The Municipal Act, 1890, s. 396, (R.S.M. c. 100, s. 330,) it is provided that "Every Council may repeal, alter and amend its by-laws from time to time," save as by that Act restricted.

On a motion to quash the by-law No. 22,

Held, that the term, "its by-laws," referred to in the statute quoted, which a municipality can repeal, means by-laws affecting its territory. The new municipality, which included the added territory and had full control and power over it, must have such power as is necessary to have the by-law enforced in the territory affected by it, and as such, for that purpose and to that extent, it must be considered as the successor of the former municipality. In that view, a by-law affecting a portion of its territory, and still in force, may be held to be one of its by-laws, subject to be repealed in due course, and by proper proceedings to that effect.

Held, also, that the by-law came under the control and power of the new municipality, only as applying to the territory

affected by it, and it was only to that extent that it became a by-law of the new municipality.

The two years, before the by-law could be repealed, must be counted from the time it was made to apply to the territory affected by it. *Doyle* v. *Dufferin*, 8 M.R. 286.

2. Mandamus—*Liquor License Act, R.S.M. 1902, c. 101—By-law, good in part and bad in part.*

The Act 53 Vic., c. 52, assented to 31st March, 1890, making changes in names and boundaries of the municipalities into which the Province was divided, provided, by section 81, that if, in any of the territory changed as to its municipal situation by the provisions of the Act, a by-law under the local option clauses of the Liquor License Act should be in force at the time of the coming into force of the Act, such by-law should continue to affect such territory the same as if the Act had not been passed.

The Village of Napinka was in 1890 part of the Rural Municipality of Brenda, in which a local option by-law had been passed forbidding the receiving of any money for licenses, under The Liquor License Act; but, by the said Act, 53 Vic., c. 52, the said village became part of the newly created Municipality of Winchester, and again in 1896 it was made part of a municipality then created under the old name of Brenda.

Held, that the said local option by-law was still in force in that village, notwithstanding the changes in name and boundaries of the municipalities referred to.

Doyle v. *Dufferin*, (1892) 8 M.R. 286, followed.

Held, also, that the by-law was valid although it contained an additional provision, unauthorized by the statute, purporting to prohibit the granting of any licenses within the limits of the municipality.

The King v. *The Fishermen of Faversham*, (1799) 8 T.R. 352; *King* v. *Bumstead*, (1831) 2 B. & Ad. 699, and *Re Fennell & Guelph*, (1865) 24 U.C.R. 238, followed.

Application for mandamus to License Commissioners to grant a license to sell liquor in Napinka refused without costs. *Rex* v. *License Commissioners, Re Anderson*, 14 M.R. 535.

II. CONTENTS OF THE BY-LAW.

1. Appointment of scrutineers—*Liquor License Act, R.S.M. 1902, c. 101, ss. 66, 68—Municipal Act, R.S.M. 1902, c. 116, ss. 200, 377, 391—Form of ballot—Publication "for at least one month"*

1. Section 377 of the Municipal Act, R.S.M. 1902, c. 116, is imported into the Liquor License Act, R.S.M. 1902, c. 101, by section 68 of the latter Act, on the proper construction of the provision that all proceedings at the poll and *for the purpose thereof* shall be conducted in the same manner as voting upon any by-law required by The Municipal Act to be voted upon, and a local option by-law which fails to provide for the appointment of scrutineers at the polling and summing up of the votes by the clerk is fatally defective and should be quashed.

Re Bell and Corporation of Elma, (1906) 13 O.L.R. 80, followed.

2. Section 200 of the Municipal Act does not extend so far as to excuse noncompliance with an obligatory provision as to the contents of a by-law.

Re Schumacher and Town of Chesley, (1910) 21 O.L.R. 538, followed.

3. The publication of the notice provided for in section 66 of the Liquor License Act in the Manitoba Gazette on the 16th, 23rd and 30th October, and on the 6th and 13th of November, satifies the requirement of publication "for at least one month" contained in that section taken along with the qualification that no more than one insertion each week shall be necessary (Howell, C.J.M., dissenting).

Hall v. *South Norfolk*, (1892) 8 M.R. 430, referred to.

The Court was equally divided on the question whether the use of the form of ballot prescribed by s. 4A of 9 Edw. VII, c. 31, amending s. 68 of the Liquor License Act, at the voting on a local option by-law, together with the directions for the guidance of voters in the form prescribed by Schedule F to the Municipal Act, referred to in section 391, without any alterations to suit the new form of ballot, was fatal to the by-law in view of the inconsistency of the two forms. *Re Municipality of Portage la Prairie, Shaw* v. *Portage la Prairie*, 20 M.R. 469.

2. Fixing time and place for summing up of votes—*Liquor License Act, R.S.M. 1902, c. 101, ss. 66, 68—Municipal*

Act, R.S.M. 1902, *c.* 116, *ss.* 376, 377—*Posting up notices of voting.*

Held, that section 68 of the Liquor License Act, R.S.M. 1902, c. 101, should be construed as requiring the council of a municipality, in passing a local option by-law, to follow the directions of sections 376 and 377 of The Municipal Act, R.S.M. 1902, c. 116, and therefore to provide for the posting up of notices of the voting and to fix a time and place for the clerk to sum up the votes, and that a local option by-law which did not make such provisions was illegal and should be quashed. *Re Municipality of South Cypress*, 20 M.R. 142.

3. Must be complete in itself—*Municipal Act, R.S.M.* 1902, *c.* 116, *ss.* 200, 376, 377—*Liquor License Act, R.S.M.* 1902, *c.* 101, *s.* 68.

A local option by-law intended to be submitted to the vote of the rate-payers under sections 61 to 72, inclusive, of the Liquor License Act, R.S.M. 1902, c. 101, must, by force of section 68, referring to proceedings under The Municipal Act, be complete in itself and contain provisions fixing the time and place of the polling and providing for the other matters specified in sections 376 and 377 of the Municipal Act, including the appointment of agents or scrutineers.

Where, therefore, the council passed two by-laws, one simply forbidding the receiving of any money for a license under the Liquor License Act, which by-law was submitted to the vote of the rate-payers before its third reading, and another making the usual and necessary provisions for the taking of the vote on the first, as required by the Municipal Act, which by-law was passed through its three readings at one session, the proceedings were held to be defective and incapable of being cured by section 200 of the Act. *Re Carman*, 20 M.R. 500.

III. Counting Rejected Ballots.

Liquor License Act, R.S.M. 1902, c. 101, s. 63—*Majority necessary to carry by-law.*

Although an elector deposits a ballot at the voting on a local option by-law submitted under The Liquor License Act, R.S.M. 1902, c. 101, if such ballot is afterwards rejected, he has not voted within the meaning of section 63 of the Act, and he should not be counted among those who vote in ascertaining whether the necessary three-fifths of those who vote have voted in favor of the by-law. *Re Swan River Local Option By-law*, 16 M.R. 312.

IV. Form of Ballot.

1. Municipal Act, R.S.M. 1902, c. 116, s. 391 and Schedule F—*Liquor License Act, R.S.M.* 1902, *c.* 101, *ss.* 66, 68—*Meaning of words "as soon as possible"—Failure to keep polls open during prescribed hours.*

1. The use of the form of ballot prescribed by section 4 A of c. 31 of 9 Edw. VII, amending section 68 of The Liquor License Act, R.S.M. 1902, c. 101, at the voting on a local option by-law, together with the directions for the guidance of voters in the form prescribed by section 391 and Schedule F of the Municipal Act, R.S.M. 1902, c. 116, is not a fatal objection to the by-law, notwithstanding the inconsistency of the two forms.

Ward v. *Owen Sound*, (1910) 15 O.W.R. 443, followed.

2. The first publication of the notice of the voting on a local option by-law, required by section 66 of the Liquor License Act, having been on the 14th of October, this was not "as soon as possible" after the second reading, which had taken place on the preceding 5th of June, and the by-law, although carried, should be quashed because that section had not been complied with.

3. The deliberate closing of one of the polls for about an hour upon an adjournment for lunch, though with the consent of all present and in pursuance of a local custom, was held fatal to the by-law in the absence of satisfactory evidence that the result of the voting had not been affected thereby.

Scott v. *Imperial Loan Co.*, (1896) 11 M.R. 190, followed.

4. A local option by-law may be given its third reading without waiting for the time for applying for a recount to elapse.

Re Coxworth and *Hensall*, (1908) 17 O.L.R. 431, followed. *Hatch* v. *Oakland, Re Oakland Municipality*, 19 M.R. 692.

V. Notice of the Voting.

1. Contents of—*Liquor License Act, R.S.M.* 1902, *c.* 101, *s.* 66—*Municipal Act, R.S.M.* 1902, *c.* 116, *s.* 427—*Costs.*

1. The notice given by the council under section 66 of The Liquor License Act, R.S.M. 1902, c. 101, must, among

other things, state that the by-law or a true copy of it can be seen at the office of the clerk until the day of the taking of the vote and the absence of such statement in the notice will be fatal to the by-law on an application to quash it.

2. If, on account of an application for a recount of the votes, the council postpone the further consideration of the by-law until after the result of the recount is known, they must either formally adjourn such further consideration to a named day or they must afterwards give such notice of the time and place when the third reading is to be moved that parties opposed to it may be in a position to attend and urge their views and, if the third reading takes place without such notice being given, the by-law will be quashed.

Re Mace and Frontenac, (1877) 42 U.C.R. 85, and *Hall* v. *South Norfolk*, (1892) 8 M.R. 430, followed.

3. The third reading of such a by-law, even after it has been carried by the votes of the electors, is not an empty formality, as the councillors have still to exercise their judgment upon it, and might, if they choose, then finally refuse to pass it.

(*a*)4. Under section 427 of the Municipal Act, R.S.M. 1902, c. 116, a Judge, on quashing such a by-law for illegality, as in this instance, has no discretion to refuse costs to the applicant. *Re Cross and the Town of Gladstone*, 15 M.R. 528.

(*a*) But see, now, s. 3 of c. 12 of 7 & 8 Edward VII.

2. Provisions of Municipal Act not applicable—*Liquor License Act, R.S.M. 1902, c. 101, ss. 66, 68—Municipal Act, R.S.M. 1902, c. 116, s. 376—Legality of ballots marked with assistance of deputy returning officer—Secrecy of the ballot.*

1. Section 66 of The Liquor License Act, R.S.M. 1902, c. 101, provides completely for the giving of notice of the voting on a local option by-law under the Act, and there is nothing in the Act which incorporates the provisions of section 376 of the Municipal Act, R.S.M. 1902, c. 116, so as to require the notices provided for by that section.

2. Section 68 of the Liquor License Act does not incorporate any provisions of the Municipal Act with respect to matters prior to the polling, especially the matter of notice of the voting which is independently and specifically dealt with in section 66.

3. The vote of an elector who requests assistance in marking his ballot cannot be legally taken without strict compliance with section 119 of The Municipal Act, and, when four votes were so taken without the oath prescribed by that section, a by-law carried by a majority of only two should be quashed, because, without violating the secrecy of the ballot, it could not be shown that a majority of the electors voted for the by-law.

4. The use of the form of ballot prescribed by section 4 A of chapter 31 of 9 Edw. VII., amending section 68 of the Act, at the voting on a local option by-law, is a sufficient compliance with the statute, although it does not expressly state what is to be the effect of a voter marking his ballot "For license" or "Against license." *Re Rural Municipality of Shoal Lake*, 20 M.R. 36.

3. Publication of the notice—*Liquor License Act—Quashing by-law—Notice of final reading—Hour of day—Calculation of time—Method of procedure prescribed by statute imperative.*

A notice published under R.S.M., c. 90, s. 63, of a local option by-law stated that the vote of the electors would be taken on Tuesday, the 10th day of May, 1892, and that the further consideration of the by-law after taking the vote and the final reading would be given by the Council in the Village of Treherne on the 17th day of May, A.D. 1892.

Held, that the notice was insufficient, as to the further consideration and final reading of the by-law, because the hour of the day was not designated.

The notice was published on the 6th, 13th, 20th, 23rd, 27th and 30th days of April.

Held, that the notice was not published at least one month before the vote was taken. What is required by the statute is at least one publication in each week of the month before the vote is taken and, for the purpose of reckoning weeks, it is necessary to begin with the day of the first publication and not with the first day of an ordinary week.

Held, also, that the only safe course is to act on the supposition that the Legislature meant what it said when it prescribed the method of procedure, and to hold the by-law invalid if the method has not been followed. *Hall* v. *Rural Municipality of South Norfolk*, 8 M.R. 430.

Distinguished, *Re Brandon Election*, 20 M.R. 705.

VI. Petition to Council.

1. Detaching signatures from headings of petitions and pasting them below the signatures on another petition—*Liquor License Act, R.S.M. 1902, c. 101, s. 62, as re-enacted by 9 Edw. VII, c. 31, s. 2. Injunction to prevent submission of by-law.*

A number of petitions to the council of the municipality asking for the passage of a local option by-law under section 62 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by s. 2 of c. 31 of 9 Edw. VII., were signed by persons aggregating more than twenty-five per cent of the resident electors whose names appeared on the last revised municipal voters' list, but, before being handed to the clerk, the printed headings of all but one of the petitions were cut off, and the rest of the sheets of paper containing only the signatures pasted successively below the signatures on the one petition not thus mutilated. These latter signatures were not themselves sufficiently numerous.

Held, following *Re Williams and Brampton*, (1908) 17 O.L.R. 398, that the document presented to the council was not such a petition as the Act requires and that an injunction should issue, on the application of an owner of a licensed hotel, to prevent the reeve and councillors from submitting a by-law to the electors as prayed for.

Little v. *McCartney*, (1908) 18 M.R. 323, distinguished. *Adams* v. *Woods*, *Re Pembina Municipality*, 19 M.R. 285.

2. Receipt of, by council.

The receipt by the clerk of a Municipality of a petition for a Local Option by-law under section 62 of the Liquor License Act, R.S.M. 1902, c. 101, as amended by section 2 of chapter 26 of 7 & 8 Edw. VII., is not a receiving of the same by the council within the meaning of the Act, and, when there was no meeting of the council after the petition reached the clerk until the third of October, a *mandamus* to compel the council to submit a by-law to the vote of the electors should not be granted. *Re North Cypress*, *McRae* v. *Elmshurst*, 18 M.R. 315.

3. Separate petitions—*Liquor License Act, R.S.M. 1902, c. 101, ss. 61-73—Proof of signatures by sufficient number—Adjournment of time appointed for summing up votes—Time when by-law to come into operation—Mistake in clerk's certificate as to result of vote—Substantial compliance with statutory requirements.*

On an application to quash a local option by-law passed under the provisions of sections 61 to 73, inclusive, of the Liquor License Act, R.S.M. 1902, c. 101,

Held, that none of the following objections to the proceedings were fatal to the by-law:—

1. That, instead of one petition, about 13 papers, all with the same printed heading, each having a number of signatures, were tied up in a roll, the sheets not fastened together, and presented to the council, it being admitted that the heading of each was sufficient for a petition.

2. That there was no entry in the minutes of the proceedings of the council showing receipt of the petition, such receipt having been recited in the by-law.

3. That there was no proof that the petitions altogether had been signed by one-fourth in number of the electors.

It was for the council to satisfy itself that this condition had been complied with, and it must be assumed that it performed its duty in that respect.

4. That, instead of preparing and posting up "a list of those entitled to vote on such by-law," as required by section 67 of the Act, the clerk of the municipality posted up and supplied merely copies of the last revised list of electors of the municipality for the year certified by him to be true copies thereof. Under section 63 of the Act, the two lists would contain the same names.

5. That the certificate of the clerk as to the result of the voting, by mistake, referred in the body of it to the by-law by a wrong number. The heading of the certificate, however, sufficiently showed what by-law was referred to.

6. That, instead of summing up the votes on the day appointed by the by-law, the clerk, on account of the non-receipt of one of the ballot boxes, adjourned the proceeding to a future day, for which there is no statutory authority.

7. That the by-law received its third reading on 27th December, 1904, and, although passed in the afternoon of that day, was declared to be in force on that day, that is, as alleged, from the beginning of that day.

When there has been a virtual compliance with the statute and the departures complained of have been rather from the letter than from the spirit of the enactment, the Court has a discretion in

determining whether there has been a sufficient compliance, and whether effect should be given to the objections on an application to quash.

White v. *East Sandwich*, (1882) 1 O.R. 530, and *Young* v. *Binbrook*, (1899) 31 O.R. 108, followed. *Re Caswell and the Rural Municipality of South Norfolk*, 15 M.R. 620.

4. Signatures on separate sheets of paper—*By-law to repeal, submission of—Liquor License Act, R.S.M. 1902, c. 101, s. 74, as re-enacted by 9 Edw. VII, c. 31, s. 4.*

It is no objection to a petition under section 74 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by 9 Edw. VII., c. 31, s. 4, for repeal of a local option by-law, that most of the signatures are on separate sheets of paper pinned to the one containing the heading and some of the signatures, although no portion of the petition appears upon such added sheets, unless it is shown that such were not attached to the first one at the time the signatures were made thereon.

Adams v. *Woods*, 19 M.R. 285, distinguished, as in that case a number of the sheets attached had been mutilated by cutting off the headings before presentation to the council. *Moore* v. *McKibbin, Re Roblin Municipality*, 19 M.R. 461.

5. Several petitions made into one by cutting off headings—*Injunction against submission of by-law—Liquor License Act, R.S.M. 1902, c. 101, s. 62, as re-enacted by 9 Edw. VII, c. 31, s. 2.*

A number of separate petitions for the submission of a local option by-law under section 62 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by 9 Edw. VII, c. 31, s. 2, containing signatures of more than the required number of the resident electors, were received by the clerk of the municipality, who handed them back to the person presenting them, to carry out a suggestion as to how they should be put together. The latter then made the many petitions into one by cutting off the headings from all but one and putting all the signatures after the one heading left. He then left this with the clerk.

Held, that the first reception of the petition by the clerk was not the receipt by him contemplated by the statute, and that only the petition, as afterwards filed, could be considered as having been presented to the council, and, following *Adams* v. *Woods*, 19 M.R. 285, that such mutilated petition was not such a petition as the Act requires, and, therefore, the injunction issued by the Judge appealed from, to prevent the submission of the by-law by the council, should stand.

Two of the headings cut off as above described were altogether insufficient as petitions under the Act, and, although the number of the signatures to these imperfect petitions could not, as a result of the mutilation, be definitely ascertained, it was believed by the Judge appealed from that there was not the necessary percentage of the electors on the remaining petitions, and he

Held, that everything should be presumed *in odium spoliatoris* and that his finding should be that there were not enough signatures to uphold the petition. *Larkin* v. *Polson, Re Rockwood Municipality*, 19 M.R. 612.

6. Using petition of previous year not then acted upon—*Liquor License Act, R.S.M. 1902, c. 101, s. 62, as re-enacted by 9 Edw. VII, c. 31, s. 2.*

A petition to the council of a municipality to submit to the vote of the electors a local option by-law under section 62 of the Liquor License Act, R.S.M. 1902, c. 101, as re-enacted by 9 Edw. VII, c. 31, s. 2, filed with the clerk in one calendar year with the intention that it should be acted upon in that year, but not so acted upon, may be acted upon as a valid petition for the submission of such a by-law in the following year, even if a portion of the territory of the municipality in which some of the petitioners resided has, in the meantime, been incorporated into a separate village, provided that there still remain on the petition enough names of persons resident in the reduced municipality. *Hatch* v. *Rathwell, Re Oakland Municipality*, 19 M.R. 465.

See CRIMINAL LAW, I, 2.
— INJUNCTION, IV, 2.
— LIQUOR LICENSE ACT, 3.
— MUNICIPALITY, I, 4.
— PROHIBITION OF SALE OF LIQUOR.
— QUASHING BY-LAW.

LORD CAMPBELL'S ACT.

1. Action for death happening out of the jurisdiction—*Necessity for administration granted by authorities in place*

where cause of action arose—Workmen's Compensation for Injuries Act, R.S.M. 1902, *c.* 178.

Allen Tait Johnson, while engaged as a switchman on defendants' railway at Port Arthur, Ontario, met with injuries which resulted in his death.

The plaintiff, his widow, was appointed administratrix of his estate by a Manitoba Surrogate Court and brought this action for damages, claiming, both at Common Law and under The Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178.

Held, following *Couture* v. *Dominion Fish Co.*, 19 M.R. 65, that the plaintiff could not sue under the corresponding Ontario Act without having been first appointed administratrix by an Ontario Court, and that, as the injury took place in Ontario, the Manitoba Act could not apply, and, there being no such right of action at Common Law, the entry of a non-suit by the trial Judge was right. *Johnson* v. *C. N. R.*, 19 M.R. 179.

2. Action against resident of Province for death happening out of the jurisdiction—*Necessity for administration granted by authorities of place where cause of action arose—General Ordinances, N.W.T.* 1905, *p.* 195—7 & 8 *Edward VII, c.* 49, *s.* 2 *(D).*

The plaintiff sued as administrator of the estate of his deceased wife appointed by the proper court of the Province of Manitoba, of which they were residents, for damages for the death of his wife in the North West Territories, alleged to have been caused by the negligence of the defendants, whose domicile was also in Manitoba.

Held, (HOWELL, C.J.A., dissenting,) 1. If the alleged wrongful act or negligence was not actionable where it took place, it would not be actionable in Manitoba, even though the defendants were domiciled there.

Phillips v. *Eyre*, (1870) L.R. 6 Q.B. 1; *The Moxham*, (1876) 1 P.D. 107, and *Machado* v. *Fontes*, [1897] 2 Q.B. 233, followed.

(2) The rule *actio personalis moritur cum persona* would apply and no action could be brought in the Territories for such wrongful act or negligence, unless Lord Campbell's Act or some statute equivalent thereto were in force there.

(3) Such equivalent statute, was: An Ordinance respecting Compensation to the Families of Persons killed by Accidents, printed at page 195 of the General Ordinances of the North West Territories of Canada, 1905, requiring that such action shall be brought by and in the name of the executor or administrator of the deceased, and it must be assumed that the Legislature meant the executor or administrator appointed as such under the laws in force in the North West Territories, and the plaintiff, not having received such appointment, could not maintain the action.

Doidge v. *Mimms*, (1900) 13 M.R. 48, followed.

Dennick v. *R. R. Co.*, (1880) 103 U.S.R. 11, distinguished.

(4) Section 2 of chapter 49 of 7 & 8 Edward VII. (D), giving jurisdiction to the Superior Courts of Manitoba and other Provinces to try civil cases with respect to persons and property in a certain portion of the Territories, does not authorize the Court here to apply the laws of Manitoba in determining rights arising in the Territories, but the Court must, while applying its own practice and procedure, decide such cases in accordance with the laws in force in such Territories. *Couture* v. *Dominion Fish Company*, 19 M.R. 65.

3. Reasonable expectation of pecuniary benefit from continuance of life—*Motion against verdict of jury—King's Bench Act, Rules* 639, 640, 642—*Negligence—Master and servant—Contributory negligence.*

The plaintiffs were the parents and sisters of the deceased, who was killed by an electric shock whilst working in electric light works owned and operated by defendants, and in consequence, as it was alleged, of defects in the appliances supplied by the defendants at the works.

The deceased, who was the only son of the rector of a small parish near Montreal, with an income of about $600 a year, had been given a college education and had returned home when about 21 years old. For a time he remained at home, earning nothing. Then he spent some time in the insurance business in Vermont. Then, on account of his father's illness, he went home, but soon left for Manitoba in search of occupation. There, after working at several things for about three years, he was employed by the defendants to manage their electric works at a salary of $115 a month, out of which he had to pay $45 a month to an engineer and sometimes to hire other assistance. He had

been thus employed about three months when he met his death. The parents were getting old and were in failing health, and it was not shown whether they had or had not any means beyond the income of $600 a year. The deceased contributed nothing to the support of the family during all the time he was in Manitoba; but, according to the father's evidence, he had been a great help to him when at home and had assisted him in many ways in his parish work and in matters of business, and was "a noble, faithful son," efficient in every way, steady and industrious, and "an affectionate son and brother."

Held, that there was nothing in all this to warrant the inference of a reasonable expectation of any pecuniary benefit to the plaintiffs from a continuance of the life of the deceased and that the verdict of the jury in favor of the plaintiffs should be set aside.

Sykes v. *North-Eastern Railway Co.*, (1875) 44 L.J.C.P. 191, and *Mason* v. *Bertram*, (1889) 18 O.R. 1, followed.

Franklin v. *South-Eastern Ry. Co.*, (1858) 3 H. & N. 211; *Dalton* v. *South-Eastern Ry. Co.*, (1858) 4 C.B.N.S. 296; *Hetherington* v. *North Eastern Ry. Co.*, (1882) 9 Q.B.D. 160, and *Blackley* v. *Toronto Ry. Co.*, (1897) 27 A.R. 44 (*n*), distinguished.

Held, also, that the Court could not, under any of the Rules in The King's Bench Act, 58 & 59 Vic., c. 6, dismiss the action or enter a non-suit or verdict for defendants in the face of the verdict of the jury. Rules 639, 640 and 642 discussed.

Connecticut Mutual, &c., Co. v. *Moore*, (1881) 6 A.C. 644, and *British Columbia Towing, &c., Co.* v. *Sewell*, (1883) 9 S.C.R. 527, followed.

New trial ordered without costs of former trial. Costs of the application to be costs in the cause to the defendants in any event. *Davidson* v. *Stuart*, 14 M.R. 74.

On appeal to the Supreme Court the order for a new trial was affirmed on the ground that there was no breach of duty on the part of the defendants towards deceased, who had undertaken to remedy the very defects that had caused his death, and the failure to discover them must be attributed to him, 34 S.C.R. 215.

See ADMINISTRATION, 4.
— WORKMEN'S COMPENSATION FOR INJURIES ACT.

LOSS OF WRIT.

See PRACTICE, VIII, 2.

LOST NOTE.

See PRACTICE, XXVIII, 13.

LOTTERY.

See CRIMINAL LAW, VIII.

LUNATIC.

1. Court's administration of estate *—Liability for failure of banker—Committee's disposition of money—Interest—Compensation—Support of lunatic's wife.*

The death of the lunatic determines the jurisdiction in lunacy except for certain purposes, as accounting, delivery of property, etc.

The paramount consideration in dealing with a lunatic's estate is his comfort and benefit, and the Court exercises great freedom in dealing with the estate.

Expenditures which have been made on behalf of a lunatic without authority may be allowed by the Court, but not by the Master. Such expenditures will be less readily sanctioned after the death of a lunatic.

Where a committee deposits money with a banker, the mere fact of his suspension is sufficient ground for presumption of negligence; though this presumption may be rebutted. The fact that the banker is a private banker will not of itself render the committee liable as being negligent. The fact that the banker selected by the committee is the one formerly employed by the lunatic is an element in favor of the committee.

It is the duty of the committee to pay into court moneys which will not, within a short time, be required for the purposes of the estate.

A committee is liable for interest upon money received by him from its receipt until payment.

The Court has power to allow compensation to a committee, but the Master

has no such power unless the matter is specially referred to him.

The wife of a lunatic has authority to pledge her husband's credit for necessaries for her support. *Re Nevins*, 5 M.R. 137.

2. Declaration of lunacy — *King's Bench Act, Rule* 772—*Lunacy Act, R.S.M.* 1902, *c.* 103, *ss.* 3, 11, 15—*Persona service of petition on lunatic—Service out of the jurisdiction—Requirements for granting of order—No presumption against supposed lunatic from fact of confinement in a lunatic asylum.*

Before a declaration of lunacy will be made on a summary inquiry under section 11 of The Lunacy Act, R.S.M. 1902, c. 103, the following rules must be strictly complied with:

(*a*) The petition must be indorsed as required by rule 772 of The King's Bench Act, and should be signed by the petitioner.

(*b*) It must be personally served upon the supposed lunatic: *Re Miller*, 1 Ch.Ch. 215, unless service has been dispensed with.

(*c*) Personal service will only be dispensed with when it would be dangerous to the lunatic to serve him, and, to prove that, the affidavit of the medical superintendent of the asylum in which the party is confined is not sufficient without corroboration: *Re Newman*, (1869) 2 Ch.Ch. 390; *Re Mein*, (1869) 2 Ch.Ch. 429.

(*d*) The petition should be presented by the nearest relative, and, where the petitioner is out of the jurisdiction, some person within the jurisdiction should be joined as co-petitioner: *Heywood & Massey's Lunacy Practice*, 20.

(*e*) It should be supported by the affidavits of at least two medical men: *Re Patton*, 1 Ch.Ch. 192, and such affidavits must show all the facts evidencing the lunacy from which the Court may judge for itself whether or not the prisoner is of unsound mind: *McIntyre* v. *Kingsley*, 1 Ch.Ch. 281; *Ex parte Persse*, (1828) 1 Moll. 219.

(*f*) There should also be affidavits from members of the family of the alleged lunatic and other persons who know him, not merely giving their opinions, but stating with particularity the material facts pointing to unsoundness of mind and incapacity to manage himself and his affairs: *Renton on Lunacy*, 259.

Nothing can be inferred against the supposed lunatic from the fact that he is confined in a lunatic asylum. He may be there improperly.

If, however, proper evidence is produced that the person has been found a lunatic by a foreign tribunal having jurisdiction to so find, the Court would generally act upon such finding, though not binding upon it.

It is doubtful whether there is any power to serve the petition out of the jurisdiction. Leave to do so was given in *Re Webb*, (1906) 12 O.L.R. 194, but that was under the Ontario rules, which are not the same as those in force here. *Re Bulger*, 21 M.R. 702.

MACHINERY.

See FIXTURES, 4, 6, 7.

MAGISTRATE.

Bias — *Disqualification — Pecuniary interest—Trial of charge by magistrate who is also a member of the board of police commissioners of a city—Resolution of commissioners instructing prosecution of that class of offences—Prohibition—Practice—Civil or criminal proceedings—King's Bench Act, R.S.M.* 1902, *c.* 40, *Rule* 1.

1. The police magistrate of the City of Winnipeg, who is also by statute a member of the Board of Police Commissioners, is not disqualified to hear and determine a charge of selling liquor without license by reason of having, at a meeting of the board previously held, moved a resolution instructing a particular member of the police force to take active steps for the prosecution of offences against the Liquor License Act in unlicensed places, without naming any individual or class of persons to be prosecuted, although the charge in question had been laid by that officer.

Queen v. *Handsley*, (1881) 8 Q.B.D. 383, and *Reg.* v. *Pettitmangin*, (1864) 9 L.T.N. S. 683, followed.

Queen v. *Lee*, (1882) 9 Q.B.D. 394; *Queen* v. *Allan*, (1864) 4 B. & S. 915, and *Queen* v. *Henley*, [1892] 1 Q.B. 504, distinguished.

2. The Police Magistrate of the City is not disqualified to hear and dispose of such a charge by reason of his being a ratepayer of the City and so benefiting to a small extent by any fine which might be imposed, part of which would be received by the City, or by reason of his being paid a salary by the City.

Ex parte McCoy, (1896) 1 Can. Cr. Cas. 410, followed.

3. An application for an order to prohibit a magistrate from hearing a criminal charge on the ground of disqualification through bias is itself a civil and not a criminal proceeding, and the practice to be followed is that laid down in the King's Bench Act, R.S.M. 1902, c. 40, and the Rules thereunder, instead of by *rule nisi* as in criminal proceedings. *Rex* v. *Suck Sin*, 20 M. R. 720.

See LIQUOR LICENSE ACT, 6.

MAINTENANCE AND CHAMPERTY.

See SOLICITOR AND CLIENT, I, 3.

MAINTENANCE OF INFANT.

See INFANT, 8.

MALICE.

See FALSE IMPRISONMENT, 3.
— LIBEL, 2, 6.
— MALICIOUS PROSECUTION, 1, 2, 5.

MALICIOUS PROSECUTION.

1. Advice of counsel or magistrate— *Mistake in law or fact—Prosecution with view to compensation—No criminal charge laid.*

A child having strayed and come into the house of the plaintiff, the defendant, her guardian, applied for the child but was refused. Defendant then went to a magistrate for "an order for the delivery of the child." The magistrate informed defendant that he had no power to give such an order and, after consultation with defendant, issued a summons to plaintiff alleging that the plaintiff "did detain one H. B. with intent to deprive the said A. P. S. of possession of the said H. B. contrary to the form of the statute," &c. Plaintiff was committed for trial, indicted and acquitted.

After verdict for plaintiff in an action for malicious prosecution and upon a motion for non-suit or new trial,

Held, 1. (BAIN, J., *dubitante*)—That the action lay, although no criminal charge had been sufficiently alleged in the information.

2. If a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel, he is not liable to an action.

3. Advising with a magistrate is a circumstance only, for the consideration of the jury in deciding the question of malice.

4. In considering the question of reasonable and probable cause, a defendant may be protected although he was mistaken upon a matter of fact, if his mistaken belief was honest and *bona fide*, but not upon a matter of law.

5. Proceedings not with a view to the punishment of an abducter, but by means thereof to regain possession of the child, exhibit a malicious motive. *Rex* v. *Stewart*, 6 M. R. 257.

2. Authority of manager of Company to order arrest.

The manager of a company (resident at its head office) directed the prosecution of the plaintiff for larceny of the Company's property. The general solicitor of the Company advised the arrest, prepared the information and conducted the prosecution. The duties of the manager were prescribed by by-law. They did not provide for taking such proceedings. There was no evidence of express authority from the Company, or that the arrest was within the scope of the manager's duties.

Held, (DUBUC, J., diss.) That the Company was not liable for the arrest.

The objection that the Company had not authorized arrest was taken on motion for non-suit at the close of the plaintiff's case, but not as an objection to the judge's charge.

Held, That the point was open in Term.

Per DUBUC, J.—Evidence that a prosecution was instituted in order to save the trouble and expense of a law-suit in a court of civil jurisdiction, tends to show an "indirect motive" and lack of good faith.

2. Where a verdict cannot be impeached except upon the ground of excessive damages, the Court may, with the plaintiff's consent, reduce the damages. *Miller* v. *Manitoba Lumber & Fuel Co.*, 6 M. R. 487.

3. Corporation.

A municipal as well as a trading corporation may be liable for malicious prosecution.

The mayor of the city assuming to act as an officer of the city laid an information against the plaintiff; and a firm of solicitors assuming to act for the city advised him in the matter, prepared the information and attended upon its return on behalf of the prosecutors. The solicitors reported the matter to the council and the city paid for the solicitors' services.

Held, That the city was liable for the action taken by the mayor.

Where the facts are distinct and uncontradicted and there is no inference of fact required to be drawn, the question of reasonable and probable cause is one wholly of law. But, where any fact or inference of fact is involved, the question must be determined by the jury under proper direction from the judge.

Opinion of counsel will not protect from an action for malicious prosecution unless the party uses reasonable care to ascertain the facts and lays them before counsel.

Damages reduced from $3000 to $500, no express malice having been proved, very little if any damage to reputation having been sustained and the plaintiff's arrest having lasted but a few hours. *Wilson* v. *City of Winnipeg*, 4 M. R. 193.

4. Determination of proceedings in plaintiff's favor—*Termination of prosecution when two justices decide differently.*

On the preliminary hearing of a charge of arson against the plaintiff, one justice decided that he should be committed for trial and the other that the information should be dismissed and nothing more was ever done in the matter.

Held, that it could not be said that the plaintiff had been discharged on this investigation so as to entitle him to bring an action for malicious prosecution against the informant.

Abrath v. *North Eastern Ry. Co.*, (1883) 11 Q.B.D. 445; *Metropolitan Bank* v. *Pooley*, (1885) 10 A.C. 210; *Parton* v. *Hill*, (1864) 12 W.R. 754, and *Baxter* v. *Gordon*, (1907) 13 O.L.R. 598, followed.

Semble. The justices might have been compelled by mandamus to make an order of dismissal under the circumstances, and, if they had made such an order, the plaintiff could have proceeded with his action: *Kinnis* v. *Graves*, (1898) 67 L.J.Q.B. 584. *Durrand* v. *Forrester*, 18 M. R. 444.

5. Want of reasonable and probable cause—*Burden of proof—Honest belief of prosecutor—Province of Judge and jury—Questions to jury—Malice—Reasonable care in ascertaining facts—Search warrant.*

1. Although a prosecutor, before commencing the prosecution of a person whom he suspects to be guilty of a crime, must, to protect himself from a subsequent action for damages for malicious prosecution, take reasonable care to acquaint himself with the facts, such reasonable care does not necessarily include making inquiries of the suspected person himself or asking him for an explanation, especially when the prosecutor's solicitor advises him to refrain from doing so.

Archibald v. *McLaren*, (1892) 21 S.C.R., per Patterson, J., at p. 603, and *Malcolm* v. *Perth*, (1898) 29 O.R. 406, followed.

2. The question of reasonable and probable cause being for the Judge, and not the jury, to decide, after obtaining the opinion of the jury, when necessary, upon facts in dispute upon which such question depends, it was not, in the circumstances of this case, safe or proper to submit to the jury the question "Did the defendants take reasonable care to inform themselves of the true facts of this case?" as covering all facts upon which the question of reasonable and probable cause depended.

Opinion of Cave, J., in *Brown* v. *Hawkes*, [1891] 2 Q.B. 718, followed.

3. Malice cannot be inferred from the fact that the defendant, in giving evidence at the trial, stated that he still believed in the guilt of the plaintiff.

4. The absence of reasonable and probable cause for the prosecution is not of itself evidence of malice, but only in cases where the conduct of the prosecutor, in instituting the prosecution, is shown to have been so unreasonable as to lead to the inference that the prosecution could only have been the result of malice.

Brown v. *Hawkes*, *supra*, followed.

5. A finding of the jury that the defendants had been actuated by some motive other than an honest desire to bring a guilty man to justice, if unsupported by the evidence, will be disregarded.

6. If the prosecutor has had a search warrant issued and executed in order to obtain evidence in support of his charge, the plaintiff, in a subsequent action for malicious prosecution, would have a right to have that considered in aggravation of damages in the event of his getting a verdict in the action; but, if he fails, he can have no separate cause of action

based on the issue or execution of the search warrant.

7. If the jury does not answer the question as to the defendants' honest belief in the case which they laid before the magistrate, and the plaintiff in the opinion of the Court has failed to satisfy the onus upon him of proving want of reasonable and probable cause and malice, a verdict entered for him at the trial should be set aside, notwithstanding the finding of the jury, unsupported by the evidence, that the defendants had not taken reasonable care to inform themselves of the true facts of the case and had been actuated by some improper motive, and a non-suit should be entered pursuant to Rule 651 of the K.B. Act as re-enacted by 10 Edw. VII, c. 17, s. 7, in the absence of any mention of fresh evidence to warrant the ordering of a new trial. *Renton* v. *Gallagher*, 19 M. R. 478.

Appeal to Supreme Court dismissed. 47 S.C.R. 393.

Leave to appeal to Privy Council refused.

See ASSAULT.
— EVIDENCE, 5.
— FALSE IMPRISONMENT, 3.
— GARNISHMENT, I, 6.
— PLEADING, X, 7.
— PRACTICE, XVI, 6.

MANDAMUS.

1. Delivery of papers.

Mandamus lies to compel the delivery of papers by a public officer to his successor.

Meetings of a municipal council are *prima facie* regular and valid, and a person acting as clerk at these meetings is, *de facto*, the clerk.

A by-law requiring the presence of the reeve, as a condition of the transaction of business at a meeting, is invalid.

Unless the right of the relator to the papers is clear, a peremptory *mandamus* will not be ordered, but only an alternative writ. *Reg. ex rel. Pacaud* v. *Dubord*, 3 M. R. 15.

2. Compelling Mayor of city to sign cheque for payment approved by Council—*Existence of other adequate remedy.*

1. One who has a valid legal claim against a municipal corporation has no right to a *mandamus* to compel the mayor to sign a cheque for the amount although the council has passed a resolution approving payment over the Mayor's veto, because the claimant has another adequate remedy, namely, to proceed by action against the municipality.

The Queen v. *Hull and Selby Railway Co.*, (1844) 6 Q. B. 70; *In re Napier*, (1852) 18 Q.B. 695; *Queen* v. *Registrar*, (1888) 21 Q.B.D. 131, followed.

2. The mere fact that the other remedy is not against the defendant in the *mandamus* proceeding does not prevent the above rule applying.

The Queen v. *Commissioners of Inland Revenue*, (1884) 12 Q.B.D. 461, followed. *Holmes* v. *Brown*, 18 M. R. 48.

3. Production of assessment rolls—*Clerical error in copy—Who should apply for mandamus—Alteration of boundaries—Delay in making application for mandamus—Inability to obey the writ—Remedy must be effective—Municipal Act, R.S.M., c. 100, ss. 663 and 664—Mandamus against Secretary-Treasurer of Municipality.*

The sheriff, having in his hands an unsatisfied execution against the defendant Municipality, proceeded under s. 663 of the Municipal Act, R.S.M., c. 100, and served a copy of the writ of execution on the Secretary-Treasurer of the Municipality on 12th June, 1893. On the 25th July following he demanded the production of the assessment rolls for the purpose of striking a rate to satisfy the execution, but the Secretary-Treasurer refused to comply with the demand. On the 27th October following, the sheriff made a similar demand and, having met with another refusal, he applied for a *mandamus* to compel the Secretary-Treasurer to produce the rolls.

In the copy of the writ served on 12th June, there was a clerical error, the year 1893 being written in two places instead of 1890, but enough information appeared in the copy to show that the error could not mislead any one.

Held, (1) that the application was rightly made by the sheriff and not by the plaintiffs.

(2) That in view of the express wording of ss. 663 and 664 of the Act, the proceedings were properly directed against the Secretary-Treasurer, instead of against the Municipal Council.

(3) That an addition of territory to the Municipality since the recovery of the judgment made no difference in the lia-

bility of the defendants; for, by section 38 of the Municipal Act, the Municipal Commissioner is exclusively charged with the adjustment of the assets and liabilities of the municipalities whose boundaries are in any way changed.

(4) That the application was not too late, although the collector's rolls had been made up and completed, the tax notices sent out, and some taxes had already been paid. The first steps taken by the sheriff were in ample time to enable the Council to make the required levy themselves, and they cannot take advantage of their own laches and neglect to prevent the law being carried out.

(5) That, even if the sheriff would have been unable to strike the rate and arrange for the necessary levy the same year as required by the statute, that would be no reason for refusing the writ, for mere inability to obey the writ has not in all cases been considered a sufficient reason for refusing it.

Reg. v. *Birmingham, &c., Ry. Co.*, 2 Q.B. 47; *Reg.* v. *G. W. R.*, 1 E. & B. 253; *Reg.* v. *York, Newcastle, &c., Ry. Co.*, 16 Q.B. 886, relied on.

London & Canadian Loan and Agency Co. v. *Rural Municipality of Morris*, 9 M. R. 377.

4. Production of books of municipality—*Municipal law.*

It is the duty of the clerk of a municipality, under the Manitoba Municipal Act, to keep the books and records of the municipality and of the council in his office or in the place appointed by the council, and neither the Reeve nor any other person has any authority to take any of these books or papers out of the custody of the clerk.

A ratepayer applied to the clerk to inspect the minutes of the meetings of council and for certified copies of certain resolutions, tendering the proper fees.

Held, that the clerk could not excuse himself for refusing the demand on the ground that the Reeve had taken away the books to Winnipeg for use in certain litigation against the municipality, and that he could not get the books or papers so as to comply with the demand; and a *mandamus* was granted. *Re Cuddy*, 10 M. R. 422.

5. Revision of voters' lists under the Manitoba Election Act, R.S.M. 1902, c. 52—*Power of Revising Officer to keep his court open after expiration of time limited by Board of Registration.*

A Revising Officer appointed to revise and close the lists of electors under The Manitoba Election Act, R.S.M. 1902, c. 52, although directed by the Board of Registration to hold his sitting for that purpose on a certain day and between certain hours, has power to continue the sitting to a later hour and on a subsequent day or days if necessary to enable him to hear and dispose of all applications brought before him.

Where, however, it was shown that, before the hearing of the application for a *mandamus* to the Revising Officer to compel him to re-open his court for the purpose of hearing further applications to be placed on the lists, he had, pursuant to section 92 of the Act, transmitted the list of electors and all books and papers to the Chairman of the Board of Registration, and that, before the final argument of the motion, the Chairman had, pursuant to section 97 of the Act, sent the revised lists to the King's Printer and the books, documents and other papers to the Clerk of the Executive Council,

Held, that the issue of a *mandamus* to the Revising Officer as asked for should be refused as it would be fruitless and futile, and both he and the Board of Registration were *functi officio*.

Rex v. *Bishop of London*, (1743) 1 Wils. 11; *Rex* v. *Bishop of Exeter*, (1802) 2 East, 466, and *Rex* v. *Bateman*, (1833) 4 B. & Ad. 553, followed. *Rex* v. *Bonnar*, 14 M. R. 467.

6. Against treasurer of municipality—*Enforcing writ of execution against school district by levy of taxes—Application to compel treasurer of municipality to make levy directed by sheriff—Who may make—Public Schools Act, R.S.M. 1902, c. 143, s. 263 (f).*

Either the sheriff, or the execution creditor, may apply for the *mandamus* authorized by sub-section (*f*) of section 263 of the Public Schools Act, R.S.M. 1902, c. 143, to be issued in case the treasurer of the municipality refuses or neglects to make the levy against the lands comprised in a school district when directed by the sheriff under an execution in his hands against the school district. *Canada Permanent Mortgage Corp.* v. *School District of East Selkirk*, 16 M. R. 618.

7. Against treasurer of municipality—*Municipality—Duty of new treasurer of municipality to obey precept served on his predecessor by sheriff—Inability to obey the order not always a reason for refusing mandamus—Public Schools Act, R.S.M.* 1902 *c.* 143, *s.* 263.]

Under s. 263 of Public Schools Act, R.S.M. 1902, c. 143, for the purpose of realizing on the execution placed in his hands in this action, the sheriff caused the treasurer of the Rural Municipality of St. Clements, W. R. Young, to be served on 23rd August, 1906, with a precept to levy the necessary rate upon the lands situated in the defendant school district. On 29th October following, Mr. Young resigned and Thomas Bunn was appointed treasurer. Mr. Bunn thereafter made out the general tax roll without including the levy directed by the sheriff. He said he had no knowledge of the proceedings against the municipality until March, 1907, but admitted knowing of the judgment. He had been a member of the municipal council during 1906.

Held, by MACDONALD, J. on application for a *mandamus* to compel Mr. Bunn to levy the rate,

1. That, as a member of the council, he should have had knowledge of the proceedings taken, and the plaintiffs were entitled to the order asked for, as the duties of the treasurer upon whom the precept had been served devolved upon his successor in the office.

2. That the inability of the treasurer to obey the *mandamus* for lack of some preliminary steps required by law to be attended to by other officers of the municipality, over whom he had no control, was not a sufficient answer to the application.

London and Canadian v. *Morris*, (1893) 9 M.R. 377, followed.

On appeal to the Court of Appeal.

Held, that the omission of the words "by rate," in the directions to the sheriff to levy indorsed on the execution, was fatal to the proceeding and that the application for a *mandamus* should be dismissed. *Canada Permanent Mortgage Corporation* v. *School District of East Selkirk, No.* 99, 21 M. R. 750.

See AGREEMENT FOR SALE OF LAND, 2.
— APPEAL FROM COUNTY COURT, III, 4.
— CONSTITUTIONAL LAW, 1.
— DOMINION ELECTIONS ACT.
— INJUNCTION, IV, 3.
— JUDICIAL DISTRICT BOARDS, 1.
— LOCAL OPTION BY-LAW, I, 2.
See MUNICIPALITY, IV, 1.
— PARLIAMENTARY ELECTIONS, 1, 2.
— SHERIFF, 4.

MANITOBA SWAMP LANDS.

See CROWN LANDS, 2.

MANSLAUGHTER.

See CRIMINAL LAW, IX.

MARITIME LIEN.

See WINDING-UP, IV, 4.

MARRIAGE.

See ALIMONY.

MARRIED WOMAN.

1. Liability on contract—*Separate estate.*

In an action brought to recover from the defendant, a married woman, the balance of an account for goods sold and delivered to her,

Held, that, in the present state of the law, debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf or separately from her husband, may be sued for as if she were an unmarried woman, that is without regard to separate estate. *Wishart* v. *McManus*, 1 M. R. 213.

2. Liability on contract—*Separate estate—Power of attorney—General and restrictive clauses.*

Debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf separately from her husband, may be sued for as if she were an unmarried woman, that is, without regard to separate estate.

When suing a married woman it is necessary to prove one of two things. It must be proved that she is carrying on a business or employment, occupation or

trade, separate from her husband, and that the liability sued upon arose out of, or was contracted in connection with, that separate business or employment, occupation or trade. Or, it must be shown that the married woman is possessed of separate property, upon which it may be presumed she intended the liability incurred, or contract entered into, and which is the subject matter of the suit, should attach, and out of which it should be paid.

As plaintiff proved neither of these a non-suit was entered.

Wishart v. *McManus*, 1 M. R. 213, followed.

A power of attorney was given by defendant to her husband on a form supplied by a Bank; it contained power and authority to do for defendant, and in her name, five separate and distinct classes of business, and proceeded, "and further, to manage and transact all manner of business whatsoever with the branch of the Bank of British North America in Winnipeg, their manager or other officer duly authorized." The note sued on was signed by defendant's husband under this power.

Held, that the clause in the power, "for me and in my name to make, draw, accept, transfer and endorse in favor of all parties whomsoever, all promissory notes, bills of exchange," &c., conferred a general power that was not limited or restricted by the subsequent clauses that referred specially to the Bank.

As to the defence that the defendant did not make the note, the plaintiff would be entitled to succeed. *Velie* v. *Rutherford*, 8 M. R. 168.

3. Next friend—*Commission—Material on application.*

A married woman defendant applied for a commission. Her husband who was also a defendant appeared and supported the motion.

Held, that a next friend was necessary for the purposes of the application, but the order was made as upon the application of both husband and wife.

It is not always necessary upon an application for a commission to shew the nature of the evidence proposed to be given. *Ontario Bank* v. *Smith*, 6 M.R. 600.

4. Next friend—*Appointment of—Property qualification—Incumbered property—Joint ownership.*

Where a proposed next friend for a married woman was shown to be possessed of property worth more than double what was necessary, but it consisted of real estate heavily encumbered and personal property, both kinds of property being owned jointly with another person,

Held, That the appointment as next friend should be refused on the ground of the nature of the property.

Held, also, that a next friend should, at least, be shown to be possessed of such property as would formerly, had he been a plaintiff resident abroad, have relieved him of the necessity of giving security for costs. *Carscaden* v. *Philion*, 9 M. R. 135.

5. Separate estate—*N. W. Territories.*

Certain moneys were settled to the separate use of a married woman, subject to her power of appointment. She appointed to her own use, received the moneys and with them purchased certain cattle and farm stock, which, with her assent, were used by her husband upon a farm. In an interpleader issue between the married woman and the execution creditors of the husband,

Held, 1. That the goods belonged to the husband by virtue of the marriage, notwithstanding the provisions of 43 Vic. (D.), c. 25, ss. 57 to 62.

2. That the husband was not a trustee for the wife, there being no evidence of his having acted in that capacity. *Brittlebank* v. *Gray-Jones*. *Gray-Jones, Claimant*, 5 M. R. 33.

Distinguished *Conger* v. *Kennedy*, 26 S.C.R. 397.

See Examination of Judgment Debtor, 8, 12.
— Husband and Wife.
— Landlord and Tenant, I, 2.
— Practice, XVI, 8.
— Real Property Act, III, 2, 3.
— Title to Land, 2.

MARRIED WOMEN'S PROPERTY ACT.

See Husband and Wife.

MARRIED WOMEN'S SEPARATE ESTATE.

See Fraudulent Judgment, 3.

MARSHALLING OF ASSETS.

See COMPANY, IV, 3.
— PRINCIPAL AND SURETY, 7.

MASSAGE.

See MEDICINE, PRACTICE OF

MASTER AND SERVANT.

I. DISMISSAL OF SERVANT.
II. NEGLIGENCE OF SERVANT.
III. WAGES.
IV. WRONGFUL DISMISSAL.

I. DISMISSAL OF SERVANT.

1. Dismissal for disobedience—*Construction of orders—Nonsuit—Scintilla of evidence.*

Defendants wrote to their servant, the plaintiff, on 28th November: "You must have your weekly warehouse reports made out on time for the Tuesday morning's mail. No excuse will be accepted for non-fulfillment of this rule." During the following month the reports were not sent regularly, and on the 30th December, instead of sending the report due on that day, the plaintiff wrote saying he would send it by next mail. He was thereupon dismissed. The excuse for non-compliance was that he was too busy; but he was unable satisfactorily to show in what way his time had been employed, and it appeared that he was authorized to employ all the assistance he required.

At the trial the Judge told the jury that it was for them to say whether the order was intended to be peremptory, and the jury found a verdict for the plaintiff for $90.

Held, that the charge was erroneous; that it was not for the jury to construe the language of the order and to find whether it meant exactly what it literally said; that the order was positive and clear; that no sufficient excuse for non-compliance had been given; and, although there might have been some evidence to go to the jury, yet that there was none upon which a verdict could be supported, and a nonsuit was entered. *McEdwards v. Ogilvie Milling Co.*, 5 M. R. 77.

2. What amounts to.

The plaintiff was engaged as a surveyor. The defendant furnished the instruments. In the morning of one day, while the plaintiff was pursuing his usual course, the defendant's son (who had authority to act for him) asked plaintiff for the key of the instrument box, which plaintiff gave him. The plaintiff remained at the camp during the day unoccupied, and unable to get the instruments, and the defendant's son did not complain of his conduct, or offer him the instruments, but, on the contrary, told the plaintiff to go and see the defendant, who was at another camp four miles away.

Held, 1. It does not require any form of words to amount to a dismissal of a servant.

2. That plaintiff was justified in considering himself dismissed.

3. If a servant be engaged for a definite period at so much per month, the amount earned may be recovered, although the defendant subsequently be properly dismissed for misconduct.

4. A servant hiring for the performance of specified duties impliedly warrants that he is possessed of the requisite skill, and if he have it not he may be dismissed. *Feneron v. O'Keefe*, 2 M.R. 40.

II. NEGLIGENCE OF SERVANT.

Action for damage to goods by mortgagor against the mortgagee—*Redemise—Amendments—Evidence—Statements of agent.*

A master is liable for a wrong committed by his agent when such wrong is committed while the agent is acting within the scope of his authority.

The defendant's son lighted a smudge near a stable to keep away mosquitos from his father's horses. The fire spread to the stable and consumed some wheat of the plaintiff stored therein. The jury gave a verdict for plaintiff and the court refused to set it aside, (KILLAM, J., *dissenting*).

In such a case the defendant held a mortgage upon the wheat executed by the plaintiff. The mortgage was not due at the time of the fire. There was no redemise clause in it. After the fire and the maturity of the mortgage, the defendant realized the money secured by the mortgage by sale of other property comprised in it. The wheat had been stored by the plaintiff in the defendant's stable

while, previously, tenant to the defendant, and the defendant had not in any other way taken possession than by occupation of the land and stable and by refusing to allow the wheat to be removed until he was paid.

Held, that the existence of the mortgage was no defence to the action for the destruction of the wheat, (KILLAM, J., *dissenting*).

Per KILLAM, J. In the absence of a redemise clause in the mortgage, no action could be brought for the loss of the goods whether it occurred before or after the expiration of the time for redemption.

2. If there could be held to be an implied redemise clause (as to which *quære*), the plaintiff could only recover for the loss of enjoyment of the goods between their destruction and the time fixed by the mortgage for payment.

3. Amendments can be allowed only where they are "necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties," and for the purpose of meeting "any formal objection * * * to the end that in all things substantial justice may be done." A count disclosing a cause of action entirely distinct from those upon the record, under the circumstances, should not be allowed.

4. A principal is not bound by the statements of his agent, after the happening of the act sued upon, unless the agent has authority to make such statements. *Down* v. *Lee*, 4 M. R. 177.

III. WAGES.

1. Non-payment of wages—*Engagement terminated.*

In order to support a conviction under The Masters and Servants Act, 34 Vic., c. 14, by a servant against his master, the hiring or engagement must be subsisting at the time of the complaint. Upon a complaint laid by a servant for non-payment of wages, the Justice should order the payment of the wages and not impose a penalty.

Therefore, a conviction imposing a fine upon a master for non-payment of wages, founded on a complaint made after the contract of hiring had ceased, was quashed. *Follansby* v. *McArthur*, T. W., 4.

2. Non-payment of wages—*Master and Servants Act*, 1871.

A conviction for non-payment of money, due for work done on a contract, cannot be sustained under The Master and Servants Act, 34 Vic., c. 14. *Merritt* v. *Rossiter*, T. W., 1.

3. Temporary illness — *Practice — Notice of motion.*

Where a servant hired by the week is absent, on account of illness, six or seven weeks, he is not entitled to be paid for the time during which he was absent.

A notice of motion to the Full Court to set aside the verdict of a single Judge stated that the plaintiff "has this day set down this cause for re-hearing," &c.

Held, a sufficient notice.

Miller v. *Morton*, 8 M. R. 1.

IV. WRONGFUL DISMISSAL.

1. Company—*Measure of damages—Corporation—Seal—Liability of company upon contract not under its seal—Presumption of yearly hiring.*

1. A company incorporated under The Manitoba Joint Stock Companies Act to carry on a quarrying business will be liable for wrongful dismissal of a person employed to act as general foreman by the manager of the company although the contract is not under its seal.

McEdwards v. *Ogilvie*, (1886) 4 M.R. 1, followed.

2. By the law of England and Canada, a general hiring, no time being specified, will be presumed to be for a year certain, especially if it is at a yearly salary.

Buckingham v. *Surrey & Hants Canal Co.*, (1882) 46 L.T.N.S. 885, and *Rettinger* v. *MacDougall*, (1860) 9 U.C.C.P. at p. 487, followed.

3. The onus is on the defendant seeking to show, in reduction of damages for the wrongful dismissal of the plaintiff, that he might have obtained other employment by reasonable diligence, and a discharged workman is not bound to accept a less remunerative position or one of a lower grade even at the same wages, nor need he abandon home and place of residence and go to another province or country to seek employment.

Costigan v. *Mohawk*, (1846) 2 Denio, at p. 616; 26 *Cyc.* 1015, and *Macdonell* on *Master and Servant*, 159, followed.

4. The tribunal assessing the damages in such a case, whether a jury or a Judge trying it without a jury, has to speculate on the chance of the servant getting a new place and arrive at the best conclusion it can, in view of all the circumstances, as to the probable time that will elapse before

another similar employment can be obtained, bearing in mind that the law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place.

Beckham v. *Drake*, (1849) 2 H.L.C. 606, and *Sowden* v. *Mills*, (1861) 30 L.J.Q.B. 176, followed.

At the date of the verdict, the plaintiff had been about six months idle, and there still remained about two and a half months of his year. The salary was at the rate of $150 per month, and the Judge, sitting as a jury, applying the above principles, assessed the plaintiff's damages at $1000. *Armstrong* v. *Tyndall Quarry Co.*, 20 M. R. 254.

2. Company—*Pleading—Statement of Claim—Readiness to continue in service—Contract of hiring—Company—Absence of seal — Authority of president — Manitoba Joint Stock Companies Act, sec. 64—Damages—Failure to seek employment—Justification of dismissal—Mistake in work—Counterclaim.*

In an action to recover damages for the wrongful dismissal of the plaintiff from the service of the defendants, it is not necessary for the plaintiff to aver that he was ready and willing to continue to serve the defendants.

The defendants, an incorporated company, hired the plaintiff as foreman. The contract of hiring was in writing, purporting to be signed by the company, by their president, but without the corporate seal. The hiring was for more than a year:—

Held, 1. That the president had authority to make the contract, it being in general accordance with his powers, and it was, therefore, binding on the company: Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, s. 64.

2. As to damages, that the plaintiff, considering the time of year when he was dismissed, and the improbability of securing work, was justified in not seeking employment immediately after his dismissal.

3. That the dismissal was not justified by the fact that in making some moulded caps he had made a mistake which made the caps useless to his employers; but that a counterclaim for this should be allowed, and the plaintiff's damages reduced by the amount thereof. *Beaucage* v. *Winnipeg Stone Co.*, 14 W. L. R. 575.

3. Drunkenness.

The defendants engaged the plaintiff as choir master. Upon the first occasion that the choir met for practice the plaintiff was drunk and unable to perform his duties, whereupon he was immediately dismissed.

Held, in an action for wrongful dismissal, that the dismissal was justified by the plaintiff's conduct. *Martin* v. *Lane and the Churchwardens of All Saints Church*, 3 M. R. 314.

4. Drunkenness—*Hiring not under seal—Power of directors.*

The defendants, a company chartered under the Joint Stock Companies Act, Con. Stat. Man., c. 9, div. 7, through its officers who usually made such contracts, hired by parol the plaintiff to manage their elevator and business at M.

Held, The contract need not have been under seal—sec. 269 of the statute— if made by an officer in general accordance with his powers "under the by-laws or otherwise."

Per TAYLOR, J. The plaintiff having been hired by those officials who hired all the persons holding positions similar to that of the plaintiff, there was evidence to go to the jury as to whether the contract had not been made "by an agent, officer or servant of the company in accordance with his powers as such officer, under the by-laws of the company, or otherwise."

Per KILLAM, J. From the mere fact of acquiescence in the exercise of such powers (by the official) or from the acquiescence of the company in the plaintiff's appointment, it may be inferred that all formalities necessary to give the official authority to make the appointment had been duly observed.

2. Acquiescence of the directors in the act of an official in dismissing the plaintiff coupled with the substitution of another employee also acquiesced in by the directors, which official had authority to hire the plaintiff, is evidence of authority to dismiss.

By sec. 47, "The directors shall, from time to time, elect from among themselves a president of the company; and shall also appoint and may remove at pleasure all other officers thereof."

Held, 1. That this clause did not apply to the plaintiff.

2. Such power of removal must be strictly pursued, and only at a regular meeting of the directors.

Per KILLAM, J. A dismissal in such manner must be pleaded.

The proper question to be left to the jury upon a justification of the dismissal for drunkenness would be: "Was the plaintiff so conducting himself that it would have been injurious to the interest of the defendants to have kept him; did he act in a manner incompatible with the due and faithful discharge of his duty; did he do anything prejudicial or likely to be prejudicial to the interests or reputation of his master?" *McEdwards* v. *Ogilvie Milling Co.*, 4 M. R. 1.

See 5 M. R. 77, also *supra*, I, 1.

5. Insolence as ground for dismissal.

A single disrespectful retort by an employee, which has been provoked or called forth by an unbecoming remark of the employer, is not a sufficient ground for dismissal of the employee.

Edwards v. *Levy*, (1860) 2 F. & F. 94, followed.

Defendant, upon being asked by plaintiff for $25 due to him, directed payment to be made, and remarked that it was "another case of paying a man who was not worth it." To this plaintiff replied that defendant would have to prove him incompetent before a Judge and jury, or words to that effect.

Quære, whether such an answer, considering the circumstances, should be regarded as insolent. *Williams* v. *Hammond*, 16 M. R. 369.

See CONTRACT, XV, 9.
— LORD CAMPBELL'S ACT, 3.
— MUNICIPALITY, III, 4.
— NEGLIGENCE, II, 1, 3; V, 1; VII, 8.
— SEDUCTION, 1.

MASTER'S OFFICE.

See EVIDENCE, 10.

MASTER'S OFFICE, PRACTICE IN.

1. Accountant in Master's office— *Attendance there of parties or experts.*

The Master has power to direct the appointment of an accountant and to tax the payment of his fee.

Although the general rule is, that nothing can be taxed for the preparation of accounts directed to be brought into the Master's office, yet in a partnership case, when it was not the duty of either party to prepare them, a disbursement for their preparation was allowed.

No allowance beyond ordinary witness fees can be made for the attendance, in the Master's office during the passing of accounts, of a person specially familiar with them. Nor to a party to the cause so attending. *Scott* v. *Griffin*, 6 M. R. 116.

2. Foreign evidence taken by Master

By consent the Master attended in Montreal for the purpose of taking certain evidence. The evidence "was to be used on the reference (saving all just exceptions) in the same manner as if said evidence had been taken under a commission."

The depositions were styled in the cause (short form) and then proceeded: "A. B. sworn," with questions and answers following. The answers were not stated to have been made by any one, and there were no signatures either of witnesses or examiner. Upon appeal from the Master's report, he certified, at the request of the Judge, that the evidence had been taken and afterwards transcribed by a short hand reporter, but that it had not been read over to the witnesses.

Held, It would be improper to receive any evidence, such as that taken in Montreal, upon less proof of its being correctly taken than would be required if there had been an order appointing the Master a special examiner for the purpose. *Lewis* v. *Georgeson*, 6 M. R. 272.

See PARTIES TO ACTION, 6, 7.
— PRACTICE, XVII, 3.

MASTER'S REPORT.

See PRACTICE, VIII, 1.

MATERIAL REQUIRED ON APPEAL.

See PRACTICE, XIV, 2.

MATTERS ARISING AFTER ACTION COMMENCED.

See PRACTICE, II, 2.

MEASURE OF DAMAGES.

See Lord Campbell's Act, 3.
— Master and Servant, IV, 1.
— Misrepresentation, II.
— Principal and Agent, V, 6.
— Real Property Limitation Act, 1.
— Sale of Goods, III, 2.
— Warranty, 1, 2, 3.

MECHANICS' LIEN.

I. Assignment of the Contract Money.

1. Affidavit—*Commissioner—Time for commencement of action.*

Held, 1. An assignee of the mechanic is entitled to a lien and may make the affidavit necessary for registration.

2. Prior to 47 Vic., c. 7, a commissioner to administer oaths had no power to take an affidavit verifying a statement of claim to be filed.

3. The statement of claim read: "The time or period within which the same was to be done or furnished. Between the 3rd day of July, 1882, and 1st day of August, 1883."

Held, sufficient.

4. Proceedings must be commenced within 90 days after the completion of the work, and the making good of trifling defects in the work does not extend the time. *Kelly* v. *McKenzie*, 1 M. R. 169.

2. Assignment of consideration by contractor—*Priority.*

Held, 1. A sub-contractor is entitled to assert a mechanic's lien, even although the contract between the owner and original contractor provides that no workman should be entitled to any lien.

(*a*) 2. An assignee of the contract price for the erection of a building is not entitled to the money as against the lien of a sub-contractor, unless the owner has in good faith bound himself to pay the assignee. *Anly* v. *Holy Trinity Church*, 2 M. R. 248.

(*a*) Reversed on appeal. The Court held, under the Act as it stood in 1885, that an assignment by the contractor of the contract money, made before the registration of a lien by a sub-contractor, took priority over such lien. 3 M. R. 193.

II. Costs.

1. Commission of 25 per cent., on what to be calculated when there are several successful lien claimants.

Under section 37 of the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902, c. 100, where there are several successful lien holders besides the plaintiff, the maximum of costs, exclusive of disbursements, that can be allowed to the plaintiff is twenty-five per cent. of the total amount awarded to him and the other lien holders, reduced by the total sum of costs awarded to the other lien holders, so that in no event shall the defendant have to pay in costs, exclusive of disbursements, a sum greater than twenty-five per cent. of all sums awarded against him to lien holders in the action. *McDonald Dure Lumber Co.* v. *Workman*, 18 M. R. 419.

2. Costs of sale and reference to Master—*Limitation of 25 per cent., to what costs applicable.*

The expression "costs of the action awarded in any action under this Act by the Judge or local Judge trying the action" in section 37 of The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, refers to the costs up to and including the trial, and means the costs which are allowed by the Judge at the hearing and entered in the judgment, and the provisions of that section, limiting the costs to be allowed in such action exclusive of disbursements to twenty-five per cent. of the amount of the judgment, do not apply to the subsequent costs of sale and proceedings before the Master, which may be dealt with by the Judge as in other cases. *Gearing* v. *Robinson*, (1900) 19 P.R. 192, followed.

The judgment pronounced empowered the Master to tax and add to the plaintiff's claim the costs of the subsequent proceedings, and the Master under it allowed the ordinary costs of a sale conducted in his office, and there was no appeal from the judgment.

Held, on an appeal from the taxation, that the Court could not interfere with the provisions of the judgment.

Section 31 of the Act provides an alternative mode of proceeding to enforce a lien in which the Judge disposes of everything necessary to realize the claims without a reference to the Master, and section 39 provides that, when the least expensive course is not taken by the plaintiff, the costs allowed shall not exceed what would have been incurred if the least expensive course had been taken.

Held, per RICHARDS, J., that it could not be assumed that proceedings under section 31 would have been any less expensive than those which had been taken.

Per PERDUE, J., that the question as to the least expensive course should have been dealt with, if at all, by the Judge who tried the action, and the taxing officer had no power, without a special direction in the judgment, to determine which would have been the least expensive course. *Humphreys* v. *Cleave*, 15 M. R. 23.

III. DATE OF COMPLETION.

1. Construction of statutes—*Retrospective—Time for filing lien—Completion of work—Amendment of bill.*

By Con. Stat. Man., c. 53, s. 5, no lien shall exist unless a statement of claim verified, &c., is filed, &c., within, &c., which statement "shall state"—then followed a number of items. This section was repealed by 46 & 47 Vic., c. 32, s. 6, and re-enacted with some slight variations. The words "shall state" however, were omitted although all the items appeared as before.

Held, that after this second statute the items need not appear in the statement.

The Act 47 Vic., c. 14, is prospective as well as retrospective.

The work (the building of a house) was completed on the 18th of August, with the exception of putting up an iron cresting which, by the contract, was to be placed on the verandah. The cresting was put upon the top of the house on the 29th of October, the plaintiff asserting, as a reason for the delay, that he had no money to pay for the cresting, the defendant having refused to pay him. The statement of claim was not filed within thirty days from the 18th of August, but was within that period after the 29th October. There was no evidence of any variation of the contract as to the place where the cresting was to be placed, nor of its acceptance by any act of the defendant.

Held, (KILLAM, J., dissenting) That the statement was filed within thirty days from the completion of the work.

The bill was amended after the lapse of the time given for filing a bill.

Held, that the bill was within the prescribed time, it having as originally filed been sufficient for asserting the lien, and the amendment having been occasioned only by the defendant's claim for cross relief in consequence of the work not having been completed within the contract time. *Irwin* v. *Beynon*, 4 M. R. 10.

2. Evidence of.

Held, 1. When the completion of the work is alleged as of a particular day which is a considerable time after the bulk of the work was performed, clear and satisfactory evidence must be given to enable the Court to find the date proved.

2. Upon the evidence, that the date was not sufficiently proved.

UPON RE-HEARING,

Held, 1. That the evidence showed that the main work was not completed before the date alleged, and that, although some levelling of the earth around the building was done upon two succeeding days, the plaintiff was entitled to his lien.

2. In a suit by a sub-contractor it is not necessary at the hearing to prove that there is anything due by the owner to the contractor. That is a matter for the Master's office. *McLennan* v. *Winnipeg*, 3 M. R. 474.

3. Time for filing lien—*Completion of contract—Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, s. 20.*

1. When a contractor or sub-contractor claiming a lien under The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, for machinery supplied by him under a contract, has himself treated the contract as having been completed more than thirty days before the filing of the lien, the time for filing it prescribed by section 20 should be held to have expired, notwithstanding an intention on his part to return later to test the machinery as soon as the other work should be sufficiently advanced to enable such test to be made.

2. A test under such circumstances would not be a performance of part of the work to be performed under the

contract. It would only be for the purpose of finding defects, and the defendants had not complained of any defects.

3. Even if defects had been found, the making good of them would not, under the authority of *Neill* v. *Carroll*, (1880) 28 Gr. 30, and *Summers* v. *Beard*, (1894) 24 O. R. 641, be a performance of a part of the work such as would revive the right to file a lien. *Day* v. *Crown Grain Co.*, 16 M. R. 366.

Appeal allowed and verdict entered for plaintiff, 39 S.C.R. 258.

The judgment appealed from (16 M. R. 366) was reversed.

DAVIES and MACLENNAN, JJ., dissented on the ground that the evidence was too unsatisfactory to justify an extension of the time.

The Court refused to quash the appeal on the ground that the right of appeal had been taken away by section 36 of the statute above referred to. *Day* v. *Crown Grain Company*, 39 S.C.R. 258.

See also [1908] A.C. 504.

IV. INTEREST OF PURCHASER OF LAND.

1. Priority of vendor's lien—*Statement of time within which work was done.*

The plaintiffs did work for defendant Jeffrey on a house which he was building upon land purchased from defendant Fisher under a verbal agreement for sale. The price of the land was $6000, of which Jeffrey paid $10 on account; but he never made any further payment, and Fisher afterwards took a release of any claim that Jeffrey might have on the land and paid the latter $50 for same.

Held, that the plaintiffs were entitled to a lien or charge upon the interest or title of Jeffrey in the land as it stood before the release given to Fisher, but that such lien or charge must be subordinate to Fisher's claim as unpaid vendor. *Graham* v. *Williams*, 8 O. R. 479, followed. *West* v. *Elkins*, 14 C.L.T. 50, and *Blight* v. *Ray*, 23 O.R. 415, distinguished.

The lien as filed stated that the work was commenced on a certain day and that it was finished on *or before* a certain other day.

Held, following *Truax* v. *Dixon*, 17 O.R. 356, and in view of clause (*uu.*) of s. 8 of the Interpretation Act, R.S.M. c. 78, that the statement sufficiently showed the time within which the work was done. *Flack* v. *Jeffrey*, 10 M. R. 514.

2. Rights of workmen as against vendor.

The purchaser of a lot of land, under an agreement of sale fixing 15th August, 1901, for payment of the purchase money, was allowed to enter into possession on 15th June, 1901, and to commence building on the land. He continued the expenditure of money upon the premises after the date fixed for payment with the knowledge and concurrence of the vendors, but eventually abandoned the purchase without having paid anything to the vendors. They then notified him that, as he had not complied with the terms of the purchase as to time, his interest had ceased.

The plaintiff's claim was for a lien on the interest of the purchaser in the property for work done by him in the erection of the building, but he submitted to the lien of the vendors for the full amount of the purchase money of the land.

Held, that the vendors could not, under the circumstances, put an end to the rights of the purchaser by giving such a notice and that, apart from the provisions of s. 11, s-s. 2, of The Mechanics' and Wage Earners' Lien Act, 61 Vic., c. 29, the plaintiff was entitled to the lien asked for with the usual inquiries and directions. *Hoffstrom* v. *Stanley*, 14 M. R. 227.

V. FOR MATERIALS.

1. Material used in a building, but not sold for that purpose.

A material man has no lien unless the goods were supplied for the purpose of being used in the particular building upon which he claims to have a lien. *Sprague v. Besant*, 3 M.R. 519.

2. Rights of material men as against reserve—*Building contract—Occupation of building by owner—Acceptance of work—Mechanics' and Wage Earners' Lien Act, R.S.M.* 1902, *c.* 110, *ss.* 9, 12.

Persons supplying materials to the contractor for the building of a house are not entitled to the benefit of the provisions of section 12 of The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, by which, in the event of the contract not being completed, wage earners may enforce liens against the percentage of the contract price which the owner is required to hold back under section 9 of the Act; but, if the contract price is payable by instalments, the general lien-holders may enforce their

liens *pro rata* to the extent of any earned instalments in so far as the same remain unpaid in the hands of the owner, although the work is not completed.

Brydon v. Lutes, (1891) 9 M.R. 463, followed.

2. The occupation of the uncompleted house by the owner and the mortgaging of it, for a sum to be paid to the contractor in accordance with one of the terms of the contract, do not estop the owner from setting up against the lienholder that the house has not been completed and that, consequently, no more money is due under the contract.

Pattinson v. Luckley, (1875) L.R. 10 Ex. 330, and *Sumpter* v. *Hedges*, [1898] 1 Q.B. 673, followed.

Black v. *Wiebe*, 15 M.R. 260.

VI. Priority of.

1. As against mortgage.

Held, A mechanic's lien does not "exist unless and until" his statement is filed in the registry office; and the mere fact that the work was done before the execution, by the owner of the land, of a mortgage upon it will not give the mechanic priority as against the mortgagee. *Kiewell* v. *Murray*, 2 M.R. 269.

But see, now, s-s. (*a*) of s. 4 of R.S.M. 1902. c. 110, and next case.

2. Between lienholders and mortgagees—*Notice of lien—Subrogation to rights of unpaid vendor in favor of mortgagee paying him off—Practice—Defects in the statement of lien registered—Costs—Counsel fees as disbursements.*

At the trial of an action under The Mechanics' and Wage-Earners' Lien Act, 1898, 61 Vic., c. 29, which was not defended by the debtor, it became necessary to determine the respective rights and priorities as between the plaintiff whose claim was for work and labor, another lienholder whose claim was for lumber and other materials supplied at different dates, and several mortgagees. These parties had been served pursuant to section 32 and section 27 (2) of the Act with notice of the trial, but had not been otherwise made parties to the action.

The following points arising under various provisions of the Act were decided:—

1. Although an account for materials supplied may consist of items for different lots supplied at different dates on separate and distinct orders, the lien filed within the required time after the delivery of the last lot will be good to cover all the orders if given in pursuance of a general arrangement previously entered into.

Morris v. *Tharle*, (1893) 24 O.R. 159, followed.

Chadwick v. *Hunter*, (1884) 1 M.R. 39, distinguished.

2. The claims of subsequent incumbrancers and other lienholders may be disposed of at the trial without their being made parties to the action, and although the notice of trial has been served after the time limited for bringing the action: *Cole* v. *Hall*, (1889) 13 P.R. 100.

3. The lienholder who registers his lien in time has priority from the date of the commencement of the work or from the placing of the materials over every conveyance, mortgage or charge made thereafter, although registered first, and such priority is not affected by section 11 of the Act, which applies only to payments or advances made subsequently to the taking effect of the lien under conveyances or mortgages otherwise having priority.

4. The effect of section 17 of the Act is that only substantial compliance with the directions as to the contents of the claim and the registration of it is required, and no failure in such compliance, in however substantial a degree, is to invalidate the lien unless some other party is prejudiced thereby, and then only to the extent to which he is thereby prejudiced.

5. The lien for materials supplied as against a mortgage has priority over the mortgage only to the extent of the material placed on the ground before the mortgage money was advanced.

6. Under section 11, if a mortgagee has notice in writing of the fact that there is an indebtedness for which a lien may be claimed, that is *prima facie* notice of the lien itself, and he cannot claim priority for moneys advanced after such notice.

7. The first mortgagee having applied his last advance in payment of the purchase money of the lots to the unpaid vendor who then conveyed the land in fee to the defendant owner, and having thus secured the title to the property, claimed to be entitled to be subrogated to the position of the original vendor in respect of such purchase money; but, having had actual notice of one of the liens and constructive notice of the other before making this payment, following *Parry* v. *Wright*; (1823) 1 Sim. & St. 369, 5 Russ. 142, it

was held that he could not have priority over either lienholder for such advance.

Brown v. *McLean*, (1889) 18 O.R. 533, and *Abell* v. *Morrison* (1890) 19 O.R. 672, distinguished.

Counsel fees actually paid are to be included among the actual "disbursements" referred to in section 37 of the Act whether the counsel is a solicitor or a partner of a solicitor in the cause or another barrister: *Magurn* v. *Magurn*, (1883) 10 P.R. 570. *Robock* v. *Peters*, 13 M.R. 124.

VII. Sub-Contractor, Rights of.

1. Contractor's failure to complete —*Public buildings—Trust property.*

Under a building contract the proprietor (the City of Winnipeg) was to pay 85 per cent. of the value of the work and materials as the structure progressed, and the balance of 15 per cent. upon the whole of the work being completed to the satisfaction of the City and acceptance of the work by the corporation. The contractor failed to complete the work, having at that time received payment to the extent of 85 per cent.

Held, that a sub-contractor had no lien in respect of the reserved 15 per cent.

[But see, now, R.S.M. 1902, c. 110, s.q. first enacted in 1898 by 61 Vic., c. 29.—Ed.]

During the progress of the work another contract was made between the proprietor and the contractor for certain extra work. In this contract there was an agreement for payment of 85 per cent. during the progress of the work; nothing was said with reference to the 15 per cent., but there was a general provision "that in all other respects said original contract shall not be varied, altered or changed, but be and remain in full force and effect."

Held, that the 15 per cent. was payable upon completion of the extra work and, this having been completed, was available to the sub-contractor.

By the terms of the contract any materials placed upon the ground were to be considered in the possession of the City, and were to be included in the progress estimates.

Held, that a material-man was not bound to show that his materials were used in the building—delivery upon the ground for the purpose of being used was sufficient.

Held, that the City hall in Winnipeg might be sold under execution against the City, and was therefore subject to sale in pursuance of the Mechanics' Lien Act.

The land upon which the hall was erected was granted to the City by a deed which provided that it was to be used only for the purpose of the erection thereon of a market building and for other public purposes, and that, if the City should use the lands for any other purposes and uses than those connected with the public purposes and uses of the corporation, the lands should revert to the grantors their heirs and assigns.

Held, that, there being some estate in the lands vested in the City, the plaintiff was entitled to a lien to the extent of such estate and to a sale of it. *McArthur* v. *Dewar*, 3 M. R. 72.

2. Lien of sub-contractor when contractor fails to complete work—*Percentages to be kept back by owner—Time for filing lien for successive jobs on distinct orders.*

Where nothing is payable under a building contract until the whole of the work is completed, but the owner voluntarily makes payments to the contractor as the work progresses, to the extent of the value of the work done, a sub-contractor who has not been paid is entitled, under section 9 of The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, as against the owner, to a lien for the amount due him, to the extent of twenty per cent. of such payments.

Russell v. *French*, (1898) 28 O.R. 215, followed.

Plaintiff's claim consisted of charges for different jobs, all in his line of business, but ordered at different times, and, as to the first job, if considered separately, his lien was not filed within the time required by the statute.

Held, that, under such circumstances, a mechanic should not be required, in order to secure payment, to file a lien after completing each piece of work, and that filing his lien after he has completed all of his work is sufficient. *Carroll* v. *McVicar*, 15 M. R. 379.

VIII. Time for Taking Proceedings.

1. Amendment of bill after time for filing elapsed—48 *Vic., c.* 33, *as to filing contracts.*

Bill alleged a contract with defendant C. for the performance of certain work in the erection of a building upon land of C. By amendment made after the time for

filing the bill had elapsed, the plaintiffs alleged that their contract was with the defendants K. & McD., who had contracted with C. for the erection of the whole building, thus changing their position from contractors to sub-contractors. No new certificate of *lis pendens* was filed.

Held, that the plaintiff could not rely upon the original bill and certificate of *lis pendens*.

It is no defence to an action for work done under a verbal contract that the contract or a statement of it was not filed in accordance with the statute 48 Vic., c. 33, s. 13. *Davidson* v. *Campbell*, 5 M. R. 250.

2. Time for registration.

Materials were supplied from time to time as the building progressed, not under any contract, but as they were required and ordered.

Held, that each sale was a separate transaction, and the subject of a separate registration. *Chadwick* v. *Hunter*, 1 M. R. 39.

Varied, 1 M. R. 363. *See* POST X., 3.

Distinguished, *Robock* v. *Peters*, 13 M. R. 125.

IX. WAIVER OF LIEN.

1. Agreement that the price shall not be paid until time for lien expired —*Refusal to give security for price as agreed upon.*

When under a building contract the time for payment of the price of the work is fixed at a date later than that at which a bill could be filed to enforce a Mechanics' lien, there is an implied agreement that no lien shall exist.

But, if, by the contract, a promissory note or other security for the price of the work is to be given within the time for enforcing a Mechanics' Lien, the implied agreement to waive the lien is conditional upon the giving of the note or other security. *Ritchie* v. *Grundy*, 7 M. R. 532.

2. Taking promissory note for amount of claim.

Notwithstanding sub-section (*c*) of section 24 of The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, if a person, claiming a lien under the Act, takes a promissory note for the amount *and discounts it*, he thereby forfeits his right to a lien. *John Arbuthnot Co.* v. *Winnipeg Manufacturing Co.*, 16 M. R. 401.

3. Taking and discounting promissory note for claim.

The provision in sub-section (*c*) of section 24 of The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, that the acceptance, by a person claiming a lien under the Act, of any promissory note for the claim shall not merge, waive, pay, satisfy, prejudice or destroy any lien created by the Act, unless the lien holder agrees in writing that it shall have that effect, does not protect the lien holder if he discounts or transfers such note, and in that event his lien is lost.

Edmonds v. *Tiernan*, (1892) 21 S.C.R. 406, followed. *National Supply Co.* v. *Horrobin*, 16 M. R. 472.

X. MISCELLANEOUS CASES.

1. Certificate of lis pendens, form of —*Commencement of action to enforce lien.*

Under section 22 of The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, in order to preserve a mechanic's lien, it is necessary, besides commencing an action, to register a certificate of *lis pendens* in respect thereof, according to form No. 6 in the schedule, in the proper registry or land titles office within the time prescribed, and a certificate that some title or interest in the land is called in question, without any reference to a mechanic's lien, is not a sufficient compliance with the statute.

Although the lien may be registered before commencing or during the progress of the work, yet an action thereon cannot be commenced before completion. *Curtis* v. *Richardson*, 18 M. R. 519.

2. Different properties separately owned —*One lien against owners of different properties—The Mechanics' and Wage Earners' Lien Act*, 1898.

A mechanic's lien registered against two lots of land owned by different persons in respect of work done upon two houses, one on each of the lots, on the order of one of the owners and for an amount claimed to be due for the work on both houses, without apportioning the amount as between the two, cannot be enforced under The Mechanics' and Wage Earners' Lien Act, 1898, nor can effect be

given to the lien as against one of the lots only for the proper amount.

Currier v. *Friedrick*, (1875) 22 Gr. 243; *Oldfield* v. *Barbour*, (1888) 12 P. R. 554, and *Rathbun* v. *Hayford*, (1862) 87 Mass. 406, followed. *Fairclough* v. *Smith*, 13 M. R. 509.

3. Land out of jurisdiction—*Personal remedy only.*

Held, 1. Varying the decree made on the hearing (1 M. R. 39), that plaintiffs were entitled to a personal order against defendants, Hunter and Short.

2. Where lands are out of the jurisdiction, the Court cannot affect them otherwise than by proceedings *in personam*, and cannot therefore enforce a mechanics' lien by sale of land out of the jurisdiction. *Chadwick* v. *Hunter*, 1 M. R. 363.

4. Reserve of percentage of contract price—*Payments to material men and wage-earners out of the reserve—Liability of owner for full amount of reserve.*

The owner of a building in course of erection, when the contract price exceeds $15,000, being required by section 9 of The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, to keep back fifteen per cent. of the amounts from time to time earned by the contractor and retain such percentages until thirty days after the completion or abandonment of the contract for the benefit of subcontractors who may become entitled to file liens under the Act, must reserve such percentages at his peril, and cannot afterwards, in an action by a person who has supplied materials, deduct therefrom any payments he may have made under section 10 of the Act for wages or materials in order to prevent the filing of liens therefor, as section 10 at the end expressly says in effect that payments made under it are not to "affect the percentage to be retained by the owner as provided by" section 9.

Carroll v. *McVicar*, (1905) 15 M.R. 379, followed.

McArthur v. *Martinson*, 16 M. R. 387.

5. Wages, lien for — *Meaning of "claim" in section 4—Personal remedy of workman against owner—Builders' and Workmen's Act, R.S.M.* 1902, c. 14.

1. A workman under a contractor engaged in the repair of a building for the owner is entitled, under sections 9 and 12 of The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, to a lien on the building for his unpaid wages to the extent of the twenty per cent. of the payments made that the owner should have held back from the contractor but did not.

Carroll v. *McVicar*, (1905) 15 M. R. 379, followed.

2. A workman who has brought his action under the above Act, can not in that action avail himself of the personal remedy given by The Builders' and Workmen's Act, R.S.M. 1902, c. 14, against the proprietor for the full amount of his claim in cases where a pay list is not kept and the proprietor neglects to see that the workmen are paid.

3. The word "claim" in the second paragraph of section 4 of the first named Act, providing that no lien shall exist under the Act for any *claim* under twenty dollars, means the amount actually due to the claimant under his contract or employment, and not the amount to which his right or remedy against the land may on inquiry be found to be limited. *Phelan* v. *Franklin*, 15 M. R. 520.

See AMENDMENT, 6.
— BUILDING CONTRACT, 5.
— PARTIES TO ACTION, 10.
— WINDING-UP, III, 2.

MEDICINE, PRACTICE OF.

Medical Act, R.S.M. 1902, c. 111, ss. 62 and 63—*Electro-therapeutics a branch of medicine—Massage not.*

According to standard dictionaries electro-therapeutics, consisting in the treatment of diseases by means of electricity, is a branch of medicine, and it is unlawful, under section 62 of The Medical Act, R.S.M. 1902, c. 111, for a person not registered under the Act to practise as an electric-therapeutist for hire, gain or hope of reward ; and under section 63 such person cannot recover any fees or charges for such treatment.

Massage, although a branch of therapeutics, is merely a skilled manipulation by external pressure of the muscles and tissues and, not depending for its efficacy upon the introduction or application of

any other element, cannot be considered to be a branch of medicine.

Regina v. *Valleau*, (1900) 3 Can. Cr. Cas. 435, followed. *Bergman* v. *Bond*, 14 M. R. 503.

MEMORANDUM IN WRITING.

See Statute of Frauds.
— Vendor and Purchaser, VII, 9.

MENACES.

See Criminal Law, V, 1, 2.

MERGER.

Subsequent incumbrance—*Mistake—Release of equity of redemption.*

When the owner of an estate in fee pays off a charge, or the owner of a charge acquires the equity of redemption, the result is that the charge merges and lets in any subsequent incumbrance, unless an intention to keep the charge alive is expressed in some way, and the onus of proving such intention rests on the party contending that there has been no merger.

The plaintiffs held a mortgage on certain lands for a large amount, and arranged with the mortgagor to take a quit claim deed from him, and to release him from all liability on the mortgage, acting in the belief that they would thus acquire the whole estate free of incumbrances. Their solicitor, however, having overlooked a registered judgment in favor of the defendant, the latter claimed that there was a merger, and that his judgment was now a first lien on the lands.

The plaintiffs filed a bill to enforce the execution of a release of this judgment.

Held, that a merger had taken place, and the relief asked for could not be granted, but that the plaintiffs were entitled, on the ground of mistake, to a decree declaring that the amount due under their mortgage should be a charge on the land in priority to the defendant's registered judgment. *Dean and Chapter of St. John's Cathedral* v. *MacArthur*, 9 M. R. 391.

See Mortgagor and Mortgagee, VI, 8.
— Principal and Surety, 5.
— Vendor and Purchaser, III, 2.

MILITARY LAW.

Enlistment in Active Militia—*Service continued after expiration of term of enlistment—Militia Act, R.S.C.* 1906, *c.* 41, *ss.* 23, 71—*Habeas Corpus.*

The applicant was a member of a permanent corps in the Active Militia of Canada. His term of enlistment expired on 18th June, 1908, but he continued in the service. Being arrested and imprisoned by order of the colonel commanding on a charge of conduct to the prejudice of good order and military discipline, and held to await trial by court-martial, he applied for his release on *habeas corpus*. He had not applied for his discharge or been legally discharged or dismissed from the force.

Held, that, under sections 23 and 71 of the Militia Act, R.S.C. 1906, c. 41, the applicant was still subject to military law, and should be handed back to the custody of the military authorities. *Re Harris*, 19 M. R. 117.

MINISTERS OF THE CROWN.

See Crown Lands, 1.

MISFEASANCE.

See Municipality, IV, 2.

MISJOINDER OF PARTIES.

See Amendment, 5.
— Contract, XI, 2.
— Railways, VII, 2.
— Warranty, 1.

MISNOMER.

See Amendment, 6.
— Capias, 4, 6.
— Chattel Mortgage, V, 5.
— Company, IV, 11.
— Fraudulent Preference, VI, 5.
— Real Property Act, I, 6.
— Sale of Land for Taxes, IV, 3.
— Statute of Frauds, 6.
— Taxation, 1.

MISREPRESENTATION.

I. Action of Deceit.

1. Damages.

The only damages recoverable in an action of deceit, based upon false representations inducing the plaintiff to purchase property, are the difference between the price paid for the thing purchased and its real value, and when the plaintiff has sold the property at a profit he can recover no damages, although he has failed to realize the profit he could reasonably have expected if the representations had been true.

Peek v. *Derry*, (1889) 37 Ch. D. 541, 14 A.C. 337; *McConnel v. Wright*, [1903] 1 Ch. 546, and *Steele* v. *Pritchard*, 17 M.R. 226, followed. *Rosen* v. *Lindsay*, 17 M.R. 251.

2. Damages—*Amendment.*

On the 25th of June, 1906, the defendants, acting as agents of the Ontario and Saskatchewan Land Corporation, gave the plaintiff Steele an option in writing to purchase all the lands of the Company in certain named townships, being about 48,000 acres, at $6.60 per acre and took Steele's cheque for a deposit of $5,000 on account. There were not funds in the bank to pay the cheque and the defendants urged Steele to provide funds. Steele then, at a meeting of the parties held on the 28th of June, introduced his co-plaintiffs, Powell and Buell, to the defendants. Powell and Buell were then induced to join Steele in the purchase and acquired a two-thirds interest in it and funds were provided to make the $5,000 payment. The plaintiffs alleged that the defendants induced Powell and Buell to go into the purchase by representing at that meeting that the purchase included all the land that the Company *ever* owned in the townships mentioned and that such representation was false as some of the best of its lands had been previously sold. After discovering the mistake the plaintiffs completed the purchase and later disposed of the bulk of the lands at a substantial profit.

The statement of claim was based on the contract of 25th June and on the allegation that the defendants by fraudulent misrepresentations induced the three plaintiffs to enter into it, and damages were claimed, as in an action of deceit, for loss of the profits that would have been made if the plaintiffs had received the lands that the Company had previously sold.

The trial Judge found that the plaintiff Steele had not been induced to enter into the purchase by any misrepresentations of the defendants, but found a verdict for the other plaintiffs against both defendants.

Held, on appeal, that, as the plaintiffs Powell and Buell had not made any independent contract with the defendants for the purchase of the lands in question, but had only acquired an interest with Steele in the option which he had previously secured, their only remedy for the alleged false representation would be by an action of deceit for that they had been thereby induced to enter into the agreement with Steele for the acquisition of an interest with him in the option, to which action Steele would not be a proper party, and that, as the issues and evidence in such an action might be widely different from those in the present action, an amendment of the pleadings setting up such new case, first asked for at the hearing of the appeal, should not be allowed, and that the action should be dismissed, without prejudice, however, to the right of Powell and Buell, if so advised, to bring a new action on the grounds above indicated.

Held, also, *per* Phippen, J. A. After discovering the alleged fraud the plaintiffs might, if the facts they alleged were true, have sued the Company for the return of their $5,000 deposit or brought an action of deceit against the defendants, laying their damages at the amount paid out. Instead of that, however, they exercised their privilege of making a new contract directing the Company to retain, as part of the purchase money thereunder, the $5,000 previously paid for the option. The plaintiffs, having thus received back the only money from which they were parted by the alleged misrepresentation, cannot further recover by way of damages. It being admitted, further, that the plaintiffs suffered no loss by reason of their purchase, but made a substantial profit by the resale of the lands, they could recover no damages for having been induced to enter into the contract.

McConnell v. *Wright*, [1903] 1 Ch. at p. 554; *Peek* v. *Derry*, (1889) 37 Ch. D., at p. 541; *Smith* v. *Bolles*, (1889) 132 U.S.R.

125, and *Sigafus* v. *Porter*, (1900) 179 U.S.R. 116, followed. *Steele* v. *Pritchard*, 17 M.R. 226.

II. Damages.

1. Costs of uselessly defending suit.

The plaintiffs, according to the findings of fact, had been induced by the misrepresentations and fraud of the defendants to purchase a horse for $1200 and to give the defendants their promissory notes therefor, but such notes had been indorsed for value to the Bank of Hamilton before maturity, so that the plaintiffs had no defence to the Bank's claim on the notes, and they had ample means of informing themselves on that point. They, however, defended the Bank's suit, but unsuccessfully.

Held, that, in this action, which was brought to recover damages for the defendant's misrepresentations, the plaintiffs could not add their costs of needlessly defending the Bank's suit to their other damages, but must be limited to the amount due on the promissory notes together with the costs of the present action only.

Godwin v. *Francis*, (1870) L.R. 5 C.P. at pp, 305 & 307, and *Roach* v. *Thompson*, (1830) 4 C. & P. 194, followed. *Morwick* v. *Walton*, 18 M.R. 245.

2. Measure of damages—*What constitutes a "clean" farm—Future damages, recovery of.*

This was an action in which the plaintiffs sought to recover damages for fraudulent representations whereby they were induced to lease the farm of the defendant at a very high rental. The false representation proved was that the farm was a clean farm, whereas in fact it was full of weeds.

Held, that the proper measure of damages in such a case is the one adopted in *Peek* v. *Derry*, 37 Ch. D. 541, namely, to ascertain the difference between the price paid and the actual value to the plaintiffs at the time of the contract. The market value is not to be considered, and the true question is—Was the farm when taken worth the rental which the plaintiffs agreed to pay, and if by reason of the existence of weeds it was worth less, how much less was it worth?

Damages were allowed to the plaintiffs on this principle at one dollar per acre for the cultivated land for each of the two years for which they had taken the farm.

Held, also, that, although the lease had still a year to run after the commencement of the action, the plaintiffs could nevertheless recover all their damages in this action, there being only one contract, and no right to bring a second action under it.

Held, also, that the expression "clean farm" does not mean a farm absolutely free from weeds, but only one on which there were not weeds in such quantities as to be materially injurious to the crops.

The defendant counterclaimed $160 for rent due under the lease.

Held, that he was entitled to this amount, and that the defence of fraud could not avail against it, for the plaintiffs had the use of the land and the contract was still in force, the bringing of the action for damages being itself an affirmance of it. *Johnstone* v. *Hall*, 10 M.R. 161.

III. Election to Affirm Contract.

1. Laches—*Rescission of contract—Ratification by delay after knowledge of the fraud—Liability of principal for misrepresentations of agent—Damages.*

1. A plaintiff asking for the rescission of a contract for the exchange of properties, which the Court finds he was induced to enter into by the fraudulent misrepresentations of the defendant, will not be held to have elected to ratify the contract by subsequent dealings with the property transferred to him or by delay, if he brings his action within a reasonable time after he gets full knowledge of the falsehood of the representations.

2. A principal will be liable for misrepresentations made by his agents in the course of his agency to the full extent of the damages suffered by the party defrauded, and his liability will not be limited to the extent to which he actually profited by the transaction impeached.

Barwick v. *English Joint Stock Bank*, L.R. 2 Ex. 259, followed. *Gardiner* v. *Bickley*, 2 W.L.R. 146.

2. By payment of money—*Rescission—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 jewellery 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 ac-

cepted a transfer of $6,000 of stock, the rest of the shares being transfered to M. and S. for the balance of the real price.

The plaintiff, to whom W. F. Doll had indorsed 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 endorsee 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 R'y Co.*, 2 Ch. D. 663, and *Morrison* v. *The Universal Marine Ins. Co.*, L.R. 8 Ex. 197, that the defendant had waived misrepresentation and that the plaintiff was entitled to a verdict for the amount of the note and interest.

Held, also, per KILLAM, J.

1. 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.

2. 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 O.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 M.R. 577.

3. Rescission of contract—*Sale of land—Secret payment by vendor to purchaser's agent.*

Defendant was induced by his agent to agree to buy plaintiff's farm for $1,850, although plaintiff's price for it was only $1,800. He paid $250 in cash and went into possession. It was represented to him that there were 80 acres of cultivated land on the farm, but it turned out that there were only about 58 acres. On discovering this he asked to have the agreement cancelled and his money returned, but this was refused. He then, on the advice of the same agent, raised a crop on the farm and remained in possession for over a year but refused to make the further payments agreed on.

Plaintiff then brought this action to have the agreement cancelled and the money he had received forfeited. At the trial it came out that the plaintiff had paid the agent $50 out of the money paid by defendant, who asked to have the agreement cancelled and his money refunded to him.

Held, without deciding whether defendant by his inaction had lost his right to repudiate the bargain on account of the shortage in the cultivated area, and distinguishing *Campbell* v. *Fleming*, (1834) 1 A. & E. 40, that, on account of the newly discovered secret payment by plaintiff to the defendant's confidential agent, the defendant had the right to ask for cancellation of the sale and repayment of the $250, with costs of action.

Panama, &c., Co., v. *India Rubber, &c. Co.*, (1875) L.R. 10 Ch. 515, followed. *Murray* v. *Smith*, 14 M. R. 125.

4. Contract — *Rescission — Damages.*

1. A misrepresentation by the vendor's agent, without the knowledge of the vendor, as to the locality of the land sold, although innocently made, will, if relied on by the purchaser, be sufficient to entitle him to rescind the contract, although he had the means of knowledge of the true location before he entered into the agreement.

Rawlins v. *Wickham*, (1858) 3 De G. & J. 317, and *Derry* v. *Peek*, (1889) 14 A. C. 337, followed.

2. But, when the purchaser failed to complain of the misrepresentation within a reasonable time after he became aware of the true location of the property and promised the vendor to pay the next instalment of the purchase money due under the agreement after it was overdue, saying that he was then a little short of money, it should be held that he had elected to affirm the contract and had lost his right to rescind it.

Clough v. *London & N. W. Ry. Co.*, (1871) L. R. 7 Ex. 24, followed.

Verdict for the amount payable under the contract in this case, without prejudice to any right the defendant might have to recover in another action any damages he had sustained by reason of the misrepresentation set up, no such relief having been claimed in this action. *Wolfe* v. *McArthur*, 18 M. R. 30.

IV. Rescission of Contract for.

1. Appeal from trial Judge's finding of fact—*Specific performance—Misrepresentation as to quality of land purchased—Fraud—Caveat emptor.*

Defendant resisted the plaintiff's claim for specific performance of a contract for the sale of a farm to him, alleging that he had wholly relied on the plaintiff's representations that the land consisted of a black sandy loam 18 to 20 inches deep with clay bottom, free from white sand and worth $15 per acre, and that these representations were all untrue. The defendant had not inspected the land before purchasing, but had consulted parties other than the plaintiff as to the quality, location and value of the property.

The trial Judge's findings of fact, both as to the alleged representations and as to their falsity, were adverse to the defendant.

The Court, while expressing doubt as to whether, upon the written evidence, they would have decided in the same way,

Held, that the verdict of the trial Judge in this case could not properly be reversed.

The trial Judge had held that, apart altogether from the conflict of testimony, the defendant could not succeed in having the contract rescinded on the ground set up, as public policy requires that persons should be expected to exercise ordinary prudence in their business dealings instead of calling on the courts to relieve them from the consequences of their own inattention and negligence, citing *Attwood* v. *Small*, (1838) 6 Cl. & F. 232, and *Slaughter* v. *Gerson*, (1871) 13 Wall. (U.S.) 379.

Perdue, J.A., dissented from this opinion, following *Redgrave* v. *Hurd*, (1881) 20 Ch. D. 1, and *Smith* v. *Land Corporation*, (1885) 28 Ch. D. 7. *Hannah* v. *Graham*, 17 M. R. 532.

2. Evidence—*Waiver—County Court—Rules of equity—New trial.*

In an action upon a note given for the purchase of a machine, the defendant pleaded that he purchased upon the plaintiff's false representation of the age of the machine.

He learned the true age on the 28th of September. On the 9th October plaintiff wrote him for payment of another note. The defendant answered on 10th November remitting $11.40 on the other note. On the 13th November plaintiff wrote for payment of the machine note. On the 20th of November plaintiff first complained of the misrepresentation. He returned the machine in the following month. The jury found a verdict for plaintiff. The county Judge ordered a new trial and the plaintiff appealed.

Held, 1. That the evidence of parol misrepresentation was admissible although a written warranty was given.

2. When a county court Judge is dissatisfied with a verdict, and orders a new trial, his decision will not be reversed unless it can be shown that he was clearly wrong.

3. It is no answer to a charge of misrepresentation that the deceived party had the means of verification at hand.

4. If the representation was untrue, and made recklessly and without reasonable ground for belief in its truth, the contract might be rescinded.

5. Generally speaking the circumstances that will support an action for deceit will justify a party in rescinding the contract.

6. In the county courts the rules of equity as to the rescission of contracts prevail, rather than the rules of law.

7. The delay in complaining of the misrepresentation was evidence only of an intention to confirm the contract, and did not necessarily estop the defendant.

Per Killam, J.—As the jury may have proceeded upon the ground that by the delay the defendant had elected to affirm the contract, the verdict should not be disturbed. *Watson Manufacturing Co.* v. *Stack*, 6 M. R. 146.

3. Secret payment by vendor to purchaser's agent—*Sale of land—Improvements by vendee before rescission—Occupation rent. Sparling* v. *Houlihan*, 14 M.R. 134.

See Murray v. *Smith*, 14 M.R. 125. *Supra* III, 3.

4. Warranty or Misrepresentation—*Fraudulent concealment of unsoundness of horse.*

The plaintiff filed his bill setting out that the defendant had, by false and fraudulent representations as to the soundness of the animal, induced the plaintiff to purchase a stallion for $500, and to give his promissory notes therefor, secured by a mortgage on his farm, and claiming a rescission of the contract and cancellation and delivery up of the notes and mortgage.

The plaintiff, during negotiations for the sale, having asked for, and the defendant having promised to give him, a warranty as to soundness, etc., the defendant, after the sale and delivery of the horse was complete, sent to the plaintiff a paper worded as follows:—"I certify that the horse, Pride of Oxford, etc., has been an average foal getter while in my possession, but what he will do I cannot say, under other management," and signed by himself.

Counsel for the defendant contended that this was a warranty, and that the plaintiff's rights were limited to whatever he could claim under it; that there was no warranty as to soundness, and that evidence could not be received of any warranty or misrepresentation outside of the written warranty delivered.

The Judge found on the evidence in favor of the plaintiff, and

Held, That all the circumstances connected with the sale could be inquired into and that the evidence fully justified the conclusion that the defendant had been guilty of fraudulent concealment of disease from which the horse was then suffering, and from which he died a few months afterwards; also that the plaintiff was entitled to have his contract rescinded, and to a decree as asked for in the prayer of the bill.

Derry v. *Peek*, 14 App. Cas. 337, and *Redgrave* v. *Hurd*, 20 Ch. D. 1, followed. *Budd* v. *McLaughlin*, 10 M.R. 75.

V. Other Cases.

1. Materiality of—*Fraudulent representation—Sale of land—Rescission of contract.*

A representation by the purchaser of land to the vendor that he was buying for himself and not for a third party to whom he knew the vendor would not sell, although false, is not a representation material to the contract or one resulting in any damage to the vendor as its immediate and direct consequence, so that a sale which the vendor was induced to make by such false representation cannot be rescinded on the ground of fraud.

Bell v. *Macklin*, (1887) 15 S.C.R. 576, followed. *Nicholson* v. *Peterson*, 18 M.R. 106.

2. As to the quality of land——*Action of deceit—Contract—Representation not amounting to a warranty.*

The defendant, on the negotiations for the sale to the plaintiff of a number of parcels of wild land, represented to the plaintiff's agent that they were a fairly good lot of farm lands. He had not seen the lands and did not state that he had. It turned out that a large portion of the lands was not good enough for farming purposes.

Held, that the plaintiff could not succeed in an action to recover damages by reason of the defendant's representations, which should be considered merely as expressions of opinion not amounting to a warranty.

De Lassalle v. *Guildford*, [1901] 2 K.B. 221, followed. *Mey* v. *Simpson*, 17 M.R. 597.

Affirmed, 42 S.C.R. 230.

See Bills and Notes, VI, 3.
— Church Lands Act, 1.
— Constitutional Law, 8.
— Contract, VII, 1, 2, 3; XI, 1; XV, 16.
— Evidence, 28.
— Fraud, 2.
— Injunction, III, 3, 4.
— Pleading, XI, 15.
— Principal and Agent, II, B; V, 6.
— Ratification.
— Sale of Goods, IV, 1.
— Sale of Land for Taxes, I, 2.
— Solicitor and Client, I, 2.
— Trustee and Cestui Que Trust, 1.
— Undue Influence.
— Vendor and Purchaser, VI, 7, 8, 17.

MISTAKE.

1. Election to affirm voidable contract—*Rescission of contract.*

1. The mistake of one party to an agreement for the purchase of land as to the

amount of land purchased, when the mistake is not known to the other party and there is nothing in the language or conduct of the other party which led or contributed to the mistake, does not give a right of rescission unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain and it would be unreasonable to do so.

Tamplin v. *James*, (1880) 15 Ch. D. 215, and *Miller* v. *Dahl*, (1894) 9 M.R. 444, followed.

2. If a purchaser of land enters into and retains possession of the land and pays two monthly instalments of the purchase money after he has found out his mistake, he should be held to have elected to affirm his contract and cannot afterwards have it rescinded. *Slouski* v. *Hopp*, 15 M.R. 548.

2. Money paid in mistake—*Recovery of, from agent.*

Where money was paid by the plaintiffs, through a mistake of fact caused by forgetfulness on the part of a clerk, to the defendants as assignees of B., who was not in equity and good conscience entitled to retain it,

Held, that the money might be recovered back, but only to the extent to which it would be inequitable for B. to retain it.

The plaintiffs had agreed to make a loan to B. on mortgage of a building in course of erection, and would have made an advance of only $500 on account at the particular time in question; but, owing to the forgetfulness of a clerk as to the amount previously advanced, they issued a cheque for $2,000 instead. It appeared, however, that, considering the advanced state of the building, B. was then entitled on the terms of the loan to have $1,067 paid over.

Held, that the plaintiffs could recover only the difference between the $2,000 and the $1,067, and not the whole of the $1,500 which they had overpaid by mistake.

Chambers v. *Miller*, 13 C.B.N.S. 125, distinguished. *Confederation Life Ass.* v. *Merchants' Bank*, 10 M.R. 67.

3. Unilateral mistake—*Specific performance of agreement—Mistake by one party, when ground of relief.*

Specific performance of an agreement will not be refused on the ground of a mistake of one of the parties to it, where the mistake was not known to the other party, and there was nothing in the language or conduct of the other party which led or contributed to the mistake, unless a hardship amounting to injustice would be inflicted upon the party by holding him to his bargain, and it would be unreasonable to hold him to it, or give the other party an unconscionable advantage.

Tamplin v. *James*, 15 Ch. D. 215, followed. *Miller* v. *Dahl*, 9 M. R. 444.

See CONTRACT, VII, 3; IX, 3, 5; IX, 3.
— MALICIOUS PROSECUTION, 1.
— MERGER.
— PRACTICE, XX, B, 4.
— RECTIFICATION OF DEED, 1, 2.
— VENDOR AND PURCHASER, III, 2.

MISTAKE OF SOLICITOR.

See APPEAL FROM ORDER, 4.
— PRACTICE, II, 1; XII, 3.

MISTRIAL.

See CRIMINAL LAW, XIV, 1.

MIXING OF ACCOUNTS.

See GARNISHMENT, V, 7.

MIXING OF GOODS.

See MONEY HAD AND RECEIVED.

MIXED JURY.

See JURY TRIAL, I, 7.

MONEY HAD AND RECEIVED.

Recovery by cestui que trust of proceeds of his property received from trustee by another—*Mixing of goods.*

County Court appeal. Defendant shipped a quantity of wheat in a car from Blake Siding in Manitoba to Duluth with instructions that the wheat was to be unloaded at Roland and cleaned and dried at the plaintiff's elevator there. This

was done and the wheat was thereby reduced in bulk to about 573 bushels. The plaintiff's employees, in reloading it into the car, supposing it to be the plaintiff's wheat, added about 260 bushels of plaintiff's own wheat to make up a car load and forwarded the car to its destination.

Defendant had obtained an advance of money from one Brown, the repayment of which he secured by transferring to Brown the bill of lading for the wheat with the agreement that Brown should sell it and, after deducting the amount of the loan, pay the balance to the defendant.

Brown afterwards sold all the wheat in the car including plaintiff's 260 bushels, received the proceeds, paid himself and accounted to defendant for the balance.

So far as appeared neither Brown nor defendant knew until afterwards that any of the wheat so sold belonged to plaintiff.

Plaintiff had a verdict in the County Court for the amount realized by defendant for the 260 bushels, and defendant appealed.

Held, (1) There was a mixture of goods by accident and the owners became tenants in common of the whole in the proportions which they severally contributed to it.

(2) That Brown, as regards the wheat in question, stood in a fiduciary relation towards both plaintiff and defendant; that the proceeds of property sold by a trustee without the consent of the owner can in equity, when traceable, be followed as fully as the property itself, if unconverted, could have been; that, so long as such money can be definitely traced, it makes no difference that it has been mixed with other money; and that this rule applies, not only in the case of a trustee in the narrow and technical sense, but to any person in any kind of a fiduciary relation to others.

Harris v. *Harris*, (1861) 29 Beav. 110, and *In re Hallett, Knatchbull* v. *Hallett*, (1880) 13 Ch. D. 696, followed.

(3) That an equitable claim like the plaintiff's in this action can now be entertained by a County Court.

(4) That no demand and refusal was necessary before action.

Per BAIN, J.—That at common law, also, the plaintiff would have been entitled to recover from the defendant as for money had and received by the defendant for his use.

Appeal dismissed with costs. *Roblin* v. *Jackson*, 13 M. R. 328.

See BAILMENT, 2.
— CHOSE IN ACTION, 2.
— COMPANY, IV, 9.
— EVIDENCE, 15.
— INFANT, 7.
— SHERIFF, 5.

MONEY LENDERS' ACT.

1. Evidence—*R.S.C.* 1906, *c.* 122—*Assignment of salary—Evidence of a loan—Evidence that accused made a practice of lending at usurious rate—Oral testimony to explain written contract.*

The prosecutor, on applying for a loan of $35, was required by the accused to sign a contract in the form of an assignment of his monthly salary for several months to commence at a later date, which was not to be acted on or notified to his employer in case he should make the stipulated payments of $2.80 per week for 20 weeks, the first of which was to be made in four days. There was no covenant to make these payments so that the accused was without remedy in case the prosecutor should die or fail to earn any salary.

At the trial, the entries of the transaction in the books kept by the accused and oral testimony as to its nature were admitted to show that it was in reality a loan and not, as accused contended, a mere purchase of the prosecutor's future salary earnings.

Held, that the oral testimony and entries in the book were admissible to show the real nature of the transaction and they sufficiently showed that it was a loan of money within the meaning of the Money-Lenders' Act, R.S.C. 1906, c. 122, s. 11, and at a rate of interest greater than that authorized by that Act.

Held, however, that, under section 2 of the Act, the prosecutor should have given evidence to show that the accused had made a practice of lending money at a higher rate than ten per cent. per annum, and that, as no such evidence had been given, the conviction must be quashed. *Rex* v. *Clegg*, 18 M. R. 9.

2. Liability of salaried employee of person whose money is lent—*Usury.*

A person in the employment of another person, not a resident of Canada, whose money is lent, acting as the manager of his business, although paid by salary and having no share in the excessive interest

charged, may be convicted as a money-lender under the Money-Lenders' Act, R.S.C. 1906, c. 122, and section 69 of the Criminal Code. *Rex* v. *Glynn*, 19 M. R. 63.

MONOPOLY.

See MUNICIPALITY, I, 7.
— STREET RAILWAY.

MORTGAGE.

See INTEREST, I.
— PARTIES TO ACTION, 7.

MORTGAGE SUIT.

See MORTGAGOR AND MORTGAGEE, V, 1; VI, 2, 12, 14.
— PRACTICE, XVII, 3; XVIII, 2; XXVIII, 14.
— PRIVITY OF CONTRACT.
— RECTIFICATION OF DEED.

MORTGAGEE IN POSSESSION.

See MORTGAGOR AND MORTGAGEE, VI, 11.

MORTGAGOR AND MORTGAGEE.

I. FORECLOSURE.
II. INTEREST.
III. POWER OF SALE.
IV. REDEMPTION.
V. SALE.
VI. MISCELLANEOUS.

I. FORECLOSURE.

1. Implied covenant to indemnify mortgagor—*Foreclosure under Real Property Act—Right of action against mortgagor on covenant for payment—Liability of transferee from mortgagor to indemnify him against mortgagee's claim for payment—Real Property Act, R.S.M.* 1902, c. 148, ss. 89, 114, 126.

1. Under sections 114 and 126 of The Real Property Act, R.S.M. 1902, c. 148, as they stood prior to the amendments of the Act by 1 George V, c. 49, a mortgagee, even after foreclosure under the Act, may, if he still retains the property, sue the mortgagor on his covenant for payment; and, therefore, in such a case, a mortgagor who has transferred the property may call upon his purchaser to pay the mortgage money under the implied covenant to indemnify him set forth in section 89 of the Act.

Williams v. *Box*, (1910) 44 S.C.R. 1; *Platt* v. *Ashbridge*, (1865) 12 Gr. at p. 106; *Campbell* v. *Holyland*, (1877) 7 Ch. D. 166, and *Blunt* v. *Marsh*, (1888) 1 Terr. L. R. 126, followed.

2. Payment by the mortgagor in such a case is not a condition precedent to his right of action on the purchaser's obligation to indemnify. Protection may be afforded to the purchaser by payment into Court for the proper application of the money.

Cullin v. *Rinn*, (1888) 5 M.R. 8, and *Meuburn* v. *Mackelcan*, (1892) 19 A.R. 729, followed. *Noble* v. *Campbell*, 21 M. R. 597.

2. Opening foreclosure—*Real Property Act, R.S.M.* 1902, *c.* 148, *s.* 71.

Section 71 of The Real Property Act, R.S.M. 1902, c. 148, must be read along with the other provisions of the Act, as section 92 dealing with trusts, section 76 declaring the cases in which an action will lie against a registered owner, and section 52 giving the Court power over certificates of title in any proceeding respecting land, and foreclosure proceedings conducted by the District Registrar, in the case of lands which have been brought under the Act, are no more binding between mortgagor and mortgagee than a decree and final order of foreclosure made by the Court; and, if the dealings between the parties, subsequent to the foreclosure, are shown to be such as would be sufficient in equity to open the foreclosure and let the mortgagor in to redeem, they should in the case of lands under the Act have the same effect.

Campbell v. *Bank of New South Wales*, Torrens Australasian Digest, p. 149, not followed.

Under the circumstances set out in the judgment it was held that the defendant was entitled to be let in to redeem the property in question. *Barnes* v. *Baird*, 15 M. R. 162.

Distinguished, *Williams* v. *Box*, 19 M.R. 560, next case.

3. Equitable jurisdiction of Court—*Opening up foreclosure proceedings—Construction of statutes—Real Property Act, R.S.M.* 1902, *c.* 148, *ss.* 71, 113, 114, 126-5 & 6 *Edw.* 7., *c.* 75, *s.* 3—*Certificate of title, effect of.*

After a mortgagee of land under the Real Property Act has regularly obtained a final order of foreclosure from the District Registrar under section 113 of the Act, and has had the same entered in the register as mentioned in section 114, and has obtained a certificate of title for the property, the Court has no power to open the foreclosure and allow the mortgagor in to redeem, although the circumstances are such that a final order of foreclosure made by the Court itself would be set aside and the mortgagor let in to redeem.

Effect of section 71 of the Act as to certificates of title discussed.

Bank of New South Wales v. *Campbell*, 11 A.C. 192, and *Assets Company* v. *Mere Roihi*, [1905] A.C. 202, followed.

Barnes v. *Baird*, 15 M.R. 162, distinguished.

Section 126 of the Act as amended in 1906, c. 75, preserving to the Court jurisdiction over "mortgages," cannot be construed so as to destroy the effect of the plain language of sections 71 and 114. *Williams* v. *Box*, 19 M. R. 560.

On appeal to the Supreme Court,

Held, that, under the provisions of section 126 of the Manitoba Real Property Act, R.S.M. 1902, c. 148, as amended by section 3 of chapter 75 of the statutes of Manitoba, 5 & 6 Edw. VII, the Court has jurisdiction to open up foreclosure proceedings in respect of mortgages foreclosed under sections 113 and 114 of the Act, notwithstanding the issue of a certificate of title, in the same manner and upon the same grounds as in the case of ordinary mortgages, at all events where rights of a third party holding the status of a *bona fide* purchaser for value have not intervened. *Williams* v. *Box*, 44 S.C.R. 1.

Leave to appeal to Privy Council refused.

4. Relief on payment of overdue part of mortgage debt, although whole amount payable under acceleration clause in mortgage—*King's Bench Act, R.S.M.* 1902, *c.* 40, *Rules* 277, 278—*Real Property Act, R.S.M.* 1902, *c.* 148, *s.* 117

Appeal from an order of the Referee, in an action for foreclosure and a personal order for payment, staying proceedings after judgment under Rule 278 of the King's Bench Act, R.S.M. 1902, c. 40, upon payment of the overdue instalment of principal, interest and costs.

Held, (1) The action was one for foreclosure within the meaning of Rules 277 and 278 of the King's Bench Act, although judgment for the amount of the debt was also asked for.

(2) A provision in a mortgage that, upon default in payment of an instalment of principal or interest, the whole should become due is not one against which equity will relieve as being in the nature of a penalty: *Sterne* v. *Beck*, (1863) 1 De G. J. & S. 595.

(3) Although Rule 278 says that proceedings may be stayed in the action after judgment "upon paying into court the amount then due for principal, interest and costs," the relief ordered could not be granted to the defendant under that Rule, because, by virtue of the acceleration clause in the mortgage, the amount *then due* was the full amount of the principal debt, and equity will not relieve against such a provision.

(4) The defendant was entitled to the relief ordered by virtue of section 117 of The Real Property Act which provides that a mortgagor, under the circumstances appearing in this case, may "pay such arrears as may be in default under the mortgage together with costs to be taxed by the District Registrar, and he shall thereupon be relieved from the consequences of non-payment of so much of the mortgage money as may not then have become due and payable by reason of lapse of time."

(5) Said section 117 of The Real Property Act, notwithstanding it is preceded and followed by sections relating only to mortgages registered under the new system, is not so limited, but expressly applies to all mortgages including those registered under the old system. *National Trust* v. *Campbell*, 17 M. R. 587.

5. Right to foreclosure.

A mortgage contained a proviso for redemption as follows:—"Provided this mortgage to be void on payment of $900 of lawful money of Canada, with interest at eight per centum per annum as follows:—Firstly, the said principal sum to bear interest at the said rate from the date hereof until the first day of December next, to be then paid: and thereafter, secondly,

the said principal and the interest thereon to be payable by an annuity of $91.80 per annum for twenty years, being composed of the interest on the said principal at the said rate of eight per centum per annum, and a sum for the progressive sinking of the debt, of $2.20 per centum per annum, such annuity to be paid in half yearly payments of $45.90 each on the first days of June and December in every year, the first of such payments to be made on the first day of June next."

Held, on demurrer, that the instrument was simply a mortgage securing repayment of a sum of money advanced by the plaintiffs, in instalments extending over a period of twenty years.

The fact that the plaintiffs had a power of sale did not prevent an application to the Court for foreclosure. To obtain a foreclosure of the equity of redemption, upon default in the payment of a mortgage, is what a mortgagee is entitled to.

In the case of a mortgage where there has been default in payment, foreclosure is the appropriate remedy. *Credit Foncier Franco-Canadien* v. *Andrew*, 9 M. R. 65.

II. Interest.

1. Compound Interest—*Rate of interest after maturity of mortgage—"Till the whole of the principal money is paid."*

A mortgage of real estate provided for the payment of the principal money on July 1st, 1888, with interest at ten per cent. half-yearly, "on so much principal money as shall from time to time remain unpaid till the whole of the principal money is paid." There was also a proviso for compound interest as follows: "That, in case default shall be made in payment of any sum to become due for interest * * * * compound interest shall be payable, and the sum in arrear for interest from time to time shall bear interest at the same rate as the principal money secured by these presents; and, in case the interest and compound interest are not paid in six months from the time of default, a rest shall be made and compound interest shall be payable on the aggregate amount then due, and so on from time to time."

Held, that after the 1st July, 1888, the mortgagees were only entitled to six per cent. simple interest.

St. John v. *Rykert*, 10 S.C.R. 278; *People's Loan Co.* v. *Grant*, 18 S.C.R. 262, and *Powell* v. *Peck*, 12 O.R. 492, 15 A.R. 138, followed. *Manitoba and N.W. Loan Co.* v. *Barker*, 8 M.R. 296.

Distinguished, *Credit Foncier* v. *Schultz*, 9 M.R. 70.

2. Rate of interest after maturity of mortgage—*Contract or damages, "Until the whole is fully paid and satisfied."*

A mortgage of real estate provided for the payment of the principal money at the expiration of five years from the date thereof, together with interest thereon at the rate of nine per cent. per annum, "until the whole is fully paid and satisfied."

Held, that, after the time fixed for payment of the principal money, the mortgagees were entitled to no more than the statutory rate of six per cent. per annum on the unpaid principal.

The Peoples' Loan and Deposit Co. v. *Grant*, 18 S.C.R. 262, followed.

Powell v. *Peck*, 15 A.R. 138, discussed.

Freehold Loan Co. v. *McLean*, 8 M.R. 116.

Distinguished. *Credit Foncier* v. *Schultz*, 9 M.R. 70.

3. Rate of interest after maturity of mortgage—*"To be paid on all and any payment in default."*

A mortgage under the Act respecting Short Forms of Indentures contained the usual clauses, but, in addition thereto, there was the following.

"The said mortgagor covenants with the said Company that the mortgagor will pay the mortgage money and interest, and observe the above proviso, and in the case of default, at the said rate, compounded with rests each half year, to be paid on all and any payment in default, whether of principal or interest or both."

Held, that interest was payable after maturity, at the rate of eight per cent. per annum.

The following cases distinguished:

People's Loan and Deposit Co. v. *Grant*, 18 S.C.R. 262.

Freehold Loan Co. v. *McLean*, 8 M.R. 116.

Manitoba and N. W. Loan Co. v. *Barker*, 8 M.R. 296.

Credit Foncier v. *Schultz*, 9 M.R. 70.

III. Power of Sale.

1. Negligence in exercising.

The plaintiff claimed damages for the sale of his farm by defendants at auction under powers of sale contained in two mortgages, interest being in arrear. The

property was near Portage la Prairie and in the centre of a district of good farming land. The evidence showed, in the opinion of the Court, that the property was worth at least $3,500, and would have brought that amount at an auction sale if properly advertised. Defendants, however, sold it for $2,800 subject to unpaid taxes.

Held, that defendants were liable for the difference between the two amounts, because they had so negligently and carelessly conducted the sale proceedings that the property was sacrificed.

The objections to the advertisement and sale were as follows:

1. There was no advertisement in any local newspaper; but only in a newspaper published in the town of Brandon, between seventy and eighty miles distant, and which was not shown to have any circulation in the neighbourhood of Portage la Prairie.

2. The advertisement itself made no mention of any of the improvements on the farm, which had valuable buildings on it, and 100 acres ready for the next year's crop, but simply described the property as the N. E. ¼ of section 22, township 12, range 7 west. It also contained a description of another property to be offered for sale at the same time, as to which it stated that "the vendors are informed that on parcel one (1) there is a two-story dwelling house," thus suggesting the inference that the plaintiff's land was unimproved.

3. The sale took place at Brandon instead of Portage la Prairie.

Aldrich v. *Canada Permanent*, (1897) 24 A.R. 193, and *National Bank of Australasia* v. *United Hand-in-Hand, etc., Co.*, (1879) 4 A.C. 391, followed. *Carruthers* v. *Hamilton Provident and Loan Society*, 12 M.R. 60.

2. In mortgage registered under the Real Property Act—*Possession of mortgaged premises held by mortgagee for statutory period—Real Property Limitation Act, R.S.M.* 1902, *c.* 100, *s.* 20—*Real Property Act, R.S.M.* 1902, *c.* 148, *ss.* 75, 110, 111—*Laches—Acquiescence.*

1. A mortgagee under a mortgage of land registered under the Real Property Act, whether the power of sale contained in the mortgage may be exercised without notice or after notice, can only make a valid sale of the property, (1) by the direction or order of the district registrar under section 110 of the Act, or (2) by an action in the Court of King's Bench for foreclosure or sale; and, therefore, a purchaser from the mortgagee, although the latter be lawfully in possession and purports to sell and convey the land, does not acquire a title free from the mortgagor's right to redeem, when such sale is not made under the directions or order of the district registrar or in an action in the court.

2. In such a case section 111 of the Act does not apply so as to make the sale good.

3. Section 75 of the Real Property Act, which provides that "After land has been brought under this Act no title thereto adverse or in derogation to the title of the registered owner shall be acquired by any length of possession merely," means the same as if the word "merely" had been omitted, and operates so as to prevent the mortgagee and all persons claiming under him from obtaining, under section 20 of the Real Property Limitation Act, R.S.M. 1902, c. 100, a declaration of the Court that the mortgagor's equity of redemption has been lost, in consequence of adverse possession for more than ten years.

Belize Estate Co. v. *Quilter*, [1897] A.C. 367, distinguished.

4. Neither can such a declaration be obtained, on the ground of the laches and acquiescence of the mortgagor or his representatives, in an action by the purchaser asserting a title in himself and claiming to be registered as the owner of the land, relying only on such a sale as is referred to in above paragraph 1.

Smith v. *National Trust Co.*, 20 M.R. 522.

Affirmed, 45 S.C.R. 618.

Leave to appeal to the Privy Council refused.

3. Sale by mortgagees under—*Bill to restrain proceedings under covenant—Demurrer—Inability of mortgagees to re-convey.*

A mortgagee who has *bona fide* exercised a power of sale contained in his mortgage deed, and who has thereby realized only part of the amount due, can proceed to enforce payment of any deficiency. He can so proceed against a surety as well as the original debtor; but, where the power of sale has not been exercised *bona fide*, and has been used for an improper purpose, that is a defence to an action upon the covenant brought after such improper exercise of the power.

The defendants, having put it out of their power to re-convey to the plaintiffs, upon payment of the mortgage money, and having done this by an exercise of a power

of sale, which was not *bona fide*, but intended to cut out the equity of redemption, while still enforcing payment of the debt, were restrained from enforcing a judgment which they had previously recovered on the covenant in the mortgage.

Kelly v. *Imperial Loan, &c., Co.*, 11 S.C.R. 516, commented on. *Crotty* v. *Taylor*, 8 M. R. 188.

4. Short Forms Act, R.S.M. 1902, c. 157—*Qualification of language of Short Form—Addition of power to sell without notice.*

The insertion of the word "calendar" before the word "month" in the words given in column one, number 13, of the second schedule to The Short Forms Act, R.S.M. 1902, c. 157, does not prevent the mortgagee getting the benefit of the wording of the corresponding long form; and, where the words of the short form above referred to were followed by the words "Should default be made for two months a sale or lease may be made hereunder without notice,"

Held, that these words were effectual to enable the mortgagee to make a valid sale and conveyance of the whole estate mortgaged without giving any notice whatever of his intention to do so. *Re Cotter*, 14 M. R. 485.

5. "Without any notice"—*Private sale without advertisement.*

A mortgage "provided that the Company (the mortgagees) on default of payment for two months may, without any notice, enter upon and lease or sell the said lands."

By statute 49 Vic. (Man.), c. 42, s. 6, it was enacted that any mortgage containing such words should be deemed to contain the long form of words in the Act respecting Short Forms of Indenture, (C.S.M., c. 61, 2nd sch., 2nd col., No. 13,) which provided a method of sale involving the service of a written notice on the mortgagor.

Held, that a sale without notice to the mortgagor could not be upheld.

A power of sale permitted a sale "by public auction or private contract."

Held, that a private sale could be made without previous advertisement of it. *Re Shore*, 6 M. R. 305.

IV. Redemption.

1. Constructive possession by mortgagee of vacant lands—*Acknowledgment to prevent statutory bar—Acquiescence and laches—Construction of contract—Condition in power of sale protecting purchasers—Exercise of power of sale by giving agreement.*

Action for redemption of a mortgage in fee covering several parcels of land given by plaintiff's predecessor in title. The mortgage became in default, 1st Jan. 1892. The land was vacant and, by the terms of the mortgage, the mortgagor's right to possession ceased upon default, but the mortgagees had not taken actual possession. Under the power of sale in the mortgage, the company had, between 1899 and 1903, made sales of the different parcels to three several persons who were made co-defendants in the action. The purchasers had not only entered into agreements to purchase, but had paid portions of their purchase money, entered into possession and made improvements on the lands. The sales had been made without notice to the plaintiff, relying on the provision in the mortgage that "in default of payment for one month and ten days the said mortgagees may without any notice enter upon the said land and proceed under and exercise the power of sale or lease *hereinafter* conferred." There was no such power referred to *after* that provision, but the statutory power of sale under the Short Forms Act was contained in an *earlier* portion of the mortgage. The plaintiff allowed over ten years to elapse without making any payment on the mortgage or for taxes on the land. She knew of the making of two of the sales two years at least before commencing this action; but made no objection to any of them, although the Company had sought her co-operation in endeavouring to realize on the lands. By the time the action was commenced, the lands had so increased in value that it became worth while to redeem them, if possible.

Held, (1) reversing the decision of Mathers, J., that the "possession" referred to in section 20 of The Real Property Limitation Act, R.S.M. 1902, c. 100, means actual adverse possession and not a mere constructive possession of vacant lands by reason of the mortgagor being in default, and the plaintiff was, therefore, not barred by the statute.

Smith v. *Lloyd*, (1854) 9 Ex. 562; *Agency Co.* v. *Short*, (1888) 13 A.C. 799, and *Bucknam* v. *Stewart*, (1897) 11 M.R. 625, followed.

(2) That the plaintiff had, by her laches and acquiescence in the sales made by the mortgagees, lost her right to redeem.

Archbold v. *Scully*, (1861) 9 H. L. Cas. 388, and *Nutt* v. *Easton*, [1899] 1 Ch. 873, followed.

(3) That the word "hereinafter" in the power of sale quoted should be construed to mean "herein" or "hereinbefore" and, so construed, the power of sale was sufficient and had been validly exercised. The Court will correct such an obvious mistake.

Wilson v. *Wilson*, (1854) 5 H. L. Cas. 66, and *Burgough* v. *Edridge*, (1827) 1 Sim. 269, followed.

(4) The defendant purchasers were in any case protected by the following clause in the mortgage: "No purchaser under said power shall be bound to inquire into the legality or regularity of any sale under the said power or to see to the application of the purchase money."

Dickie v. *Angerstein*, (1876) 3 Ch. D. 600, followed.

If an irregular or improper sale is made by the mortgagee, the mortgagor has his remedy by way of an action for damages: *Hoole* v. *Smith*, (1881) 17 Ch. D. 434.

(5) The agreements of sale entered into between the Company and the purchasers were valid exercises of the power of sale, and conveyances were not necessary.

Thurlow v. *Mackeson*, (1868) L. R. 4 Q. B. 97, followed.

(6) The posting up on the lands, after the making of the sales, of a notice of sale prepared by the Company's solicitors did not give the plaintiff a right to redeem. It was not the act of the purchasers and their rights could not be prejudiced by it. *Campbell* v. *Imperial Loan Co.*, 18 M. R. 144.

2. Conveyance absolute in form, but given to secure debt—*Real Property Act, R.S.M.* 1902, *c.* 148—*Real Property Limitation Act, R.S.M.* 1902, *c.* 100, *s.* 20—*Constructive possession by mortgagee of vacant land—Acknowledgment to prevent statutory bar.*

The plaintiff claimed a right to redeem a parcel of land which she had in January, 1891, caused to be vested in the defendant by a certificate of title in fee simple under the Real Property Act in security for a loan of $200, payable in two months.

Plaintiff paid no taxes on the property after the transfer to defendant and had never paid anything on the debt, and allowed the matter to rest until October, 1902, when she asked defendant for a statement of his claim. Defendant then sent plaintiff a memorandum showing, among other things, the amount claimed to be due on the $200 debt.

The land in question was vacant and continued to be so until this action was commenced in December, 1902.

Held, 1. The transfer of the land to defendant, having been given only as a security, had the same effect as a bare mortgage under the old system of registration without redemise clause, covenants or provisoes.

2. At the date of the certificate of title, the defendant became entitled to the possession of the land as it was vacant, and he should be deemed to have "obtained possession" at that date within the meaning of section 20 of The Real Property Limitation Act, R.S.M. 1902, c. 100, and, consequently, under that statute, plaintiff's right of action for redemption was barred by the lapse of over ten years.

Bucknam v. *Stewart*, (1897) 11 M.R. 625, followed.

3. An acknowledgment of the right of redemption given after the lapse of the statutory period is of no avail to the mortgagor seeking redemption.

Sanders v. *Sanders*, (1881) 19 Ch. D. 373, followed.

Rutherford v. *Mitchell*, 15 M.R. 390.

But see *Campbell* v. *Imperial Loan Co.*, 18 M.R. 156 (*ante*).

3. Deed absolute in form but intended only as a security—*Acknowledgment obtained by duress.*

Plaintiff, in 1901, gave defendant a quit claim deed of the land in question as security for a debt. Defendant afterwards paid the money required to procure title to the land from the Canadian Northern Railway Company; but, up to about May, 1903, he recognized the right of the plaintiff to redeem the land on payment of what was then against it, viz., about $900. Shortly afterwards, the defendant drove out to the plaintiff's farm and told him that if he wanted the farm he would now have to pay $2,000 for it. In the following November, the plaintiff went to the defendant's office and received from him a letter written by the defendant, addressed to the plaintiff's wife, offering to sell the farm to her upon certain conditions for $2,000, and the defendant at the same time induced the plaintiff to sign a letter agreeing to leave the place and all his improvements if the option to purchase was not exercised before the first day of November, 1904. When this last letter

was signed, the plaintiff was told by the defendant that he must sign it or leave the place. The plaintiff was then, to the knowledge of the defendant, in distressed circumstances financially.

Held, that this transaction was, on its face, most unfair and extortionate and, having been obtained by duress, the acknowledgment could not be allowed to stand in the way of the plaintiff's right to redeem which, up to that time, had clearly not been extinguished.

Ford v. *Alden*, (1867) L.R. 3 Eq. at p. 463, followed. *Winthrop* v. *Roberts*, 17 M.R. 220.

4. After sale by mortgagee—*Real Property Act, R.S.M. 1902, c. 148, ss. 80, 108-112—Setting aside sale for gross undervalue.*

1. After sale proceedings regularly taken by a mortgagee of land under the Real Property Act, R.S.M. 1902, c. 148, pursuant to sections 108 to 112 inclusive, whereby the property is sold to a *bona fide* purchaser who makes the first payment called for by the terms of the sale and binds himself to complete the purchase, it is too late for the mortgagor to apply for redemption even if the purchaser has made default in strict compliance with his agreement.

2. The fact that, in such a case, the purchaser has not yet received his transfer from the mortgagee makes no difference.

National Bank of Australasia v. *United Hand in Hand Co*, (1879) 4 A.C. 391, distinguished.

3. A sale by auction for $4850 of a property valued at $7200 is not a sale at such a gross under-value that equity should interfere to set it aside. *Saltman* v. *McColl*, 19 M.R. 456.

5. Time to redeem.

Held,—There should be only one period of six months allowed for redemption, for all parties, mortgagor and subsequent incumbrancers. *Rice* v. *Murray*, 2 M.R. 37.

V. SALE.

1. After foreclosure—*Variation of decree.*

The Court has no power to direct a sale of a mortgaged property after foreclosure has been ordered, without the consent of the defendant, although it be shown that the mortgaged premises are not worth the amount due under the mortgage. *Credit Foncier Franco-Canadien* v. *Schultz*, 10 M.R. 158.

2. Fraud on the Court—*Decree for sale—Execution issued for balance due—Petition to set aside proceedings.*

A decree was made in a mortgage suit for sale of the mortgaged premises and payment of any deficiency after sale. The lands were knocked down to P. The Master made a report confirming the sale and found a large balance due plaintiff by C. & G., for which executions were issued; and the lands were vested in P. Subsequently, it was alleged on petition that plaintiff really held the mortgage as nominee and trustee of a certain company; that there was no real sale to P., to whom the land was knocked down for the benefit of the company; that P. transferred the land to an officer of the company without consideration; that this officer transferred it to another who subsequently died, having devised the land to his executors in trust for the company; that these officers always admitted themselves to be trustees of the lands for the company, and that all the proceedings in the suit were conducted for and on behalf of the company, and at its expense.

Held, that the report confirming the sale and the vesting order were obtained by a fraud upon the Court and the defendants. In the absence of some of the parties interested, the sale could not be formally set aside; but it, and all the subsequent proceedings, could be treated by the Court as nullities; and, as all the parties concerned in the subsequent report and *fi. fa's.* issued thereon were before the Court, those proceedings should be set aside. *Taylor* v. *Sharp*, 8 M.R. 163.

3. Fraudulent scheme of mortgagee to cut out equity of redemption—*Sale by way of exchange—Constructive notice—Costs in redemption action.*

Action to set aside the proceedings taken by the defendant McKinstry for the sale of a farm under the power of sale in a mortgage from the plaintiff and the several conveyances from McKinstry to one Dickerson, from Dickerson to Mrs. McKinstry, and from Mrs. McKinstry to the defendant Barker, and seeking to redeem the land from the latter. The property was worth at least $600, but was at the auction knocked down to Dickerson at $195. It was conveyed to Dickerson the same day by deed purporting to be made under the power of sale, with the usual

covenants in the statutory short form, and Dickerson on the same day conveyed the land to Mrs. McKinstry by an ordinary quit claim deed for an expressed consideration of $200.

These two conveyances were registered two days after their execution, when Mrs. McKinstry conveyed to the defendant Barker, by a similar quit claim deed without covenants, all her estate, right, title, etc., in the land for an expressed consideration of $600. Mrs. Barker, however, paid no money, but Mrs. McKinstry received in exchange a conveyance of a lot in the town of Dauphin.

It was conceded that the alleged sale to Dickerson and the transfer to Mrs. McKinstry were merely colorable proceedings of the mortgagee for his personal benefit, and ineffective to cut out the equity of redemption, but it was contended on behalf of Mrs. Barker that she was a purchaser for value without notice, holding under a registered instrument, and that, even if she were affected with notice of the invalidity of the sale proceedings, Mrs. McKinstry should be considered as an assignee of the mortgage and her conveyance valid and effective as an exercise of the power of sale in the mortgage.

During the pendency of the said sale proceedings, McKinstry was negotiating with Mr. Barker, husband of the other defendant, for the purchase of the said town lot, and informed Mr. Barker that he had the mortgage in question and expected to get it paid by a subsequent incumbrancer and to use the mortgage money in paying for the lot. Barker knew, also, that the land was being put up for sale under the mortgage, and a few hours after the pretended sale to Dickerson he met McKinstry, who said to him either, "Mrs. McKinstry got that farm," or "We got that farm," and suggested the exchange of the farm for the town lot, which was afterwards carried out.

The solicitor who acted for McKinstry in the sale proceedings, and drew the several conveyances for him and Mrs. McKinstry, also acted for Mrs. Barker in drawing the deed from her to Mrs. McKinstry, but there was nothing to show that he had been instructed to examine the title of the farm on behalf of Mrs. Barker.

Held, (1) That Mrs. Barker was not affected with notice of anything the solicitor knew, but that knowledge of the contents of the conveyances, and of other facts from which a court of equity would infer that there had not been an actual *bona fide* exercise of the power of sale, should be imputed to Barker and through him to his wife, as he acted as her agent, and that she thus had sufficient notice of the plaintiff's equitable right to prevent her from claiming to hold the property free from it. Notice of the facts is all that should be required, whether or not the party understands the effect that a court of equity would give them.

Rose v. *Peterkin*, 13 S.C.R. 677, followed.

(2) The conveyances from McKinstry to Dickerson and from him to Mrs. McKinstry operated to vest the legal estate in her, and she could exercise the power of sale in the mortgage which had not been exhausted by the proceedings which had been taken.

Henderson v. *Astwood*, [1894] A.C. 150, followed.

(3) The conveyance to Mrs. Barker could not be treated as an exercise of the power of sale because it did not purport to grant the whole estate in mortgage, but only the interest of the grantor, Mrs. McKinstry, which was that of a mortgagee merely, there having been no attempt to convey the interest of the mortgagor.

(4) The power of sale in a mortgage cannot be properly exercised by the mortgagee accepting other property in exchange instead of making a sale for money, unless, perhaps, in a case where it is clear that there is no value in the equity of redemption.

Smith v. *Spears*, (1893) 22 O.R. 286, explained and distinguished.

(5) The defendant Barker was entitled, on being redeemed, to add to her claim the costs of the sale proceedings up to but not including the conveyance to Dickerson or any subsequent conveyances, and, following *Harvey* v. *Tebbutt*, (1820) 1 J. & W. 197, the costs of the action so far as it was a suit for redemption only; but that, if she insisted on these costs, she should pay the costs occasioned by her resisting the claim to redeem, to be set off against the mortgage money and costs allowed to her.

Judgment that plaintiff was entitled to redeem on payment to Mrs. Barker of the mortgage money and interest and costs as above indicated, and that McKinstry should pay the costs both of the plaintiff and of Mrs. Barker. *Winters* v. *McKinstry*, 14 M. R. 294.

VI. Miscellaneous.

1. Accounts in the Master's office—*Subsequent incumbrancer—Bonus or special commission on mortgage loan, when allowed.*

On an appeal by a subsequent incumbrancer from the report of the Master on the taking of the account of the plaintiff's claim under a mortgage given by the defendant, the following points were decided:

1. Where the party brought in to the Master's office under notice provided for by rule 117, Queen's Bench Act, 1895, takes no steps to have the decree varied or set aside, he cannot afterwards object to the plaintiff's right to a decree of foreclosure.

2. Where the plaintiff has served a party with such notice to come in and prove his claim as a subsequent incumbrancer, he cannnot afterwards raise an objection that the party so served has no lien on the land.

3. A mortgagee, in bringing his accounts into the Master's office, should charge himself with the net proceeds only of any rents or profits received by him out of the mortgaged premises, leaving the incumbrancer to surcharge if he considers the mortgagor entitled to a larger credit.

4. Where, in the negotiations for a loan to be secured by a mortgage, the mortgagee stipulates for a bonus or special commission, or other charge in consideration of advancing the money and in addition to the interest, he may retain it if he deducts the amount at the time from the loan and only advances the balance, or in case the amount is afterwards paid and settled, but otherwise such bonus or special advantage cannot be recovered or allowed in equity.

Potter v. *Edwards*, (1857) 26 L.J. Ch. 468; *Mainland* v. *Upjohn*, (1889) 41 Ch. D. 126, followed.

James v. *Kerr*, (1889) 40 Ch. D. 524; *Eyre* v. *Wynn-Mc Kenzie*, (1894) 1 Ch. 218, and *Field* v. *Hopkins*, (1890) 44 Ch. D. 524, distinguished. *Phillips* v. *Prout*, 12 M.R. 143.

2. Assignment of mortgage—*Mortgage suit where mortgage assigned—Covenant by mortgagee for payment—Remedy against mortgagee as surety.*

On an assignment of a mortgage, the mortgagees covenanted to pay the assignee all moneys secured by the mortgage, according to its terms, in the event of default being made by the mortgagors.

In a suit for sale the original mortgagees were made parties, and a personal order was asked as against th m.

Held, 1. That no order could be made against the original mortgagees for immediate payment, but only an order for payment of any deficiency after a sale.

2. That the original mortgagees were entitled upon payment forthwith after decree of principal, interest, and the costs of an undefended action at law against them upon their covenant, to be discharged from further liability; and to an assignment of the plaintiff's securities upon payment of any costs he might have against the other parties. *Taylor* v. *Sharp*, 2 M.R. 35.

3. Costs—*Abortive sale.*

Held, That where a mortgagee had offered property for sale under a power of sale, and the sale proved abortive, he was entitled to the costs, the attempt to sell having been *bona fide*. *Cameron* v. *McIlroy*, 1 M.R. 242.

4. Distress for interest—*Landlord and tenant—Attornment clause—The Distress Act, R.S.M., c. 46, s. 2.*

A mortgage of lands contained a special attornment clause whereby the mortgagor became tenant of the lands to the defendants at a yearly rental equal to the interest on the amount of the loan to be paid at the times appointed for the payments of interest. This mortgage was not executed by the mortgagee.

Held, that the relationship of landlord and tenant was validly created between the parties, and that on default of any payment of interest the mortgagee might distrain for a year's rent under the attornment clause, and take any goods upon the premises, whether belonging to the mortgagor or not, and make a valid sale of same.

But see, now, R.S.M. 1902, c. 49, s. 5.

Held, also, that sec. 2 of the Distress Act, R.S.M., c. 46, has no reference to the right of mortgagees to distrain for rent under a tenancy validly created, but only to the right to distrain for interest as such provided for in the ordinary distress clause in the short form of mortgages set out in the Act respecting Short Forms of Indentures. *Linstead* v. *Hamilton Provident and Loan Society*, 11 M.R. 199.

5. Growing crops—*Right to, when mortgagee takes possession under mortgage—*

Right of mortgagee taking possession after crops cut down—Priority between mortgagee of land and mortgagee of growing crops.

When a mortgagee actually enters into lawful possession of land under the terms of his mortgage, he becomes entitled to any crops growing on the land as against a mortgagee of the crops under a chattel mortgage executed after his mortgage and before possession taken; but, if the crops are cut at the time of possession taken, the holder of the chattel mortgage would have priority.

Lang v. *Ontario Loan and Savings Co.*, 46 U.C.R. 114, and *In re Phillips*, 16 Ch. D. 104, followed. *Harrison* v. *Carberry Elevator Co.*, 7 W.L.R. 535.

6. Implied covenant to indemnify vendor—*Liability of purchaser of land subject to mortgage—Foreclosure, effect of, upon liability of mortgagor under covenant—Parties to action.*

The plaintiff sold certain land to the defendant subject to two mortgages under the Real Property Act, so that defendant was under an implied covenant to indemnify the plaintiff against the mortgages.

The mortgagees subsequently recovered judgment against the plaintiff for the amount due on the mortgages, and afterwards foreclosed them and obtained certificate of title to the property.

In this action by plaintiff to enforce the defendant's implied covenant of indemnity defendant raised the contention that the plaintiff was released from his covenant by the action of the mortgagees in obtaining the foreclosure.

Held, that this question could not be decided in the absence of the mortgagees, and that unless plaintiff would amend, pursuant to leave, adding the mortgagees as parties defendant, the action should be dismissed with costs. *Noble* v. *Campbell*, 20 M.R. 232.

7. Lease by Mortgagor.

A garnishing creditor of the mortgagor is entitled as against the mortgagee to rent due in respect of a lease of the mortgaged premises made after the mortgage (in the statutory form) by the mortgagor. *Green* v. *Cauchon*, 3 M.R. 248.

8. Merger—*Conveyance of equity of redemption in discharge of debt—Pleading.*

To an action upon covenant in a mortgage defendant pleaded that he had conveyed the equity of redemption to B., who conveyed it to the mortgagee in discharge of the debt.

Held, A good equitable plea.

After the conveyance to B there was an implied obligation in equity on his part to indemnify the mortgagor against the debt.

Quære, Whether in such a case the relation of principal debtor and surety, as between the mortgagor and B., was constituted. *Forrest* v. *Gibson*, 6 M. R. 612.

9. Money advanced to construct buildings—*Lien for materials supplied—Payment to contractor—Transactions in fraud of mortgagor's rights—Redemption—Costs.*

A Building and Loan Company advanced money to an illiterate woman for the purpose of aiding in the construction of a house to be erected upon lands mortgaged to it to secure the loan. The mortgage contained no provision for advances to contractors, etc., as the work progressed, beyond the following:

"And it is hereby agreed between the parties hereto, that the mortgagees, their successors and assigns, may pay any taxes, rates, levies, assessments, charges, moneys for insurance, liens, costs of suit, or matters relating to liens or incumbrances on the said lands, and solicitors' charges in connection with this mortgage, and valuator's fees, together with all costs and charges which may be incurred by taking proceedings of any nature in case of default by the mortgagor, her heirs, executors, administrators or assigns, and shall be payable with interest, at the rate aforesaid, until paid, and, in default, the power of sale hereby given shall be forthwith exercisable. And it is further agreed that monthly instalments in arrear shall bear interest at the rate aforesaid until paid."

In a suit for redemption,

Held, Firstly, that the clause in the mortgage did not justify the mortgagees in making advances to contractors and persons supplying material, without the express order of the mortgagor.

Secondly, that the mortgagees ought not to have recognized an order in favour of the contractor for the total amount of the loan when they knew that the contractor had not completed his contract and was, therefore, not entitled to the money, when the order contained no name of a witness, and showed that the mortgagor was unable to sign her name.

The payment having been made by the Loan Company to a lumber company supplying material to the contractors for the building, without the express authority of the mortgagor, and the lumber company having taken an assignment of the mortgage, and attempted to enforce it against the mortgagor, the transaction was declared fraudulent as against the mortgagor, and the payment to the lumber company disallowed.

Held, also, that the only costs the assignees of the mortgage were entitled to add to the mortgage debt were the costs of an ordinary redemption suit consented to by a mortgagee.

Judgment appealed from varied, and appeal dismissed with costs. *Hiebert* v. *Black*, 38 S. C.R. 557.

10. Mortgagee buying at tax sale—*Action on covenant—Removal by mortgagee of buildings.*

After a mortgagee had taken possession under his mortgage, purchased the land at tax sale and obtained a conveyance, and removed valuable buildings from the land, he obtained judgment upon the covenant in the mortgage.

Upon a motion to stay proceedings on the ground that the judgment had been satisfied,

Held, 1. A mortgagee may purchase at tax sale and then resist redemption. The effect of the purchase is the same as if he had obtained a final order of foreclosure. It does not satisfy the covenant, but an action on the covenant would let in redemption.

2. The removal by the mortgagee of buildings does not prevent an action upon the covenant. Waste is a matter of account.

3. An application to stay proceedings upon a judgment on the ground of its satisfaction can properly be made in Chambers. *Miller* v. *McCuaig*, 6 M. R. 539.

11. Mortgagees in possession—*Commission on rents received by agent of mortgagees—Manifest error in report—Costs.*

A mortgagee cannot have any allowance for his personal care or trouble in receiving rents.

Where the property is at a distance, or where the circumstances are such that the mortgagee would, if himself the owner, employ a bailiff or collector, an allowance may be made.

The Master, in making his report, made an error in the calculation of interest, manifest on the face of it. Defendant gave notice of appeal, plaintiffs' solicitor on being served with the notice of appeal, having had his attention directed to the error, at once wrote offering to attend in chambers and consent to an order amending the report, but the appeal was proceeded with.

An order was made amending the report, without costs to either party. *Freehold Loan Co.* v. *McLean*, 9 M. R. 15.

12. Notice of credit—*New day.*

Held, Where, in a mortgage suit, a payment is made during the time fixed for redemption, and no notice of credit is given, there should be an order referring it to the Master to fix, or the order may itself fix, a new day for payment. *Manitoba and N. W. Loan Company* v. *Scobell*, 2 M. R. 125.

13. Proceedings to realize on property in possession of a receiver—*Parties to suit in Equity—Receiver of mortgaged property—Manager of mortgaged railway—Sale of mortgaged railway property—Right to sale in Equity where power of sale is given by mortgage—Petition or motion.*

The plaintiffs as judgment creditors of the defendant Company having obtained a decree for the appointment of a receiver of the railway, and procured the appointment of one of themselves who was in possession as such receiver, the petitioners, mortgagees of the first 180 miles of the railway together with all the revenue thereof to secure certain bonds which were in default, petitioned the Court for leave to file a bill in this Court for the appointment of a receiver and manager of the mortgaged property and for foreclosure thereof. Before the filing of this petition an order had been made adding the petitioners as parties to the cause in the Master's office, but this order had not been served.

Held, (1) That, under circumstances similar to those set forth in this petition, mortgagees are entitled as of right to a receiver; that the petitioners were not bound to be satisfied with the receiver appointed at the instance of the plaintiffs, and that the petitioners should have leave to take proceedings for a receiver and for sale of the mortgaged property.

(2) That the petitioners were not entitled to the appointment of a manager of

the railway, there being no legislative authority for the transfer of the responsibility of management from the hands of the Company; nor could they sue for possession or foreclosure.

(3) That it was proper to proceed by petition instead of by motion, notwithstanding the language of General Order 389.

(4) That mortgagees may proceed in equity for a sale of the mortgaged property immediately after default in payment, notwithstanding that their mortgage contains a power of sale which could not be exercised until after the lapse of a named period. *Allan* v. *Manitoba & N. W. Ry. Co.* *Re Gray, No.* 1, 10 M. R. 106.

14. Lands purchased by Railway Company from mortgagor—*Mortgage suit.*

Plaintiffs were mortgagees of land under a mortgage made by defendant McL. After the making of the mortgage, defendant McL. conveyed to defendant R., and R. conveyed to the defendants, the C.P.R. Co., a strip across the land for their track.

The bill was for foreclosure, for immediate payment by McL., and for possession as against Ross and the C.P.R. Co.

The answer of the C.P.R. Co. set up that they had made an agreement with R. for the purchase of the strip of land, and that they had paid into court the purchase money, and given notice by advertisement as required by the statute.

Held, that the plaintiffs could not have, as against the railway company, delivery of possession. 2. That the payment into court protected the railway company against the claim of the plaintiffs, and that the rights of the latter were confined to a claim against the compensation paid into court.

Held, that, as against the defendant McL., the plaintiffs were entitled to an order for immediate payment, and, as against defendant R., to delivery of possession of the land not embraced in the deed to the railway company. *Manitoba Mortgage and Investment Co.* v. *C.P.R.*, 1 M.R. 285.

15. Real Property Limitation Act, s. 24—*Action on covenant—Statute of Limitations—Lands outside jurisdiction—Decisions of English and Ontario Courts, where different, on similar statutes.*

The provisions of section 24 of The Real Property Limitation Act, R.S.M. 1892, c. 89, that no suit shall be brought to recover any money secured by mortgage, &c., upon any land, after ten years after the right to the same accrued, or ten years after the last payment of principal or interest, or the last acknowledgment thereof has been made or given, apply to any land, as well outside as within the Province.

Semble. Where the decisions of Courts of sister Provinces of Canada are at variance with English decisions, on questions where the law is substantially the same in Imperial and Provincial legislation, the doctrine adopted by the English courts should be followed. *McLenaghan* v. *Hetherington*, 8 M.R. 357.

See APPEAL FROM MASTER ON EVIDENCE.
— COSTS, XIII, 1.
— DISTRESS FOR RENT, 3.
— LANDLORD AND TENANT, I, 3; II.
— MASTER AND SERVANT, II.
— REAL PROPERTY LIMITATION ACT, 3, 7.
— RECTIFICATION OF DEED, 1.
— SALE OF LAND FOR TAXES, VII, 2.

MOTION BY OUTSIDE PARTY.

See PRACTICE, XXVIII, 15.

MOTION FOR JUDGMENT.

See PRACTICE, XI, 2, 3; XXIV, 2, 3.

MOTOR VEHICLE.

See NEGLIGENCE, VII, 4.

MULTIFARIOUSNESS.

See INFORMATION TO RESTRAIN NUISANCE.
— INJUNCTION, I, 8.
— MECHANICS' LIEN, X, 2.
— PLEDGE.
— PRIVITY OF CONTRACT.
— REGISTERED JUDGMENT, 6.
— PATENT OF INVENTION, 1.
— PLEADING, VI.
— SALE OF LAND FOR TAXES, V, 2.
— SOLICITOR AND CLIENT, III, 2.
— WILL, III, 4.

MULTIPLICITY OF SUITS.

See PLEADING, I, 3.

MUNICIPAL ELECTIONS.

1. Disclaimer—*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. *Reg.* v. *Murray*, 5 U.C.L.J. O.S. 87, and *Reg.* 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 M.R. 612.

2. Disqualification — *Contestation — Seat claimed by petitioner.*

Held, 1. A registrar and a county court bailiff are disqualified for the office of mayor and councillor respectively.

2. A returning officer must receive nominations for any candidate who appears to be assessed for $100, even if he be in fact disqualified upon other grounds.

3. The petitioner claimed the seat, but he appeared to be largely indebted to the Municipality, and a new election was directed. *Reg. ex rel, Duncan* v. *Laughlin*; *Reg. ex rel. Stevenson* v. *Blanchard*, 2 M.R. 78.

3. Injunction to restrain assumption of Municipal Office.

A Court of Equity will not, upon an injunction bill, try the validity of an election to office of mayor or councillor, even though the custody of the books and papers of the municipality be in question; at all events, not unless there be others claiming the right to hold the offices. *Fairbanks* v. *Douglas*, 5 M.R. 41.

4. Irregularities of officials conducting elections—*Directory or imperative requirements of statutes—Illiterate voters—Secrecy of the ballot.*

Sections 90, 116, 118, 191 and 287 of The Municipal Act, R.S.M. 1902, c. 116, relating to the duties of the municipal officers in connection with the holding of the annual election of the mayor of a city, are directory and not imperative, and breaches of any or all of those sections by the officers, not amounting to wilful misconduct, and not materially affecting the result of the polling, will not be sufficient to warrant the declaring of the election void.

Woodward v. *Sarsons*, (1875) L.R. 10 C.P. 747, followed.

The following irregularities and omissions, therefore, were held not to be fatal to the election:

1. That the clerk did not post up notices giving the names of the candidates in all the places pointed out by section 90, but only in two of them.

Re Wycott and Ernestown, (1876) 38 U.C.R. 533, followed.

Cases arising under the Canada Temperance Act, or under local option clauses of Liquor License Acts, such as *Hatch* v. *Oakland*, (1910) 19 M.R. 692; *Re Mace and Frontenac*, (1877) 42 U.C.R. 70; *Re Henderson and Mono*, (1907) 9 O.W.R. 599, and *Hall* v. *South Norfolk*, (1892) 8 M.R. 437, distinguished.

2. That the clerk did not, as required by section 287, furnish each of the deputy returning officers with two copies of sections 276 to 287 inclusive (the sections dealing with corrupt practices) and did not post up a copy in his office and one in the post-office.

West Gwillimbury v. *Simcoe*, (1873) 20 Gr. 211, followed.

3. That most of the deputy returning officers, poll clerks and agents failed to take the oath of secrecy as to the marking of the ballots required by section 191, there being nothing to indicate that the officials did not, in fact, substantially maintain the secrecy of the ballot or that they permitted any invasion of that principle.

Wynn v. *Weston*, (1907) 15 O.L.R. 1, followed.

4. That the clerk, as returning officer, relieved the deputy and acted in his stead for a short time in each of three polling places on the polling day, although the ballots initialled by him were disallowed.

Watterworth v. *Buchanan*, (1897) 28 O.R. 352, 357, and *Re Ellis and Renfrew*, (1910) 21 O.L.R. 74, 85, followed.

5. That, in taking the votes of a large number of persons unable to read, the deputy returning officers went into the voting compartments with the voters and marked their ballots or caused them to be marked out of the sight of the agents of the candidates contrary to section 116, and this without any declarations of inability to read having been made by the

voters, as most of them were foreigners unable to understand English and the deputies apparently acted in good faith.

6. That a number of the deputies failed to make the declaration prescribed by section 118 as to the proper keeping of the poll book.

Held, also, that it would not be proper to deduct from the total vote cast for the successful candidate votes to the number of the assisted voters who had not made the declaration of inability to read, as the petitioner had brought out in evidence that many of the latter had marked their ballots for him.

Re Prangley, Re Ellis and Re Schumacher, all in 21 O.L.R., at pp. 54, 74, and 522 respectively, followed.

In re Shoal Lake, (1910) 20 M.R. 36, dissented from.

Re Brandon Election. Wallace v. *Fleming*, 20 M.R. 705.

5. Petition to declare seat vacant—*Time for presenting petition—Powers of clerk—Resignation of Reeve—Subsequent withdrawal of resignation.*

S. was elected Reeve of a rural municipality in December, 1892. On 18th March, 1893, he resigned his seat in the council in writing pursuant to the statute. Afterwards, on the 6th day of May, 1893, S. attended a meeting of the council, he proceeded to take part in the proceedings of the council and voted on a motion to amend the minutes of the previous meeting declaring that the council accepted the withdrawal of his resignation, and declared the motion carried by his casting vote, the other members of the council being evenly divided.

A petition was then filed to have the seat declared vacant. On the hearing before the County Court Judge, the respondent took two preliminary objections—1. That the provisions of section 178 of the Municipal Act do not apply to the case of a member of the council who has resigned his seat. 2. That the petition was not presented within the time prescribed by the statute.

These objections were over-ruled.

S. then applied in the Queen's Bench for a prohibition.

Held, 1. That, under the circumstances alleged in the petition, the remedy by petition provided for in section 178 was the proper remedy.

2. That the 21 days mentioned in section 197, within which a petition must be presented, began to run at the time the act complained of was done, and that the petition was presented in time.

3. That, as there was a *bona fide* dispute on a doubtful legal question concerning the vacancy of the seat, the Clerk was right in not assuming to determine it by issuing a writ for a new election. *Sexsmith* v. *Montgomery*, 9 M. R. 173.

6. Property qualification of candidate—*Municipal Act, R.S.M., c. 100, s. 51—Qualification of mayor or councillor—Leasehold interest.*

By section 51 of The Municipal Act, R.S.M., c. 100, the persons eligible for election as mayors or councillors of villages must be the owners respectively, at the time of the election, of freehold or leasehold, or partly freehold and partly leasehold, real estate rated in their own names respectively on the last revised assessment roll of the village to at least the amount of $500, over and above all charges, liens and incumbrances affecting the same.

The respondent lived with his wife upon a property in a village that was assessed in the name of the wife as owner at $600. His name appeared on the roll as occupant or tenant of the same property, and opposite his name, under the heading "description and valuation," were dots. His name did not otherwise appear on the roll. The title to the property was in the wife, as appeared by the certificate of title under The Real Property Act, which also showed that it was incumbered by mortgages to the extent of $550.

Held, that the respondent had not the necessary property qualification for mayor of the village. *Re Morden Election, Ruddell* v. *Garrett*, 12 M. R. 563.

See INJUNCTION IV, 3.

MUNICIPAL OFFICER.

See GARNISHMENT, V, 6.
— MANDAMUS, 2, 3, 6, 7.
— MUNICIPAL ELECTIONS, 4.
— NEGLIGENCE, IV, 1, 2.

MUNICIPAL WEIGH SCALES.

See MUNICIPALITY.

MUNICIPALITY.

I. By-laws and Resolutions.

1. Approval of plans—*Conditional approval—Winnipeg Charter, s. 472—Injunction.*

1. Notwithstanding the provision of section 472 of the Winnipeg Charter that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for," the approval by the city council of the construction by defendants of a loop line on certain named streets of the city may be given by resolution.

Toronto v. *Toronto Ry. Co.*, (1906) 12 O.L.R. 534, followed.

2. It is not a valid objection to such a resolution that it was one approving a report of the Board of Control even if such Board had no power to deal with such a matter.

3. The council had power to give an approval coupled with a condition that the company should also construct another loop line on certain other streets, although the council might be unable afterwards to enforce the condition.

4. Under the law governing such construction the approval of the detailed plans by the City Council is not required, so that the making of a change in the plans by the City engineer which had not been approved by the council was no ground for an injunction. *Black* v. *Winnipeg Electric Ry. Co.*, 17 M. R. 77.

2. By-law as to repairing buildings within fire limits—*Ultra vires—Validation of by-laws by subsequent legislation—Prohibition to inferior Court.*

1. Under sub-sections (*a*) and (*b*) of section 607 of The Municipal Act, R.S.M. (1892), c. 100, as amended prior to 8th May, 1899, authorizing the Council of the City of Winnipeg to pass by-laws for regulating the erection in specified parts of the City of wooden buildings or additions thereto or alterations thereof, and for prohibiting the erection of buildings, with the walls other than of brick, iron or stone, within defined areas, and for regulating the repairing or alteration of roofs or external walls of existing buildings within the said areas, so that they might be made more nearly fire-proof, also for regulating the size and strength of walls, beams, joists, rafters and roofs, and their supports in all buildings to be erected or repaired or added to, and for compelling production of the plans of all buildings for inspection and for enforcing the observance of such regulations, the Council had no power to pass a by-law requiring the submission of plans and specifications of proposed repairs to a building inspector and the obtaining of his certificate before the commencement of repairs to any building; and the conviction of the defendant for breach of such by-law was quashed.

2. Repairs to a building do not constitute a re-erection thereof, and it was *ultra vires* of the Council, under the powers above set out, to enact that, if the proposed repairs to a building should cost forty per cent of its actual value, they should be considered a re-erection thereof, subject to the terms of the by-law; and, where the owner had made repairs to a frame building within the first class fire limits, which had been damaged by fire, a rule *nisi* to prohibit a magistrate from proceeding with a prosecution as for alleged unlawful re-erection of the building, in breach of the said by-law, was made absolute.

3. The amendment by the City Council of other provisions of the same by-law, under powers conferred by legislative amendments of the section of the Municipal Act referred to, made after the passing of the by-law, had not the effect of re-enacting the provisions objected to.

4. The effect of section 6 of The Winnipeg Charter, 1 & 2 Edw. VII., c. 77, which provides that the by-laws, &c., of the City, "when this Act takes effect, shall be deemed . . . the by-laws . . . of the City of Winnipeg, as continued under or altered by this Act," was merely to provide that the then existing by-laws should stand as they stood before the passing of the Act with only such force, effect or validity as they previously had, and not to declare that all such by-laws were legal and valid. *Rex* v. *Nunn. Re Rogers and Nunn*, 15 M. R. 288.

3. For Sale of Land—*Contracts of municipality requiring by-laws—Estoppel by conduct—Winnipeg Charter*, 1902, *c.* 77, *ss.* 387, 472—*Real Property Act, R.S.M.* 1902, *c.* 148.

1. The making of a contract for the sale of land vested in the corporation is not one of the powers which the Council of the City of Winnipeg, under its charter, 1 & 2 Edw. VII, c. 77, can exercise by resolution, as section 472 says that the power of the Council shall be exercised by by-law when not otherwise authorized or provided for.

Waterous v. *Palmerston*, (1892) 21 S.C.R. 556, followed.

2. The defendant City was not estopped from insisting on the absolute title acquired by it, under the Real Property Act, R.S.M. 1902, c. 148, of lands formerly owned by the plaintiff and purchased by it at a tax sale, by reason of the facts that, after the issue of the final certificate of title in 1902, the City Assessor assessed the land to the plaintiff, the Court of Revision confirmed the assessment, the usual assessment notice was sent to the plaintiff and the tax collector sent to him the usual notice and demand for the taxes of that year, as these steps had all been taken by the city officials in accordance with their statutory duties and without any special authority or instructions from the City Council.

3. *Per* HOWELL, C. J. A. Although the City Council passed a resolution authorizing a sale of the lands to the plaintiff for a named amount, and the resolution was entered in the minutes which were afterwards signed by the mayor and city clerk, yet there was no writing signed in such a manner as to be binding under the Statute of Frauds.

4. *Per* MATHERS, J. If the City had sued the plaintiff for the taxes of 1902 relying on section 387 of the charter, it would have been a good defence to show that he was not the owner of the lands at the time of the return of the assessment roll and its final revision, and, therefore, it could not be said that the City was asserting two absolutely inconsistent rights. *Ponton* v. *City of Winnipeg*, 17 M.R. 496.

Affirmed. 41 S.C.R. 18.

4. Seal of corporation—*Signature of head of council or presiding officer—Territorial limits affected by quashing by-law—Municipal Act, R.S.M., c.* 100, *s.* 336—*Order quashing by-law bad on its face.*

1. Section 336 of The Municipal Act, R.S.M., c. 100, is imperative, and an instrument not sealed with the seal of a municipal corporation, or not signed by its head or the person presiding at the meeting at which the supposed by-law was passed, is no by-law of the corporation.

2. When such alleged by-law purports to be passed in accordance with the local option clauses of The Liquor License Act, R.S.M., c. 90, the applicant is entitled to a definite order quashing it, so that the council of the municipality may know whether to receive license fees or not.

3. The order to quash a by-law should not affect territory detached from the municipality whose council originally passed it, and now forming parts of new municipalities which were not served with notice of the application. *Re Vivian and Rural Municipality of Whitewater*, 14 M.R. 153.

Not followed, *Houghton* v. *Argyle*, 14 M.R. 526.

5. By-law taking effect on the happening of some contingent event—*Meaning of "passage of the by-law"—Winnipeg Charter, s.*, 708, *s-s.* (c1) *as re-enacted by* 3 & 4 *Edw.* VII, *c.* 64, *s.* 15,—*Uncertainty in by-laws—Delegation of powers of Council.*

Under sub-section (c) of section 708 of the Winnipeg Charter, as re-enacted by 3 & 4 Edward VII, c. 64, s. 15, the City on 30th September, 1907, passed a by-law, No. 4264, for diverting and closing up certain streets in the City and for conveying the same to the Canadian Northern Railway Company, and determining what persons or classes of persons were injuriously affected by the closing of such streets. The by-law excluded the defendants from any right to compensation, but provided that it was not to come into force until the execution of a supplementary agreement between the railway company and the City and the due ratification of the same by the council.

In July, 1908, such agreement having been executed, the City passed By-law No. 5050, declaring that "by-law No. 4264 is hereby ratified and confirmed and declared to be in force."

Within ten days after the passing of By-law No. 5050, the defendants appealed to a Judge of the Court of King's Bench under sub-section (c1) of the same section, against their exclusion from the class of persons entitled to compensation as being

injuriously affected by the closing of the streets.

Held, (1) The Council could not determine conclusively what persons or classes of persons were injuriously affected by the closing of the streets by a by-law which, in its terms, was not to come into force until the happening of a contingent event which might never happen, and such persons could not appeal from such determination until after the by-law was brought into force by the second by-law, because they could not be injuriously affected by the passage of a by-law which might never come into force.

(2) The expression, "within ten days after the passage of the by-law," in subsection (c1), should, under the circumstances of this case, be construed to mean within ten days after the coming into force of the by-law, because the literal construction would work a manifest injustice by arbitrarily depriving persons injuriously affected of all remedies.

Attorney General v. *Lockwood*, (1842) 9 M. & W. 398; *Becke* v. *Smith*, (1836) 2 M. & W. 195, and *Schneider* v. *Hussey*, (1881) 1 Pac. Rep. 343, followed.

Ex parte Rashleigh, (1875) 2 Ch. D. 9, distinguished.

(3) The defendants, therefore, came in time when they brought their appeal within ten days after the passage of the by-law bringing the by-law in question into force.

Per RICHARDS, J.A. A by-law, which in its terms provided that it should only come into force on the execution by a railway company of a certain agreement with the City, is bad for uncertainty and because of its delegation by the council of part of its power to the railway company.

Re Cloutier, (1896) 11 M.R. 220, followed. *City of Winnipeg* v. *Brock*, 20 M.R. 669.

Affirmed 45 S.C.R. 271.

6. Motion to quash for unreasonableness and discrimination—*Prohibition of erection of buildings within fixed distance from street line in residential locality—Removal of prohibition in favour of individual owner—Status of applicant—Acquiescence—Winnipeg Charter, s.* 703, (29).

Under paragraph (29) of section 703 of the Winnipeg Charter, the City passed a by-law prohibiting the erection of buildings on River Avenue, a residential street, within 15 feet of the street line. Subsequently a by-law was passed in amendment of the former by-law and permitting one Millman to erect a building on the corner of River Avenue and an intersecting business street within six feet of the street line on condition that he would convey the six feet and a small triangle at the corner to the City. On motion to quash the amending by-law,

Held, on appeal from PRENDERGAST, J., that the by-law was within the powers of the Council and was neither unreasonable nor discriminatory and that there was a good and sufficient consideration given to the City for passing it.

Per PRENDERGAST, J., in the Court appealed from. The motion should be denied because it had not been made until about ten months after the date of the by-law attacked, during which time Millman had erected and completed his building at a cost of about $80,000, and the applicant had been fully cognizant of the work from its inception.

In re Taber and Township of Scarborough, (1861) 20 U.C.R. 549; *In re Grant and Township of Puslinch*, (1868) 27 U.C.R. 154, and *In re Platt and City of Toronto*, (1872) 33 U.C.R. 53, followed. *Wood* v. *City of Winnipeg*, 21 M.R. 426.

7. By-law requiring weighing of coal on municipal weigh scales—*Municipal Act, R.S.M.* 1902, *c.* 116, *ss.* 368, 632 (*i*), 654 (*f*)—*Ultra Vires—Restraint of trade—Monopoly.*

1. Under sub-section (*f*) of section 654 of the Municipal Act, R.S.M. 1902, c. 116, the council of a town may pass a by-law requiring that all coal sold in the town shall before delivery be weighed on the public weigh-scales which the town is authorized by sub-section (*i*) of section 632 to establish, and that the person delivering such coal shall, at time of delivery, hand to the purchaser a certificate of the true weight signed by the public weighmaster. The power to regulate the sale of coal enables the council to make the above provisions.

Dillon, sec. 390; *Cooley*, p. 286, and *Tiedeman*, par, 127, followed.

2. Such provisions cannot be regarded as in restraint of trade: *Dillon*, sec. 390, and *Stokes* v. *New York*, (1835) 14 Wend. 88.

3. A by-law of that kind is not in contravention of section 368 of the Act as creating a monopoly in the weighing of coal, being only part of the machinery for

the administration of the public affairs of the town. *Re Miller and Town of Virden*, 16 M.R. 479.

II. Liability for Unauthorized Acts of Officials.

1. Arrest made by police.

The charter of the defendants provided for the appointment of a police force, the members to be appointed by, and hold office during the pleasure of, a board of police commissioners. The defendants provided the pay of the men. A member of the force arrested the plaintiff for an alleged breach of a by-law of the defendants.

Held, In an action for assault and false imprisonment, that the defendants were not liable. *Wishart* v. *City of Brandon*, 4 M.R. 453.

2. Construction of ditch by ward committee—*Ditch constructed along highway between two municipalities—Unauthorized work.*

The provisions of the Municipal Act, R.S.M., c. 100, and amending Acts, relating to highways between adjoining municipalities, require the joint action of the councils of the two municipalities in any work upon the same.

The plaintiff, whose lands, situated in a municipality adjoining that of defendants, had been over-flowed with water and his crops damaged in consequence of the negligent construction of a ditch along the highway between the two municipalities, claimed damages in respect thereof. It was proved that the work had been done by the authority of one of the ward committees of the defendants' council, but the council had not passed any resolution or by-law or motion providing for the construction of the ditch in question, and had not, in any formal manner, authorized the ward committee to execute such work.

Held, that the work done was wholly *ultra vires* of the defendants' council, and that the defendants were not liable for the acts of their agents complained of which were wholly beyond the scope of their authority.

The plaintiff relied upon two resolutions of the council authorizing the treasurer to pay out moneys for ward appropriations on the orders of the chairman of the ward committees and upon the fact that two payments on account of the work had been made by the council.

Held, that this was not sufficient evidence of the adoption of the work by the council, so as to make the defendants thereby liable, although the ditch had been negligently and improperly constructed, and that the plaintiff must be non-suited. *Atcheson* v. *Rural Municipality of Portage la Prairie*, 10 M.R. 39.

3. Work ordered by officials.

The plaintiff contracted under seal to erect for the defendants a building to be used as a police station. The contract contained a clause providing for further agreements in writing, in case of any change or alteration in the plans or specifications.

The plaintiff sued for the value of certain work, part being alterations in the building, part additional work in conection with the building in of a boiler for heating purposes, (neither the furnishing of the boiler nor its fittings being part of the plaintiff's contract), and part for furnishings for the building, such as benches in the cells, lockers, railings, desk and other articles.

The orders for the work were given partly by the chief of police, and partly by the licence and police committee. The city took possession and made use, by its officials, of the work sued for.

Held, That the defendants were not liable for any part of the work.

Oral evidence of that which, upon cross examination, turns out to have been in writing remains valid as evidence. *Kilpatrick* v. *City of Winnipeg*, 4 M.R. 103.

III. Negligence.

1. Contributory Negligence—*Notice of action—Winnipeg Charter, ss.* 722, 728—*Remedy over against third party.*

The plaintiff's claim was for damages caused by falling from his bicycle into a deep unguarded excavation in a lot owned by the defendant Luce on the corner of a public street and a lane in the City of Winnipeg. He was riding down an inclined part of the highway towards and close to a portion of it which was only about 30 feet wide, and which was obstructed for half its width by a pile of building materials in the possession of, and maintained there by, Luce, and, observing that the remainder of the roadway was at the moment occupied by a team with a loaded wagon, he attempted to stop by backpedalling. But the chain then came off the sprocket wheel and, being unable to check his speed, he tried to turn into a lane on the hither side of the obstructions.

His speed was too great, however, and he ran into the excavation at the edge of the lane, being seriously injured.

It appeared that the proper City officials had notice of the obstructions being on the street for a considerable time previously and that they had requested Luce to remove them.

It was contended on behalf of the City that the plaintiff had been guilty of contributory negligence, as he was aware of the condition of the street and of the chance that it might be wholly blocked at any time, and should not have run the risk of the chain slipping off whilst going down the incline. He was, however, an experienced bicycle rider, and had used the same wheel for several years without the chain having ever come off.

Held, that he was not guilty of contributory negligence in the matter, and that the City was liable in damages to the plaintiff.

The City also set up that notice of the claim had not been served on the City Clerk, as required by s. 722 of the Winnipeg Charter, 1 & 2 Edw. VII, c. 77. The notice relied on was a letter which the plaintiff delivered personally to the Chairman of the Board of Works and which contained full particulars of the accident and of the injuries received and asked for payment of $350. This letter reached the City Clerk within the time required by that section.

Held, that the statute was sufficiently complied with to enable the plaintiff to recover.

Held, also, that the City was entitled, under s. 728 of the Charter, to relief over against Luce for the amount of the plaintiff's judgment and all its costs in the action.

Barnes v. *Ward*, (1850) 9 C.B. 392, and *Dalton* v. *Angus*, (1881) 6 A.C. 829, followed. *Mitchell* v. *Winnipeg*, 17 M.R. 166.

2. In exercising statutory powers—*Municipal Act—Powers of Municipality limited to its own territory.*

No action will lie for doing that which the Legislature has authorized to be done, if it be done without negligence, although it does occasion damage to any one; but an action does lie for doing that which the Legislature has authorized, if it be done negligently.

And, if, by a reasonable exercise of the powers either given by the Statute or existing at common law, the damage could be prevented, it is, within this rule, "negligence" not to make such reasonable exercise of the powers.

In the absence of such negligence, a party injured by the acts of a Municipal Council can only resort to the arbitration provided for by the Municipal Act.

In declaring against a municipality for damages to plaintiff's land arising out of the construction of drainage works by defendants, it is necessary to allege that such ditch or drain was within the territorial limits of the municipality. *Atcheson* v. *Rural Municipality of Portage la Prairie*, 9 M.R. 192.

3. In exercising statutory powers—*By-law—Right of action—Arbitration—Pleading—Municipal Act, ss.* 665, 480, 597.

The statement of claim alleged that the defendant, by constructing in a negligent and improper manner a ditch for drainage purposes, had caused the plaintiff's land to be overflowed with water whereby he had suffered damages, but did not allege that any by-law had been passed by the council of the municipality authorizing the construction of such drain. It was demurred to on the ground that the plaintiff's remedy was confined by section 665 of the Municipal Act to an arbitration.

Held, that it was unnecessary to decide whether that section prevents a party from resorting to an action in case of damage resulting in the manner alleged where negligence is charged. But as, under the Municipal Act, sections 480 and 597, a municipality has no power to construct drainage works except under a by-law duly passed, and the statement of claim did not show that there had been any by-law to authorize the work in question, for all that appeared the work might have been done without statutory authority, and the demurrer should be overruled with costs. *Foster* v. *Municipality of Lansdowne*, 12 M.R. 42.

4. In exercising statutory powers—*Right of action—Arbitration—Municipal Act, s.* 665—*Liability for negligence of servant.*

The plaintiff claimed damages in an action against the defendant municipality for injury caused to his land and crops by the negligent and wrongful construction of a ditch by the corporation in consequence of which water, diverted from its natural course and collected in the ditch, overflowed upon the plaintiff's

land. This work had been done under a by-law simply authorizing the expenditure of money upon the ditch in question which was dug wholly upon land under the control of the municipality.

Held, that such a by-law could not make lawful an act causing damage by flooding private lands; and that an action will lie against a corporation for doing what the Legislature has authorized, if it be done negligently so as to cause damage to the plaintiff, the recovery by arbitration under section 665 of The Municipal Act being confined to any damage necessarily resulting from the exercise of such powers; and it makes no difference that the corporation exercised proper care in the selection of its servants and agents if they acted within the scope of their employment.

Geddis v. *Proprietors of Bann Reservoir*, (1878) 3 A.C. 430; *Queen* v. *Selby Dam Drainage Commissioners*, [1892] 1 Q.B. 348; *Mersey Docks Trustees* v. *Gibbs*, (1866) L.R. 1 H.L. 93, and *Atcheson* v. *Portage la Prairie*, (1893) 9 M.R. 192, followed.

Raleigh v. *Williams*, [1893] A.C. 540, distinguished. *Foster* v. *Rural Municipality of Lansdowne*, 21 M.R. 416.

IV. Repair of Roads, Streets and Bridges.

1. Bridge carried away by flood—*Municipal Act, R.S.M.* 1902, *c.* 116, *s.* 667—*Damages, from what date—Continuing cause of action—King's Bench Act, Rule* 566—*Mandamus—Remedy by indictment —Costs.*

1. A private individual who suffers special damages caused by the neglect of a municipal council to replace a bridge on a public highway that had been carried away by a flood is entitled to recover for such damages in an action against the municipality under section 667 of the Municipal Act, R.S.M. 1902, c. 116.

Iveson v. *Moore*, (1700) 1 Ld. Raym. 495, followed.

2. A mandamus to replace the bridge should not be granted in such a case, as there is another adequate remedy, viz: to proceed by indictment, but the refusal of the mandamus should be without prejudice to the plaintiff's right so to proceed.

3. Under sub-section (*b*) of above section the plaintiff's claim for damages should be limited to such as he had suffered since one month prior to the service of his notice of action on the municipality.

4. The cause of action being a continuing one, the damages should, under Rule 566 of the King's Bench Act, be assessed up to the date of the delivery of the judgment.

5. It is proper to bring such an action in this Court, even if the damages allowed should be within the jurisdiction of the County Court, and the plaintiff should have full costs. *Noble* v. *Municipality of Turtle Mountain*, 15 M.R. 514.

2. Bridge breaking down—*Municipal Act, R.S.M.* 1902, *c.* 116, *s.* 667—*Meaning of "happening of the alleged negligence" —Notice of action—Misfeasance—Expectation of pecuniary benefit from continuance of life—R.S.M.* 1902, *c.* 31, *who may claim under.*

1. Under section 667 of the Municipal Act, R.S.M. 1902, c. 116, a municipality is liable for damages caused by a heavy traction engine breaking through rotten timbers in the approach to a bridge on one of its public highways on which work had been performed and improvements made by it, when such engines had, to the knowledge of the officials of the municipality, been passing over the bridge for the previous two years and no attempt had been made to stop such traffic or to warn those in charge of it of any danger, such bridge being the strongest one across the river within many miles.

Manley v. *St. Helens*, (1858), 2 H. & N. 840, and *Lucas* v. *Moore*, (1879) 3 O.R. 602, followed.

2. Defendants could not be held to have been guilty of negligence amounting to misfeasance, so as to make them liable in damages independently of the statute, by reason of having failed to stop up a spike hole in one of the joists in the approach in consequence of which it had rotted more than the others on account of water lodging in the hole.

Patterson v. *City of Victoria*, (1897) B.C.R. 628, distinguished.

3. The notice of action required by the statute to be given to the municipality need not be signed by the claimant personally or show that she was claiming in her capacity of personal representative of the deceased.

4. The words "happening of the alleged negligence," in the section referred to, should either be construed to read, "happening of the injury or damages resulting from the alleged negligence," or it should be held that the negligence continued to "happen" up to the time that the damages

resulted from it, otherwise no notice of the action or claim could be given, in compliance with the statute, in any case where the negligence had existed for more than a month before the injury resulted from it.

5. Plaintiff could recover nothing on behalf of a son of deceased who, in the circumstances and position of his father, could have had no reasonable expectation of pecuniary benefit from the continuance of the life, nor on behalf of a nephew or an adopted child, as they do not come within the provisions of R.S.M. 1902, c. 31, or any other enabling Act. *Curle* v. *Brandon*, 15 M.R. 122.

3. Ice and snow on sidewalk.

The plaintiff's claim was for damages for an injury sustained by falling upon an icy slope which had formed on a sidewalk in the City of Winnipeg adjacent to a public well supplied with a pump which was daily used by a large number of people. The well was one of about sixty provided by the corporation and maintained at its expense, and a number of men were employed by the corporation whose duty was to visit the wells from time to time during the winter and remove or reduce the mounds of ice on the sidewalks and around the pumps caused by the freezing of the water that dripped from them or was spilled from pails while being carried away. One of these employees was on the spot on the very day of the accident and did not consider it necessary to do anything for the purpose of making the place more safe for foot passengers, and other employees of the City whose duty it was to report unsafe conditions had passed the place on the same day and made no report upon it.

The trial Judge found on the evidence that the ice mounds and slopes on the sidewalk had been caused, not from the water that dripped from the pump or was spilled in filling pails there, but by the spilling of water from the pails while being carried along the sidewalk or in the filling of other vessels, and so were the result of negligence on the part of other persons and not of any faulty construction of the pump or its approaches; and that the place where the accident happened was not shown to have been at the time more unsafe than many other spots on the sidewalks are frequently rendered by local conditions, when freezing and thawing follow each other at short intervals.

Held, (1) That the mere allowance of the formation and continuance of obstructions or dangerous spots in the highways due to accumulations of snow or ice may amount to non-repair for which the corporation would be liable, but in every such case the question to be determined is whether, taking all the circumstances into consideration, it is reasonable to hold that the municipality should have removed the danger.

City of Kingston v. *Drennan*, (1896) 27 S.C.R. 46, followed.

(2) That in the present case it would not be reasonable to hold the defendants liable, as there were so many such wells in the City, usually placed at street crossings and in constant use; and to keep the sidewalks near them completely free from ice or roughened by chopping or sprinkling some substance upon them would have been well nigh impossible. *Taylor* v. *City of Winnipeg*, 12 M.R. 479.

4. Liability at common law.

A municipality is not, by the common law, answerable in damages occasioned by defective highways or bridges.

A general statute provided that "all the roads and road allowances within the Province shall be held to be under the jurisdiction of the municipality within the limits of which such roads or road allowances are situated, and such municipality shall be charged with the maintenance of the same, with such assistance as they may receive from time to time from the Government of the Province."

Held, That this statute did not impose upon municipalities any liability for such damages. *Wallis* v. *Municipality of Assiniboia*, 4 M.R. 89.

5. Notice of action — *Negligence* — *Municipal Act, R.S.M.* 1902, *c.* 116, *s.* 667

Under section 722 of The Winnipeg Charter, which is the same in effect as section 667 of The Municipal Act, R.S.M. 1902, c. 116, the corporation will be liable in damages for injury sustained by a person in consequence of a fall caused by stepping on and so breaking down a rotten plank in a sidewalk laid down by the corporation on a public highway, the said sidewalk being very old and decayed underneath, it being shown that the defect, although not apparent, would have been detected if there had been a proper and adequate system of inspection employed.

The notice of the action given by the plaintiff, pursuant to sub-section (*b*) of

the same section, stated that she claimed from the defendants $1,000 damages with respect to the matters therein set out and that she would commence an action in the Court of King's Bench to recover that sum for injuries sustained by her through the omission and default of defendants to keep in repair a public sidewalk on the east side of Main Street between Polson and Bannerman Avenues in said city. The accident happened at a point between Polson Avenue and Atlantic Avenue which is between Polson and Bannerman Avenues. It was given within a month from the date of the injury, but did not state such date or the nature of the injury or how it had occurred, or the place more specifically than as above. The trial judge gave plaintiff a verdict for $3,000 damages.

Held, that the statute, which only requires "notice of any such claim or action," should receive a liberal construction, and requirements, not specifically stated and not necessarily implied, should not be read into it, and that the notice given was sufficient.

Curle v. *Brandon*, (1905) 15 M.R. 122; *Jones* v. *Bird*, (1822) 5 B. & Ald. 837; *Martins* v. *Upcher*, (1842) 3 Q.B. 662, and *Bond* v. *Conmee*, (1899) 16 A.R. 398, followed. *Clarkson* v. *Musgrave*, (1882) 9 Q.B.D. 386, and *St. John* v. *Christie*, (1892) 21 S.C.R. 1, distinguished on the ground of differences in the wording of the respective statutes.

Held, also, that, as plaintiff's injuries had resulted much more seriously after the notice was given than she anticipated, she was not precluded by the terms of the notice from claiming and recovering in the action a larger amount than $1,000. *Iveson* v. *Winnipeg*, 16 M.R. 352.

6. Pitch-holes in winter roads—*Negligence—Objections not raised at trial—Municipal Act, R.S.M., c.* 100, *ss.* 618, 619.

Appeal from the judgment of the County Court of Portage la Prairie against the defendants.

The plaintiff's claim was for damages for injury to a horse caused by non-repair of a highway by reason of the continued existence of a series of deep pitch-holes produced by traffic in the snow-covered surface of a travelled road in the defendant municipality.

There were 10 or 12 of these pitch-holes in almost uninterrupted succession at intervals of only a few feet, varying in depth from 1 to 3½ or 4 feet below the level of the travelled snow road, and the descent into them was very steep.

The evidence also showed that the depth of the snow outside the one beaten trail was so great that it was impossible for a loaded sleigh such as the plaintiff was driving to turn out so as to avoid the pitch-holes, and that the defects in the road had existed for a considerable time and could have been remedied by a small expenditure of money.

Held, BAIN, J., dissenting, that, under section 618 of The Municipal Act, R.S.M., c. 100, the defendants were liable for the damages sustained by the plaintiff.

Caswell v. *St. Mary's Road Co.*, (1869) 28 U.C.R. 247, and *Walker* v. *City of Halifax*, (1883) 16 N.S.R. 371, Cas. Dig. 175, followed.

The liability of the municipality for non-repair being limited by section 619 of the Act to that portion of a road on which work has been performed or public improvements made by the municipality, or which had been in some way assumed by it, objection was taken on the hearing of the appeal that there was no direct evidence that such had been done; but the County Court Judge stated that it was not disputed before him that the municipality was bound to keep the road in repair, and he found that it was a road of very considerable importance leading into the town of Portage la Prairie and at all times much used.

Held, following *Proctor* v. *Parker*, (1899) 12 M.R. 529, that, by not raising the objection at the trial, the defence had waived strict proof of the circumstances rendering the municipality liable to keep the road in repair. *Kennedy* v. *Portage la Prairie*, 12 M.R. 634.

7. Work done on part of road distant from place where accident occurs—*Evidence of notice to the municipality of non-repair.*

1. If work is performed on a public road by a municipality to facilitate travel between points on both sides of the place where the work is done, so as to provide a completed road between such points for the use of the public, the municipality is liable, under section 667 of The Municipal Act, R.S.M. 1902, c. 116, in case an accident happens by reason of non-repair of the road at any place between those points, although no work has been done at or near that particular place.

2. When an obstruction in the shape of a barbed wire fence has been allowed to

remain across part of a highway for more than three months at that season of the year during which road repairs would naturally be made, notice of its existence should be imputed to the municipality notwithstanding the absence of direct evidence of notice. *Couch* v. *Municipality of Louise*, 16 M.R. 656.

V. Sale of Roads and Streets.

1. By-law to sell road allowance—*Statutory notices—Quashing by-law.*

A rural municipality passed a by-law closing up an original road allowance and selling it to M. who owned the land adjoining on one side. W. owned and resided upon the land adjoining on the other side. There was another road by which W. had access to his land, but it was not so convenient, as it required him to travel a much greater distance in going to and returning from the market town, and other lands which he owned. Compensation to W. was not provided for in the by-law, nor did the municipality provide any other convenient road or access to W's land. The public notices that were posted up pursuant to section 435 of The Municipal Act were notices of an intention to close up the road allowance, but said nothing about selling it. Upon an application to quash the by-law,

Held, 1. That under section 440 of of The Municipal Act it is only when a person would be, by the closing of the road, excluded from all ingress or egress to or from his land that he can demand some other convenient road or way of access. If there is an existing road which would have satisfied the requirements of the law, if provided for the use of such owner in lieu of the highway closed, then the case is not within the section. It may not be so convenient, and, if so, then it is a case for compensation.

2. That it is not a condition precedent to the passing of the by-law that compensation should be given, or provided for in the by-law.

3. That the objection that no notice was given, pursuant to section 435 of The Municipal Act, of an intention to pass a by-law for selling this road allowance was fatal, and the applicant, by attending at the meeting of the council at which the by-law was passed, and objecting, was not estopped from taking exception to the want of notice.

4. That, considering the extensive powers possessed by municipal councils, and the danger there is of these being used unwisely, if not to serve the interests of private individuals, they should be held to a strict compliance with the statutory requirements when proceeding to exercse these powers. *White* v. *Rural Municipality of Louise*. 7 M.R. 231.

2. By-law to close street and sell land—*Street shown on registered plan but not taken over or improved by municipality—By-law passed for improper object—Approval of Lieutenant Governor in Council—Effect of promulgation—Municipal Act, R.S.M.* 1902, *c.* 116, *ss.* 425, 426, 667, 693 (*d*) and 694 (*c*).

1. When the owner of land has registered a plan of sub-division of it into lots and showing a street and has sold lots lying alongside and facing on the street, he is bound by the plan and cannot, without the consent of the purchasers, close up the street and retake the land composing it, and what he could not do himself the council of the municipality has no right to do for him by passing a by-law effecting that result.

2. When it clearly appears that a by-law of a municipal council has been passed for an improper purpose, it should be quashed as being an abuse of the powers conferred on the council by the Municipal Act. *Re Morton and Township of St. Thomas*, (1881) 6 A.R. at p. 325, followed.

3. Under section 667 and sub-section (*d*) of section 693 of the Municipal Act, R.S.M. 1902, c. 116, the power of a council to sell roads stopped up by them is restricted to original road allowances and to public roads which have been duly dedicated as such and over which the council has established its jurisdiction, and is not conferred in the case of a street simply shown on a private plan of subdivision and which the council has not improved or assumed any liability to repair.

4. The approval by the Lieutenant Governor in Council, pursuant to subsection (*c*) of section 694 of the Municipal Act, has not the effect of making valid a by-law which is unauthorized by the Act.

5. The promulgation of a by-law, under the provisions of sections 425 and 426 of the Act, cannot have the effect of validating a by-law which the council has not power to pass. Such promulgation simply cures defects in the substance or form of the by-law and in the steps leading up to the passing of it. *Re Knudsen and Town of St. Boniface*, 15 M.R. 317.

VI. Solicitor, Employment of.

1. Contract with municipality—*No resolution or by-law—Liability of municipality.*

Plaintiff sued a rural municipality for services as a solicitor, but no resolution or by-law of the Council employing him was produced, nor did the Council adopt or derive any benefit from his services.

Held, that he was not entitled to recover. *Curran* v. *Rural Municipality of North Norfolk*, 8 M.R. 256.

2. Retainer of solicitor to bring suit may be made without a by-law—*Motion to dismiss action not authorized by plaintiff—Subsequent ratification when suit commenced without authority—Practice—Municipal Act, R.S.M.* 1902, *c.* 116, *s.* 362.

Under section 362 of the Municipal Act, R.S.M. 1902, c. 116, which provides that "the powers of the Council shall be exercised by by-law when not otherwise authorized or provided for," a by-law is not necessary to authorize the commencement of an action, but a municipal corporation may give such authority by resolution under the corporate seal.

Town of Barrie et al, v. *Weaymouth*, (1892) 15 P.R. 95; *Barrie Public School Board* v. *Town of Barrie*, (1899) 19 P.R. 33, and *Brooks* v. *Torquay*, [1902] 1 K.B. 601, followed.

Where an action has been commenced without authority, a subsequent ratification of the proceedings by a properly executed retainer will be a sufficient answer to an application by the defendant to dismiss the action, subject to the question of costs.

Quære, per Perdue, J., whether a defendant has any *locus standi*, under the present practice, to ask for the dismissal of an action on the sole ground that it has been brought without the authority of the plaintiff. *Town of Emerson and W. W. Unsworth* v. *Wright*, 14 M.R. 636.

VII. Ultra Vires By-laws and Resolutions.

1. Dairy inspection—*Quashing by-law.*

The City of Winnipeg, relying on sections 593 and 607 of the Municipal Act and section 17 of 57 Vic., c. 20, passed a by-law for inspecting and regulating dairies 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 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 and City of Winnipeg*, 11 M.R. 358.

2. Dairy inspection—*Quashing by-law.*

The City of Winnipeg having, in assumed exercise of the powers conferred by the Municipal Act, s. 599, as amended by 57 Vic., c. 20, s. 17, 58 & 59 Vic., c. 32, s. 15, and 59 Vic., 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 *Dillon on Municipal Corporations*, *s.* 91, and *Merritt* v. *Toronto*, 22 A.R. 205, that all such by-laws should be construed strictly, and that any ambiguity or doubt as to the extent of powers conferred on municipalities to make by-laws is to be determined in favor of the general public as against the grantee of the power, especially where such by-law affects 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 the penalties imposed.

(2) 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 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.

(3) 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 arbitrarily to deny a license even when there is a favourable report.

(4) 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 favoritism, and makes the by-law unequal in its provisions.

(5) 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.

(6) It is further 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.

(7) 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 City of Winnipeg*, 11 M.R. 420.

3. Dairy inspection—*Municipal Act, R.S.M.* 1892, *c.* 100, *s.* 593, *and* 60 *Vic., c.* 20, *s.* 14.

After the decision in *Re Taylor and City of Winnipeg*, 11 M.R. 420, the Legislature by 60 Vic., c. 20, s. 14, amended s. 593 of the Municipal Act, R.S.M., c. 100, by giving the municipalities additional powers in connection with the regulation and licensing of milk vendors and inspection of cows and stables, and the Council of the City then passed a new by-law for the same purposes as the former by-law, which had been quashed. Application was then made to quash the new by-law.

The following objections taken to it were not sustained, and it was held that the by-law was not unreasonable or *ultra vires* in respect of any of them:

(1) That, although the Council has power to prevent and regulate the sale of milk in the city, clause 3 assumed to regulate the sale of milk outside of the city limits for use in the city, and to pass regulations which might prevent a citizen from going outside the city and purchasing some milk for his own use.

(2) That the by-law would enable the veterinary surgeon to delay the second inspection of cows found, on a first inspection, to be affected by disease, and thereby to injure the dairymen.

(3) That, by clause 12 of the by-law, the issue of a license in a disputed case is left to the discretion of a committee of the Council who might exercise it in an arbitrary and unfair manner. But

Held, that the Council has no authority to pass a by-law requiring a licensed vendor of milk, when asked by a health officer or veterinary inspector, to state where he obtained the milk he has sold or is about to sell, along with a provision for cancellation of licenses and other penalties for an infraction of the by-law, because the effect would be that, under threat of liability to a penalty for not giving the information, a licensee might be compelled to make a discovery which would subject him to a penalty.

Held, also, that it is *ultra vires* of the Council to pass a by-law requiring a vendor of milk to permit a sample or samples to be taken for examination without compensation under penalties in case of refusal. *Re Taylor and City of Winnipeg*, 12 M.R. 18.

4. Delegation of powers—*Evidence—Directory or imperative requirements of statutes.*

The City of Winnipeg having, under the Shops Regulation Act, R.S.M., c. 140, s. 3, as amended by 57 Vict., c. 42, s. 2, passed a by-law requiring boot and shoe shops to close at 7 p.m., except on Saturdays and on the day before any civic holiday * * * * and during the days on which the exhibition of the Winnipeg Industrial Exhibition Association is being held, the applicant was convicted of a breach thereof by a magistrate, when he applied for a *certiorari* to remove the conviction in order to get it quashed.

Held, that the by-law was bad for uncertainty and also *ultra vires* because the council delegated the power of fixing cer-

tain of the days when the shops might remain open to the Exhibition Association.

Held, also, that, although it was too late to move to quash the by-law, a conviction under it might be quashed, since the invalidity was apparent on the face of it.

Per TAYLOR, C. J., When an objection is taken before a magistrate that a by-law under which he is asked to convict is illegal, the illegality must appear on the face of the by-law, and no evidence should be received to show how it came to be passed, or that there were irregularities or failures to comply with statutes in and about the introduction and passing of the by-law. The provisions of the Act requiring a petition signed by three fourths of the occupiers of shops of the same kind prior to the passing of the by-law, that the by-law should be passed within one month from the receipt of the petition, and that the by-law should be published before the date on which it was to take effect, are directory and not imperative. *Re Cloutier*, 11 M.R. 22 5.

5. By-law as to traffic on highways.

The Legislature of Manitoba having enacted, by section 593 of the Municipal Act as amended by 58 Vic., c. 32, s. 14, that Rural Municipalities might pass by-laws "for regulating or prohibiting the passage of traction engines, threshing machines, or other heavy vehicles over highways or bridges upon highways, and for providing the penalty in case of the violation of the provisions of such by-law," the defendants passed a by-law providing that no traction engine, steam engine, threshing machine, or water tank should pass, or be transported, over any of the highways within the defendant's municipality, except at the sole risk of the owner of such engine, machine, etc.

Held, that this was not a *bona fide* exercise of the power conferred by the Act, as it neither regulated nor prohibited the passage of the engines, etc., and that the by-law was *ultra vires* of the Council. *McMillan* v. *Portage la Prairie*, 11 M.R. 216.

6. Requiring pool rooms to be closed on Sunday—*Powers of Provincial Legislatures—Objection to by-law as being unreasonable, oppressive or discriminating between different classes.*

A municipal by-law, passed under the powers conferred by sub-section (*a*) of section 640 of The Municipal Act, R.S.M. 1902, c. 116, and providing that all licensed pool rooms and billiard rooms shall be closed from 8-30 p.m. of every Saturday until 7 a.m. of the following Monday, and from 10 p.m. of every other day until 6 a.m. of the next day, is not *ultra vires* of the municipal council on the ground that it may have been intended as a means of enforcing Sabbath observance to that extent. Such provision is within the power of regulating and governing pool rooms and billiard rooms conferred along with the licensing power.

A provision in such a by-law requiring the screens or other devices for obscuring the view from the outside into the pool rooms to be removed during the prohibited hours is not unreasonable or oppressive, and should not be held invalid as discriminating between one class of the people and other classes. *Re Fisher and Village of Carman*, 16 M.R. 560.

7. Resolutions of council passed at special meeting—*By-law or resolution.*

It is not within the powers of the council of a municipality to provide for payment of the expenses of counsel and witnesses in attending upon a Royal Commission appointed, under section 431 of The Municipal Act, to inquire into the financial affairs of the corporation, but the council might properly authorize the employment of counsel and payment of other expenses in opposing a Bill introduced into the Legislature to abolish the municipality and apportion its territory among the adjoining municipalities.

Resolutions of the council making such provisions had been passed at special meetings, but the notices calling the meetings did not in any way specify the business to be taken up, as required by sections 284 and 288 of the Act.

Held, that the resolutions must be quashed on that ground.

Semble, that, if the council had power to apply the funds of the municipality for any of the purposes dealt with in the resolutions, it should have proceeded by by-law. *Re Rural Municipality of Macdonald*, 10 M.R. 294.

8. Resolutions of Council passed at special meetings.

The Council of a Municipality at the close of the first meeting of the year and of each meeting afterwards adjourned to meet again at the call of the Reeve. Subsequent meetings were held through-

out the year upon notices issued by direction of the Reeve whenever it was necessary to call a meeting. These notices did not contain any mention of the subjects or matters that were to be taken into consideration at the meetings.

On the application of a ratepayer to quash a by-law and two resolutions of the Council passed at meetings called in that way,

Held,—(DUBUC, J., dissenting) that the meetings in question were not regular but special meetings within the meaning of sections 284 and 288 of The Municipal Act, and that under the latter section the applicant was entitled to succeed.

Re Macdonald, 10 M.R. 294 followed. *Re Rural Municipality of Macdonald*, 10 M.R. 382.

9. Wages of workmen employed on work for corporations, minimum rate of.

It is not *ultra vires* or in itself unreasonable for the Council of a municipal corporation to provide by resolution that contractors on corporation works should agree to pay their laborers or other workmen not less than a stated minimum rate of wages, and that such minimum rate should be paid to all laboring men to be employed on any contracts for corporation work, or on any new construction work undertaken by the corporation, although competent workmen might be hired at a lower rate of wages.

In this case it was shown that the defendants' Council had acted on such a resolution for three years, and evidence was given to show that the rate provided was not more than a fair living rate of wages in the City, and that the Council was actuated by the belief that it was not in the interest of the City to have a number of its citizens employed at less than a fair living wage.

No evidence was given to show that defendants' Council had so acted through any fraudulent or improper motive.

Held, that the matter in dispute appeared to be a question of policy in the government of the City as to the expediency of which the ratepayers and not the Court should pronounce, and that the plaintiff's motion for an injunction to restrain the defendants from continuing to act on the resolution complained of should be dismissed. *Kelly* v. *City of Winnipeg*, 12 M.R. 87.

VIII. MISCELLANEOUS CASES.

1. Alteration of boundaries of a municipality—*46 & 47 Vic., c. 66, Man.—Debentures—Coupon for less than* $100.

After the issue of the debenture sued on in this action, the boundaries of the defendant municipality were changed by the Legislature adding some new townships and detaching the town of Gladstone.

Held, that the effect of the statutes 44 Vic., c. 7, s. 4, and 46 & 47 Vic., c. 66, ss. 1 & 4, was such that the defendant municipality was liable for the debenture in question, notwithstanding the altered boundaries.

Held, also, that plaintiff could recover on a coupon for $30.00 interest on the debenture, notwithstanding the provision in the statute, 1881, c. 3, s. 81, against the issuing of any bond, bill, note, debenture, or other undertaking of a municipality for less than $100. *Gillespie* v. *Municipality of Westbourne*, 10 M.R. 656.

2. Compensation for injury to land caused by exercise of municipal powers when no part of the land actually taken—*Winnipeg Charter, 1 & 2 Edw. VII, c. 77, ss. 708 (c), 774, 775—Date from which time allowed for making claim is to be computed.*

Section 775 of the Winnipeg Charter, 1 & 2 Edw. VII, c. 77, provides that every claim for compensation for any damage necessarily resulting to an owner of land entered upon or used by the City in the exercise of any of its powers, or injuriously affected thereby (the right to which is given by the preceding section), shall be made within one year from the date when the real property was so entered upon, taken or used, or when the alleged damages were sustained or became known to the claimant.

The defendants' claim, however, was for compensation for their land injuriously affected by the exercise of the powers of the City under sub-section(c) of section 708 of the Charter, as re-enacted by s. 15 of c. 64 of 3 & 4 Edward VII, and had been expressly recognized by a by-law of the council passed under that sub-section, which by-law was expressly validated and confirmed by section 23 of the last mentioned Act.

Held, that section 775 of the Charter had, under the circumstances, no application to the claim of the defendants, and that they had all the time allowed them by

the general law applicable to the case for making their claims.

Held, also, by MACDONALD, J., in the Court below, that, in the case of real property not entered upon, taken or used by the City but only injuriously affected by the exercise of its powers, the year allowed by section 775 for making the claim for compensation counts only from the date of the completion of the work provided for by the by-law, or from the date when the damages became known to the claimant if that date was later, and not from the date of the commencement of the work, as it would in the case of land entered upon, taken or used. *Winnipeg* v. *Toronto General Trusts Corporation*, 20 M.R. 545.

3. Expropriation—*Prohibition*—*Winnipeg Charter, ss.* 783, 788, 789, 796—*Appointment of arbitrator.*

1. Under section 796 of The Winnipeg Charter, 1 & 2 Edw. VII, c. 77, the appointment by the City of an arbitrator to determine the compensation to be paid for land sought to be expropriated must be signed in the same manner as a by-law, that is, it must be under the corporate seal and signed by the mayor or acting mayor and the clerk or acting clerk, and it is not sufficient that a regularly signed by-law had been passed authorizing the mayor to appoint a named person as arbitrator, and that the appointment had been signed by the mayor alone under the corporate seal.

2. The City Charter contains no provision enabling the City to carry on arbitration proceedings to enforce the expropriation of land,unless the amount claimed by the landowner does not exceed one thousand dollars, and then only in the manner pointed out by section 789.

Order made to prohibit the City and an arbitrator appointed by it from proceeding in the matter of a proposed arbitration to determine the compensation for certain lots sought to be expropriated for a market site. *Devitt* v. *City of Winnipeg*, 16 M.R. 398.

4. Illegality—*Injunction against carrying out illegal contract—Ultra vires—Costs—Municipal Act, R.S.M., c.* 100, *s.* 396.

The City of Winnipeg having by resolution of its council proposed to enter into a contract of purchase of certain land to be paid for in five yearly instalments, notwithstanding the provisions of section 396 of The Municipal Act, R.S.M., c. 100, this action was brought by a ratepayer and a motion made for an injunction to prevent the proposed purchase.

After several adjournments of the motion, and before it finally came on for hearing, a new arrangement was entered into so far varying the original proposition that the injunction was not pressed for on the argument, and the only question for decision was as to the disposition of the costs.

Held, following *Hoole* v. *The Great Western Railway Co.*, (1867) L.R. 3 Ch. 262, that a suit for an injunction was proper in such a case and that the defendants should pay the costs. It is not necessary that such a suit should be brought in the name of the Attorney-General.

Smith v. *Raleigh*, (1882) 3 O.R. 405, and *Wallace* v. *Orangeville*, (1884) 5 O.R. 37, followed. *Shrimpton* v. *City of Winnipeg*, 13 M.R. 211.

5. Quashing by-law—"*Judge*," *persona designata*—*R.S.M.*1892, *c.* 100, *s.* 385.

Section 258 of The Municipal Act, 1890, (R.S.M., c. 100, s. 385), provides that: "In case a resident of a municipality, or any other person interested in a by-law, order or resolution of the council thereof, applies to a Judge of the Court of Queen's Bench sitting in Chambers, * * * * * the Judge, after at least ten days' service on the corporation of a summons, or rule to show cause in this behalf, may quash the by-law," &c.

Held, that the term "Judge" in the statute is *persona designata*, and only the Judge who issued the rule or summons can hear the application on its return. *Doyle* v. *Dufferin*, 8 M.R. 294.

6. "Municipal" taxes, whether include school taxes—*Tax exemption by-law—Assessment Act, R.S.M.* 1892, *c.* 101, *s.* 135—57 *Vic.* (*M*), *c.* 21, *s.* 3.

The City of Winnipeg having levied school taxes upon defendants' property for the years 1890-1894, the defendants resisted an action at law for the amount relying on the terms of a by-law of the City passed in 1881, by which it was enacted that all property of the defendants then or thereafter to be owned by them for railway purposes within the City should be exempt forever from all municipal taxes, rates, levies and assessments of every nature and kind.

Held, that school taxes are not included in the term "municipal taxes," and that under section 135 of The Assessment Act,

R.S.M., c. 101, as amended by 57 Vic., c. 21, s. 3, the plaintiffs had a right to sue for them, being merely constituted by the Legislature as the agents through whom the school corporation levies the amounts they require for education purposes. *Winnipeg* v. *C.P.R.*, 12 M.R. 581.

Reversed, 30 S.C.R. 558, where it was

Held, that the exemption included school taxes.

The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 & 47 Vic., c. 64, s. 6, it was provided that "by-law 148 to authorize the issue of debentures granting by way of bonus to the C.P.R. Co. the sum of $200,000 in consideration of certain undertakings on the part of the said company, and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertakings" * * * "be and the same are hereby declared legal and binding and valid. * * *"

Held, also, that, notwithstanding the description of the by-law in the Act was confined to the portion relating to the issue of debentures, the whole by-law, including the exemption from taxation, was validated.

C.P.R. v. *City of Winnipeg*, 30 S.C.R. 558.

7. Use of streets by electric light company after expiration of time limited —*Injunction—Order to remove poles and wires—Estoppel.*

The defendant Company had acquired the rights and business of a company which had in 1891 secured the right to erect poles and wires in the streets of the Town of Selkirk and to carry on the business of supplying electric light and power in the Town for a period of ten years.

After the expiration of that period and until the year 1909, the defendant Company and its predecessors in title continued the business and erected from time to time new poles and wires in the streets without procuring any extension of the franchise, but also without any action being taken by the Town to prevent the carrying on of the business.

Held, that the Town was not estopped from passing a by-law in 1909 revoking and terminating the rights and privileges previously granted and then exercised by the defendant Company and requiring the immediate removal of all their poles and wires from the streets, and was entitled to a declaration that the defendant Company had no right any longer to maintain its system, an injunction to restrain it from maintaining the same or erecting poles or wires or transmitting electricity within the Town, and an order requiring the Company to remove their poles and equipment from the streets of the Town.

Held, also, that the Attorney General was not a necessary party to the action.

Saugeen v. *Church Society*, (1858) 6 Gr. 538, and *Fenelon* v. *Victoria Ry. Co.*, (1881) 29 Gr. 4, followed. *Town of Selkirk* v. *Selkirk Electric Light Co.*, 20 M.R. 461.

See APPEAL FROM COUNTY COURT, V, 1.
— COMPANY, IV, 14.
— CONSTITUTIONAL LAW, 16.
— CORPORATION, 2, 3.
— EVIDENCE, 3.
— EXPROPRIATION OF LAND, 1.
— GARNISHMENT, V, 6.
— HIGHWAY, 1.
— LOCAL OPTION BY-LAW, I, 1.
— MANDAMUS, 3, 4.
— MECHANIC'S LIEN, VII, 1.
— NEGLIGENCE, IV.
— NUISANCE, I, 3.
— PUBLIC HEALTH ACT.
— PUBLIC PARKS ACT.
— RAILWAYS, XI, 1.
— REAL PROPERTY LIMITATION ACT, 8.
— RECEIVER.
— SALE OF LAND FOR TAXES, III, 3; VI, 4; VII, 1; VIII, 1, 2; X, 1, 5, 8.
— STREET RAILWAY.
— SUMMARY JUDGMENT, II, 3.
— TAXATION, 3.

MURDER.

See CRIMINAL LAW, XVII, 3.

MUTUAL INSURANCE.

1. Assessment of premium notes—*Discount for prompt payment—Mutual Hail Insurance Act, R.S.M., c. 106, s. 35.*

Action to recover the amount of an assessment on a premium note given by defendant for an insurance against loss by hail.

Section 35 of The Mutual Insurance Act, R.S.M., c. 106, under which the plaintiff company was incorporated, provides that the assessments upon premium notes

or undertakings shall always be in proportion to the amounts of such notes or undertakings.

In making the assessment of five per cent. upon the amount of each policy, the directors added a proviso that all members and policyholders who should pay the full amount of the assessment on or before 1st November, 1899, should be entitled to and should receive a discount of 25 per cent. upon the amount of such assessment.

Held, that the company had no power to allow a discount for, or to impose penalties for default in, prompt payment, and, being a mutual company, the directors must strictly observe the requirements of the Act and preserve equality amongst the members in assessing them; and that the effect of the resolution was really to assess 75 per cent. of five per cent. upon those who should pay before a certain date and the full five per cent. upon all others, and that the assessment was therefore void under section 35 of the Act. *Manitoba Farmers' Mutual Hail Ins. Co.* v. *Lindsay*, 13 M.R. 352.

2. Assessment of premium notes—*Mutual Hail Insurance Act, R.S.M., c. 106, s. 27—Withdrawal from membership—Presumption of continuance of policy after first year—Impossibility of performance of condition—Evidence.*

In an action by a company incorporated under The Mutual Hail Insurance Act R.S.M., c. 106, to recover the amount of an assessment imposed by resolution of the directors upon one of its members for the second crop season after the issue of the policy, it is incumbent on the company to show that by the terms of the policy the person called on to pay the assessment is still a member of the company; and, if no evidence is given to show what the terms of the policy were in regard to the period covered by it, the action should be dismissed.

If a member of such company is entitled to withdraw from membership upon certain conditions, including the surrender of the policy issued to him, he cannot exercise such right without surrendering the policy, although the loss of it has rendered it impossible for him to perform that condition.

Croockewitt v. *Fletcher*, 1 H. & N. 893, and *Cutter* v. *Powell*, 6 T.R. 320, followed. *Manitoba Farmer's Mutual Hail Ins. Co* v. *Fisher*, 14 M.R. 157.

NAVIGABLE RIVERS.

1. Obstruction to navigation—*Liability of Bridge Company.*

The defendants by their charter wer empowered to erect a toll-bridge over the Red River and it required that the bridge should be provided with a draw or swing so constructed as to allow sufficient space, not less than 80 feet, for the passage of boats, rafts, etc. After the bridge had been constructed the two ends were carried away, leaving the swing portion however uninjured. For the purpose of a temporary bridge pending repairs, piles were driven in the bed of the river, but no obstruction was placed under the swing. The plaintiff's raft in descending the river was driven by the current against the piles, broken and lost.

Held, That the public had no right to use any other space than that provided for by the charter.

2. That the Bridge Company were entitled to erect a temporary bridge and for that purpose to drive piles.

3. Where both parties have equal rights in a navigable river, it must be shown, in order to maintain an action, that the defendant has exercised his rights in such a manner as to unreasonably impede or delay the plaintiff. *Rolston* v. *Red River Bridge Co.*, 1 M. R. 235.

2. Obstructions—*Reasonable use.*

A declaration alleged that the plaintiffs were owners of steamboats accustomed to navigate the Red River; that the Red River was a navigable river; that there was no other route for the plaintiffs' boats; that defendants, whilst the plaintiffs were so navigating, "unlawfully, wrongfully and injuriously blocked up and obstructed the said river with logs and timber and thereby obstructed, impeded, hindered and prevented the plaintiffs from navigating the said river with their said boats, and continued the said obstruction for a long space of time, whereby during all that time the plaintiffs were hindered and obstructed from navigating the said river;" and alleged special damage.

Held, bad upon demurrer.

North West Navigation Co. v. *Walker*, 3 M. R. 25.

See 4 M.R. 406 and 5 M.R. 37.

3. Obstructions — *Reasonable use — Negligence.*

After the judgment upon the demurrer as reported, 3 M.R. 25 *supra*, the plain-

tiffs amended their declaration, alleging, in addition, in effect, that the defendant, using the river for the purpose of floating a large quantity of logs down it, so negligently and improperly floated the logs as to cause injury to the plaintiffs, owners of steamboats and barges, who were also at the time lawfully using the river for the purpose of navigating their steamboats and barges.

The defendants again demurred.

Held, declaration as amended good.

North West Navigation Co. v. *Walker*, 4 M. R. 406.

Affirmed, 5 M.R. 37.

See CONSTITUTIONAL LAW, 1.
— INJUNCTION, I, 4, 5.

NEGATION OF STATUTORY EXCEPTIONS.

See CRIMINAL LAW, XVII, 13.

NEGLIGENCE.

I. CONTRIBUTORY NEGLIGENCE.

1. Evidence.

The plaintiff, a contractor for constructing and repairing roofs, came to the defendants' premises on their invitation to examine the roof and give an estimate of the cost of certain repairs to it.

There was a cupola on the roof from which it could be examined. This cupola was reached by a ladder going up through a hole in the roof. It had two windows and was well lighted. There was also another hole in the floor of the cupola which was there for the purpose of furnishing light to the floor below and was unguarded. The plaintiff in broad daylight ascended to the cupola, accompanied by defendants' foreman, for the purpose of examining the roof and, after looking through one of the windows, he stepped backwards and fell through the last mentioned hole to the floor below and was injured.

Held, that there was no evidence of negligence on defendants' part to go to the jury, and that plaintiff was properly non-suited.

Johnson v. *Ramberg*, (1892) 51 N.W. Rep. 1043, followed.

Indermaur v. *Davies*, (1865) L.R. 1 C.P. 274, distinguished.

Held, also, that, as the danger was obvious, there was no duty on the part of defendants' foreman, although he was present, to warn plaintiff of it. *Fonseca* v. *Lake of the Woods Milling Co.*, 15 M.R. 413.

2. Findings of jury—*Damages for personal injury—Questions to be submitted to jury—New trial.*

In an action for damages for personal injury caused by a car of the defendants, the jury found that defendants' negligence was the cause of the accident, but also that the plaintiff might, by the exercise of reasonable care, have avoided the accident. There was evidence sufficient to justify both these findings.

The trial Judge dismissed the action, following *London Street Railway Co.* v. *Brown*, (1901) 31 S.C.R. 642.

On appeal, the Court ordered a new trial on the ground that the jury's finding that the plaintiff might have avoided the accident by the exercise of reasonable care was not sufficient without their saying in what respect he failed to exercise reasonable care, as the Court was unable to determine from the jury's findings whether the plaintiff was in law guilty of contributory negligence or not.

The Court suggested that the proper course for the trial Judge to take in such a case would be to submit to the jury two questions such as, 1. Was the plaintiff guilty of negligence? 2. If yes, what was this act of negligence? and that it would probably be well to add a third question: Whose negligence really caused the accident? *Shrondra* v. *Winnipeg Elec. Ry. Co.*, 21 M.R. 622.

3. New trial for misdirection to jury—*Railway Act, R.S.C.* 1906, *c.* 37, *s.* 288—*Duty of company to pack frogs.*

Contributory negligence may be a defence to an action for damages suffered in consequence of a breach of a statutory duty.

Groves v. *Wimbourne*, [1898] 2 Q.B. 419, and *Beven on Negligence*, pp. 633, 634, 643, and the cases there cited, followed.

In an action for damages for injuries suffered by the plaintiff in consequence of putting his foot in a frog which it was alleged had not been properly packed as required by section 288 of the Railway Act, R.S.C. 1906, c. 37, the trial Judge charged the jury that, if the frog was unpacked, the Company would be liable, whether the plaintiff was guilty of contributory negligence or not.

Held, that this was a misdirection, and that, notwithstanding the question of contributory negligence was submitted to the jury and answered in plaintiff's favor, there should be a new trial.

Bray v. *Ford*, [1896] A.C. at p. 49, and *Lucas* v. *Moore*, (1878) 3 A.R. at p. 614, followed. *Street* v. *C.P.R.*, 18 M.R. 334.

4. Volenti non fit injuria.

The deceased and a number of other purchasers of sand and gravel from a pit owned and operated by the defendants were loading sand in an excavation underneath the frozen crust two feet thick. Ten or fifteen minutes before the accident a man employed by the defendants for that purpose warned all those working in the pit that the crust was cracking. The others withdrew in time, but the deceased thought he could complete his loading before the crust caved in, took the risk and was killed in consequence of the crust falling upon him.

Held, that, although it was the defendants' duty to break down the crust as soon as it became dangerous to their customers, yet the maxim "*volenti non fit injuria*" applied in this case, and the defendants were not liable in damages for the death of the deceased. *Roy* v. *Henderson*, 18 M.R. 234.

5. Voluntarily incurring risk—*Remoteness of damages.*

Defendant was the owner of a threshing machine and a portable steam engine and hired from the plaintiff a team of horses with a driver for use in moving the engine about and in drawing straw and grain during the work of threshing. While threshing for a certain farmer, sparks from the engine set fire to a stack of grain and, the separator being thereby placed in danger, the plaintiff's driver attached his horses to it for the purpose of hauling it into a place of safety; but the fire spread so rapidly and unexpectedly before the separator could be moved or the horses detached that they were severely burned and had to be killed.

The County Court Judge, who tried the case without a jury, found that the fire had been caused by negligence on the part of the defendant's servants, also that the horses had been attached to the separator either in obedience to a call from the defendant's foreman or under his personal supervision, and that there was no negligence on the part of the plaintiff's driver.

Held, on appeal,

1. That the evidence fully warranted the finding of negligence and, unless the plaintiff's driver was guilty of contributory negligence, the defendant was responsible for the loss of the horses.

2. That the driver was not guilty of contributory negligence in exposing the horses to danger, as it was not obvious and he had acted either on the orders of the defendant's foreman or in obedience to a natural impulse to try to save the defendant's property.

Connell v. *Prescott*, (1892) 20 A.R. 49, 22 S.C.R. 147, followed.

Thorn v. *James*, 14 M.R. 373.

II. Fellow Servants' Negligence.

1. Master and servant—*Defect in system—Accident to workman.*

The plaintiff, a structural iron worker in the employ of the defendants, while working under the direction of an experienced foreman believed by the defendants to be a competent man, was severely injured by the falling of a steel column set vertically upon a cement pier to which it was fastened by split anchor bolts through the flanges and holes drilled in the pier. Plaintiff had been sent to the top of the column to assist in connecting it with a horizontal steel beam at a height of about 25 feet. The case was tried without a jury by a judge who was unable to find whether the falling of the column had been caused by the faulty construction of the pier or by defective filling in of the holes with cement after the bolts had been driven in or by the dropping out of the wedges in the lower ends of the bolts, so that the bolts did not spread out at the bottom, or by sending the plaintiff to the top of the column before the cement had sufficient time to harden properly.

It was only as to the last of these suggested causes that there was any evidence to show knowledge on the part of the defendants that the work was being done improperly and, if the fall of the column was from any of the other causes, the negligence was that of the foreman only.

Held, that, as the plaintiff's claim was based wholly upon a common law right of action, the rule of common employment applied, and he was bound to show that the injury had resulted from some negligent practice on the part of the foreman of which the defendants were aware and that, as he had failed to show this, he could not recover.

Bartonshill Coal Co. v. *Reid*, (1858) 3 Macq. 290, followed.

Smith v. *Baker*, [1891] A.C. 325, *Sword* v. *Cameron*, 1 Sc. Sess. Cas. 2nd Ser. 493, and *Patersons* v. *Wallace*, [1854] 1 Macq. 748, distinguished. *Lawrence* v. *Kelly*, 19 M.R. 359.

2. Common employment—*Liability of employer for injury to workman caused by negligence of foreman—Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, s. 3 (b)—Duty of persons who cause others to handle specially dangerous things.*

The death of the deceased was caused by carelessness and ignorance in the handling of dynamite by the deceased and a fellow workman named Anderson employed by the roadmaster of the defendants to look after the work. Anderson and White were not competent persons to be so employed, and the roadmaster was aware that they were not.

Held, 1. The plaintiffs could not recover under Lord Campbell's Act, because the roadmaster was a fellow workman with the deceased.

2. The plaintiffs were entitled to recover damages under the Workmen's Compensation for Injuries Act—R.S.M. 1902, c. 178—because, by the jury's findings, the death was caused by reason of the negligence of a person in the service of the employer who had superintendence entrusted to him, whilst in the exercise of such superintendence: paragraph (*b*) of section 3.

Dominion Natural Gas Co. v. *Collins*, [1909] A.C. 440, 79 L.J.P.C. 16, followed as to the duty of those who cause others to handle specially dangerous things. *White* v. *C.N.R.*, 20 M.R. 57.

3. Master and servant—*Injury to employee caused by negligence of fellow employee intrusted with superintendence—Liability of employer at common law—Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, s. 3.—Railway Act, R.S.C. 1906, c. 37, s. 306—Limitation of time for action.*

The plaintiff's claim was for injuries sustained by the explosion of some dynamite while he was thawing it for use in blasting out hard pan in a gravel pit under the superintendence of one Campbell, a roadmaster in defendant's employ. In answer to questions, the jury at the trial found that the plaintiff was ignorant of the material he was using, that Campbell had not given him proper instructions, that the injury had been caused by the negligence of the defendant company, that such negligence consisted in not employing a competent person to superintend the work and in not furnishing proper appliances and storage for explosives, and that the defendant company had not used reasonable and proper care and caution in the selection of the person to superintend the work.

Held, HOWELL, C.J.M. dissenting, the evidence at most showed that, on the occasion in question, Campbell might have been negligent in his superintendence of the work, that there was no proof of his incompetency otherwise or that the defendant had been negligent in appointing him, or in furnishing proper appliances, the onus of proving which was on the plaintiff, and, therefore, the plaintiff could not recover at common law, but was entitled, under The Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, s. 3, to the amount alternatively fixed by the jury under section 6 of that Act.

Smith v. *Howard*, (1870) 22 L.T. 130; *Young* v. *Hoffmann*, [1907] 2 K.B. 650, and *Cribb* v. *Kynoch*, [1907] 2 K.B. 548, followed.

Per HOWELL, C.J.M. There was evidence to submit to the jury on all the questions answered by them and the verdict for damages at common law should not be disturbed.

Held, also, by all the Judges, that the damages had not been "sustained by reason of the construction or operation of the railway," and therefore the plaintiff was not barred by section 306 of the Railway Act, R.S.C. 1906, c. 37, from bringing his action after the lapse of

one year. *Anderson* v. *C.N.R.*, 21 M.R. 121.

Appeal of defendants to the Supreme Court of Canada dismissed and cross appeal of plaintiff allowed, the Court holding that the plaintiff could recover at Common Law, because, according to the finding of the jury, which was amply sustained by the evidence, the defendants had been guilty of negligence in not employing a competent person to superintend the work, and in not furnishing proper appliances and storage for explosives. 45 S.C.R. 355.

Appeal of defendants to Privy Council dismissed.

III. Fires.

1. Prairie fire, damages for starting. A person who starts a fire on his own property for purposes of husbandry, although not bound at all hazards to prevent the spread of fire to his neighbor's property, is yet bound to exercise caution and care proportionate to the risk of fire spreading and doing damage; and whatever falls short of taking every precaution that is reasonably possible under the circumstances, to prevent the spread of the fire, will be held to be negligence—for which the person will be made liable in damages. *Furlong* v. *Carroll*, 7 A.R. 145, followed.

A Judge in appeal will seldom reverse the finding of the trial Judge on any question of disputed facts—but he may differ from him in the inference to be drawn from the facts that are really not in dispute, and, thus differing, the appellant is entitled to the benefit of his opinion. *Booth* v. *Moffatt*, 11 M.R. 25.

2. Threshing Operations—*Escape of sparks from engine—Condition of spark arrester—Assumption of risk.*

The defendants brought their threshing machine to the plaintiff's farm to thresh her crop, which was stacked in 18 stacks near her farm buildings. There was a strong wind, but the machine was set going near the stacks, and sparks from the engine set fire to the stacks and consumed them. In an action for negligence, it was contended that the plaintiff had assumed the risk of fire.

Held, that, if the plaintiff assumed any risk, it was no other than that occasioned by the location of the engine, and that all that could be urged against her in this respect was that she could not now be heard to say that the smoke was blowing upon the stacks, or that it was too windy to thresh; and the defendants were not, by reason of the assumption by the plaintiff of any such risk, relieved of their obligation to use such care as was requisite in the circumstances. The circumstances required a high degree of care; and, upon the evidence, due care was not taken in the adjusting of the spark arrester provided with the engine, so that it was of little or no use in preventing the escape of sparks; and this amounted to actionable negligence on the part of the defendants. *Fawcett* v. *Ferguson*, 13 W.L.R., 572.

3. Fire on vessel—*Absence of precautions against fire spreading—Dangerous conditions in furnace room—Failure to warn passengers to escape—Res ipsa loquitur.*

In the absence of direct evidence as to the cause of a fire which destroyed the defendants' steamer while lying at her dock, and in consequence of which the plaintiff suffered severe personal injury and loss, proof of the existence of dangerous conditions in the furnace room, where it was probable the fire had started, of the absence of means to put out an incipient fire, that when the fire was first noticed it had gained such headway that the plaintiff could only escape by jumping into the lake, and that there was either no watchman on duty or, if on duty, he neglected to give any warning to the passengers to escape, so that some of them were burned to death in their rooms, is sufficient to warrant a finding of negligence on the part of the defendants and a verdict for the plaintiff for substantial damages.

The doctrine of *res ipsa loquitur* is applicable in this case, following *Smith* v. *Baker*, [1891] A.C. 335, and *Quebec, &c., Ry. Co.* v. *Julien*, (1906) 37 S.C.R. 632.

Isbister v. *Dominion Fish Co.*, 19 M.R. 430.

Affirmed, 43 S.C.R. 637.

IV. Liability of Municipalities.

1. For unsafe condition of polling booth—*Agency of corporation officer.*

In submitting money by-laws to a vote of the electors under section 486 of the Winnipeg Charter, 1 & 2 Edw. VII, c. 77, the City Clerk, acting as returning officer,

should be deemed to have acted as the agent of the City, and an elector who enters the polling booth to vote on the by-laws and there receives injuries caused by defects in the apartment provided for marking ballots, the polling booth having been appointed by the council in the by-laws, is entitled to recover damages from the City for such injuries in an action for negligence, and it makes no difference that the elector is at the same time voting at a municipal election for mayor and aldermen.

Mersey Docks Trustees v. *Gibbs*, (1866) L.R. 1 H.L. at p. 110, and *McSorley* v. *St. John*, (1881) 6 S.C.R. 531, followed.

Per HOWELL, C.J.A. If the plaintiff had been injured simply because of the neglect of some official in preparing booths for the election of mayor and aldermen, the official would have been acting in a public capacity and the law of *respondeat superior* would not apply so as to make the City liable: *Wishart* v. *Brandon*, (1887) 4 M.R. 453; *McCleave* v. *Moncton*, (1902) 32 S.C.R. 106. *Garbutt* v. *City of Winnipeg*, 18 M.R. 345.

2. For negligence of employee of water-works department—*Agency of servant of corporation.*

A municipal corporation authorized by the Legislature to establish and manage a system of water-works, but not bound by law to do so, will, if it does so, be liable for injuries caused by the negligence of the servants employed by it therein while in the performance of their duties.

Hesketh v. *Toronto*, (1898) 25 A.R. 449, and *Garbutt* v. *Winnipeg*, (1909) 18 M.R. 345, followed.

It is actionable negligence if an employee of the waterworks department of a city, having opened the trap door in the floor of a kitchen for the purpose of reading the water meter in the basement, leaves the trap door open on going away, whereby an occupant of the house is injured by falling through the open trap door. *Shaw* v. *City of Winnipeg*, 19 M.R. 234.

3. For non-repair of sidewalk—*Municipal Act, R.S.M.* 1902, *c.* 116, *s.* 667—*Winnipeg Charter, s.* 722.

The plaintiff was injured in consequence of stepping on the end of a loose plank in a comparatively new sidewalk and so being thrown down. There was evidence that the plank had been loose for two or three weeks before the accident, but none to show that any of the City's servants or officials had knowledge of it, and many persons, including an inspector of sidewalks in employ of the City, had walked over it without noticing that there was any defect there.

Held, that the defendants were not liable, as negligence on their part was not proved.

Ireson v. *Winnipeg*, (1906) 16 M.R. 352, distinguished.

Forrest v. *City of Winnipeg*, 18 M.R. 440.

4. For non-repair of sidewalks—*Municipal Act, R.S.M.* 1902, *c.* 116, *s.* 667—*Winnipeg Charter, s.* 722.

Under section 667 of the Municipal Act, R.S.M. 1902, c. 116, or under section 722 of the Winnipeg Charter, 1 & 2 Edw. VII, c. 77, a municipality is not liable for the consequences of an accident caused by the want of repair of a sidewalk unless negligence on its part is shown.

The plaintiff was injured by the tilting up of a loose plank in a sidewalk only ten years old which had been regularly inspected by an officer of the City without the discovery of the defect, and no notice of the defect had been brought home to the City in any way. It appeared that the plank had got loose by the breaking of the nails and not by reason of age or decay of the wood.

Held, that the defendants were not liable.

Davies v. *City of Winnipeg*, 19 M.R. 744.

V. Railway Companies.

1. Burden of proof—*Master and servant—Precautions against accidents—Contributory negligence.*

Deceased was employed by defendants as a switchman in the station yards. In discharging his duties his foot caught in a "frog" and while held fast he was run over and killed. The frog had been "blocked," but the blocking had worn down to some extent.

At the trial of an action by widow and children, the presiding Judge at the close of the plaintiffs' case held that there was no evidence to go to the jury. Plaintiffs' counsel declined to take a non-suit or to permit leave to be reserved to enter a non-suit in Term. The Judge then told the jury to bring in a verdict for defendants, and allowed no addresses by counsel. The jury found a verdict for the plaintiff.

Upon a motion in Term to set aside the verdict,

Held, 1. That neither the trial Judge nor the Court could enter a non-suit against the plaintiffs' desire.

2. That the verdict would not necessarily be set aside, but would not be allowed to stand if the trial Judge was plainly and certainly right in point of law.

3. That, in the absence of evidence that the system of blocking was defective or that the blocking of this particular frog was imperfect, and there being evidence that the Company employed proper and competent workmen to keep the frogs in repair, there was no case for the jury.

4. The onus of proving the incompetency of the workmen was on the plaintiffs.

5. It was for the plaintiffs to prove that the deceased was ignorant of the dangerous character of the frog and that the defendants were aware of it.

Rajotte v. *C.P.R.*, 5 M.R. 365.

2. Contributory negligence—*Volenti non fit injuria—Evidence to go to the jury—Non-suit—New trial—Workmen's Compensation for Injuries Act, R.S.M.* 1902, *c.* 178.

At the trial before a jury of an action by a switchman to recover damages against a railway company for injuries alleged to have been caused to him while engaged in the execution of his duty under the orders of his foreman, through negligence in the operation of a train by other servants of the company and because there was not sufficient room between the different tracks in the railway yard to enable the plaintiff to carry on his work safely, the defences of contributory negligence and *volenti non fit injuria* are properly for the jury and, when there was some evidence that the bell had not been rung or the whistle sounded on the train which struck the plaintiff and to show that the "lay-out" of the yard was defective, a verdict entered for the defendants by direction of the trial Judge should be set aside and a new trial granted.

Toronto Railway Co. v. *King*, (1908) A.C. 260, and *Higley* v. *City of Winnipeg*, (1910) 20 M.R. 22, followed.

Wood v. *C.P.R.*, 20 M.R. 92.

Reversed. Decision of PERDUE, J. A., directing a verdict to be entered for defendants, restored, 47 S.C.R. 403.

Leave to appeal to Privy Council refused, 45 S.C.R. 7.

3. Contributory negligence—*Death of person run over on railway track through negligence of crew of engine—Railway Act*, 1903 (*D*), *s.* 224.

The plaintiff's husband, while in the actual discharge of his duty as section foreman on the defendants' railway examining the track, was struck by a yard engine running backwards. No lookout was on the tail board or rear of the engine and no signal of any kind was given to warn the deceased of the approach of the engine.

Held, that there was ample evidence to support the findings of the jury that the deceased came to his death in consequence of the negligence of the engine crew in neither blowing the whistle, ringing the bell nor keeping a proper lookout, and that the deceased could not, by the exercise of reasonable care under the circumstances, have avoided the accident, and that the appeal from the verdict in favor of the plaintiff should be dismissed.

Although the deceased, if he had looked round, would have seen the approaching engine and stepped out of the way, yet he was engaged at the time in the discharge of a duty of an absorbing character which would naturally take his whole attention and, under the circumstances, a jury might properly infer that there was no absence of reasonable care on the part of the deceased. Moreover, even if the deceased had been guilty of negligence, the defendants would still be liable if the engine crew could, by the exercise of reasonable care, have avoided the accident.

Coyle v. *G. N. Ry.*, (1887) L. R. 20 Ir. 409; *The Bernina*, (1887), 12 P. D. 89; *Kelly* v. *Union Ry. & T. Co.*, (1888) 8 S. W. R. 20; *Canada R. Co.* v. *Jackson*, (1890) 17 S. C. R. 316, and *London &c. Co.* v. *Lake Erie &c. Ry. Co.*, (1906) 7 O. W. R. 571, followed.

The omission of a Common Law duty is actionable negligence equally with the omission of a statutory duty, and the Common Law requires the defendants' servants, when running through the yard, to take the obvious precaution of watching for workmen lawfully on the track and giving them timely warning: *Canada Atlantic Ry. Co.* v. *Henderson*, (1899) 29 S. C. R. 632.

Held, also, that the jury would have been justified if they had drawn inferences unfavorable to the defence

from the fact that neither the engineer nor the fireman who were in charge of the engine was called to give evidence for the defence: *Green* v. *Toronto Ry. Co.*, (1895) 26 O. R. 326.

The accident occured within twenty feet of a public highway crossing, but,

Quære, whether section 224 of the Railway Act, 1903 (D), requiring that the whistle should be sounded when approaching a highway crossing and that the bell should be continuously rung until the highway is crossed, can be invoked on behalf of any persons except those using the highway crossing. *Wallman* v. *C.P.R.*, 16 M.R. 82.

4. Defective apparatus—*Costs—Evidence—Railway Act, R.S.C.* 1906, *c.* 37, *s.* 264 (*c*)—*Brakeman injured whilst going between ends of moving cars to uncouple.*

The plaintiff, a brakeman on duty in the defendant's employ, was injured in an attempt to uncouple a number of cars from an engine, the train being in motion. There was evidence that the lever on the engine tender failed to work properly, that there was no lever on the end of the car next the tender, and that the plaintiff, in order to uncouple, had to reach in between the ends of the cars in an effort to pull out the coupling pin. In so doing he either tripped or was knocked down and had an arm cut off by the wheels of the tender.

Held, that, in view of the requirement of sub-section (*c*) of section 264 of the Railway Act, R.S.C. 1906, c. 37, that all cars should be equipped with apparatus which shall prevent the necessity of brakemen going in between the ends of the cars to uncouple, the plaintiff had made out a *prima facie* case of negligence, and that the non-suit entered at the trial should be set aside, and a new trial granted.

Costs of the former trial and of the appeal to be costs to the plaintiff in any event of the cause.

The trial Judge had made an order that, if a new trial should be granted by the Court of Appeal, then, in the event of either of the plaintiff's witnesses being out of the country, he should have the right to read the evidence such witness had given at the trial on the case coming up for trial again, and the Court ordered this provision to be embodied in the judgment. *Scott* v. *C.P.R.*, 19 M.R. 29.

5. Defective apparatus—*Railway Act, R.S.C.* 1906, *c.* 37, *s.* 264—*Brakeman injured whilst going between ends of moving cars to uncouple.*

The plaintiff, a brakeman on duty in the defendants' employ, was injured in an attempt to uncouple a number of cars from an engine, the train moving slowly backward. There was evidence that the lever on the engine tender failed to lift the pin; that there was no lever on the end of the car next the tender, and that the plaintiff, in order to uncouple, had to reach in between the ends of the cars in an effort to pull out the coupling pin. In so doing he either tripped or was knocked down and had an arm cut off by the wheels of the tender.

Held, that, in view of the requirement in sub-sec. (*c.*) of s. 264 of the Railway Act, R.S.C. 1906, c. 37, that all cars should be equipped with apparatus which should prevent the necessity of brakemen going in between the ends of the cars to uncouple, the plaintiff had made out a *prima facie* case of negligence and the verdict of the jury in his favor should not be interfered with. *Scott* v. *C.P.R.*, 19 M.R. 165.

VI. Street Railway Cases.

1. Accident resulting from contact of electric wires.

Per Dubuc, C. J. A street railway company is not guilty of negligence in failing to take steps to prevent telephone wires crossing above its trolley wire from coming in contact, if broken, with the trolley wire, unless it be at some place known to be specially dangerous: *Albany* v. *Watervliet & Co.* (1874) 76 Hun. 136.

Per Mathers, J. Such failure by a street railway company is evidence of negligence to go to the jury. The escape of electricity from wires suspended over streets through any other wires that may come in contact with them must be prevented so far as it can be done by the exercise of reasonable care and diligence, and the defendants should have put up guards such as were shown to be in use very generally in the United States and England to prevent such accidents.

Royal Electric Co. v. *Here*, (1902) 32 S.C.R. 462; *McKay* v. *Southern Bell Telephone Co.*, (1896) 19 Sou. R. 695, and *Block* v. *Milwaukee*, (1895) 61 N.W.R. 1101, followed.

The Court being equally divided, the appeal from the County Court jury's verdict in favour of the plaintiff was dismissed. *Hinman* v. *Winnipeg Elec. St. Ry. Co.*, 16 M.R. 16.

2. Frightening horses.

The plaintiff's claim was for damages for an injury to herself arising from the alleged negligence of the defendants. She was sitting in a sleigh with a team of horses attached standing at the side of the road, when another team of horses with their driver and a wagon were coming off a bridge near by just as a car of the defendants was approaching in an opposite direction, and at a high rate of speed as was alleged. This latter team showed signs of terror, but the motorman driving the car did not slacken speed, and the frightened team, as soon as it got clear of the bridge and past the car, got beyond the control of the driver and ran into the plaintiff's team, with the result that she was thrown out and injured. The jury rendered a verdict for the plaintiff.

Held, that there was sufficient evidence, if the jury believed it, to warrant their verdict, and if their verdict was right on the evidence the negligence of the motor-man in not slackening speed or stopping when he saw, or should have seen, the frightened team was the direct cause of the injury to the plaintiff; and that the verdict should not be disturbed.

Although a street railway company may be permitted by its charter to run its cars on the public streets at high rates of speed, it is not, therefore, relieved from the duty of exercising proper care to prevent accidents. *Lines* v. *Winnipeg Elec. St. Ry. Co.*, 11 M.R. 77.

3. Liability for injury to person risking his life to save that of another.

A statement of claim alleging, in effect, that a child about two years of age had fallen on the track of the defendants' street railway on a public street in the City; that one of the defendants' cars was approaching the child at a high rate of speed, and that, owing to the negligence of the motorman in charge of the car in not stopping it, the child's life was endangered without negligence on her part; that the plaintiff, observing this, necessarily rushed in front of the car in an attempt to save the child, and that, owing to the motorman's negligence in not stopping the car or reducing its speed, he was struck and injured by the car, discloses a good cause of action.

Eckert v. *Long Island Railroad Co.*, (1871) 43 N.Y. 502, followed.

Anderson v. *Northern Railway Co.*, (1876) 25 U.C.C.P. 301, distinguished. *Seymour* v. *Winnipeg Elec. Ry. Co.*, 19 M.R. 412.

4. Motorman abandoning his post—*Accident caused by negligence of servant of defendants—Common carriers—Duty to carry passengers safely.*

While the plaintiff was being conveyed as a passenger on a car of the defendants, he was injured in consequence of the car being run into from behind by another car on the same track. The motorman and conductor of the other car had, contrary to the express rules of the company, exchanged places, and the conductor in operating the car, either through negligence or incompetence, allowed the collision to take place.

Held, that the negligence of the motorman in abandoning his post to the conductor was the effective cause of the accident, and that the defendants were liable in damages for the injury to the plaintiff, although the conductor, whose act was the immediate cause of the accident, was not acting within the scope of his employment at the time.

Englehart v. *Farrant*, [1897] 1 Q.B. 240, followed.

Gwilliam v. *Twist*, [1895] 2 Q.B. 84; *Beard* v. *London*, [1900] 2 Q.B. 530; *Harris* v. *Fiat*, (1907) 23 T.L.R. 504, distinguished.

Held, also, *per* PERDUE, J.A., that, in order to make the defendants as carriers of passengers by the railway liable to the plaintiff, it was enough to show that the negligence or omission which caused the accident was that of the defendants' servants then in actual charge of the car.

Wright v. *Midland Ry. Co.*, (1873) L.R. 8 Ex. 137; *Thomas* v. *Rhymney Ry. Co.*, (1871) L.R. 6 Q.B. 266, and *Taylor* v. *Manchester etc., Ry. Co.*, [1895] 1 Q.B. 134, followed.

Vance v. *G.T.P. Ry. Co.*, (1910) 17 O.W.R. 1000, distinguished. *Hill* v. *Winnipeg Elec. Ry. Co.*, 21 M.R. 442.

Appeal to Supreme Court dismissed, 46 S.C.R. 654.

5. Passenger alighting from car—*Contributory negligence.*

The plaintiff was a passenger on a crowded car of the defendants going westwards along Portage Avenue, in the City of Winnipeg. Being near the front end of the car when it stopped at the street where he wished to alight, he made his way past a number of people in the passage and in the front vestibule to the steps at that end, on which another man was standing, and stepped off the car in the direction of the parallel track of the railway. Almost instantaneously upon alighting, he was struck by another car of the defendants proceeding eastwards on the other track, knocked down and very seriously injured.

The distances between the sides of two cars, when passing one another on the two tracks, was 44 inches, and the height of the lowest step of the car from the ground was 15½ inches.

There was no rule of the Company prohibiting passengers from alighting at the front entrance of cars, but a rule of the Company required motormen, when approaching another car on that Avenue, to slacken speed and ring the gong continuously until the car had been passed.

It was the custom of the company to permit passengers to alight at the front entrance.

The trial Judge found as facts that the motorman on the eastbound car did not sensibly slacken his speed or ring his gong as he approached the other car.

The plaintiff was not aware of the approaching car until it struck him.

Held, (1) That the motorman on the car by which the plaintiff was struck was guilty of negligence, rendering the defendants liable in damages for the injury done to plaintiff.

(2) The plaintiff had not been guilty of such contributory negligence as to prevent his recovery of damages, as he had a right to expect that, as far as the acts of the defendants' servants were concerned, he might alight in safety and would have a reasonable time after alighting to look about so as to guard himself against injury from other cars of the defendants, but was not given that time.

Oldright v. *G.T. Ry. Co.*, (1895) 22 A.R. 286, and *Chicago M. & St. P. Ry. Co.* v. *Lowell*, (1894) 151 U.S.R 209, followed.

(3) There is no binding authority for the proposition that, from the moment a passenger's foot touches the ground, a street railways' liability for injuries to him by their other cars ceases. Statements to that effect in some judgments cited are merely *obiter dicta*. *Bell* v. *Winnipeg Elec. St. Ry. Co.*, 15 M.R. 338.

Affirmed, 37 S.C.R. 515.

6. Wheel guards—*Duty of Company to put on wheel guards—Damages—New trial.*

1. It is negligence in a company operating electric cars on the streets of a city not to have such guards for the front wheels as will prevent persons falling on the track from being run over, and the company will be liable in damages to any person injured in consequence of such negligence, unless there is sufficient contributory negligence on the part of such persons to constitute a defence.

2. No such contributory negligence could be attributed to a child under six years old.

3. A verdict for $8,000 damages in such a case, where one of the child's legs was cut off, is not so excessive as to warrant the Court in ordering a new trial. *Wald* v. *Winnipeg Elec. Ry. Co.*, 18 M.R. 134.

Affirmed, 41 S.C.R. 431.

VII. Miscellaneous Cases.

1. Horses running away—*Extraordinary occurrence—Liability of owner of horses breaking loose, and injuring plaintiff on highway.*

The owner of a team of horses, which he had left tied by a reasonably strong halter and rope to a post in the street, will not be liable for negligence if the horses, being frightened by some extraordinary occurrence, break the fastenings, run away and injure a traveller on the highway.

Moore v. *Crossland*, 6 W.L.R. 199.

2. Infant—*Liability of father for infant's tort—Possession as evidence of title as against a wrong doer.*

A father is not liable for negligence in allowing his fourteen year old son to go out alone with a gun to shoot game, if the boy has been carefully trained in the use of a gun and ordinarily exercises great care in handling it; but the son will be liable in damages for the consequences of carelessness in firing the gun so as to start a prairie fire which destroys the plaintiff's property.

Part of the plaintiff's claim was for the loss of a stable on land which he had agreed to sell. The stable had been placed on the land by the purchaser, but the

plaintiff had taken possession of the stable and was using it at the time of the fire.

Held, that the plaintiff's possession of the stable was evidence of title as against a wrong doer and that the defendant could not rely on the purchaser's rights as against the plaintiff, but was liable to the plaintiff for the value of the stable as well as of the other property destroyed by the fire.

Jefferies v. *G.W.R.*, (1856) 5 E & B, 802; *The Winkfield*, [1902] P. 42, and *Glenwood* v. *Phillips*, [1904] A.C. 405, followed. *Turner* v. *Snider*, 16 M.R. 79.

3. Landlord and Tenant—*Liability of employer for negligence of employee.*

Plaintiff was tenant of a store owned by defendant McNichol, who had agreed to heat it sufficiently. The heating being found deficient, the landlord's agent employed the other defendants, a firm of plumbers, to put in an additional steam radiator. Before quitting work for the day, the connections not being complete, the plumbers' workmen put a valve on the steam pipe in the plaintiff's store and closed it, so that, when the steam should be turned on, it should not escape into the store. When the steam was turned on at the request of the caretaker of the building, it was found that there was an escape of steam at a defective radiator in the room above and it had to be turned off again. At the request of the caretaker the workmen returned in the evening, made good the defect in the room above, and again turned on the steam. The plaintiff's store was then locked up and nothing was done to ascertain whether the valve was still closed. It had, however, been opened in the meantime, by whom the evidence did not show. The result was that, during the night, the plaintiff's goods were greatly damaged by the escaping steam.

Held, (1) That it was no part of the plumbers' work to turn the steam on after putting in the additional radiator. That would be a matter to be attended to by the landlord or those acting for him and, as between the plaintiff and the landlord, it was the duty of the person in charge of the heating to make sure that the valve in the plaintiff's store was closed before the steam was turned on the second time, and his failure to take such precaution was negligence on the part of the caretaker such as to make the landlord liable for the damages that resulted.

(2) It was not necessary for the decision of the case to determine who had opened the valve again, as the acts of the plumbers, in turning on and turning off the steam and again turning it on, should be regarded as those of the caretaker who was present assenting to and assisting in the performance of them, and who was in charge of the apparatus.

(3) The defendant plumbers were not responsible for the negligence of their employee, if he was guilty of any, as his actions in turning on the steam in the evening at the request of the caretaker were clearly outside the scope of his employment.

(4) The landlord was not responsible for such part of the injury to the plaintiff's goods as was caused by the leakage of water from the room above. *Malcolm* v. *McNichol*, 16 M.R. 411.

Appeal of defendant McNichol dismissed. Judgment affirmed with variation, declaring the plumbers jointly liable with the landlord, 39 S.C.R. 265.

Leave to appeal to Privy Council refused.

4. Motor vehicle—*Duty of driver with regard to pedestrians—Damages—Costs—Recovery of amount within jurisdiction of the County Court—King's Bench Act, Rule* 933.

The plaintiff, when on his way to board a street car which had stopped at a switch point at a place where it was usual for passengers to get on the cars, was knocked down and injured by a motor vehicle driven by the defendant's chauffeur past the street car. It appeared that the chauffeur was driving at a moderate rate of speed on the proper side of the road behind a team going in the same direction, that the team when just opposite the street car turned to the right to avoid hitting the plaintiff, that the chauffeur then proceeded, thinking the road was clear, when suddenly the plaintiff appeared before him on the pavement, that he blew his horn and applied the brakes and did all he could to avoid hitting the plaintiff, but that the latter appeared confused, took a step backward and was struck, although not run over.

Held, that the circumstances and the situation were such as to require the chauffeur to exercise a more than ordinary degree of care for the safety of pedestrians and to anticipate the possibility of being confronted at any time in such a situation by pedestrians who for the moment lose control of their mental faculties, and are

overcome by a sudden panic, although at other times of healthy and rational intellect, and that under the circumstances the chauffeur was guilty of such negligence that the defendants were liable for the damages suffered by the plaintiff.

The trial Judge assessed the plaintiff's damages at $344, an amount within the jurisdiction of the County Court; but, being satisfied that the plaintiff's solicitor honestly believed that the plaintiff would recover an amount beyond that jurisdiction, while giving him no costs, he gave the statutory certificate, under Rule 933 of the King's Bench Act, to prevent the defendant setting off any costs. *Rose* v. *Clark*, 21 M.R. 635.

5. Right of action by employee against contractor and sub-contractor—*Recovery of judgment in action against one a bar to subsequent action against the other—Liability of several tort feasors.*

When a contractor employs a sub-contractor to do work of a dangerous character which is liable to result in damage to third persons if due precautions are not taken, if the sub-contractor is guilty of negligence in the performance of the work, such negligence not being casual or collateral to such performance, and one of his workmen is injured in consequence of such negligence, the workman has the same right of action against the principal contractor as he has against the sub-contractor, and he may sue either, or both.

Dalton v. *Angus*, 6 A.C., per Lord Blackburn at p. 829, and *Penny* v. *Wimbledon*, [1899] 2 Q.B. 72, followed.

But, if the workman chooses to bring his action against the sub-contractor alone, the recovery of judgment in such action is a bar to a subsequent action against the contractor for the same cause of action.

Longmore v. *McArthur*, 19 M.R. 641.

Affirmed, 43 S.C.R. 640.

6. Liability of stable-keeper for injury to horse kept in his stable—*Contract—Estoppel.*

Plaintiff's mare, kept for him in an open stall in defendant's stable, was kicked by a horse, kept in the adjoining open stall, which had broken his halter shank during the night and got loose. This horse had got loose in the stable on several previous occasions, and on one of such occasions the plaintiff's mare had received a slight injury to one of her legs which defendant supposed had been caused by the same horse.

In the opinion of the majority of the Court, it was not proved that the horse was a vicious one, or that he had ever broken a halter shank before, or that the shank he broke on that night was not as strong as halter shanks usually are. Plaintiff's mare shortly afterwards died as the result of the kicking.

Held, that defendant was not liable for the loss.

Per PERDUE, J., dissenting. The evidence showed that the horse in question had a propensity for breaking loose at night, that the defendant knew this and that he had reason to believe, and did believe, that the same horse had, on a previous occasion, when loose, inflicted some injury on the plaintiff's mare. Defendant was therefore bound to exercise greater care than he had and should be held liable for the loss.

After the first injury, the plaintiff's son, in the absence of his father, asked defendant to put his father's mare in a box stall, saying that his father on his return would pay the extra charge. Defendant did so, but, a day or two before the injury, put the mare back into the same open stall without the knowledge of the plaintiff or his son.

Held, that there was no contract binding on defendant to keep the mare in the box stall.

Per PERDUE, J., dissenting. The defendant, after acting upon the arrangement he had made as to the box stall, could not dispute the boy's authority to act for his father and should be held liable for the damages caused by his breach of that arrangement. *Templeton* v. *Waddington*, 14 M.R. 495.

7. Undertaking of mortgage company to keep up insurance on mortgaged property—*Undertaking not under seal—Setting off unliquidated damages against debt—Right of set-off as against assignee of debt—Notice of assignment—King's Bench Act, s.* 39.

1. If a mortgage company through its manager undertakes with the mortgagor to keep alive an insurance on the mortgaged property, and takes steps towards carrying out such undertaking, but fails to carry it out, it is guilty of such negligence as to render it liable in damages to the mortgagor, if ignorant of such failure,

for the amount of such insurance in case the property is burned after the policy lapses.

Skelton v. *L. & N.W.Ry. Co.*, (1867) L.R. 2 C.P., *per* WILLES, J., at p. 636, followed.

2. It is not necessary in such a case that the company's undertaking should be under seal.

3. The mortgagor has a right, under section 39 of the King's Bench Act, to set-off such damages against the mortgage debt in the hands of an assignee in trust, in the absence of proof of notice of the assignment having been given to him before the fire.

Newfoundland v. *Newfoundland*, (1888) 13 A.C. 213, followed. *Campbell* v. *Canadian Co-operative Inv. Co.*, 16 M.R. 464.

8. Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178—*Negligence of foreman or person entrusted with duty of seeing that machinery and plant are in proper condition—Employer and workman—Defect in ways, works, machinery and plant.*

The plaintiff, a carpenter in the defendant's employ under the superintendence of a foreman, was directed to assist in doing some work which necessitated the moving of a plank from one position to another in a frame building. The plank being above his reach when standing on the floor, the plaintiff, without specific directions from and in the absence of the foreman, took a ladder about six feet long that was near by, placed it in position, stepped on the lowest rung, held on to the top rung with one hand and with the other tried to raise the plank. In so doing the rung on which he was standing broke under the pressure and the plaintiff fell upon some machinery underneath and was severely injured. The ladder was the property of the defendant. It was made of cross pieces or cleats nailed to studding, but not "checked in," and had been frequently used on defendant's premises by the plaintiff and other workmen. In answer to questions submitted to them, the jury found that the ladder was defective, but they also in effect found that the plaintiff had been negligent in not using some other and safer method of reaching up to and shifting the plank.

Held (PERDUE, J. A., dissenting), that the ladder was a part of the ways, works, machinery and plant which it was the duty of the foreman to see were in proper condition, that there was evidence to support the jury's finding that the ladder was not properly constructed and that the defect in it had not been remedied owing to the negligence of the foreman, thereby entitling the plaintiff to recover damages under sections 3 (a) and 5 (a) of the Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, and that the jury's finding as to the plaintiff's negligence would not prevent such recovery.

Held, also, that the damages assessed by the jury ($1500) being well within the maximum allowed by statute, were not excessive, and should not be reduced on the contention that the plaintiff had unreasonably neglected to follow the advice of a medical specialist.

Marshal v. *Orient Steam Navigation Co.*, (1910) 79 L.J.K. B. 204, followed.

Per PERDUE, J. A. The plaintiff should be non-suited because he had negligently adopted a dangerous method of reaching the plank when several safer methods were open to him, without directions from the foreman to use the ladder and without taking care to see that the ladder was safe.

Cripps v. *Judge*, (1884) 13 Q.B.D. 383, and *Weblin* v. *Ballard*, (1886) 17 Q.B.D. 122, distinguished. *Higley* v. *Winnipeg*, 20 M.R. 22.

See ANIMAL FERÆ NATURÆ.
— AUTOMOBILE.
— BAILMENT, 4, 5.
— BREACH OF TRUST.
— BUILDING CONTRACT, 4.
— CONSTRUCTIVE NOTICE.
— CRIMINAL LAW, IX, 1.
— FIRE.
— HOTEL KEEPER.
— LORD CAMPBELL'S ACT, 3.
— MASTER AND SERVANT, II.
— MORTGAGOR AND MORTGAGEE, III, 1.
— MUNICIPALITY, III; IV, 2, 3, 5, 6.
— NAVIGABLE RIVER, 3.
— PLEADING, XI, 6, 7, 8.
— PRACTICE, XII, 1.
— PUBLIC OFFICER.
— RAILWAYS, II, 1; III, 2, 3, 4; IV, 3; VI, A, B; VIII.
— SHERIFF, 6.
— SOLICITOR, 3.
— WORKMEN'S COMPENSATION FOR INJURIES ACT.

NEGOTIABLE INSTRUMENT.

Deposit receipt—*"Not transferable"—Chose in action—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. *Re Commercial Bank of Manitoba. Barkwell's Claim*, 11 M.R. 494.

See BILLS AND NOTES, V. 1.
— FRAUDULENT CONVEYANCE, 15.

NEW ACTION.

See RAILWAYS, VI, C, 9.

NEW TRIAL.

1. Additional evidence.

Cause heard and decree in plaintiff's favor made on 27th March, 1883, when defendant though absent appeared by counsel; cause re-heard by the Full Court in Easter Term, 1883, and judgment affirming decree given 4th February, 1884.

On 6th February, 1884, defendant presented a petition, praying that the decree might be set aside, and that he might be allowed to adduce evidence in his own behalf, and that the suit might be set down again for hearing and examination of witnesses, on the ground that defendant was absent from Manitoba and never made aware of the date of hearing.

Held, that application must be dismissed with costs. *Archibald* v. *Goldstein*, 1 M.R. 146.

2. Appeal from Judge's findings of fact—*Principles on which Judge's findings of fact reversed.*

The plaintiff sued the executors of S., deceased, to recover the amount of three promissory notes made by S. for $400, $63.25 and $101.80 respectively, payable to, and endorsed by, the plaintiff. The plaintiff alleged that the notes were endorsed for S.'s accommodation, that they were discounted by S., and that the plaintiff retired them after S.'s death. The cause was tried before TAYLOR, C.J., without a jury, who entered a verdict for defendant. The plaintiff moved to have the verdict set aside and one entered for him, on the ground that the verdict was against evidence and the weight of evidence.

Held, That the finding of a Judge on facts is entitled to as much weight as the finding of a jury, with this difference, that, if the verdict should be set aside, or reduced, the Court has the power to enter the verdict that it thinks should have been entered, without sending the case to be tried over again.

Per KILLAM, J. There is the one element of difference that usually the Court can ascertain the principle upon which the Judge proceeded more accurately than in the case of a jury, and the further discussion may shew that principle to be so incorrect that the Court should review the finding.

Per KILLAM, J. The evidence touching the $400 note was insufficient, and the verdict on that count should be set aside. *Chevrier* v. *Parmenter*, 7 M.R. 194.

3. New material—*Final judgment—Order for summary judgment—Application to Full Court to reverse its own order—Special circumstances.*

After the Full Court had affirmed an order giving the plaintiff leave to sign final judgment, and after the Supreme Court of Canada had quashed an appeal from the decision of the Full Court, the Court refused to re-open the case upon new material and let in the defendants to defend, although in a second action between the same parties the Court upon the same new material reversed an order of the Referee giving the plaintiff leave to sign final judgment. *London & Canadian Loan & Agency Co.* v. *Municipality of Morris*, 12 C.L.T. Occ. N. 76.

4. Objection to evidence—*Motion to set aside verdict.*

Held, on motion to set aside a verdict, no objection can be taken to the admissibility of evidence which was not objected to at the trial. *Watson* v. *Whelan*, 1 M.R. 300.

5. Surprise.

Defendant agreed to "feed and winter" 47 young cattle for plaintiff and to be responsible for the loss of any of the cattle in any other way than by death from ordinary disease.

29 of the cattle died and plaintiff sued for damages.

At the trial, plaintiff had a verdict on the strength of evidence proving that the stable in which defendant had kept the cattle was too small for so many cattle.

There was nothing in the statement of claim to inform defendant upon what grounds he was held liable, and he filed affidavits to show that he had been unable to ascertain such grounds on the examination of the plaintiff for discovery, also that the stable, which had been taken down and removed before the trial, had been of quite sufficient size to accommodate the cattle.

Held, that there should be a new trial on the ground of surprise in the evidence produced by the plaintiff as to the size of the stable. Costs to abide the result of the new trial. *McLenaghan* v. *Hood*, 15 M.R. 510.

6. Weight of evidence—*Verdict under* £20.

A new trial will not be granted, on the ground that the verdict was against the weight of evidence, where the verdict is under £20. *Cleaver* v. *Mun. of Blanchard*, 4 M.R. 464.

See AMENDMENT, 4.
— APPEAL FROM COUNTY COURT, V, 2.
— CONDITIONAL SALE, 3.
— CRIMINAL LAW, XIII, 2; XIV, 1; XVII, 12, 14.
— COUNTY COURT, I, 6.
— EVIDENCE, 2, 3, 6, 10, 13.
— FI. FA. GOODS, 4.
— FALSE IMPRISONMENT, 3.
— JURY TRIAL, I, 9.
— LANDLORD AND TENANT, I, 2.
— LIBEL, 5, 6.
— LORD CAMPBELL'S ACT, 3.
— MISREPRESENTATION, IV, 2.
— NEGLIGENCE, I, 2, 3; V, 4; VI, 6.
— PRACTICE, XII.
— RAILWAYS, VIII, 3; XI, 5.
— REAL PROPERTY ACT, I, 7; II, 2.
— TRIAL.
— VERDICT OF JURY, 1.

NEWSPAPER ACT.

See LIBEL, 1.
— SECURITY FOR COSTS, VI.

NEXT FRIEND.

See INFANT, 10, 11, 12.
— MARRIED WOMEN, 3, 4.
— REAL PROPERTY ACT, III, 3.

NOMINAL PLAINTIFF.

See SECURITY FOR COSTS, VII.

NON-DELIVERY.

See SALE OF GOODS, II, 3.

NON-RESIDENT.

See ARBITRATION AND AWARD, 7.
— GARNISHMENT, V, 3, 7.
— JURISDICTION.
— PROHIBITION, I, 6.
— SECURITY FOR COSTS, II, 1.

NON-RESIDENT DEFENDANT.

See EXAMINATION FOR DISCOVERY, 4.
— EXAMINATION OF JUDGMENT DEBTOR, 9.

NON-RESIDENT LANDS.

See SALE OF LAND FOR TAXES, IV, 1.

NON-SUIT.

See INFANT, 2.
— LORD CAMPBELL'S ACT, 3.
— NEGLIGENCE, V, 1.
— PRACTICE, XV, 2.
— RAILWAYS, VI, C, 9.
— REAL PROPERTY ACT, II, 2; V, 9.

NOT GUILTY BY STATUTE.

See LANDLORD AND TENANT, I, 2.

NOTICE OF ACTION.

See MUNICIPALITY, III, 1; IV, 2, 5.

NOTICE OF APPEAL.

See ACCIDENT INSURANCE, 1.
— APPEAL FROM ORDER, 5.
— PRACTICE, XIII.
— TIME, 4.

NOTICE OF APPLICATION.

See MUNICIPALITY, I, 4.
— SALE OF LAND FOR TAXES, V, 1.
— SURROGATE COURT.

NOTICE OF ASSIGNMENT.

See NEGLIGENCE, VII, 7.
— SET OFF, 5.

NOTICE OF CANCELLATION.

See VENDOR AND PURCHASER, II, 4, 5; VI, 12.

NOTICE OF CLAIM.

See BAILMENT, 3.
— CHATTEL MORTGAGE, III, 1; IV, 2.

NOTICE OF DISHONOR.

See BILLS AND NOTES, X, 3, 7.

NOTICE OF INJURY.

See WORKMEN'S COMPENSATION FOR INJURIES ACT, I.

NOTICE OF LIEN.

See MECHANIC'S LIEN, VI, 2.

NOTICE OF MOTION.

See PRACTICE, I, 1; V, 1; XIV.

NOTICE OF PRIOR SALE.

See VENDOR AND PURCHASER, VI, 9.

NOTICE OF RESCISSION.

See VENDOR AND PURCHASER, IV, 2, 6.

NOTICE OF TRIAL.

See INTERPLEADER, VI, 1.
— PRACTICE, XV.

NOTICE OF VOTING.

See LOCAL OPTION BY-LAW, II, 2; V.

NOTICE TO CONSIGNEE.

See RAILWAY COMPANY, III, 3.

NOTICE TO PRODUCE.

See PRACTICE, XXVIII, 8.

NOTICE TO QUIT.

See LANDLORD AND TENANT, III, 4.

NOVATION.

See CONTRACT, IV, 2.
— EVIDENCE, 7.

NOVELTY IN INVENTION.

See PATENT OF INVENTION, 2.

NUDUM PACTUM.

See DISTRESS FOR RENT, 1.

NUISANCE.

1. By-laws defining nuisances.

A by-law of the town of St. Boniface provided that no stable should be built and maintained at less than twenty feet from any house without the permission of the owner of such house and declared all stables built and in use at the date of the passing of the by-law, which did not conform to that standard, to be nuisances and as such subject to abatement.

Held, (1). The Municipality had no statutory power to define what constitutes a nuisance and its attempt to do so was *ultra vires*.

(2). Section 631 (*a*), giving power to pass by-laws "for preventing and abating public nuisances," gives no power to pass such a by-law, as the matters declared by it to be nuisances are not shown to be public nuisances and the council, in enacting it, did not deal with them as such. *Re Dupuis*, 17 M.R. 416.

2. Injunction—*Injury to landlord's reversion— Damages in lieu of injunction— Prospective change in nature of occupancy of locality where nuisance exists.*

1. A landlord is not entitled to an injunction to prevent the carrying on of a livery and feed stable business in proximity to dwellings occupied by his tenants in a mainly residential locality so as to constitute a nuisance, without proof of injury to the reversion or that one or more of the tenants had left because of the annoyance from the stable, but such injunction may be granted at the suit of any tenant who proves such nuisance.

2. Although the nature of the occupancy of a locality is a large factor in deciding whether the carrying on of a certain trade there would or would not create a nuisance; yet, in deciding that question, no consideration need be given to the probability that in the near future, owing to the increase of population, the locality will become mainly a business instead of a residential district.

3. The plaintiffs being tenants from month to month only, it would not be a proper case for awarding damages instead of granting an injunction, as it could not be known how long the tenants might remain and, besides, injuries of the kind in question cannot be fully compensated by damages and it would be impossible to estimate such damages accurately in every case.

Jones v. *Chappell*, L.R. 20 Eq. 539, followed.

Mc Kenzie v. *Kayler*, 15 M.R. 660.

3. Non-repair of highway by Municipality—*Indictment for—Order for abatement of—Remedy for disobedience of— Writ de nocumento amovendo.*

When a municipality has been found guilty upon indictment for a nuisance for allowing a highway to remain out of repair and has been ordered by the Judge to abate the nuisance by a given date, the Court will, on it being shown that the defendants have neglected to obey the order, authorize the issue of a writ *de nocumento amovendo* to the sheriff to repair the highway at the expense of the municipality. *Rex* v. *Portage la Prairie*, 2 W.L.R. 141, 10 Can. Cr. Cas. 125.

4. Offensive odours—*Injury to health and business.*

The plaintiff kept a shop on the ground floor of a block and had her dwelling apartments and her workroom on the second floor. The defendants were tenants of the cellar under the plaintiff's shop and stored there potatoes and other vegetables.

During the winter months a strong and offensive odour came from the cellar into the premises of the plaintiff above, which caused the plaintiff and some of her employees to become ill, and the business carried on in the shop was seriously injured in consequence.

Held, that the exercise of the defendants' right to use the cellar for storing vegetables was limited by the general right of the public, and that they had no right to infringe upon or interfere with the enjoyment of the plaintiff's premises, and that the plaintiff was entitled to recover for the damages sustained in the business, and those incurred in consequence of the illness.

Robinson v. *Kilvert*, 41 Ch. D. 94; *Reinhardt* v. *Mentasti*, 42 Ch. D. 685, and *Humphries* v. *Cousins*, 2 C.P.D. 239, followed. *Malcolm* v. *Brown*, 16 C.L.T. Occ. N. 198.

5. Right of private individual to prevent infringement of municipal by-law—*Construction of building obstructing plaintiff's view—Injunction.*

The plaintiff by injunction sought to prevent the completion of a large frame warehouse which the defendant was erecting on ground leased by him from a railway company, being part of their right of way adjoining the lawn of a property owned and occupied by plaintiff as a dwelling in the City of Winnipeg. On the other side of the right of way was a strip of land, owned by defendant, sloping down to the Red River.

The warehouse was situated directly between plaintiff's house and the river and would obstruct plaintiff's view of the river. It was being constructed of wood in contravention of the fire limit by-law of the city.

Held, (1) That plaintiff had no right to the unobstructed view of the river.

(2) That plaintiff had no right to enforce the fire limit by-law by injunction, as it was a by-law passed for the protection of the general public and providing for a penalty in case of its infringement, and there was no evidence to show that the risk of fire to the plaintiff's property would be specially increased by the construction of the warehouse.

Atkinson v. *Newcastle*, &c., (1877) 2 Ex. D., p. 441, followed.

The plaintiff further urged that the construction and intended use of the warehouse would create a nuisance to her which she was entitled to have prevented by an injunction and gave some evidence as to the use by tramps and others of the vacant ground on the side of the warehouse next her property, causing unpleasant smells, but it was not shown that defendant was lessee or occupant of that vacant ground.

Held, that there was not sufficient evidence to entitle the plaintiff to an injunction on the ground of nuisance.

Action dismissed with costs. *McBean* v. *Wyllie*, 14 M.R. 135.

NUL TIEL RECORD.

1. Issue—*New Assignment.*

Upon an issue of *nul tiel record*, the only question is whether the record, upon its face, shows that the present cause of action *may* have been the same as that for which judgment was recovered.

If the plaintiff desire a closer examination of the former action, he should file a new assignment, or a replication denying the identity of the causes of action.

To an action, (1) upon the common counts, (2) in trover, (3, 4, 5, & 6) upon a special contract for two years services, at $1,000 a year, the defendant pleaded to all the counts, except that in trover, judgment recovered in the County Court. The plaintiff replied *nul tiel record*. The record, when produced, showed that the plaintiff had recovered for debt, $83.33.

Held, that the existence of the alleged record sufficiently appeared.

Per KILLAM, J.—(1). The test as to the identity of causes of action is, whether the same evidence will support both actions.

(2). A writ of *certiorari* to bring up papers from the County Court should be directed to the clerk of that court—either by name, adding the name of his office, or by the name of his office alone.

(3). It is no objection to a return to a writ of *certiorari* that more papers than directed are returned.

(4). The record of a judgment of the County Court is the entry thereof in the procedure book. *Lunn* v. *Winnipeg*, 2 M.R. 225.

2. Proof.

Held, (following *Lunn* v. *Winnipeg*, 2 M.R. 225), that the only question upon an issue on a plea of *nul tiel record* is whether there is remaining in the court in question the record of such a judgment as the pleadings set up. To a declaration in covenant for payment of money, and for use and occupation, the defendant pleaded a number of pleas, alleging that both causes of action were in respect of rent, and setting forth various circumstances shewing a termination of the tenancy. The plaintiff replied that formerly he brought an action in the County Court for other rent under the same lease, in which action the same defences were set up, and the plaintiff had judgment; a transcript to the Court of Queen's Bench; and that the judgment thereby became a judgment of the Court of Queen's Bench. Rejoinder, *nul tiel record*. Upon trial of this issue, the plaintiff produced

a transcript of the procedure book of the County Court, from which it appeared that on a certain day the plaintiff recovered against the defendant judgment for $135, for debt, together with $20.10 for costs, and also produced the transcript of this judgment, in the statutory form, from among the records of the Court of Queen's Bench.

Held, the existence of the record as alleged was sufficiently proved by the production of the transcript filed in the Court of Queen's Bench, and that the only judgment subsisting was that recovered in the Court of Queen's Bench by the filing of the transcript there. *Burridge v. Emes*, 2 M.R. 232.

See PLEADING, XI, 1.

OBJECTIONS AT TRIAL.

See BILLS AND NOTES, X, 7.
— CHOSE IN ACTION, 3.
— CONVICTION, 5.
— COSTS, XIII, 21.
— EJECTMENT, 6.
— EVIDENCE, 15.
— GARNISHMENT, IV, 2.
— JURISDICTION, 2.
— MUNICIPALITY, IV, 6.
— NEW TRIAL, 4.

OBSTRUCTING CLERGYMAN AT DIVINE SERVICE.

See CRIMINAL LAW, X, 1.

OBSTRUCTION OF HIGHWAY.

See INFORMATION TO RESTRAIN NUISANCE.

OBSTRUCTION OF STREET.

See CRIMINAL LAW, X, 4.

OBSTRUCTION OF VIEW.

See NUISANCE, 5.

OBSTRUCTION TO NAVIGATION.

See NAVIGABLE RIVER.

OCCUPATION OF BUILDING BY OWNER.

See MECHANIC'S LIEN, V, 2.

OCCUPATION OF LAND AS NOTICE.

See BREACH OF TRUST.

OCCUPATION RENT.

See ADMINISTRATION, 1.

OFFER AND ACCEPTANCE.

See GUARANTY, 2.
— RAILWAYS, V, 1.

OFFICER.

See COUNTY COURT, II, 4.

OFFICER DE FACTO.

See BALLOT BOX STUFFING.
— MANDAMUS, 1.

OFFICER OF CORPORATION.

See COMPANY, II, 1.
— EXAMINATION OF JUDGMENT DEBTOR, 9, 10, 11.
— EXAMINATION FOR DISCOVERY, 5, 7, 8, 9, 10.
— PRODUCTION OF DOCUMENTS, 7, 8.

OFFICIAL ASSIGNEE.

See FRAUDULENT PREFERENCE.

ONTARIO COURTS—DECISIONS OF

See MORTGAGOR AND MORTGAGEE, VI, 15.

OPTION TO PURCHASE.

See CONTRACT, I, 1.
— VENDOR AND PURCHASER, VII, 5.

ORDER FOR PAYMENT OF COSTS.

See PRACTICE, XXVIII, 17.

ORDER OF COURT—WHEN EFFECTIVE.

See PRACTICE, XXVIII, 16.

OVERHOLDING TENANT.

See COSTS, V, 1, 2.
— LANDLORD AND TENANT, III.

OWNERSHIP.

See EVIDENCE, 15.

OWNERSHIP OF BED OF RIVER.

See INJUNCTION, I, 5.

OWNERSHIP OF CROPS.

Agreement by vendee of land that crops when grown should be the property of vendor—*Execution*—*Priority.*

In an agreement for the sale of land on credit it was provided that the crops grown upon it should be and remain the property of the vendor, and should not be removed therefrom until the then current year's payment of principal money and interest should have been made, without the authority of the vendor.

Held, that under this agreement, when the crop came into existence, the legal title to it was in the vendee, and no property in it passed to the vendor, but at most he had an equitable right to enter and take the crop when it came into existence, or to call for the execution of a formal and legal mortgage upon it; and that he had no title to the crop in question as against an execution creditor of the vendee, whose writ was placed in the sheriff's hands before the crop was sown. *Clifford* v. *Logan*, 9 M.R. 453, followed. *Smith* v. *Union Bank*, 11 M.R. 182.

See HUSBAND AND WIFE, I.
— TRESPASS AND TROVER, 1.

OWNERSHIP OF GOODS.

See COMPANY, II, 2.
— HUSBAND AND WIFE, II.

OWNERSHIP OF OFFSPRING.

See CHATTEL MORTGAGE, I, 6.

PARENT AND CHILD.

See NEGLIGENCE, VII, 2.
— WORKMEN'S COMPENSATION FOR INJURIES ACT, 4.

PARLIAMENTARY AGENT.

See SOLICITOR AND CLIENT, III, 3.

PARLIAMENTARY ELECTIONS.

1. Recount of ballots—*Mandamus to County Judge—Ballots not objected to before deputy returning officers.*

Held, 1. That a *mandamus* will not lie to a county judge to compel him to consider the validity of ballot papers.

Re Centre Wellington Election, 44 U.C.Q.B. 132, followed.

Per WALLBRIDGE, C. J. Upon a recount, should the county judge consider the validity of ballot papers not objected

to before the deputy returning officers, *quære*.

Per KILLAM, J. 1. The return of a returning officer is not void when based upon a certificate of the county judge, in proper form, merely because the county judge has not legally or fully discharged his duties upon a recount of ballots.

2. There being another remedy, viz., an application to the Legislature, a *mandamus* should not be granted. *Regina* v. *Prudhomme. Re North Dufferin Election.* 4 M.R. 259.

2. Registration of electors—*Manitoba Election Act, secs.* 6, 7, 9, 10—*Sittings of Registration Clerk—Order in Council—Proclamation—Change in date—Power of executive—Unauthorized change in notices before amending order—Mandamus.*

Pursuant to section 6 of the Manitoba Election Act, 1904, an order of the Lieutenant-Governor in Council was passed on the 28th April, and proclaimed in the Manitoba Gazette on the 30th April, appointing registration clerks for a certain electoral division, and fixing the 23rd May as the date and A.'s house as the place for receiving applications for registration of electors. Notices as provided for in section 7 were posted up as required, naming the 23rd as the date. The King's Printer, for certain reasons, deemed the date inconvenient, and printed and on the 4th May sent out new posters naming the 16th May as the date, and these were posted 10 days before the 16th May. On the 10th May an order in Council was passed amending the proclamation of the 30th April by substituting the 16th for the 23rd May:—

Quære, whether the Lieutenant-Governor in Council had power to change the date mentioned in the proclamation.

Semble, that, at all events, the King's Printer had no authority to issue the amended notices, and the notice thus given was not a compliance with section 9, which requires the notice to be posted at least 10 days before the commencement of the registration sitting.

Upon an application for a *mandamus* to compel the registration clerk to hold a sitting at A.'s house, the applicant swore that he had seen the notice appointing the 23rd, but did not become aware of the change of date until after the sitting had been held on the 16th.

Semble, that it was no answer to the application that the applicant might have attended at another place in the electoral division on a subsequent day; his right was to have the clerk sit at the places named in the proclamation.

But *held*, that to make a *mandamus* effective the clerk must be ordered to attend at some future time; the Court had no power to fix a time, and the clerk was equally powerless. The Lieutenant-Governor in Council might have the power under section 10, but the Court had no jurisdiction to compel the exercise of it; and the Court will not grant a *mandamus* unless it can be made effective. *Re Assiniboia Electoral Division. Re Carr*, 14 W.L.R. 392.

3. Return of election made by returning officer—*Jurisdiction of Court of King's Bench—Injunction—Breech of, by agent of defendant—Contempt of Court—Manitoba Controverted Elections Act, R.S.M.* 1902, *c.* 34.

The Court of King's Bench has no jurisdiction to hear and determine a complaint against the return of a member to serve in the Legislative Assembly of Manitoba otherwise than in proceedings under the Manitoba Controverted Elections Act, R.S.M., 1902, c. 34.

Reg. v. *Prudhomme*, (1887) 4 M.R. 159, followed.

The Court has power, however, to deal with the defaults and misconduct of election officers and compel them to perform their public duties.

An interim injunction had been issued restraining the defendant, the returning officer, his servants and agents, from delivering his return to the Clerk of the Executive Council. Defendant had already handed the return to an Express Company for transmission, and the agent of the company was notified of the injunction, but delivered the return in spite of it.

Held, that such agent was liable to be committed, not technically for a breach of the injunction, but for a contempt of Court tending to obstruct the course of justice: *Kerr on Injunctions*, p. 599. *Davis* v. *Barlow*, 20 M.R. 158.

PAROL AGREEMENT.

See EVIDENCE, 19.
— SOLICITOR AND CLIENT, I, 1.

PAROL EVIDENCE.

See EVIDENCE—PAROL.

PAROL GRANT.

See WAY OF NECESSITY.

PAROL TRUST.

See STATUTE OF FRAUDS, 6, 7.

PARTICULARITY IN PLEADING.

See PLEADING, III, 1.

PARTICULARS.

See PRACTICE, V, 3; XI, 5; XVI.

PARTIES TO ACTION.

1. To enforce agreement to pay creditors—*Creditors not necessary parties.*

The plaintiff filed a bill to enforce the provisions of a chattel mortgage, by which the defendants agreed with the plaintiff to pay her creditors. The creditors were not parties to this agreement. The prayer of the bill was in the alternative—that the money found due under the agreement should be paid to the plaintiff, to be applied by her in paying the creditors, or that it should be paid into court for the benefit of the creditors.

On demurrer for want of parties on the ground that the creditors should have been made parties to the suit,

Held, that the creditors were not necessary parties on the grounds, (1) That, in case the plaintiff should succeed, if the money were paid into court the creditors' interests would be amply safeguarded, and the defendants protected against any future demand by them, (2) That, as the creditors were not parties to the agreement on which the suit was brought, their rights against the plaintiff could not be barred by this suit. *Gillies* v. *Commercial Bank of Manitoba*, 9 M.R. 165.

2. To set aside fraudulent conveyance—*Grantor should not be made a party—Allegation that grantor has no other means.*

To a bill by a judgment creditor to set aside a fraudulent conveyance made by his debtor before judgment and to have the land sold to pay the debt, the debtor is neither a necessary nor a proper party.

In such a bill it is sufficient to allege that an execution in the district in which the debtor resides has been returned *nulla bona* by the sheriff, and it is unnecessary to set up that the debtor has no other property but the lands fraudulently conveyed. *Bank of Montreal* v *Black*, 9 M.R. 439.

Distinguished, *Shields* v. *Adamson*, 14 M. R. 703.

3. Joinder of plaintiffs—*Assignor and assignee—Replevin—Equitable interest.*

The plaintiff McMeans purchased from the defendant two land scrips or certificates entitling the holder to locate on Dominion lands. He afterwards sold them to one Henderson who again sold them to the plaintiff Wright.

This was an action of replevin for the scrips which the defendant, as it was alleged, had wrongfully seized and kept. At the commencement of the action, the only interest McMeans had in the scrips was to see that Wright got them and to protect himself against claims by Henderson or Wright if the scrips could not be recovered and used. *Held*, that McMeans was properly joined as a plaintiff in the action.

Carter v. *Long*, 26 S.C.R. 430, followed. *Wright* v. *Battley*, 24 C.L.T. Occ. N. 278.

4. Joint covenantees—*Improper use of co-plaintiff's name.*

If a covenant be made to two jointly, either is entitled to sue in the name of both, upon indemnifying the other.

The form of motion by the objecting plaintiff is to stay proceedings until security be given; not to have his name struck out. *Conley* v. *Wellband*, 3 M.R. 207.

5. Partners—*Demurrer—Allegation of contract under seal—Contract signed by one partner in firm's name without authority from co-partner—Warranty of authority.*

The plaintiff declared against the defendant upon a contract alleged to have been made between Martin and Curtis of the one part and David Wark of the other part. The agreement, as given verbatim in

the declaration, concluded with the words, "In witness whereof the said parties hereto have hereunto set their hands and seals," and the signatures were copied with the letter "S" after each, but the declaration did not otherwise allege that the defendant contracted by deed or under seal.

Held, on demurrer, that it could not be inferred from the use of the words quoted that the agreement had been executed under seal.

Martin was not a party to the suit, and the declaration alleged that the defendant executed the agreement in the firm name of Martin & Curtis, of which he was a member, but had no authority from Martin to use his name in making and executing it, of which want of authority Wark had no knowledge, but that the defendant acted therein on his own authority only.

Held, that the defendant might be sued on such contract separately from Martin.

The alleged contract contained a proviso that Martin & Curtis might retain the whole or any part of said contract moneys, and pay the wages of said Wark's employees and for supplies for him and his men, and on the argument of the demurrer it was objected that the declaration did not show that the defendant had not applied the moneys earned in accordance with such proviso.

Held, that the proviso in question was merely for a particular mode of payment in discharge of the obligation and, if the defendant had paid in that way, he should have pleaded it. *Wark* v. *Curtis*, 10 M. R. 201.

6. Prior incumbrancers should not be made parties—*Variation of decree.*

The plaintiffs, judgment creditors of the Railway Company, having obtained a decree for appointment of a receiver, etc., which decree directed the Master among other things to inquire as to incumbrances, and to settle the rights and priorities of the several incumbrancers and to add them as parties in his office, the Master issued an order making the petitioners parties to the cause in his office.

The petitioners were mortgagees holding the first lien and charge upon the first 180 miles of the defendants' railway in trust for certain bond holders.

Held, On their petition, that they should not have been made parties, and that the decree should not have been taken out as it was, but should have confined the inquiry in the Master's office to the liens and charges of subsequent incumbrances. *Allan* v. *Manitoba & North-Western Railway Co. Re Gray*, No. 2, 10 M.R. 123.

7. Redemption—*Purchasers from mortgagee — King's Bench Act, Rule 40 — Mortgage.*

When, after default in payment of a mortgage of lands, the mortgagee has sold the lands under the power of sale in the mortgage, the purchasers must be made parties to an action brought by the mortgagor for redemption, unless the plaintiff is satisfied with judgment for redemption subject to the several agreements of sale, as the sales could not be set aside or inquired into without having the purchasers before the Court.

It would not be sufficient to make the purchasers parties in the Master's Office under Rule 40 of the King's Bench Act, as that rule applies only to cases where no direct relief is sought against the parties to be added.

Rolph v. *Upper Canada Building Society*, (1865) 11 Gr. 275, and *Hopper* v. *Harrison*, (1880) 28 Gr. 22, followed. *Campbell* v. *Imperial Loan Co.* 15 M.R. 614.

8. Striking out parts of statement of claim in which some of the defendants are not interested—*Pleading—Joinder of causes of action.*

If the statement of claim in an action against a number of defendants contains paragraphs setting up matters in which some of the defendants are not interested, such paragraphs should be struck out on application of any of those defendants, but not on the application of any of the others.

Gower v. *Couldridge*, [1898] 1 Q. B. 348, and *Sadler* v. *G. W. Ry.*, [1896] A. C. 450, followed.

As incidental to the matters which led up to the main cause of action against all the defendants including an incorporated company, plaintiffs' statement of claim asked for judgment for a sum of money alleged to be due to them by the company.

Held, that this did not constitute a separate and distinct cause of action against this company alone so as to bring the case within the principle of the above cited authorities.

Kent Coal Company v. *Martin*, (1900) 16 T. L. R. 486, and *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q.B. 504, followed. *Martel* v. *Mitchell*, 16 M.R. 266.

9. By survivor of three trustees, mortgagees—*Demurrer—Want of parties.*

On a bill for foreclosure filed by the survivor of three trustees, who were mortgagees, but had no beneficial interest in the mortgage moneys,

Held, on demurrer, that the representatives of the deceased joint mortgagees were not necessary parties to the suit. *Landale* v. *McLaren*, 8 M.R., 322.

10. Transfer of interest of owner—*Mechanic's lien—Suit by sub-contractor against contractor.*

A, an owner of property, who has employed a contractor to build a house for him and, before the filing of a lien under the Mechanics' and Wage Earners' Lien Act by a sub-contractor for his claim against the contractor, has sold and conveyed all his interest in the land to a purchaser, is neither a necessary nor a proper party to the action afterwards commenced to realize the lien, as the plaintiff could not have any relief against him.

Although the plaintiff's claim would be limited to the amount due by A. to the contractor and he would have to prove what that indebtedness was, yet that would not justify making A. a party, as the plaintiff could prove that indebtedness at the trial or on a reference to the Master without having A. before the court. *Christie* v. *McKay*, 15 M.R. 612.

See AMENDMENT, 8.
— COMPANY, IV, 14.
— DEED OF SETTLEMENT.
— DEVOLUTION OF ESTATES, 2.
— ELECTION PETITION, IV, 4.
— FENCES.
— FRAUDULENT CONVEYANCE, 13, 16, 18.
— FRAUDULENT PREFERENCE, II; III, 6.
— GARNISHMENT, VI, 8.
— INDEMNITY, 1.
— MISREPRESENTATION, III, 2.
— MORTGAGOR AND MORTGAGEE, V, 2; VI, 6, 13.
— MUNICIPALITY, VIII, 4, 7.
— PARTNERSHIP, 7.
— PATENT OF INVENTION, 1.
— PLEADING, III, 1; IV, 1; VI, 1; XI, 13.
— PRACTICE, II, 3, 4; XVII.
See PRINCIPAL AND AGENT, V, 2.
— PRIVITY OF CONTRACT.
— RAILWAYS, IX, 1.
— RIGHT OF ACTION.
— REAL PROPERTY ACT, II, 3.
— RECTIFICATION OF DEED, 1.
— REGISTERED JUDGMENT, 8.
— SOLICITOR'S LIEN FOR COSTS, 1, 4.
— STATUTES. CONSTRUCTION OF, 2.
— TITLE TO LAND, 1, 2.
— TRUSTEES, 2.
— VENDOR AND PURCHASER, IV. 5; VI, 3, 16.

PARTNERSHIP.

1. Accommodation note signed by one partner—*Renewal with notice.*

One partner is bound by the acts of his co-partner in all acts referable to the partnership trade; but where a man takes a security from one partner in the name of the partnership, in a transaction not in the usual course of trade, he takes such security at his peril.

One partner, without the knowledge of his co-partner, signed a note in the firm's name as accommodation for A. The plaintiffs discounted this note without notice of the irregularity. When the note fell due the plaintiffs were made aware of the facts, but took a renewal signed in the same way. In an action upon the renewal,

Held, that the above principle applied, and the plaintiffs could not recover. *Union Bank* v. *Bulmer*, 7 C.L.T., Occ. N., 277.

2. Admissions by one partner—*Books as evidence—Goods for private use.*

S. was a member of the firm of S. & Co. He purchased goods for the use of the firm, but said that they were for J. S. & Co., of which firm he said that his partners were members.

Held, That the firm was liable.

It was alleged that some of the goods were purchased by Stewart for his own use. He having admitted, however, the correctness of accounts delivered to the firm, including these goods, and the books of the firm, which he kept, having recognised the indebtedness as of the firm,

Held, that the onus was on the defendants of proving that goods were so purchased by S.

A partner has power to borrow money for the purposes of the firm, but if bor-

rowed upon his own credit, even if applied for the purposes of the firm, he alone is liable. *Hudson's Bay Co.* v. *Stewart*, 6 M.R. 8.

3. Authority to sign partnership name—*Liability on notes signed by co-partner.*

Held, 1. The implied authority of one partner to sign the partnership name, or to make and indorse notes, is limited to doing so for the purposes of the partnership.

2. When a person takes a note made or indorsed by a partnership, knowing that it was not made or indorsed for the purposes of the partnership, the *onus* is cast upon him of proving that the partnership signature was given with the knowledge or assent of every member of the firm. *Union Bank* v. *Bulmer*, 2 M.R. 380.

4. Discharge of retiring partner by agreement with creditor inferred from course of dealing—*Partnership Act, R.S.M.* 1902, *c.* 129, *s.* 20 (*b*).

The plaintiff company was a creditor of a firm composed of the defendant and one McDonald. This firm was dissolved in 1902, McDonald taking over the assets, assuming the liabilities and continuing the business.

The plaintiff's manager took part in bringing about these arrangements, and the company continued to sell goods and give credit to McDonald and subsequently to McDonald & Simmons. It took renewal notes from McDonald to cover the entire liability of the old partnership and the notes sued on were entered in the bill book as paid by these renewals. The balance due by the firm was charged up to McDonald in the new account opened for him in the books and the plaintiff, while persistently urging McDonald for payment during a period of nearly six years, never asked the defendant for payment, although it held the original notes of McDonald and Bowser now sued on. It sought security for this debt from McDonald. Payments made by McDonald were credited directly to him in the plaintiff's ledger. Plaintiff allowed one of the notes sued on to become barred by the Statute of Limitations.

Held, that, from these acts and conduct of the plaintiff, there should be inferred an agreement by the plaintiff to discharge the defendant from his liability as a member of the firm, and that the case came within sub-section (b) of section 20 of the Partnership Act, R.S.M. 1902, *c.* 129.

Hart v. *Alexander*, (1837) 7 C. & P. 746. 2 M. & W. 484, followed. *Watson Manufacturing Co.* v. *Bowser*, 21 M.R. 21.

5. Dissolution not registered—*Continuation of business by one partner—Tort.*

A partnership was dissolved, but the dissolution was not registered. One of the partners continued the business under the partnership name and committed a tort.

Held, that the retiring partner was not liable, there being no evidence that he consented to, or knew of, the continuance of the firm name. *Burt* v. *Clarke*, 5 M.R. 150.

6. Execution against goods of one partner—*Interpleader between execution creditor and other partners—Priority as between vendor of land sold on crop payments and execution creditor of purchaser—Growing crops—Bills of Sale and Chattel Mortgage Act, R.S.M.* 1902, *c.* 11, *s.* 39.

When several persons are tenants in common of a farm and jointly raise crops on it, they are partners in such farming operations and the crops when harvested are the property of the partnership. Such crops cannot be sold by the sheriff under an execution against one partner. All the sheriff can sell is the share and interest of the execution debtor in such of the chattels of the partnership as are seizable under a *fi. fa.*, and all the purchaser gets is the right to have the accounts of the partnership taken to ascertain what that share or interest is, and then to realise it in proceedings to wind up the partnership.

Manitoba Mortgage Co. v. *Bank of Montreal*, (1889) 17 S.C.R. 692, and *Helmore* v. *Smith*, (1887) 35 Ch. D. 447, followed.

Christie, one of the claimants in the interpleader proceedings, had sold the farm in question, on deferred payments, to the defendant and two other persons who had agreed that all the wheat grown upon it should, when threshed, be delivered at an elevator or in cars in the joint names of vendor and purchasers and that half of the proceeds should be applied, first, in paying the interest

due, second, in paying taxes and other charges against the crop, and the balance towards the purchase price of the farm, the remaining half to be paid to the purchasers.

Held, that the plaintiff, as execution creditor of one of the purchasers, could reap no advantage against Christie from section 39 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, which makes void a security taken upon growing crops or crops to be grown, even if that section would apply in such a case as to which no opinion was expressed. The plaintiff, claiming the proceeds of the crops which were partnership funds, must fail in the issue as against another partner claiming the fund and also as against Christie, as that partner conceded Christie's right to it. *Smith* v. *Thiesen, Christie et al. Claimants*, 20 M.R. 120.

7. Holding out oneself to public as partner.

Action against A., B. and C., as members of C. & Co., for money had and received to the use of the plaintiff. In truth B., C. & X. were the partners. A. had to the knowledge of B., but not to the knowledge of C., held himself out as a member of the firm.

Held, that a verdict against A., B. and C. was right.

That X. was not a party was an objection that could be taken by a plea in abatement only. (*a*). *Cameron* v. *Cameron*, 3 M.R. 308.

(*a*) Pleas in abatement having been abolished, a motion to add X. would now be necessary. Ed.

8. Infant—*Representations.*

The law as to the circumstances under which an infant may be liable as a member of a partnership stated. *Woods* v. *Woods*, 3 M.R. 33.

9. Limited partnership—*Partnership Act, R.S.M.* 1902, *c.* 129, *ss.* 61–81.

The defendant Rosenthal bought an interest in a partnership business carried on by his co-defendants under the name Winnipeg Shirt and Overall Manufacturing Company and contributed $4000 in cash to the funds of the partnership. Rosenthal intended that he should be only a special partner with liability limited to the amount he paid in and the three signed a certificate in the form set out in section 66 of the Partnership Act, R.S.M. 1902, c. 129, using the same firm name. The certificate was filed in the office of the Prothonotary who noted it in a book he kept, pursuant to section 54, but it was not recorded "at large" as then required by section 68.

Held, (1) That, under section 69, the intended limited partnership failed of formation because the certificate had not been recorded at large, and, also, under section 72, because the firm name did not contain the name of any of the general partners.

2. That Rosenthal, having thus failed to form a limited partnership under the Act, was liable to the creditors of the firm as a general partner.

3. To render himself liable as a general partner, it is not necessary that one should be clothed with authority to bind his fellow partners as their agent. He may be a silent or dormant partner and yet liable as a general partner.

Poole v. *Driver*, (1877) 5 Ch. D. 474, followed.

Slingsby Manufacturing Co. v. *Geller*, 17 M.R. 120.

Appeal by Rosenthal to the Supreme Court dismissed.

10. Profits made by one partner in private speculations with partnership funds—*Partnership Act, R.S.M.* 1902, *c.* 129, *ss.* 22, 24, 32.

The defendant was the master mind of the partnership, a firm of builders and contractors. He possessed great executive and organizing ability, and contributed from time to time nearly all the capital with which in a period of 25 years large profits were made in carrying on that business. The plaintiffs were his brothers, men with little education or ability, competent only to act as foremen on the works. They always acted on the defendant's orders, and only drew money from the firm for their own use when and as permitted by the defendant. He allowed Martin Kelly to share equally with him in the profits and Michael got one fourth, but this was because they were his brothers, and from motives of generosity and ties of affection. There had never been any written articles of the partnership which was one at will; but after its dissolution the plaintiffs claimed to share in the profits made by the de-

fendant in speculations, mostly in real estate, with moneys drawn by him from the partnership funds before any ascertainment of the respective shares of the partners in, or any division of, the profits. The total amount so drawn out by the defendant was much less than he would have been entitled to had such division been made. Entries were made from time to time in the books of the firm by direction of the defendant showing particulars of the transactions in question. The plaintiffs, though they were aware of some of the speculations, made no inquiries about them and appeared to have taken at the time no interest in them. The defendant never made the firm liable for postponed payments on his purchases, but gave his own covenants only; and, in cases where he made losses, they were never charged to the firm. Each of the plaintiffs had on several occasions, without the knowledge of the other, obtained the defendant's consent to draw out money for private speculations on his own account. The defendant had, from the beginning, followed the practice of paying his own money into the firm so as to improve its position financially and to allow it the use of the money.

Held, (CAMERON, J. A., dissenting) applying section 22 of The Partnership Act, R. S. M. 1902, c. 129, that the course of dealing between the partners had been such that there should be inferred from it a consent of all the partners that their mutual rights and duties, as defined in sections 24 and 32 of the Act, should be varied so as to allow the defendant full liberty of action in respect of any funds which he would have been entitled to withdraw on a division of the profits, that the entries in the books had been made as they were only for convenience and not as showing partnership transactions, and that the plaintiffs had no right to share in the profits of speculations clearly intended by the defendant as private ones of his own.

Ex parte Harris, (1813) 2 V. & B. 210, followed.

Helmore v. *Smith*, (1886) 35 Ch. D. 456, distinguished.

The contrary intention which, by section 24 of the Act, would prevent property bought with money belonging to the firm from being deemed to have been bought on account of the firm, sufficiently appeared from the evidence.

Per PERDUE, J. A. 1. The intention to be considered in this case is that of the defendant alone, and it is not necessary to show that it must be that of all the partners.

Ex parte Hinds, (1849) 3 De G. & Sm. 613, followed.

2. The plaintiffs had constructive notice or means of knowledge of what the defendant was doing and their consent may be implied from that: *Ex parte Yonge*, (1814) 3 V. & B. 36.

Kelly v. *Kelly*, 20 M.R. 579.

Reversed on appeal to the Privy Council, [1913] A.C.

11. Liability for goods bought by partner—*Ratification.*

Where one of two partners, without the knowledge of the other, purchases goods in his own name or in the name of a firm which he expects to form afterwards in partnership with some other person, intending to exclude the other partner from the contract, the latter cannot be made liable upon the contract by ratification afterwards, although the old partnership is continued and the goods are subsequently taken into stock and disposed of for the benefit of the firm.

A man cannot be made a party to a contract unless he who assumes to contract does so on behalf of that man; and no ratification can be effectual unless the act has been done by the agent on behalf of the party who ratifies, or, in other words, there can be no binding ratification by a person not contemplated by the agent as his principal at the time of entering into the contract.

Watson v. *Swann*, (1862) 11 C. B. N. S. 771, and *Vere* v. *Ashby*, (1829) 10 B. & C. 288, followed.

Durant v. *Roberts*, [1900] 1 Q. B. 629, distinguished. *Fraser* v. *Sweet*, 13 M.R. 147.

See AMENDMENT, 9.
— BANKS AND BANKING, 4.
— BILLS AND NOTES, III, 2.
— CONTRACT, IX, 4.
— COSTS, XIII, 17.
— EXAMINATION FOR DISCOVERY, 12.
— PARTIES TO ACTION, 5.
— PRINCIPAL AND SURETY, 5.
— RECTIFICATION OF DEED, 1.
— REGISTERED JUDGMENT.

PART PERFORMANCE.

See VENDOR AND PURCHASER, VI, 10.

PARTY APPEARING IN PERSON.

See PRACTICE, XXVIII, 18.

PATENT FROM THE CROWN.

See CROWN PATENT.

PATENT OF INVENTION.

1. Action for infringement of patent rights—*Parties to action—Service out of the jurisdiction—Patent Act, R.S.C.* 1886, *c.* 61, *as amended by* 53 *Vic., c.* 13.

To an action by the holder of a patent of invention against parties resident within the jurisdiction for an injunction against infringement of the patent and damages, other parties not within the jurisdiction, who make and sell to the defendants the goods which are the subject of the plaintiff's complaint under another patent which the plaintiff claims to be null and void, are neither necessary nor proper parties, and service upon them of an amended statement of claim asking for damages and an injunction against them, and for a declaration that their patent is null and void, will be set aside with costs.

The statement of claim did not allege that the non-resident parties had done anything as to which an injunction could be asked against them in Manitoba, and upon its allegations the only relief the plaintiffs could possibly claim against them would be a declaration that their patent was null and void, thus raising two distinct and separate causes of action, one against the parties within the jurisdiction and the other against the non-resident parties, both of which issues should not be tried in one action.

Under the Patent Act, R.S.C., c. 61, as amended by 53 Vic., c. 13, this Court has no jurisdiction to impeach a patent held by a person whose domicile is in another province, but could only, on the application of a defendant sued in this Pr vince for an infringement of such a patent, declare it to be void as against him, leaving it *prima facie* valid as against every one else. *Maw* v. *Massey-Harris Co.*, 14 M.R. 252.

2. Novelty—*New combination of well-known devices.*

Although all the individual parts of a machine may lack novelty, yet if, by a new combination of them, a decided improvement in the working is attained, that is sufficient to support a patent of invention, and the courts look with favor upon any slight change whereby an improvement is effected and find invention in it if they can.

The plaintiff's patented grain pickling machine was constructed upon lines similar to those of two other such machines that had been previously patented. In all these the grain was fed into a hopper on the top of a box containing a revolving worm or screw, and the pickling liquid was in a box so placed that it would fall into the box containing the worm so as to mix with the grain in its progress to the discharging end of the box; but in the plaintiff's machine the liquid was conveyed through a lead tube into the side of the box containing the worm to a point underneath the opening in the hopper so that the liquid and the grain ran through together and much space was saved. The mixing of the grain and the pickling fluid was, owing to the use of the lead tube and the peculiar arrangements of the parts, more thoroughly done by the plaintiff's machine than by either of the others; and, though of the same size as they, its capacity was considerably greater.

Held, that there was sufficient novelty and improvement in the plaintiff's machine to support his patent and that he was entitled to the usual order for an injunction and damages against the defendants for infringing upon it. *Mattice* v. *Brandon Machine Works Co.*, 17 M.R. 105.

PAYMENT.

See INTEREST, 4.
— VENDOR AND PURCHASER, V, 2.

PAYMENT AFTER NOTICE.

See GARNISHMENT, VI, 8.

PAYMENT BY CHEQUE.

Dishonor—*Pleading.*

Defendants, being indebted to plaintiffs, sent them the cheque of B. for a portion of the amount. Subsequently the plaintiffs rendered accounts showing a credit of the amount of the cheque, but stating that it had not been paid, and still later rendered other accounts showing the amount charged back. The defendant in an earlier letter said that he had not seen B. since getting the cheque, but "will go and see him tomorrow, and when I see him will remit to you at once." His later letters made no objection to the re-charging of the amount.

Held, 1. That the conduct of the parties shewed that the cheque had not been received as payment.

2. That, under a plea of payment, the plaintiff was not bound to prove presentment of the cheque and dishonor.

3. That the correspondence might be considered as an admission that everything had been done to entitle the plaintiff to sue. *Campbell* v. *Heaslip*, 6 M.R. 64.

PAYMENT INTO COURT.

See Costs, XI, 2.
— Interpleader, II, 6.
— Pleading, X, 8.
— Practice, XXVIII, 19, 31.
— Summary Judgment, I, 2.
— Trustees, 1.

PAYMENT OF MONEY ON DEPOSIT IN BANK.

See Winding-up, IV, 10.

PAYMENT ON ACCOUNT.

See Limitation of Actions, 7.
— Real Property Limitation Act, 2.

PAYMENT OUT OF COURT.

See Practice, XXVIII, 16.
— Security for Costs, II, 2.

PAYMENT TO AGENT.

See Landlord and Tenant, I, 8.

PAYMENT UNDER PROTEST.

See Sale of Land for Taxes, X, 2.

PEACE OFFICER.

See Criminal Law, IX, 2.

PECUNIARY BENEFIT.

See Lord Campbell's Act, 3.
— Municipality, IV, 2.
— Workmen's Compensation for Injuries Act, 4.

PENALTY.

See Liquor License Act, 10.
— Vendor and Purchaser, II, 4; VI, 15; VII, 6.

PENALTY OR LIQUIDATED DAMAGES.

See Building Contract, 3.
— Contract, XV, 12.

PENDING BUSINESS.

See Practice, XXVIII, 29.

PENITENTIARY.

See Criminal Law, XVII, 19.
— Ticket of Leave Act.

PERFORMANCE OF CONTRACT.

See Building Contract, 5, 6.
— Contract, VIII, 1, 2, 3, 4, 5; X, 3; XII, 2; XV, 9, 13.
— Pleading, VIII, 2; XI, 4.
— Sale of Goods, VI, 5.

PERJURY.

Criminal Code, 1892, s. 148—*Dominion Elections Act, R.S.C.* 1886, *c.* 8, *s.* 45—*Authority to administer oath—Personation.*

The prisoner was convicted on an indictment for perjury, in having sworn before the Deputy Returning Officer at an election for member of the House of Commons for the City of Winnipeg, that he was the person whom he represented himself to be, named on the list of electors for the polling sub-division. He was not an elector, or entitled to vote in the constituency.

At the trial, prisoner's counsel contended that there was no authority for the Deputy Returning Officer, under s. 45 of the Dominion Elections Act, R.S.C. 1886, c. 8, to administer an oath to any person but an elector, and the Judge reserved a case for the opinion of the Court as to whether the prisoner had been properly convicted.

Held, that the statute must receive a reasonable construction, that authority was intended to be conferred upon the officer to administer the oath to any person presenting himself and claiming to be an elector entitled to vote, and that under s. 148 of the Criminal Code, 1892, prisoner had been properly convicted of perjury.

Tribunals of limited jurisdiction have implied authority to receive proof of the facts on which their right to exercise their jurisdiction depends.

Reg. v. *Proud*, L.R. 1 C.C. 71, followed. *Reg.* v. *Chamberlain*, 10 M.R. 261.

PERMIT TO CUT HAY.

See CONTRACT, V, 2.

PERSONA DESIGNATA.

See CONTEMPT OF COURT, 1.
— MUNICIPALITY, VIII, 5.
— RAILWAYS, I, 1.

PERSONATION.

See PERJURY.

PETITION.

See HOMESTEAD, 1.
— LOCAL OPTION BY-LAW, VI.
— PRACTICE, XXVIII, 20.

PETITION UNDER REAL PROPERTY ACT.

See REAL PROPERTY ACT, I, 3, 6, 7, 8; III; IV, 1; X, 7.

PICKETTING AND BESETTING.

See TRADE UNIONS.

PITCH HOLES IN WINTER ROAD.

See MUNICIPALITY, IV, 6.

PLAINTIFF A PUPPET.

See INJUNCTION, I, 10.

PLEA IN ABATEMENT.

See PLEADING, XI, 1.

PLEA OF NON EST FACTUM.

See PRINCIPAL AND SURETY, 4.

PLEADING.

I. AMENDMENT.
II. COUNTERCLAIM.
III. FRAUD.
IV. FRAUDULENT CONVEYANCE.
V. JOINDER OF CAUSES OF ACTION.
VI. MULTIFARIOUSNESS.
VII. PROLIXITY.
VIII. PUIS DARREIN CONTINUANCE.
IX. SALE OF LAND UNDER REGISTERED JUDGMENT.
X. STRIKING OUT AS EMBARRASSING.
XI. MISCELLANEOUS CASES.

I. AMENDMENT.

1. Departure in replication —*Costs.*

When a plaintiff is not entitled to relief on the case made by his bill, but may be so entitled on facts set up or partly set up in the answer, he should amend the bill instead of making admissions in the replication.

The plaintiffs sought relief at the hearing on a case or state of facts different from that set forth in their bill of complaint, but which was partly set up in the answer. In their replication they admitted these allegations in the answer, but did not amend their bill, and brought the case on for hearing. The evidence failed to establish the case made by the bill, and the plaintiffs did not ask leave to amend.

Held, without deciding whether the plaintiffs were entitled to any relief on the evidence submitted, that the bill should be dismissed with costs unless the plaintiffs wished leave to amend, which they might have on payment of costs. *Boyle* v. *Wilson*, 9 M.R. 180.

2. Illegality — *Amendment — Dispute note—Weights and Measures Act.*

At the trial of an action in the County Court to recover the price of a quantity of lime, the defendant objected that the plaintiffs had not shown that the lime was measured by a standard measure according to the Dominion Weights and Measures Act, and that they could not recover without showing this. The defendant had not in his dispute note set up the provisions of this Act or claimed the benefit of it or alluded to it in any way.

Held, on appeal to the Queen's Bench, that the defendant could not avail himself of the provisions of the Act as against the plaintiff's claim without having set up such defence in his dispute note, and the Court would not interfere with the discretion of the County Court Judge in refusing to allow the defendant's dispute note to be amended for the purpose of setting up such defence. Such a defence based on a statute must be set up in the dispute note or the defendant cannot avail himself of it.

Illegality, whether it arises on a statute or at common law must be pleaded, and it makes no difference whether the illegality appears from the plaintiffs' proofs or otherwise, and the onus of proving it rests upon the defendant. *Hanbury* v. *Chambers*, 10 M.R. 167.

3. Action for recovery of possession of land—*Joinder of causes of action—Multiplicity of suits—King's Bench Act, s.* 38 (*k*), *Rule* 258.

The plaintiff Lee, being the assignee of a contract of sale of land by the defendants P. and M. to the defendant G., paid the balance due under the contract to P. and M. and received from them a transfer under the Real Property Act. He then discovered that one L. was in possession of part of the land, claiming title by prescription.

This prevented Lee from getting his transfer registered and he brought this action for recovery of possession from L., joining, by leave of a Judge obtained under Rule 258 of the King's Bench Act, a claim for specific performance of the contract as against G. and damages by way of compensation or otherwise.

This was an application for leave to amend the statement of claim by adding a claim against P. and M. for specific performance of the contract alleged to have been made by them directly with Lee when he paid his money to them and they gave him the transfer, or for compensation in default.

Held, that, under sub-section (*k*) of section 38 of the King's Bench Act, the amendments asked for should be allowed.

Krut v. *Spence*, (1887) 36 Ch. D. 770, followed.

The test as to whether an amendment ought to be allowed is whether or not the other party would be placed in such a position that he could not be compensated by an allowance for costs or otherwise.

Stewart v. *Metropolitan Tramway Co.*, (1885) 16 Q.B.D. 180; *Annual Practice*, 1905, p. 350, followed.

That the amendment asked for set up a new cause of action is not of itself a sufficient ground for refusing to allow it.

Budding v. *Murdoch*, (1872) 1 Ch. D. 42; *Hubbock* v. *Helms*, (1887) 56 L.J. Ch. 539, followed.

The contention that leave to join another cause of action with one for the recovery of land can only be granted before the commencement of the action is not supported by the authorities which show that such leave is granted

whenever the Court thinks it reasonable to do so.

Rushbrooke v. *Farley*, (1885) 52 L.T. 572; *Hunt* v. *Tensham*, 28 Sol. J. 253, and *White* v. *Ramsay*, (1888) 12 P.R. 626, followed. *Lee* v. *Gallagher*, 15 M.R. 677.

II. Counterclaim.

1. Striking out defence.

In an action for possession of land by a landlord against his tenant, the defendant may counter-claim against the plaintiff for damages for illegal seizure, distress and sale of his goods under an alleged claim for rent of the same land; and the paragraph of the statement of defence setting up such counter claim will not be struck out on the ground that it raises an issue which should be tried by a jury. *Dockstader* v. *Phipps*, 9 P.R. 240, and *Goring* v. *Cameron*, 10 P.R. 496, followed. *Gowenlock* v. *Ferry*, 11 M.R. 257.

2. Practice — *Third party—King's Bench Act, Rules* 294, 295.

Action by the registered owner of land to remove a caveat filed by defendant.

Held, that the defendant had, under Rule 294 of the King's Bench Act, R.S.M. 1902, c. 40, the right to set up by way of counter-claim that a third party had agreed in writing to sell the land to the defendant, that such third party was a co-owner with the plaintiff and, in executing the agreement, had acted on behalf of himself and the plaintiff and was authorized to do so, and to claim specific performance of the agreement against both; but there was nothing in the rules to permit the defendant to set up a claim in the alternative against such third party alone for damages for breach of warranty of authority to make the agreement. *Fernie* v. *Kennedy*, 19 M.R. 207.

III. Fraud.

1. Allegations of fraud or error—*Parties—Fraudulent vendor—Attorney-General—Costs.*

It is not sufficient to allege that a patent was issued through fraud, or in error or improvidence, without setting out in what the fraud or error or improvidence consisted; or to allege that it was issued upon the faith of certain statutory declarations which were untrue, without showing what the declarations contained.

The original patentee was made a party to an information to set aside a patent, although the information alleged that he had conveyed the land to his co-defendant. The information charged fraud as against the patentee's vendor, but none against himself.

Held, that the patentee could not demur for want of equity.

The Attorney-General will not be ordered to pay costs; the Imperial Statute 18 and 19 Vic., c. 90, not being in force in this province. *Atty.-Gen.* v. *Richard*, 4 M.R. 336.

2. Election to rescind contract for —*Allegation of rescission and restitution —Amendment of plea of fraud.*

1. A plea setting up fraud in the sale of a horse to the defendant should contain allegations that, on discovering the fraud, he rescinded the contract and restored the horse, or—in case the horse was dead—that it had died before discovery of the fraud from disease or accident without defendant's fault and that, for that reason, restitution was impossible.

2. There is not the same objection to amending a plea of fraud by adding such allegations as there would be to amending the defence by setting up a plea of fraud.

3. Such allegations may be allowed to be added by way of amendment to a plea of fraud so as to make it a good plea, even after all the evidence has been heard, when the whole question of rescission and restitution has been fully gone into in the evidence. *Moore* v. *Scott*, 5 W.L.R. 8.

IV. Fraudulent Conveyance.

1. Certificate of Judgment—*Judgments Act, R.S.M.* 1892, *c.* 80, *s.* 6.

In a bill to realize on a decree of the Court of Queen's Bench on its equity side, ordering money to be paid, and relying upon the registration of a certificate of such decree as creating a charge and incumbrance on lands of the defendant under section 6 of the Judgments Act, R.S.M. c. 80, it is essential to allege precisely that the decree referred to was one *ordering money*, costs, charges or expenses *to be paid* to some person, or into Court or otherwise; and, where the bill alleged only that, in certain pro-

ceedings in this Court against a debtor, a decree was made, that in pursuance of the decree the master made a report, and the plaintiff recovered a judgment against the debtor for $, and he was ordered, not stating by what, to pay to the plaintiffs forthwith the said sum of money, and that, in pursuance of such decree, report and proceedings thereunder, the plaintiffs caused a certificate of the said decree to be issued and registered in the Registry Office for the proper Land Titles District, a demurrer for want of equity was allowed with costs.

The bill also sought to set aside certain conveyances as fraudulent, and plaintiffs' counsel contended that, notwithstanding the defective allegations of a lien and charge, a sufficient case was made out for a declaration that the deeds were fraudulent; but, as the bill was not filed on behalf of the plaintiffs and all other creditors, this contention was held untenable.

Reese River Mining Co. v. *Atwell*, L.R. 7 Eq. 347, and *Longeway* v. *Mitchell*, 17 Gr. 190, explained. *Credit Foncier Franco-Canadien* v. *Schultz*, 10 M.R. 417.

2. Action to restrain debtor from transferring his property before judgment—*Injunction—Allegations necessary to show right—Evidence to show that transfer fraudulent.*

In the statement of claim in an action brought by the plaintiff on behalf of himself and all other creditors of the defendant to recover a debt and for an injunction to prevent the debtor from making further transfers of his property and for a declaration that transfers already made are fraudulent and void, it must be clearly alleged:

(*a*) That the defendant is indebted to the plaintiff, showing in what way and that the debt existed at the time of the transfer.

(*b*) That there were at the time other creditors of the defendant, and

(*c*) That, after parting with the assets in question, the debtor had not enough property left to meet his liabilities.

An interim injunction based upon a pleading lacking these allegations was dissolved.

The only evidence brought forward upon the motion for the injunction to prove the alleged fraudulent nature of the transfers was that the debtor had stated to the plaintiffs' manager in reply to a demand for security that he had no security to give, whereas a short time before he was proved to have been the owner of a large number of shares in different companies.

Per HOWELL, C.J.A. This was not sufficient evidence of the fraud charged to warrant the issue of an injunction.

Traders Bank of Canada v. *Wright*, 8 W.L.R. 208.

V. JOINDER OF CAUSES OF ACTION.

1. Distinct causes of action.

The declaration stated that in consideration that the plaintiff would let to the defendant a certain house and furniture therein for a certain period, at $60 a month, the defendant promised to enter on the said premises and occupy the same, and keep the same in tenantable repair, and to use and take care of the said furniture for and during the said period, and to deliver the same up at the end of the said period in good repair, reasonable wear and tear excepted, and to pay to the plaintiff the said sum of $60 a month, at the end of each and every month. The breaches alleged were that "the defendant, after having entered on and taken possession of the said premises and furniture, and occupied and used them for a portion of the said term, wilfully and without reasonable cause or excuse, left the said premises and furniture unoccupied and uncared for for a long time, and during the remainder of the said term, and refused to pay the plaintiff the said rent of $60 per month, whereby the plaintiff lost the use and profit of the said money and the said premises and furniture, and was put to great expense, cost and trouble, in caring for and storing the said furniture, and in insuring the same from injury and damage, and was otherwise greatly damaged."

Held, that the count could not be objected to on the ground that it embraced two distinct causes of action. *Hagel* v. *Starr*, 2 M.R. 92.

2. Joinder of defendants—*Joinder of cause of action arising out of tort with one arising out of contract—King's Bench Act, Rule* 219.

A plaintiff may, under Rule 219 of the King's Bench Act, proceed in the same action against one defendant for a breach of a contract and against other defendants for maliciously and wrong-

fully procuring and inducing the breach, there being such a unity in the matters complained of as entitles the plaintiff to join all the defendants.

Compania v. *Houlder*, [1910] 2 K.B. 354; *Frankenburg* v. *Great Horseless Carriage Co.*, [1900] 1 Q.B. 504; *Bullock* v. *London Omnibus Co.*, [1907] 1 K.B. 264, and *Evans* v. *Jaffray*, (1901) 1 O.L.R. 614, followed.

Smurthwaite v. *Hannay*, [1894] A.C. 494, and *Sadler* v. *Great Western Ry. Co.*, [1896] A.C. 450, not followed, because they were decided under English Order XVI, rule 1, before it was amended so as to make it the same as our Rule 218. *Gas Power Age* v. *Central Garage Co.*, 21 M.R. 496.

VI. Multifariousness.

1. Parties to suit—*Demurrer—Setting aside release given by trustee in fraud of cestuis que trustent—Allegation that release under seal—Fraud, if relied on, must be sufficiently alleged.*

A number of creditors of defendant M., having assigned their claims to defendant S. so that he might sue upon all in one action at law, filed a bill in equity to set aside a release of their claims given by S. to M., and to prevent M. from setting up the release as a defence in the action at law. The plaintiffs alleged that it had been procured by M. in collusion with S., with knowledge of S.'s position, and with the intent and design of defeating and defrauding the plaintiffs. The alleged release was set out *verbatim* in the bill, and purported to have been executed under seal, but there was no specific allegation that the release had been executed under seal. The bill also asked for payment by M. of the plaintiffs' several claims.

Held, on demurrer,

(1). That the bill was not multifarious.

(2). That there is jurisdiction in equity to set aside such a release for fraud, even if the same relief could have been obtained by motion in the action at law; and, although the Court now has power to give equitable relief in actions at law, the plaintiffs are not confined to seeking it there.

(3). But that the demurrer should be allowed, because the bill did not sufficiently allege that the release complained of had been executed under seal, and there were no sufficient charges of fraud or breach of trust to warrant the interference of a court of equity. *Dougan* v. *Mitchell*, 9 M.R. 477.

2. Want of Equity—*Demurrer.*

The bill filed prayed for an account against defendant S., payment of the amount which might be found due the plaintiffs, and in default a sale of certain chattels upon which they claimed a right to possession until payment. It alleged that the defendant S. had given a mortgage to the defendants the I. Bank upon the chattels and prayed an injunction against the Bank, to restrain it from taking possession of, and selling, the chattels.

Held, the demurrer of the defendants, the I. Bank, for multifariousness and want of equity should be allowed. *Ward* v. *Short*, 1 M.R. 328.

VII. Prolixity.

1. King's Bench Act, Rules 306, 326.

1. Mere prolixity in a pleading, not such as will embarrass or delay the fair trial of an action, does not warrant the striking out, under Rules 320 or 326 of the King's Bench Act, of any portions of it and there is no power under any of the Rules for the Court to revise pleadings which are merely over-lengthy by striking out or amending particular paragraphs in whole or in part.

Millington v. *Loring*, (1880) 6 Q.B.D. 195, followed.

2. In a statement of claim making out a case for an injunction to prevent an infringement of the plaintiffs' trade name, they may either allege in terse and general terms the acquisition of title by long user, or they may set out such facts in detail to prove the user, as they might have furnished by way of particulars, if demanded, in case they had confined themselves in the first instance to a general allegation of title acquired by user. *Theo. Noel Co.* v. *Vitæ Ore Co.*, 17 M.R. 319.

2. Striking out pleadings as embarrassing—*King's Bench Act, Rules* 306, 326.

Notwithstanding the requirement of Rule 306 of the King's Bench Act that "pleadings shall contain a concise statement of the material facts upon which the party pleading relies, but not the evidence by which they are to be proved," and notwithstanding the amendment of Rule 326 by 7 & 8 Edw. VII, c. 12,

s. 6, by inserting the words "unnecessary or" before the word "scandalous" therein, if pleadings are merely prolix by reason of containing passages setting out facts which are immaterial and unnecessary and passages which are merely recitals of the evidence proposed to be adduced, such passages should not be struck out under Rule 326 as they are neither embarrassing nor tending to prejudice or delay the fair trial of the action.

Theo. Noel Co. v. *Vitæ Ore Co.*, (1907) 17 M.R. 319, and *dictum* of Bowen, L. J., in *Knowles* v. *Roberts*, 38 Ch.D. at p. 270, followed. *MacLean* v. *Kingdon Printing Co.*, 18 M.R. 274.

VIII. Puis Darrein Continuance.

1. Amendment—*Defences arising after delivery of statement of defence—King's Bench Act, Rule* 339.

Defences arising after the delivery of the statement of defence should be allowed on the defendant's application to amend if they are such that they may be fully met by facts set up by the plaintiff in reply.

If, however, an amendment sought to be made to the statement of defence is of such a nature that it would, if made, put the plaintiff in such a position that he could not be compensated by costs or otherwise, it should be refused upon an application made for leave to make it after the lapse of the eight days from the delivery of the statement of defence within which, by Rule 339 of the King's Bench Act, the defendant may of right make such an amendment.

Steward v. *North Met. Tramways*, (1885) 16 Q.B.D. 180, 558; *Lee* v. *Gallagher*, (1905) 15 M.R. 677, and cases collected in *Annual Practice*, 1909, p. 370, followed. *City of Winnipeg* v. *Winnipeg Elec. Ry. Co.*, 19 M.R. 279.

2. Evidence in diminution of damages—*New contract—Estoppel by judgment or payment—Adding new pleas—Discretion.*

1. Leave may be given to withdraw pleas, and plead *de novo* to enable a defendant to plead matter arising subsequent to the last pleading, without thereby waiving his former pleas.

2. In actions upon *quantum meruit* for work and labor, defective workmanship may be proved in mitigation of damages, although not pleaded. *Secus* if the action be upon a special contract.

3. In an action upon a special contract for the sale of a specific article, for goods sold and delivered, evidence of a breach of a warranty may be given in reduction of the contract price, although not pleaded.

4. In an action for goods sold and delivered, or for work and labor, evidence of damage for delay cannot be given unless under a counter-claim.

5. *Semble.*—In an action by a carrier for freight, evidence of damage to the goods cannot be given unless under a counter claim.

6. If the terms of a special contract be not fully complied with, a new contract to pay for the work actually done at its true value may be implied from the defendant's accepting the benefit of it.

7. A judgment against a contractor and his surety may be pleaded, as an estoppel, against the contractor alone in an action by him against the other parties to the contract and their sureties.

8. Payment for work and labor after action brought is no estoppel in an action by the employer for non-completion of the contract, or for delay.

9. A judge has no discretion to shut out a defendant from a *bona fide* defence, or a plaintiff from a right *bona fide* to press a claim upon a mere slip of a party or his attorney, unless other rights intervene, or there are aggravating circumstances.

10. The discretion of a judge as to admitting new pleas not interfered with. *Smith* v. *Strange*, 2 M.R 101.

IX. Sale of Land Under Registered Judgment.

1. Exemptions—*Certificate of judgment—Bill to enforce—Allegations in bill.*

A bill in equity to enforce a lien created by a registered certificate of judgment upon the lands of a judgment debtor need not allege that the lands are not exempt from such proceedings.

Fonseca v. *Macdonald*, 3 M.R. 413, distinguished. *Keewatin Lumber Co.* v. *Wisch*, 8 M.R. 365.

2. Jurisdiction of the Court—*Retroactive legislation—Queen's Bench Act*, 1895, *Rules* 803-807—60 *Vic.*, *c.* 4.

Everything is intended in favor of the jurisdiction of a Superior Court: *Peacock* v. *Bell*, (1678) 1 Wm. Saund, 96; *Mayor of London* v. *Cox*, (1866) L.R. 2 H.L. 239.

Therefore, where the statement of claim in an action for possession of land alleged the recovery of a judgment in a County Court, the registration of a certificate thereof, the making of an order of the Court of Queen's Bench for the sale of the land under the judgment, and an order vesting the land in the plaintiff as purchaser.

Held, on demurrer, that, for anything that appeared in the statement of claim, the order for sale might have been regularly made in an action in this Court, although, at the date of the order, there was no jurisdiction to make such an order except after an action commenced for that purpose, and that the demurrer should be overruled.

Held, also, *per* DUBUC, J., (1) that the amendment to Rule 807 of the Queen's Bench Act, 1895, made by 60 Vic., c. 4, although made after the orders relied on, had the effect of validating them, if they had not been regular, as they had not been attacked in any way prior to its passing; (2), following *In re Padstow, etc., Association*, (1882) 20 Ch. D. 137, that an order made by a court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and the proper way to get rid of it, if it is erroneous, is to appeal against it, as in *Proctor* v. *Parker*, 11 M.R. 485. *Ritz* v. *Froese*, 12 M.R. 346.

See, however, *Ritz* v. *Schmidt*, 31 S.C.R. 602.

X. STRIKING OUT AS EMBARRASSING.

1. Exceptions to the declaration —*Demurrer to defendant's pleas allowed—Subsequent application to strike out count in declaration.*

Although a count of the declaration may be double, setting out two separate things, if the defendant pleads over and his pleas are held bad on demurrer, it is too late for him to move to strike out the count in the declaration as embarrassing. *Livingstone* v. *Rowand*, 12 C.L.T. Occ. N. 30.

2. As embarrassing — *Counterclaim —Matter pleaded in anticipation of defence.*

A counterclaim should not contain allegations set up only by way of anticipating the defence that the defendant supposes the plaintiff will make to it, and such allegations will be struck out as embarrassing. *City of Winnipeg* v. *Toronto General Trusts Corp.*, 19 M.R. 420.

3. Embarrassing pleas—*Equitable defence.*

The defendant's 13th plea alleged that the promissory notes sued on were made by the defendant for the accommodation of the payees to the knowledge of the plaintiffs, and that the plaintiffs were indebted to the payees in certain sums of money which the defendant and the payees desired to set off against the plaintiffs' claim. The payees had indorsed the notes to the plaintiffs, but were not parties to this action.

Held, that this could only be a defence in equity, and should have been introduced with the words, "for a defence on equitable grounds," in accordance with the Administration of Justice Act, section 11, and, as it was not, it should be struck out.

The 14th plea was similar to the 13th, and commenced with the statement that it was pleaded on equitable grounds, but in addition to the statement of the set-off it contained allegations relating to a deed or agreement that had been made between the payees and the plaintiffs which raised issues altogether collateral to the main question of the set-off.

Held, that such plea in such form should be struck out as embarrassing. *Union Bank of Canada* v. *McBean*, 10 M.R. 211.

4. Embarrassing defences — *King's Bench Act, Rules* 290, 306, 309, 313 *and* 326.

The plaintiffs sued for the price of goods alleged to have been sold and delivered to the defendant, and, in the alternative, claimed damages for non-acceptance of the goods and non-payment for same.

By the third paragraph of the statement of defence, the defendant denied that she had purchased or received the goods, and then proceeded as follows: —"And the defendant is informed that the alleged claim of the plaintiffs for the said brushes (part of the goods), if any, arose prior to the time when the defendant started in business, and if the same exists at all, which the defendant does not admit, it is against the estate of the

defendant's late husband and not against the defendant."

Held, that the part of the paragraph quoted was embarrassing, and should be struck out because it was not stated positively but only on information, and was thus in violation of Rule 306 of The King's Bench Act, and also because it sought to raise an immaterial issue.

Odgers on Pleading, 103, 106, and *Jones* v. *Turner*, (1875) W.N. 239, referred to.

Paragraph 5 was in part as follows: —"The defendant says that she never agreed to purchase mufflers from the plaintiffs for the price and sum of £129 15s. 1d, as alleged by the plaintiffs."

Held, that this was an evasive or ambiguous denial containing a "negative pregnant," and was not in compliance with Rule 290, which requires a specific denial, if any is made, as the statement would be true even if the fact was that the defendant had purchased the goods for £129 15s., and that this paragraph must be amended or in default struck out.

Paragraph 7 alleged that some of the goods referred to in the statement of claim, if ordered at all, which was not admitted, were ordered under a contract set out in another paragraph setting up a counter-claim, a contract which was in no way identified with that sued upon, and alleged a breach of such other contract and went on to set up two quite different defences.

Held, that this paragraph also was embarrassing and should be amended, or in default struck out as conflicting with Rule 309.

Davy v. Garrett, (1878) 7 Ch. D. 489, and *Re Morgan*, (1887) 35 Ch. D. 497, followed. *Alois Schweiger & Co.* v. *Vineberg Co.*, 15 M.R. 536.

5. Embarrassing defences on motion under Rule 318 of the Queen's Bench Act, 1895.

Questions of substantial difficulty or importance raised by the statement of defence should not be disposed of on motion in chambers, under Rule 318 of the Queen's Bench Act, 1895, to strike out paragraphs of the statement of defence as embarrassing, but should be left to be dealt with at the trial of the action.

The defences set out in the statement of defence printed in the report were held to present questions of such substantial difficulty and importance that they should not be struck out on motion in chambers.

Ætna Life Insurance Co. v. *Sharp*, (1896) 11 M.R. 141, discussed and explained. *Long* v. *Barnes*, 14 M.R. 427.

6. Embarrassing pleas—*Falsity.*

A false plea cannot, merely on the ground of its falsity, be assumed to have been filed for embarrassment or delay if there be other valid pleas upon the record.

The rule as to striking out embarrassing pleas applies to affirmative pleas. It is not necessarily unreasonable that a defendant should put a plaintiff to the proof of his case.

Upon a motion to strike out a plea, although the plaintiff give *prima facie* evidence of its falsity, the defendant is not bound to swear to its truth in order that it may not be struck out.

Although there be direct Manitoba authority against the validity of a defence, the plea will not, merely upon that ground, be struck out. *Woods* v. *Tees*, 5 M.R. 256.

7. Action for malicious prosecution—*Striking out paragraphs of defence as embarrassing—Queen's Bench Act*, 1895, *Rules* 280, 283, 293, 298, 301 *and* 318.

1. In the statement of defence in an action for malicious prosecution a simple traverse of the plaintiff's allegation of the want of reasonable and probable cause is sufficient.

2. In such an action, when the defendant in separate paragraphs of his statement of defence alleges certain facts tending to show reasonable ground for his belief in the plaintiff's guilt, but leaves it open for himself to prove other and distinct facts for the purposes of this defence at the trial, so that the plaintiff might be misled into assuming the allegations on the record to be all he has to meet, such paragraphs should, under Rule 318, Queen's Bench Act, 1895, be struck out as embarrassing.

3. In such a defence it is not sufficient to allege that the defendant received certain information without showing the source or that it was reliable, or to allege possession by the plaintiff of the animals which he had been accused of stealing without showing that it was recent possession, or that all the information received had been laid before the magis-

trate before whom the charge had been laid and before counsel who advised the prosecution complained of, without showing what facts had been laid before them; and paragraphs of the defence setting up such matters without showing absolutely reasonable and probable cause should be struck out. *Rogers* v. *Clark*, 13 M.R. 189.

8. Payment into Court—*Equitable defences.*

Held, 1. To an action upon a covenant in a mortgage, a plea of payment into court may be joined with a plea of *non est factum*.

2. In such an action an equitable plea as to the amount sued for, except a certain sum, and, as to that sum, payment into court, was struck out as embarrassing, not being contemplated by the form of plea prescribed by the C.L.P. Act.

3. A plea of payment into court must be an answer to the whole count to which it is pleaded, or if to a part only of the money claimed, then it must be confined to answering that part, and any answer, legal or equitable, to any other portion of the cause of action must be set up in a separate plea. *Pratt* v. *Wark*, 2 M.R. 213.

9. Traverse—*Defences setting up right to do things not complained of by plaintiff—Injunction against members of trade union — Declaratory judgment —King's Bench Act, R.S.M.* 1902, *c.* 40, *s.* 38 (*c*).

1. Pleadings in defence are confined to denials, (*a*) of the jurisdiction of the Court, (*b*) of the plaintiff's charges, or (*c*) of the sufficiency in law of those charges, and pleas by way of confession and avoidance.

2. A denial by a defendant that he has been guilty of any improper conduct is not a proper traverse of the plaintiff's charges complaining of specified acts of the defendant, and should be struck out.

3. Defences setting up merely argumentative claims of right to do certain things which the defendants do not admit having done, and which do not clearly appear from the pleadings to be the acts charged against them, should be struck out, not being pleas by way of traverse or by way of confession and avoidance.

4. This Court would have no jurisdiction, under sub-section (*c*) of section 38 of the King's Bench Act, to give a declaratory judgment interpreting an Act of the Parliament of Canada on hypothetical facts, even if it could so interpret a Provincial statute on the application of a defendant. *Vulcan Iron Works* v. *Winnipeg Lodge, No.* 122, *International Association of Machinists*, 16 M.R. 207.

XI. Miscellaneous Cases.

1. Pleas in abatement and bar to same count—*R.P. Act—Instrument substantially in form given by Act—Non-registration—Action on covenant in unregistered instrument.*

After a plea in abatement had been filed and issue joined upon it, pleas in bar were, by leave, added,

Held, That the plea in abatement was waived; and after trial of the issues it was disregarded.

The defendant, owner of land subject to the Real Property Act, executed a lease of it to plaintiff, using the form given in the Act respecting Short Forms of Indentures. It purported, however, to be made in respect of the Act respecting Short Forms of Leases. The lease contained the statutory covenant for quiet enjoyment. The lease was not registered or filed. Afterwards the lessor conveyed the land to X. by a conveyance which made no mention of the lease.

In an action upon the covenant for quiet enjoyment, after ouster by X.

Held, 1. That the covenant in the lease could be sued upon.

2. That the instrument was within the Act respecting Short Forms of Indentures.

3. Costs of an action of ejectment by plaintiff against X. were allowed as part of the damages, but not costs of some Police Court proceedings stated in evidence to have arisen out of an endeavour by the plaintiff's husband to obtain possession, but the nature of which did not clearly appear.

Per Killam, J.

1. The instrument was substantially in conformity with the form given in R.P. Act, and could have been registered.

2. Not having been registered it could not take effect as a lease.

3. Even without registration the covenant might be sued upon.

4. The neglect of the lessee to register his lease was not, but the transfer by the lessor without mention of the lease, was,

the proximate cause of the damage to plaintiff.

Per BAIN, J.

Quære, whether the lease was one which could have been registered under the R.P. Act. *Shore* v. *Green*, 6 M.R. 322.

2. Admissions—*Proof of deed by Registrar's certificate.*

The bill alleged, as the plaintiff's title to the lands in question, the existence of a patent and certain deeds. The answer, altough not expressly admitting the patent and deeds, charged that the latter were procured by fraud and deception; that they were never read over to the grantor, and that the parcels were not those intended by the grantor to be conveyed; and prayed by way of cross-relief that the patent and the deeds set forth in the bill should be declared to be clouds upon the defendant's title.

Held, affirming the judgment of WALLBRIDGE, C.J., that the patent and deeds were admitted by the answer.

Held, that the production of a deed from the registry office with the usual certificate of the registrar indorsed was sufficient proof of the deed.

Canada Permanent Loan and Savings Co., v. *Page*, 30 U.C.C.P. 1, approved. *Pritchard* v. *Hanover*, 1 M.R. 366.

3. Alternative relief—The bill alleged that, the defendants having proceeded to expropriate certain lands of the plaintiff and a certain award having been made, an agreement was come to whereby the City was to give certain other lands and a certain sum of money for the land of the plaintiff.

Held, that there were not two opposing claims alleged, and that no part of the bill was demurrable upon that ground. In such a case, the Court being of opinion that the agreement was proved and the award good, and the City being unable to give title to its lands, a decree was made for payment to the plaintiff of the amount due upon the footing of the award. *Wright* v. *Winnipeg*, 3 M.R. 349.

4. Common Counts—*Special agreement.*

Where a special agreement is substantially performed, though not in the exact terms thereof, the plaintiff may recover on the common counts; but not where there is a condition which he must comply with before recovery, and no new contract can be implied. *Clarke* v. *City of Winnipeg*, T.W., 56.

5. Allegation of completed contract.

The declaration alleged that, "in consideration that the plaintiff would haul for the defendant the blocks that would be required for paving," &c., "the defendant promised to allow and permit the plaintiff to haul all the said blocks and to pay him therefor,"&c. (Then followed allegations of partial performance of the work.) "Yet the defendant refused to allow the plaintiff to haul the remaining portion of the said blocks," &c.

Upon demurrer, *held*, that the count disclosed a completed agreement, and not merely an unaccepted offer of the defendant. *Veitch* v. *McLennan*, 3 M.R. 383.

6. Contract or tort.

Plaintiff, having sustained personal injury and loss of baggage in a railway accident, obtained leave to proceed in an action provided he declared in contract. His declaration contained the following counts:

1 & 2. Allegation of contract to carry; breach, that defendants did not safely carry, but owing to negligence goods lost.

3 & 4. Allegation of contract to safely and securely carry; breach, that defendants did not safely and securely carry, but owing to negligence plaintiff was injured.

5 & 6. The same as 1 & 2 without the allegation of negligence.

Held, 1. (Overruling DUBUC, J.) That the first four counts were in contract and not in tort.

2. That counts 1 & 2 were in reality the same as 5 & 6 and should therefore be struck out as encumbering the record.

The defendants pleaded to counts 5 & 6 a condition of the contract by which their liability was restricted to $100, and payment into Court of that amount.

To this plea plaintiff replied negligence within section 24 of the Consolidated Railway Act, 1879.

Held, that this replication should not be struck out, but if objectionable should be demurred to. *Shaw* v. *C.P.R.*, 5 M.R. 198.

7. Denials of allegations of fact in the statement of claim—*King's Bench Act, Rule* 290, *as re-enacted by* 7 & 8 *Edw. VII*, c. 11, *s.* 4.

To an action charging negligence on the part of the defendants in leaving open and unguarded a trap door in their premises through which the plaintiff, while lawfully

there, fell and was injured, it is proper for defendants to plead under Rule 290 of the King's Bench Act, as re-enacted by 7 & 8 Edw. VII, c. 11, s. 4, denying in separate paragraphs the leaving of the trap door open or unguarded, and that it was by reason of its being open or unguarded that the plaintiff fell into it if (which was not admitted) he did in fact fall into it, and setting up in other paragraphs that, if the trap door was open (which was denied), it was sufficiently guarded by a rail and was not dangerous, that there was no negligence on the part of the defendants, and that the plaintiff did not exercise ordinary care or caution in the matter.

Form of defence in *Bullen & Leake*, 6th ed. at p. 889, referred to. *Smith* v. *Canada Cycle & Motor Co.*, 20 M.R. 134.

8. Departure—*Damages—Objection to appeal.*

If a carrier's contract provide that he will not, in case of loss, pay more than a certain sum, this limits the amount of the liability only, and need not be set out in the declaration; but, if it provide that he will not pay anything upon goods which exceed a certain value, this limits the liability itself and must be alleged in the declaration.

Therefore, where to a declaration against a carrier in contract, not alleging any limitation, the defendants pleaded a term of the contract, viz., that except as to $100 a special contract, "that the baggage liability of the defendants should be limited to wearing apparel not exceeding $100 in value"; to which the plaintiff replied gross negligence,

Held, that the replication was a departure and bad upon demurrer.

Semble, The Consolidated Railway Act, 1879, sec. 25, sub-sec. 4, probably introduces an implied term in contracts to which it is applicable. *Shaw* v. *C.P.R.*, 5 M.R. 334.

Appeal to Supreme Court quashed. 16 S.C.R. 703.

9. Ejectment — *Equitable defence — Patent obtained by fraud.*

An equitable defence in ejectment must do more than displace the plaintiff's legal title. It must show that the defendant is himself, of right, entitled to some interest, which gives him a right to attack the plaintiff's legal title.

A plea attacked the patent under which the plaintiff claimed as having been obtained by fraud, but did not show that, if the patent were set aside, the defendant would be entitled to possession.

Held, that the plea was bad. *London and Canadian Loan and Agency Co.* v. *Moffat*, 3 M.R. 249.

10. Good in part and bad in part—*Demurrer—Plea to several counts, one of which is good.*

When a plea is pleaded to several counts or breaches and is bad as to some of them upon demurrer it is bad altogether. It cannot be construed distributively under the C.L.P. Act. *Robertson* v. *City of Winnipeg*, 6 M.R. 483.

11. Indorsement of Cheque—*Demurrer.*

Action for non-payment of cheques.

The second count alleged the drawing of a cheque, payable to O., that the cheque was delivered to O. in payment of debt due O. from the plaintiff, "and the said O. being the lawful holder of the said cheque, and entitled to receive the amount thereof, duly presented," &c. Plea, that the cheque was not delivered to O. in payment of a debt.

Held, plea bad.

The fourth count alleged the drawing of a cheque payable to the order of the Union Bank of Lower Canada, who presented it, &c. Plea, that the said Bank did not indorse the cheque to the defendants, and refused to indorse it.

Held, plea good. *Todd* v. *Union Bank of Lower Canada*, 1 M.R. 119.

12. Interpleader bill—*Demurrer—Defendant's titles not shown.*

The bill stated that the plaintiff agreed with A and B to purchase from them certain land upon certain terms; that he had paid them a portion of the purchase money; that A claimed the balance, and that B and X also claimed it.

Held, upon demurrer for want of equity, that the bill sufficiently disclosed the nature of the opposing claims. *Tees* v. *Spence*, 3 M.R. 430.

13. Joint obligors—*Demurrer.*

Action on a joint bond against three defendants. The declaration revealed the fact that five persons were liable jointly with the defendants.

Held, that, as the declaration did not show that these others had sealed the bond, and were resident within the jurisdiction,

the defendant should have pleaded the non-joinder in abatement, and not have demurred. *Moore* v. *Fortune*, 2 M.R. 28.

14. Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, s. 45.

Under section 45 of The Mechanics' and Wage Earners' Lien Act, R.S.M. 1902, c. 110, and the form No. 7 in the schedule of forms appended to the Act, it is permissible for a defendant, in an action under that Act, to plead that the lien asserted by the plaintiff was not filed, and that the proceedings had not been instituted, within the time required by law, but not that the plaintiff was not entitled to said lien which is only an allegation of a conclusion of law. *Imperial Elevator Co.* v. *Welch*, 16 M.R. 136.

15. Misrepresentation as to something that would take place in the future not sufficient to found action.—*Demurrer—Action of deceit.*

In an action of deceit it is not sufficient for the plaintiff to allege a misrepresentation by defendant as to something to take place in the future, as, for example, that a store to be leased by the plaintiff from the defendant would be vacant at a certain date; and, if, in such a case, the plaintiff's inability to get possession of the store at such date was caused by the defendant having given a prior lease to another party, the statement of claim should specifically allege the concealment of such prior lease as the ground of action. *Smythe* v. *Mills*, 17 M.R. 349.

16. Nul tiel record to foreign judgment.

The plea of *nul tiel record* is not applicable to a declaration upon a foreign judgment. *Hill* v. *Rowe*, 3 M.R. 247.

17. School trustees—*Action by teacher—Contract.*

The first count of the declaration set out that, in consideration that plaintiff would enter into the service of defendants and serve them for one year . . . . in the capacity of school-teacher, at $300 a year, to be paid, &c., and lodgings, fuel and light to be furnished, &c., the defendants promised to retain the plaintiff in the capacity, &c. It further alleged the plaintiff's entry into the service, &c., and wrongful dismissal.

The second count was an *indebitatus* count for work done, as a school-teacher and otherwise.

The defendants demurred.

Held, 1. The wrongful dismissal of a teacher is a matter "connected with his duty," within the Manitoba School Act, s. 93, and consequently not the subject of an action, but of arbitration only.

2. The first count was bad, inasmuch as it did not allege the agreement to be in writing and under seal or excuse the want of a seal.

3. The second count was bad because the moneys, although under the direction of the trustees, are not in their hands, but in those of the secretary-treasurer. *Pearson* v. *School Trustees of Catholic School District of St. Jean Baptiste Centre*. 2 M.R. 161.

18. Several pleas—*Pleading a number of pleas together—General Rule No. 5.*

Held, under general rule 5 of the Court of Queen's Bench for Manitoba any number of pleas may be pleaded together without a judge's order. *Allen* v. *Dickie*, 2 M.R. 61.

19. When action at issue—*Amendment of pleading—Application for special jury—King's Bench Act, Rule* 301—*Jury Act, s.* 60.

When the statement of defence has been amended, an action is not at issue, under Rule 301 of the King's Bench Act, until the expiration of ten days from the delivery of the amended statement of defence, and an application for a special jury may, under section 60 of the Jury Act, be made within six days after the expiration of such ten days. *Brown* v. *Telegram Printing Co.*, 21 M.R. 775.

See Arbitration and Award, 12.
— Bailment, 3.
— Bills and Notes, VIII, 9, 13.
— Bond.
— Chattel Mortgage, V, 6.
— Company, III. 4; IV, 4, 11, 14.
— Contract, VIII, 4.
— County Court, II, 6.
— Demurrer.
— Duress, 2.
— Election Petition, IV, 4.
— Evidence, 12.
— Examination for Discovery, 15.
— Executors and Administrators, 1.
— Expropriation of Land, 3.
— Felon.
— Fire Insurance, 1.
— Foreign Judgment, I, 4, 5, 6.
— Fraudulent Conveyance, 17, 18.
— Fraudulent Preference, II.
— Garnishment, I, 10.

See ILLEGALITY, 3.
— INDEMNITY, 3.
— INFANT, 7.
— INJUNCTION, IV, 5.
— JUDICIAL DISTRICT BOARDS, 1.
— JURISDICTION, 2.
— LANDLORD AND TENANT, I, 2.
— LIBEL, 1, 4.
— LIVERY STABLE KEEPER, 1.
— MASTER AND SERVANT, IV, 2.
— MECHANIC'S LIEN, IV, 1; VI, 2.
— MORTGAGOR AND MORTGAGEE, VI, 8.
— MUNICIPALITY, III, 2, 3.
— NUL TIEL RECORD, 1.
— PARTIES TO ACTION, 2, 5, 8.
— PAYMENT BY CHEQUE.
— PRACTICE, XXVIII, 31.
— RAILWAYS, II, 2.
— REAL PROPERTY ACT, I, 6; III, 4, 5, 6; V, 1.
— REPLEVIN, 3.
— SALE OF GOODS, VI, 3.
— SALE OF LAND FOR TAXES, V, 2; VIII, 1.
— SUMMARY JUDGMENT, II, 1, 2, 4.
— TAXES.
— VENDOR AND PURCHASER, IV, 1, 5, 11; VI, 1, 4, 11, 16; VII, 11.
— WINDING-UP, I, 1.
— WORKMEN'S COMPENSATION FOR INJURIES ACT, 4.

PLEADING OVER.

See PLEADING, X, 1.

PLEDGE.

Deposit — *Collateral security* — *Multifariousness.*

As collateral security for the payment of certain acceptances, the defendants deposited with the plaintiffs certain of the defendants' mortgage bonds, with power of sale in case of default. After default and recovery of judgment upon the acceptances, plaintiffs filed their bill on behalf of all holders of similar bonds for a receiver and for sale of the railway.

Held, per BAIN, J. 1. That the legal title in the bonds did not pass to the plaintiffs, but that they were pledgees merely. Their remedy was a sale of the bonds, and not a sale of the railway.

2. That the bill was multifarious in basing the right to a receiver upon plaintiffs' judgment, for in that the other holders had no interest.

Upon appeal,

Held, that, having regard to the surrounding circumstances, the plaintiffs were not pledgees of the bonds; and that no obligation arose upon them until after sale of them by the plaintiffs under their power. *West Cumberland Iron & Steel Co.* v. *Winnipeg & Hudson's Bay Railway Co.*, 6 M.R. 388.

POKER.

See CRIMINAL LAW, XVI, 3.

POLITICAL CRIME.

See EXTRADITION, 6.

POOL ROOM—REGULATION OF

See CONSTITUTIONAL LAW.
— MUNICIPALITY, VII, 6.

POSSESSION.

See AGREEMENT FOR SALE OF LAND, 2.
— CHATTEL MORTGAGE, III, 1, 2; V, 3.
— CONTRACT, III, 1, 2.
— EJECTMENT, 1.
— EQUITABLE MORTGAGE.
— FRAUDULENT JUDGMENT, 3.
— GIFT, 2.
— NEGLIGENCE, VII, 2.
— PRINCIPAL AND AGENT.
— REAL PROPERTY LIMITATION ACT, 3, 4.
— RECTIFICATION OF DEED, 2.
— TRESPASS.

POSSESSION OF GOODS.

Fire—*Ownership of hay cut on Crown lands without permission.*

Where a person, without any lease, permission or authority, cuts hay on the vacant land of another person, or of the Crown, and puts it up in stacks on the land, and does not remain in actual or *de facto* possession of the hay so put up, he has no property in it while

there, and no right of action for damages for its destruction, though that be the result of the wrongful or negligent conduct of some other person.

The actual possession of goods at the time, or such use and control as the nature of the subject admits of, is *prima facie* evidence of ownership to found an action for damages. *Gaudry* v. *C.P.R.*, 11 M.R. 69.

POSSESSION OF GOODS STOLEN ABROAD.

See CRIMINAL LAW, XVII, 9.

POSSESSION OF LAND.

See CROWN LANDS, 1.
— FENCES.
— MORTGAGOR AND MORTGAGEE, III, 2; IV, 1, 2; VI, 5, 13.
— PUBLIC PARKS ACT.
— RAILWAYS, V, 5; VII, 2.
— VENDOR AND PURCHASER, VI, 1, 12, 14, 15; VII, 8.

POSTPONEMENT OF TRIAL.

See COSTS, XIII, 18.
— CRIMINAL LAW, XIV, 2.
— EVIDENCE, 9.

POUNDAGE.

See SHERIFF, 1.

POWER OF APPOINTMENT.

General or limited—*Execution against donee of power.*

R. G. being the owner of certain lands, and M. G. (his wife) being the owner of certain other lands, they joined in a conveyance of them to a trustee. The conveyance (22nd July, 1884) recited that it had been agreed to settle the lands "for the benefit of themselves and their children," as thereinafter appeared. The trusts declared were to hold to such uses as R. G. and M. G. or the survivor of them should by deed or will appoint and, secondly, until and in default of appointment to the use of M. G. for life, and after her decease to the use of R. G. for life, and after the decease of both to the use of their children in equal shares.

By a subsequent conveyance (18th November, 1885) R. G. and M. G. appointed and conveyed the lands to R. G. upon the following trusts:—to the use of the children, with power to R. G. to appoint among them; in default of appointment and after the death of R. G., to M. G. for life, with power to her to appoint among the children; and in default of such appointment to the children then living.

By deed (8th February, 1888), R. G. and M. G. appointed and conveyed to P., one of the children.

Held, 1. That the power of appointment in the first deed was general, and not limited, as to its objects, to the children.

2. That the second deed, therefore, was a good appointment and vested the legal estate in R. G., and the equitable in the children, with power to transfer this latter estate to one or more of the children.

3. That executions against R. G., between the first and second deeds, did not affect the title of P., the grantee under the third deed. *Re Patterson*, 5 M.R., 274.

POWER OF ATTORNEY.

See MARRIED WOMAN, 2.

POWER OF REVOCATION.

See DEED OF SETTLEMENT.

POWER OF SALE.

See MORTGAGOR AND MORTGAGEE, III; IV, 1; VI, 13.

POWER TO SELL AND PLEDGE BONDS.

See RAILWAYS, IX, 2.

POWERS OF CORPORATION.

See CORPORATION, 6.

POWERS OF COURT.

See COSTS, XIII, 20.

POWERS OF DIRECTORS.

See MASTER AND SERVANT, IV, 4.

POWERS OF MUNICIPAL CLERK.

See MUNICIPAL ELECTIONS, 5.

POWERS OF PROVINCIAL LEGISLATURES.

See PROVINCIAL LEGISLATURES—POWERS OF.

PRACTICE.

I. AFFIDAVIT.

1. Filing—*Motion to take bill off files—When to be made—Judge's Chambers—Notice of Motion—Reading affidavit filed prior to notice.*

A motion by the defendant to take a bill off the files is properly made in Judge's Chambers.

A notice of motion stated that certain affidavits would be read, but did not state the date of the filing. One affidavit was filed prior to the date of the notice of motion. The opposite party filed affidavits in reply and gave notice of filing.

Held, that the affidavit filed prior to the notice of motion might be read. *Fuller* v. *Starkey*, 8 M.R. 400.

2. Of service.

Affidavit of service must shew that indorsements on writ are on copy served. *Bisson* v. *Sinnott*, 1 M.R. 26.

3. Of service of specially endorsed writ.

An affidavit of service stated that the deponent had served defendant with a copy of the writ annexed to the affidavit, upon which, as also upon the copy served, was endorsed "a notice of the name and residence of the attorney by whom the said writ was issued, and English notice of claim, particulars of claim, and notice in case of non-appearance of said defendant according to the statute in that case made and provided." The writ annexed to the affidavit was specially endorsed.

Held, that there was sufficient proof that the copy served was also specially endorsed. *McDonald* v. *Deacon*, 4 M.R. 452.

II. AMENDMENT.

1. Estoppel by judgment—*Mistake by attorney as to legal effect of signing final judgment for part of claim as a waiver of residue—Discretion to permit amendment.*

To a declaration on a special count upon a contract for hiring and the common counts, the defendant pleaded never indebted and a number of other pleas, and in each plea he excepted $450, parcel, &c. The plaintiff signed final judgment for the $450 and filed a joinder of issue, and gave notice of trial for the remainder of his claim. On an application by the defendant to stay the proceedings as

to the balance forever, or for leave to plead the signing of the final judgment, it appeared that the plaintiff's attorney in signing final judgment did not intend to abandon the excess of his claim over $450, but acted under a misapprehension of the effect of that proceeding. The Referee made an order giving the plaintiff leave to amend his judgment and make it interlocutory only. The defendant appealed.

Held, that there was jurisdiction to make the order, and it was rightly made. *Smart* v. *Moir*, 7 M.R. 565.

2. Matters arising pending action—*Breach of covenant occurring after commencement of action—King's Bench Act, R.S.M.* 1902, c. 40, *Rules* 336-340—*Striking out amendments made under order afterwards set aside on appeal.*

There is nothing in Rule 340 of the King's Bench Act to warrant the amendment of the statement of claim by setting up matters which have arisen since the commencement of the action except by way of answer to a counterclaim set up by the defendant. That Rule confers on the Court no new power of amendment but merely defines the procedure to be followed in exercising powers of amendment which exist apart from it and as to which the procedure is not pointed out by the rules preceding it.

Toke v. *Andrews*, (1882) 8 Q.B.D. 432, distinguished.

The Referee having previously made an order allowing such an amendment to be made, the plaintiff made the amendments without waiting for the expiration of the time for appealing.

Held, that this was no reason for disallowing the appeal which was made within the time allowed by the rules. *Speton* v. *Gilmour*, 14 M.R. 706.

3. Parties to action—*Contract made on behalf of company to be formed.*

Defendant contracted to sell and deliver to plaintiff all the bricks he should make during the year. It was stated in the contract that plaintiff entered into it on behalf of a company to be afterwards incorporated under the name of the Manitoba Construction Company. After the incorporation of such company the plaintiff brought this action in his own name for an injunction to restrain defendant from committing breaches of the contract and for damages for breaches already committed.

Held, that the plaintiff should not be allowed to amend his statement of claim by adding the company as co-plaintiff. *Cass* v. *McCutcheon*, 15 M.R. 667.

4. Parties to Action—*Trustee and beneficiary—Contract made on behalf of company to be formed.*

The facts being as stated in the head note to the decision in this case reported above.

Held, that the plaintiff should not be allowed to amend his statement of claim by adding claims for damages for himself as trustee for the Manitoba Construction Company and also for the company as *cestui que trust*.

Cases in which it has been held that a trustee may enter into a valid contract on behalf of a *cestui que trust* not in existence at the time, as, for example, an unborn child, distinguished. *Cass* v. *McCutcheon*, 15 M.R. 669.

See AMENDMENT.

III. APPEAL.

1. Cross-appeal—*King's Bench Act, Rule* 652 (*a*)—*Relief against party not an appellant.*

Rule 652 (a) of The King's Bench Act, R.S.M. 1902, c. 40, does not apply when the party against whom the respondent in an appeal seeks relief is not an appellant.

It is not sufficient in such a case for the respondent to serve upon such non-appealing party a notice under said Rule, but he must set down a substantive cross-appeal. *Bent* v. *Arrowhead Lumber Company*, 18 M.R. 277.

2. From County Court—*Amendment of præcipe.*

The defendant's præcipe to set down an appeal was inadvertently filed one day too late under section 320 of the County Courts Act; it did not set out clearly the nature of the application intended to be made as required by section 321, but merely that defendant appealed "from the judgment of Thomas Ryan, Esq., County Court Judge, delivered in a certain suit," between the plaintiff and defendants, "and in which a judgment was entered for plaintiff for $20," the real name of the Judge being Joseph Ryan.

Held, that, under section 327 of the Act, upon payment of $5 costs the præcipe might be amended so as to specify clearly

the relief asked for, and that under section 328 the appeal might be heard, notwithstanding the objection as to time, as the respondent could not be prejudiced thereby. *Broughton* v. *Hamilton Provident Society*, 10 M.R. 683.

3. From County Court—*Q.B. Act, 1895, Rule* 168 (*b*), (*d*).

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 M.R. 460.

4. From Referee—*Time for appeal—Prompt issue of execution—Waiver of irregularity.*

Held, 1. An appeal from the Referee must be brought on for hearing within 14 days from the issuing of the order.

2. A party entitled to costs may proceed to collect the same by execution immediately after taxation; the practice of the court does not require that any time be given for payment.

3. An irregularity may be waived in equity, as at law, by delay, or by taking a step in the cause after knowledge of the irregularity. *Wood* v. *Wood*, 2 M.R. 87.

5. To Supreme Court—*Costs—Execution after notice—Sheriff's poundage—Making order of Supreme Court a judgment of the Court below.*

1. A plaintiff is justified under Rule 683 of The Queen's Bench Act, 1895, in issuing executions and certificates of judgment immediately on judgment being entered notwithstanding defendant has given notice of appeal to the Supreme Court; and, although, upon the perfecting of the security for the appeal, an order has been made setting aside the executions, the plaintiff is entitled, after dismissal of the appeal, to the costs of the executions and certificates.

Clarke v. *Creighton*, (1890) 14 P.R. 34, followed.

2. The order setting aside the executions having reserved the question of the sheriff's fees, but made no reference to poundage, such cannot be ordered afterwards in view of section 48 of The Supreme Court Act, R.S.C., c. 135.

3. It is doubtful whether it is necessary to make the judgment of the Supreme Court an order of this Court for any purpose when the appeal is simply dismissed, and at any rate the costs of an application to do so should not be given when not so ordered upon the application. *Day* v. *Rutledge*, 12 M.R. 451.

IV. Examination for Discovery.

1. Appeal from County Court—*Stay of proceedings—Transfer from County Court to Queen's Bench.*

When an action has been transferred to the Court of Queen's Bench by an order of the Judge of the County Court under section 86 of the Queen's Bench Act, 1895, there is no longer any cause, matter or proceeding pending in the County Court; and the filing of an affidavit of intention to appeal from the order under section 317 of the County Courts Act will not have the effect of staying the proceedings in the Queen's Bench.

On motion to commit the defendant or to strike out his defence because of his failure to attend and submit to examination for discovery, defendant objected that by his affidavit of intention to appeal all proceedings in the Queen's Bench were stayed.

Held, following *Harris* v. *Judge*, [1892] 2 Q.B. 565, and *Moody* v. *Steward*, L.R. 6 Ex. 35, that there was no stay of proceedings.

The affidavit of service of the appointment and subpœna showed that the defendant was personally served "with a true copy of the subpœna hereunto annexed marked B, and of the said appointment marked A, by delivering such *appointment* to and leaving the same with the said John F. Howard personally."

Held, that upon a motion to put a party in contempt the material must be strictly correct and that the affidavit of service was insufficient as to the subpœna.

Quære, whether the plaintiff was entitled to discovery and production until he had delivered a statement of claim in the Queen's Bench: *Davies* v. *Williams*, 13 Ch. D. 550. *Doll* v. *Howard*, 10 M.R. 635.

2. Interrogatories—*King's Bench Act, Rule* 407 B, *as enacted by* 5 *and* 6 *Edw. VII, c.* 17, *s.* 2.

A party may be required to answer interrogatories delivered pursuant to Rule 407 B of the King's Bench Act, as enacted by

s. 2 of c. 17 of 5 & 6 Edw. VII, notwithstanding that he has also been ordered to attend and be examined for discovery under Rule 387.

Dobson v. *Dobson*, (1877) 7 P.R. 256, followed. *Timmons* v. *National Life Ass. Co.*, 19 M.R. 139.

3. Service of copy of appointment instead of original—*King's Bench Act, Rules* 391 A (1), 389.

The plaintiff's solicitor, desiring to examine the defendant for discovery, served upon his solicitor a copy of the examiner's appointment, relying on sub-rule (1) of Rule 391 A, added to the King's Bench Act, R.S.M. 1902, c. 40, by 5 & 6 Edw. VII, c. 17, s. 2, and, upon defendant failing to attend on the appointment, obtained an order from the Deputy Referee directing the defendant to attend for examination at his own expense.

Held, on appeal from this order, that, as the sub-rule speaks of the service of an *appointment* upon the solicitor, service of a *copy* only of the appointment was not sufficient, without service also of a subpœna on the defendant personally under Rule 389, and that the order should be set aside with costs.

Meyers v. *Kendrick*, (1883) 9 P.R. 363, followed. *Foley* v. *Buchanan*, 18 M.R. 296.

4. Service on solicitor—*Witness fees—Queen's Bench Act*, 1895, *Rules* 381, 382, 390.

It is not sufficient service of an appointment on the solicitor of a party to be examined for discovery under The Queen's Bench Act, 1895, to push it under the door of his office in his temporary absence, when it first comes to his notice on his return to his office within 48 hours of the time set for the examination, and the party in such case will be excused for not attending in obedience to a subpœna served upon him for such examination.

Grand River Nav. Co. v. *Wilkes*, (1851) 8 U.C.R. 249, and *McCallum* v. *Provincial Insurance Co.*, (1873) 6 P.R. 101, followed.

Under Rule 381 of the Act, a party subpœnaed to attend on such an examination should be paid not only his railway fares or mileage both ways, but also his witness fees for as many days as he will certainly be absent from his home in attending on the examination and returning home.

Quære, whether alterations and interlineations in a subpœna, not authenticated by the Prothonotary, do not make it invalid. *Unger* v. *Long*, 12 M.R. 454.

V. Ex Parte Orders.

1. Certificate of state of cause on obtaining ex parte injunction—*Notice of motion to continue—Waiver—Equity practice.*

The plaintiff obtained *ex parte* an interlocutory injunction with leave to move to continue it. He did not, on the *ex parte* application, file a certificate of the state of the cause. He also, on an allegation that the defendant resided abroad, and S. was his agent in this province, obtained an order for substitutional service on S. The notice of motion was not only to continue the injunction (for which leave had been granted) but also, that an injunction be issued in accordance with the prayer of the bill.

The defendant served on plaintiff a demand for copies of the affidavits filed on the motion.

Held, 1. That it is not necessary to file a certificate of the state of the cause on obtaining an *ex parte* injunction.

2. That the notice of motion asking something more than leave was given to ask, does not vitiate it.

3. That service of a demand for copies of the plaintiff's affidavits was a waiver of any objection to the mode of service on defendant. *McDonald* v. *Charlebois*, 7 M.R. 35.

2. Order for examination of witness about to leave jurisdiction.

Application to set aside an order, made *ex parte*, for the examination of B. as a witness on behalf of the plaintiff. The affidavit upon which it was granted stated the cause of action, that appearance had been entered, but no declaration filed, that B. was a material and necessary witness, that he intended to leave the Province on the day upon which the order was made, and would not return for at least six months.

Held, that, according to the established practice, the order should not have been made *ex parte*. It was therefore set aside. *Holmes* v. *C.P.R.*, 5 M.R. 346.

3. For particulars of plaintiff's residence, &c.

An order having been made *ex parte* that the profession, occupation, quality, and place of abode of the plaintiff should be given, a summons was taken out to set aside the same.

Held, that an order could be made *ex parte*, in the discretion of the judge, but that the correct practice was to proceed by summons.

After reviewing the facts of the case, the summons was discharged without costs. *Martel* v. *Dubord*, 1 M.R. 174.

VI. Interrogatories.

1. Order for further particulars.

The plaintiffs' claim was for the price of an incinerating machine bought by the defendants who refused payment on the ground that the machine would not do the work contracted for.

In preparing for trial the plaintiffs, believing it to be necessary to procure information as to the quantities of the different classes of refuse to be consumed by the machine, delivered interrogatories, the answers to which did not satisfy plaintiffs.

On plaintiffs' appeal from the order of Mathers, J., sustaining an order of the Referee dismissing the plaintiffs' application for further details of information to be given by defendants, in answer to the interrogatories,

Held, per Howell, C.J.A., and Richards, J. A., that plaintiffs were not entitled on the appeal to an order requiring the City to furnish estimates or opinions of its officers as to the quantity of manure produced throughout the City, although such officers had means of forming such opinions.

Per Perdue and Cameron, JJ.A., that such information should be furnished.

The Court being equally divided, the appeal was dismissed without costs. *Decarie Manufacturing Co.* v. *City of Winnipeg*, 18 M.R. 663.

2. Relevancy of—*King's Bench Act, Rule* 407B *added by* 5 & 6 *Edw. VII, c.* 17.

The pleadings in this case raised an issue whether or not the plaintiff, in order to induce the defendants to enter into the agreement sued on, falsely represented to them that, by virtue of his own interest and the interest of others represented by him, he controlled a certain company and could determine whether the company would accept the defendants' offer or not. A letter had been written by the plaintiff to one of the defendants before the acceptance of the offer in which he spoke of other parties as interested in the sale and holding out for a larger sum.

Held, (Richards, J. A., dissenting), that interrogatories put by the defendants to the plaintiff, under Rule 407B added to the King's Bench Act by 5 & 6 Edw. VII, c. 17, s. 2, asking for information as to the names of the other parties referred to, and as to all communications between them and the plaintiff relating to the proposed sale, were relevant to the issue and should be fully answered. *Affleck* v. *Mason*, 21 M.R. 759.

VII. Irregularity.

1. Setting aside notice of trial—*Service on another than the attorney on record—Technicality.*

Where advantage is sought to be taken of an alleged irregularity, and the application is technical and without merit, the applicant should be treated with the utmost strictness.

The plaintiff moved to set aside a notice of trial of an issue under the Real Property Act, on the ground, among others, that it had been served on an attorney who was not the attorney on the record ; although it had been served on the attorneys who then had the matter in hand, and also on the acting Winnipeg agents of the attorney in Portage la Prairie, who had formerly acted for plaintiff in the proceedings prior to the order directing the issue.

Held, that to succeed in such a motion the affidavits filed should have negatived every other possible mode of good service under the rules and practice of the Court, which they did not do, and the summons was dismissed with costs. *Kerr* v. *Desjarlais*, 9 M.R. 278.

2. Waiver.

The failure to file declaration within a year after the service of the writ is only an irregularity and not a nullity.

Such an irregularity may be waived by the defendant applying for an extension of time to plead. *Imperial Bank* v. *Glines*, 10 M.R. 317.

VIII. Issue of Execution.

1. Before confirmation of Master's report.

Held, that under the usual mortgage decree plaintiff has a right to issue execution immediately after making of Master's report and before its confirmation. *Cameron* v. *McIlroy*, 1 M.R. 197.

2. Loss of writ.

Where a writ of execution after renewal has been lost in transmission to the sheriff through the Post Office, an order may be made for the issue of a new writ *nunc pro tunc* to bear the same indorsements and evidence of renewal as the original writ; also that the substituted writ should have the same force and effect as the original. *White* v. *Lovejoy*, 3 Johns, 448, and *Herman on Executions*, 87, followed. *Douw* v. *Burt*, 1 Wend. 89, distinguished. *Fairchild* v. *Crawford*, 11 M.R. 330.

IX. Joinder.

1. Of different causes of action—*Jury trial—Separate trials of different causes of action—King's Bench Act, s. 59, Rules 257, 263.*

Under Rule 257 of The King's Bench Act, R.S.M. 1902, c. 40, a plaintiff may sue in the same action both for malicious prosecution and trespass, although, by section 59 of the Act, the former must be tried by jury unless the parties waive it, whilst the latter must be tried without a jury unless a judge otherwise orders, and a statement of claim including both such causes of action is not thereby embarrassing or inconsistent with the rules of practice of the Court.

After the pleadings are closed, a plaintiff suing for both such causes of action may either waive his right to a jury or apply to have the trespass claim also tried by a jury, and, if such application fails, then an application might be made, under Rule 263, to exclude one of the causes of action or for separate trials, but no application under the last mentioned rule should be made before the cause is at issue. *Coates* v. *Pearson*, 16 M.R. 3.

2. Of defendants—*Suit against two companies insuring same property—King's Bench Act, Rule 219.*

Rule 219 of the King's Bench Act, R.S.M. 1902, c. 40, does not permit a plaintiff to proceed in one action against two separate insurance companies upon separate policies, although they cover the same goods destroyed by the same fire.

Faulds v. *Faulds*, (1897) 17 P.R. 480; *Hinds* v. *Barrie*, 6 O.L.R. 656, and *Andrews* v. *Forsyth*, (1904) 7 O.L.R. 188, followed.

A plaintiff who had commenced such an action was required to elect within five days which company she would proceed against in the action and to discontinue as against the other. *Levi* v. *Phœnix Ins. Co. of Brooklyn*, 17 M.R. 61.

X. Judgment.

1. Final Judgment—*Action against several defendants, one only defending—Discontinuance of action—King's Bench Act, Rule 538.*

Final judgment cannot be signed against a defendant for want of a defence, if there is an untried issue pending between the plaintiff and another defendant in the same action who has entered a defence.

A notice of discontinuance of an action as against defendant B, served more than a year after the irregular entry of final judgment against defendant A, is a nullity and A may, within a reasonable time after the service of such notice, move to set aside the judgment against him.

Such a discontinuance cannot be effected under Rule 538 of the King's Bench Act except under sub-section (c), and then only by leave of the Court or a Judge. *Macdonald* v. *Fairchild Co.*, 19 M.R. 129.

2. Motion to vary minutes.

Upon a motion to vary minutes the later rule is, that the only question to be argued is, What was the actual order made? except in cases where both parties consent, or where it cannot be ascertained what order was pronounced.

By a judgment an indulgence was granted upon payment of costs, but no order for payment in any event was pronounced. Upon speaking to the minutes this latter order was directed to be inserted. *Balfour* v. *Drummond*, 4 M.R. 467.

3. Review by judge after entry—*Correction of errors in judgment as entered—King's Bench Act. Rule 638—Entry of judgment.*

Until the judgment pronounced in an action is entered the Court has full

power to rehear or review the case; but, after the judgment has been entered, the Judge who pronounced it has no power to amend or alter it if it correctly represents the actual decision even although based on a misapprehension.

In re Suffield v. *Watts*, (1888) 20 Q.B.D. 693; *In re Lyric Syndicate*, (1900) 7 T.L.R. 162, and *Preston* v. *Allsup*, [1895] 1 Ch. 141, followed.

Clerical mistakes or accidental slips or omissions may, however, be corrected under Rule 638 of the King's Bench Act. *Munroe* v. *Heubach*, 18 M.R. 547.

XI. MOTION FOR JUDGMENT.

1. Against one of several defendants—*Special indorsement.*

An application to sign judgment against one defendant will not be entertained, in the absence of evidence as to the position of the action with reference to the others.

A writ was endorsed "to recover the sum of $3,000, on a covenant contained in a deed for principal and $270 for interest thereon, also for interest on both amounts at ten per cent. per annum from the first day of March last until judgment."

Held, Not a sufficient special indorsement. *Stewart* v. *Richard*, 3 M.R. 610.

Distinguished, *London & Can. Loan Co.* v. *Morris*, 7 M.R. 129.

2. On admissions in pleading—*King's Bench Act, Rule* 615.

In an action for partition or sale of lands, if the defendant in his statement of defence admits the plaintiff's claim in respect of part of the lands, the plaintiff may under Rule 615 of the King's Bench Act have judgment for partition or sale of the lands in respect of which the admission is made, without waiting for the result of the litigation as to the remaining land. *Kelly* v. *Kelly*, 18 M.R. 362.

3. By defendant on admissions in his own pleadings—*King's Bench Act, Rule* 615—*Costs.*

The words "admissions of fact in the pleadings" in Rule 615 of the King's Bench Act, R.S.M. 1902, c. 40, are not confined to such admissions made by an opposite party, and this rule may be availed of by the party making the admissions and an order made accordingly; and, when the defendant in his statement of defence consents to the relief asked for by the plaintiff and offers to give the conveyance required by him, such consent and offer, although strictly speaking not an admission of fact should be treated as one for the purposes of the Rule, as its object is to save further proceedings and further costs when the need of trying issues is removed by admissions.

The statement of defence, besides the consent and offer referred to, denied the allegations of the statement of claim.

Held, that, as defendant, by making an application under Rule 615, had put it out of the power of the plaintiffs to prove their allegations and out of the power of the Court to decide, on the merits, who should pay the costs of the action, the case should be treated, for the purpose of awarding costs, as if the defendant had admitted the truth of the plaintiffs' pleadings as well as submitted to the relief asked for, and that the defendant should pay the main costs of the action, including the costs of the motion. *Houghton* v. *Mathers*, 14 M.R. 733.

4. Where defendant served by publication.

Held, where defendant is served by publication, it is necessary to move in court for a decree.

2. In other cases where there is no defence, or where the answer admits the facts entitling the plaintiff to a decree, or amounts to a disclaimer, and the defendants are *sui juris*, decrees may issue on præcipe. *Manitoba & N.W. Loan Co.*, v. *Harrison*, 2 M.R. 33.

5. Writ served ex juris—*Indorsement of particulars.*

The defendants were served out of the jurisdiction with the writ prescribed by the C.L.P. Act, 1852, s. 18, which had indorsed thereon the following particulars of claim:

"To interest upon loan, from plaintiffs to defendants, due to 1st December, 1883, $1,088 00
To interest on $1,088, from 1st December, 1883, to 1st April, 1884..... 36 26
$1,124 26"

On a motion for leave to enter final judgment under 46 and 47 Vic., c. 23,

s. 16, and the amending Act, 47 Vic., c. 21, s. 7, an affidavit of service of the writ and indorsements was produced, and other affidavits were filed proving the plaintiff's claim.

Held, that an indorsement of the particulars of claim upon the writ would sufficiently comply with the Statute, but that the particulars as indorsed in this case were not full enough under the C.L.P. Act, 1852, and did not show "fully the nature and amount of the claim sued for," as required by the Statute in that behalf, and the summons was discharged. *Dundee Mortgage and Invt. Co.* v. *Sutherland*, 1 M.R. 308.

XII. New Trial.

1. After dismissal at hearing, plaintiff being unready.

14th August, 1884.—Bill was filed.

30th October, 1884.—Bill amended by adding a large number of parties.

January, 1886.—Case was or ought to have been ripe for hearing.

April, 1886.—Set down for hearing and postponed.

June, 1886.—Set down and postponed by plaintiff, defendant D. being a necessary witness and having left the Province although subpœnaed.

September, 1886.—Set down and postponed, D. not having returned.

January, 1887.—Set down and postponed, D. not having returned and B., the plaintiff's agent, also a necessary witness, being absent although subpœnaed, and having neglected to attend upon an appointment to take his evidence *de bene esse*.

31st March, 1887.—Set down, postponement refused, although D. and B. absent : D. meanwhile had been in the province.

4th April, 1887.—Question of costs argued.

7th April, 1887.—B. returned to the City.

19th April, 1887.—Defendants, by leave of Judge, notified plaintiffs that, unless by this date decree agreed to, Judge would make decree.

25th April, 1887.—Petition served for leave to set down anew for hearing.

26th April, 1887.—Another sittings held, case, of course, not set down.

Defendants did not show existence of any injury to them by reason of delay.

Held, 1. Under all the circumstances set out in the judgment, that leave should be given to set down again upon payment of costs of the day and the petition.

2. The engagements of a witness coupled with shortness of notice may form an excuse for non-attendance upon subpœna.

3. The negligence of plaintiff's solicitor in not procuring evidence may form a ground for an extension of time for hearing. *Balfour* v. *Drummond*, 4 M.R. 388.

2. Jury fee, after order for.

49 Vic., c. 4, s. 2, (Man.) provides that: "No civil cause shall be entered to be tried by a jury, or shall be tried by a jury, until the party requiring the jury shall have deposited with the sheriff the sum of $25, to be applied towards the payment of jurors and shall have filed with the Prothonotary the sheriff's receipt for the $25." The defendant complied with this enactment. The action was tried with a jury and a verdict rendered for the defendant. A new trial was ordered in Term. The defendant did not pay in any further sum. The plaintiff then moved to strike out the jury notice. Bain, J., made the order. The defendant applied to reverse the order. *Per Curiam.*—Application allowed with costs. A second payment was not necessary. *Elliott* v. *Wilson*, 6 M.R. 63.

3. Mistake of solicitor—*Costs.*

On an application to a single Judge in Court under Rule 654, Q. B. Act, 1895, to set aside a verdict obtained by plaintiffs at a postponed trial in the absence of defendant's counsel, it was shown that he had not attended on the postponement owing to a misapprehension, not attributable to negligence, as to the date to which the trial had been postponed, and that it had always been the intention of defendant to defend the action.

Held, that the application should be granted on the terms that the costs of the day should be costs to the plaintiffs in any event, and that the costs of the application should be costs to the plaintiffs in the cause. *Pollock* v. *Goldstein*, 10 M.R. 631.

XIII. Notice of Appeal.

1. Form of motion before Full Court.

A notice of motion to the Full Court to set aside the verdict of a single Judge

stated that the plaintiff "has this day set down this cause for re-hearing," &c.

Held, a sufficient notice. *Miller* v. *Morton*, 8 M.R. 1.

2. Form of notice of re-hearing.

A decree having been made in favor of the plaintiffs, the defendants properly entered the cause for rehearing before the Court *in banc*, and gave the following notice: "Take notice that I have this day entered this cause for rehearing before the Full Court in order that the decree herein dated, &c., may be wholly discharged," &c.

Held, the notice was good. *Dundee Mortgage Co.* v. *Peterson*, 6 M.R. 65.

3. Form of notice of appeal from verdict of single Judge.

A verdict having been rendered for the plaintiff, the defendant properly filed a *præcipe* requiring the cause to be set down for rehearing before the Court in *banc*, and gave the following notice to the other side: "Take notice that the defendants will apply by way of appeal to the Full Court from the decision of Mr. Justice Dubuc in this cause," setting out the grounds of appeal.

Held, the notice was insufficient. *Simpson* v. *McDonald*, 6 M.R. 302.

XIV. NOTICE OF MOTION.

1. To compel witness to answer—*Notice of reading examiner's certificate.*

On a motion to compel a party to a suit to answer questions that he had refused to answer on an examination on the pleadings, the notice of motion must state that the certificate of the examiner, as well as the examination, will be read, although those two documents may be embodied in one.

Depositions being read upon a motion contained certain questions to which there appeared no answers other than as follows: "Witness on advice of counsel refused to answer."

Held, that there was not sufficient evidence of refusal to answer the questions. *West Cumberland Iron and Steel Co.* v. *Winnipeg and Hudson's Bay Ry. Co.*, 7 M.R. 504.

2. Short leave—*Notice of—Demurrer—Appeal from single Judge—Material required—Rule issued through inadvertence—Rescinding.*

Where leave was given to move next day to rescind a rule of Court, a notice of motion which stated that by leave *this day given* an application would be made to the Court next morning was held sufficient.

On an appeal from the decision of a single Judge allowing a demurrer, it is not necessary to verify the proceedings. The demurrer book, bearing the Judge's endorsation of the demurrer being allowed, and the entry in the clerk's book furnish sufficient material.

Where the Court had struck out an appeal under a misapprehension, the rule dismissing it was rescinded as having been issued through inadvertence. *Sparham* v. *Carley*, 7 M.R. 611.

XV. NOTICE OF TRIAL.

1. By defendant.

Held, that a defendant can give notice of trial, although plaintiff not in default. *Moore* v. *Fortune*, 2 M.R. 94.

2. By defendant—*Non-suit where plaintiff does not appear.*

A defendant may pass and enter the record, and give notice of trial for the Assizes, as well as for any Tuesday.

Where the plaintiff does not appear at the trial a non-suit may properly be entered. The defendant is not, in such case, entitled to a verdict. *Calder* v. *Dancy*, 4 M.R. 25.

3. Remanet.

A record was entered for the Spring Assizes in Winnipeg in 1883, and made a remanet. At the Autumn Assizes it was placed on the docket by the Prothonotary. No one appeared for the plaintiff, but defendant's counsel insisted upon a verdict being given in his favor.

Held, that a new notice of trial was necessary, and the verdict was set aside with costs. *Robinson* v. *Hutchins*, 1 M.R. 122.

XVI. PARTICULARS.

1. Order for after pleadings closed.

Per MATHERS, J., dismissing an appeal from DUBUC, C. J., RICHARDS, J., dissenting.

Particulars will not be ordered after the close of the pleadings unless under special circumstances. That was the rule in this Court prior to the Judicature Act, and there is nothing in the King's Bench Act or Rules to change the practice in that regard.

Smith v. *Boyd*, (1897) 17 P.R. 467, followed.

Under the English Rules, Order 19, Rules 6 and 7, particulars are treated as amendments of the pleadings, but our Act and Rules contain nothing corresponding to those English Rules. If the party seeking particulars has examined the opposite party for discovery and failed to get them, that might be treated as a special circumstance warranting the order: *Bank of Toronto* v. *Ins. Co. of N. A.*, (1897) 18 P.R. 29. *Savage* v. *C.P.R.*, 16 M.R. 376.

2. Order for, when and for what purpose made after the close of the pleading.

After the close of the pleadings particulars will only be ordered when it is shown by affidavit, or otherwise, independently of the pleadings, that they are required for the purpose of saving expense or preventing surprise at the trial.

Smith v. *Boyd*, (1897) 17 P.R. 463; *Gouraud* v. *Fitzgerald*, (1889) 37 W.R. 55, and *Bank of Toronto* v. *Ins. Co. of North America*, (1897) 18 P.R. 27, followed. *Rat Portage Lumber Co.* v. *Equity Fire Ins. Co.*, 17 M.R. 33.

3. Order for, after close of pleadings—*Particulars of charge of misconduct—Partnership action—Examination for discovery.*

After the close of the pleadings particulars are only required for the purpose of limiting the issues at the trial and will not be ordered until after discovery, and not then if the discovery results in full disclosure.

The particulars disclosed at an examination for discovery are as binding on the party discovering as they would be if delivered in the form of a pleading. *Kelly* v. *Kelly*, 18 M.R. 331.

4. In libel action—*Examination for discovery.*

Action for libel in charging the plaintiff with not accounting for moneys received as agent for defendants. The defendants pleaded privilege and set out certain circumstances which they alleged created the privilege. They also pleaded in justification of the libel. The plaintiff applied for particulars and the defendants, while not denying his right to particulars, claimed the right to examine him for discovery before being compelled to deliver particulars. The plaintiff however refused to attend for examination until after the delivery of particulars by the defendants.

Held, that the plaintiff should forthwith attend at his own expense for examination and that the defendants should deliver at once particulars of the grounds of their belief that the words complained of were true. *Timmons* v. *National Life Ass. Co.*, 18 M.R. 465.

5. Of malice in libel action—*Interrogatories.*

When the defendant has pleaded privilege, in an action for libel, and anticipates that plaintiff will endeavour to prove malice to rebut the privilege, he is not entitled to an order requiring the plaintiff to furnish particulars of express malice charged by the plaintiff against the defendant as affecting the publication complained of.

Lever v. *Associated Newspapers*, [1907] 2 K.B. 626, followed.

When the defendant has not pleaded justification in an action for libel, he is not entitled to administer interrogatories asking the plaintiff if he did certain acts with a view to showing that the statements in the alleged libel were true. *Timmons* v *National Life Ass. Co.*, 19 M.R. 227.

6. In action for malicious prosecution—*Costs.*

The plaintiff claimed damages from the defendant Company for "causing and procuring one John McKenzie to lay a series of criminal charges against" him.

On an application of the defendants, the Referee ordered the plaintiff to give further and better particulars in writing of the manner in which the defendant caused and procured McKenzie to lay the charges. The plaintiff claimed that he could not furnish such particulars.

Held, on appeal, that the order should be varied so as to require only that the plaintiff should furnish the best particulars he could give, with liberty to supplement his particulars after examining the defendants' officers and securing productions, such additional particulars to be furnished not later than ten days before the trial of the action.

Marshall v. *Interoceanic*, (1885) 1 Times L.R. 394, and *Williams* v. *Ramsdale*, (1887) 36 W.R. 125, followed.

Costs of the appeal and of the order appealed from made costs in the cause

to the defendants. *Cousins* v. *C.N.R.*, 18 M.R. 320.

7. Of negligence—*Action against owner of motor vehicle for running over and killing a person—Motor Vehicle Act*, 7 & 8 *Edward VII*, *c.* 34, *s.* 38.

Plaintiff sued as administrator of S. The statement of claim set out that the defendant's servants, while driving a motor vehicle belonging to him along a public highway and turning into an intersecting street, operated the motor vehicle so negligently, suddenly and without warning and at too great a speed that S., who was then riding a bicycle on said street, was struck and run over by the motor vehicle and instantly killed.

The defendant's application for an order for particulars was dismissed by the Referee. The plaintiff, in his affidavit filed against the application, swore that he had no personal knowledge of the manner in which S. came to his death, and that he had no means of obtaining the knowledge necessary to give the particulars asked for.

Held, on appeal from the Referee, that, taking into consideration the nature of the action, that some particulars were given in the statement of claim, and in view of the effect of section 38 of The Motor Vehicle Act, 7 & 8 Edward VII, c. 34, particulars should not be ordered.

Miller v. *Westbourne*, (1900) 13 M.R. 199, and *Brown* v. *Great Western Ry. Co.*, (1872) 26 L.T.R. 398, followed. *Cuperman* v. *Ashdown*, 20 M.R. 424.

8. Of residence, &c., of husband of married woman plaintiff.

Particulars of the residence, etc., of the husband of a plaintiff married woman ordered to be delivered. *McLellan* v. *Mun. of Assiniboia*, 5 M.R. 299.

9. Residence of plaintiff—*Effect of Rule* 101.

On an application for an order directing H., who was alleged to be the plaintiff's attorney, to declare in writing the profession, occupation or quality and place of abode of the plaintiff, the only evidence adduced was an affidavit of the partner of defendant's attorney, stating that two notices annexed were served on H., and he had not complied with them. The notices were:—(1) A demand to declare in writing the profession, occupation or quality and place of abode of plaintiff. (2) A demand of security for costs. Each was addressed to N. F. H———, Esq., plaintiff's attorney, and on each was endorsed, "Service hereof admitted on date. N. F. H———, plaintiff's attorney." No demand was made upon H.———as to whether the writ was issued by him, or with his authority or privity.

Held, that there was not sufficient evidence that H——— was plaintiff's attorney, and had so refused. *Lafferty* v. *Spain*, 7 M.R. 32.

10. Of special damage.

To an action upon a promissory note given for the price of a wire-binding machine the defendant pleaded by way of counter claim a warranty given upon the sale of the machine by the plaintiff and a breach of such warranty, claiming as damages, (1) loss of profits which he would have made by hiring the machine to others, (2) expense incurred in endeavoring to make the machine fit for use, and (3) expense to which he was put and loss sustained in and about the cutting and binding of his own corn.

Held, that particulars of the damages alleged should be given. *Elliott* v. *Hogue*, 3 M.R. 674.

11. In actions of tort—*Special grounds must be shown to get order for particulars.*

On an application for an order for particulars of plaintiff's claim in an action of tort, special grounds must be shown by affidavit setting forth at least such facts as would satisfy a Judge that the defendants would be embarrassed in their defence without such particulars and that justice requires their delivery.

An affidavit by defendants' solicitor that he believes the defendants cannot frame their defence without any statement of particulars is not sufficient to warrant the making of such an order.

Brown v. *G. W. Ry. Co.*, (1872) 26 L.T.N.S. 398, followed. *Miller* v. *Rural Mun. of Westbourne*, 13 M.R. 197.

XVII. Parties to Action.

1. Adding or substituting plaintiff—*Consent to be added—King's Bench Act, Rule* 242 (*b*).

The consent in writing, required by par. (*b*) of Rule 242 of the King's Bench Act, for the addition or substitution of a person as a party plaintiff in an action,

must be signed by such person himself. Signature by an agent, however undoubted his authority, will not suffice. *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649, followed.

No such consent, however, is required for the addition, in a proper case, of a person as a party defendant. *Watt* v. *Popple*, 16 M.R. 348.

2. Fraudulent conveyance—*Estoppel —Amendment.*

In an action brought against a husband alone for the sale of land vested in his wife by an unregistered deed, and which the plaintiff claimed was bound by a registered certificate of judgment against the defendant, the plaintiff applied after the case had been set down for trial for leave to amend his statement of claim by adding the wife as a party defendant and by alleging that the land in question was the defendant's property and had been mortgaged by him with other lands to a bank; that, after the bank had commenced an action for foreclosure of the mortgage, it was agreed between it and the defendant that the bank should take a final order apparently foreclosing the defendant's title to all of the mortgaged lands, but should accept in actual satisfaction of its claim the mortgaged lands other than the parcel in question and should hold the latter for the defendant; that such agreement was carried out, and that after getting such final order the bank at the defendant's request conveyed the parcel in question to defendant's wife who gave no consideration for it, but received and had always since held it solely as a trustee for the defendant. When he began the action the plaintiff had knowledge of the facts thus sought to be set up by amendment.

Held, that leave to amend as asked should be granted on payment of costs, and that both husband and wife would be proper parties to such an action, notwithstanding that the defendant in his statement of defence had denied that he had any interest in the land. Such denial could not afterwards be set up as an estoppel against him in favor of his wife or even in favor of the plaintiff, but would only be evidence that at one time, and for certain purposes, he had repudiated having any such interest.

Bank of Montreal v. *Black*, (1894) 9 M.R. 439, distinguished. *Shiels* v. *Adamson*, 14 M.R. 703.

3. Prior incumbrancer —*Delay*—*Practice in Master's office.*

In a mortgage suit the usual præcipe decree was issued directing a reference to the Master, and a sale on default of payment.

The Master, amongst others, made H., an execution creditor, a party in his office and settled the priorities as follows: —H. first, the plaintiff second, and L. M. & P. third. H., relying on having proved her claim in this suit, allowed her writ of execution to expire, and so lost her priority. Seven years afterwards the plaintiff revived the suit, and a final order for sale was made. The sale proving abortive, the plaintiff gave notice of motion for an order *inter alia* that a time be appointed to pay the sum due the plaintiff and, in default, that all the defendants be foreclosed.

Held, 1. That H., being a prior incumbrancer, should not have been made a party, but that the plaintiff having acquiesced in the Master's order, and in H.'s claim being proved, could not, after the great lapse of time, take exception to it.

2. That H. could not be foreclosed, nor under the circumstances dismissed from the proceedings.

Order made foreclosing the defendant by bill and subsequent incumbrancers, on default of payment, with leave to H. if not paid off, to apply for a sale, or that the plaintiff pay her or stand foreclosed. *Leggo* v. *Thibaudeau*, 7 M.R. 38.

XVIII. Sale by the Court.

1. Leave to plaintiff to conduct sale and bid—*Sale under decree.*

Unless all parties consent, a plaintiff in a mortgage suit will not be permitted to bid at a sale of which he has the conduct. *Taylor* v. *Sharp*, 3 M.R. 4.

2. Leave to plaintiff to conduct sale and bid.

This case was similar to the last, with the exception that all parties consented to the leave, asked by the plaintiff, being given.

Held, It was objectionable that the party having the conduct of the sale should have leave to bid, but, if the parties were willing that he should do so, an

order might go giving him leave. But it must be drawn up as a consent order. *Halsted* v. *Conklin*, 3 M.R. 8.

XIX. Service of Process.

1. Application to extend time for service of statement of claim—*Statute of Limitations.*

Unless there are extraordinary circumstances, an application to extend the time for service of the statement of claim should be made before the lapse of the six months allowed for service by Rule 176 of the King's Bench Act, especially as the plaintiff can obtain substitutional service or some other remedy under Rule 203, and in all cases an honest attempt to serve the defendant should be shown.

Such an attempt is not shown where the affidavit of the solicitor merely states that since the issue of the statement of claim he has been constantly endeavoring to "locate" the defendant, but without success, until recently, when it was discovered he resided in Saskatchewan.

Under such circumstances leave to serve the statement of claim ought not to be given, if the effect be to revive a cause of action barred by the Statute of Limitations at the time the application is made.

Doyle v. *Kaufman*, (1877) 3 Q.B.D. 340, followed. *Watson Man. Co.* v. *Bowser*, 18 M.R. 425.

2. Out of the jurisdiction—*Action for breach of contract to be performed within the jurisdiction—King's Bench Act, Rules* 201 (*c*), 202.

The plaintiff, a resident of Manitoba, sued the defendant, a resident of Saskatchewan, for commission on the sale for defendant of land situated in Saskatchewan. The bargain respecting the agency was closed between the parties at Winnipeg when defendant agreed to pay a certain commission in case plaintiff found purchasers.

Held, that the plaintiff had a right, under sub-rule (*c*) of Rule 201 of the King's Bench Act, to serve the statement of claim out of the jurisdiction without obtaining a prior order for leave to do so, for, although there was nothing provided as to where the commission should be payable, yet it would be the duty of the defendant to pay to the plaintiff at his residence in Winnipeg any commission earned by him and so there would be, in case of non-payment, a breach within Manitoba of a contract which, according to the terms thereof, ought to be performed within Manitoba.

Reynolds v. *Coleman*, (1887) 36 Ch. D. 453, followed.

Held, also, that, if a plaintiff relies upon Rule 202 of the King's Bench Act, he must not only establish the existence of assets within the jurisdiction owned by defendant to the amount of $200, but he must also obtain an order for leave before service out of the jurisdiction will be allowed. *Gullivan* v. *Cantelon*, 16 M.R. 644.

3. Personal service when party refuses to accept—*Leave to defend—Setting aside judgment.*

In effecting personal service of process, which the party refuses to accept from the officer, he should explain the nature of it to the party, and then it will be sufficient to throw it down before him and leave it there: *Thomson* v. *Pheney*, (1832) 1 Dowl. 441.

In this case the affidavit of service of the statement of claim showed that the defendant had refused to accept the copy and that the officer left it at the defendant's house.

Held, that the service was not effectual, more especially as the defendant was a Mennonite and did not understand English, and that the defendant should be allowed to put in his defence to the action within fifteen days.

The evidence contained in the affidavits as to the merits of the defence raised not being satisfactory or convincing,

Held, that the plaintiff's judgment should not be set aside in the meantime, and that he should be allowed to remain in possession of the property, which was the subject of the action.

O'Sullivan v. *Morphy*, (1884) 78 L.T. 213, followed.

Costs of the application reserved until after the trial. *Ritz* v. *Schmidt*, 12 M.R. 138.

XX. Setting Aside Executions, Judgments and Orders.

A. Executions.
B. Judgments.
C. Orders.

A. EXECUTIONS.

1. Issued contrary to good faith.
Upon an appeal from an order setting aside an execution,

Held, that the execution was issued contrary to good faith and in violation of an agreement, and the appeal must be dismissed, but without costs, unless the defendant would undertake not to bring an action for the seizure and sale of his stock-in-trade under the execution. *Ashdown* v. *Dederick*, 2 M.R. 212.

2. Execution issued in bad faith—*Motion against, by third party—Attachment obtained by misrepresentation.*

Where an execution was issued in face of an order that it should not issue for a certain time which had not elapsed,

Held, that this was not merely an irregularity, and that another execution creditor might move against it.

The sheriff having seized and sold goods under the writ, it could not be set aside, but was declared to be deemed to have been placed with the sheriff on the earliest day on which it properly could have reached him.

During a contest for priority between execution creditors, if the sheriff, by consent of both parties, proceeds and sells, an agreement that the rights of the parties are not to be affected will almost be presumed.

An attachment was obtained by an attorney who appeared for the plaintiffs, but who was in reality the defendants' attorney, upon the ground that the defendants had assigned their property with intent to defraud their creditors. The fact that the assignment was to the plaintiffs themselves having been concealed, the attachment was set aside with costs to be paid by the attorney. *Whitla* v. *Spence*, 5 M.R. 392.

B. JUDGMENTS.

1. Delay in application.
Where judgment obtained and execution placed in sheriff's hands, and no application made to set same aside for nearly a year,

Held, that after such delay the Court would not interfere upon a ground of irregularity. *Union Bank* v. *McDonald*, 1 M.R. 335.

2. Delay.
The writ was issued on 23rd June, 1883. Judgment was signed 10th July, and execution issued 16th July, 1883. On 3rd March, 1884, defendant applied to set aside the judgment, on the ground of irregularity, and on the merits.

Held, application refused. *Tait* v. *Calloway*, 1 M.R. 102.

3. Irregularity—*Want of merits—New material not to be used on appeal.*

Action against two defendants commenced in May, 1883. Judgment signed in September, 1883, for want of appearance. There was an affidavit of personal service filed.

Defendant P. in October, 1892, applied to set aside the judgment on the ground that he had never been served with the writ, and had only lately learned of the judgment. He swore positively that prior to the date given in the affidavit as that of the service of the writ he had left the province, and did not return for some years afterwards, and never was served with the writ or any papers of any kind relating to the suit; some other person was served by mistake for defendant. Defendant did not swear to merits, nor did he show that the writ had never come to his knowledge.

Held, that the fact that defendant never was served with the writ of summons, or a copy thereof, constituted an irregularity only and not a nullity. In order to take advantage of such irregularity, defendant must show, not only that he was not served with the process, but that such process did not come to his knowledge or into his possession.

On a summons by way of appeal from an order of the Referee, no affidavits can be looked at except those that were before the Referee. *Rutherford* v. *Bready*, 9 M.R. 29.

4. Leave to defend—*Queen's Bench Act*, 1895, *Rules* 339 (*a*), 655.

Under Rules 339 (a) and 655 of The Queen's Bench Act, 1895, a defendant seeking to set aside a judgment entered by default is not obliged to show the existence of a defence on the merits as clearly as was required in order to set aside a judgment on default of appearance under The Common Law Procedure Act, but there is a discretion to let him in to defend if the Judge thinks that under the circumstances he ought to be permitted to defend.

The plaintiff's claim was for damages for breach of a contract to deliver a quantity of wheat, and the defendant

bona fide intended to contest the claim, but made a mistake as to the time of service and tried to put in the defence only one day too late. The judgment signed was interlocutory, and an assessment of damages was still required.

Held, that, although it was by no means clear on his own showing that the defendant had a good defence on the merits, the order of the Referee setting aside the judgment, and allowing defendants to file a statement of defence on payment of costs, should not be interfered with. *Moore* v. *Kennedy*, 12 M.R. 173.

5. Leave to defend—*Special circumstances—Discretionary order—Infancy.*

A writ was issued under The Summary Procedure on Bills of Exchange Act, 1855, on a promissory note made by the two defendants, and judgment was obtained by default on 21st April, 1891. On the 29th September, 1892, the defendant R.T.L. applied in chambers to set aside this judgment on the ground that, at the time of making the note, he was an infant, that he joined in the note only as surety for his co-defendant and that his co-defendant promised to settle the suit; also, that for that reason he did not defend the action, and heard nothing more of it until, on the 24th September, 1892, the sheriff seized his crop under an execution. An order was made in Chambers setting aside the judgment, and granting leave to defend.

On an application to the Full Court to reverse this order,

Held, (KILLAM, J. dissenting), that, the Judge in Chambers having exercised his discretion, the Court should not interfere with his order.

Per KILLAM, J. No special circumstances were shown entitling the Judge in Chambers to exercise any discretion to set aside the judgment. *Fairchild* v. *Lowes*, 8 M.R. 527.

6. Meritorious defence, when required to be shown—*County Court—Judgment by default regularly signed—Setting aside judgment—Affidavit of merits.*

A judgment by default, regularly signed, cannot be set aside *ex parte*, but only upon notice to the plaintiff and an affidavit of merits, and this rule applies to the County Courts as well as the Court of Queen's Bench. *McKay* v. *Rumble*, 8 M.R. 86.

7. Meritorious defence when required to be shown—*Leave to defend—Absence of defence on the merits—Judicial discretion—Appeal from Referee.*

When a judgment is regularly entered in default of a defence, a good defence on the merits should be shown on an application to set it aside and allow a defence to be filed, even if it was by the error of a clerk of the defendant's solicitor, in not carrying out his instructions, that the defence intended was not filed in time.

Watt v. *Barnett*, (1878) 3 Q.B.D. 363, approved.

Where, however, the Referee has exercised his discretion in favor of the defendant and made an order giving leave to defend, such order should not be reversed on appeal, although the Judge cannot find that any defence on the merits has been shown.

Moore v. *Kennedy*, (1898) 12 M.R. 173, followed. *McCaul* v. *Christie*, 15 M.R. 358.

C. ORDERS.

Discretionary order—*Onus of proof—Order allowing service of ex juris writ—Filing order to proceed.*

An order allowing service of an *ex juris* writ, under 49 Vic., c. 35, s. 32, s-s. (e) (M. 1886), is a discretionary order, and the Court will not set aside such an order made by the Referee unless it appears very clearly that he was in error.

The onus is on a defendant moving to set aside such an order to shew that the order should not have issued; and, where the order was made on the ground that money owing by an insurance company was attached in Manitoba, the defendant must shew both that the insurance money was payable and the insurance contract made out of Manitoba.

When a defendant has moved to set aside the service of a writ out of the Province, on the ground of want of jurisdiction, he cannot afterwards be heard on a motion to set aside the writ itself on the same ground supported by further material.

A declaration was filed without first filing or serving the order for leave to proceed.

Held, there is no established practice, and an objection on that ground cannot be given effect to. *Empire Brewing and Malting Co.* v. *Harley*, 7 M.R. 416.

XXI. Stay of Proceedings.

See Staying Proceedings.

XXII. Striking Out Defence.

1. Special endorsement of writ for service out of jurisdiction—*Appearance—Motion for judgment.*

The writ issued was for service out of the jurisdiction, and was specially endorsed.

Defendant appeared.

Plaintiffs took out a summons under 46 and 47 Vic., c. 23, s. 16, to strike out the appearance, and for leave to sign judgment.

Held, that a writ of summons for service out of the jurisdiction should not be specially endorsed, but that the defendant had waived the objection by entering an appearance. Order made as asked. *Imperial Bank* v. *Prittie*, 1 M.R. 31.

2. For non-attendance for examination.

Upon a summons for leave to sign final judgment the defendant filed an affidavit disclosing a defence, but refused to attend for examination upon it in pursuance of a judge's order.

Held, that the affidavit could not be read, and judgment was ordered. *American Plumbing Co.* v. *Wood*, 3 M.R. 42.

3. For non-attendance for examination.

Circumstances under which an order will be made to strike out a defence for non-attendance for examination. *Ontario Bank* v. *Sutherland*, 3 M.R. 261.

XXIII. Striking Out Pleadings.

1. As bad on demurrer—*Demurrer—Amendment—Queen's Bench Act*, 1895, *Rule* 318.

Several paragraphs of the defendant's statement of defence were objected to by the plaintiff, as raising defences which were not good in law, and a motion was made to strike them out under Rule 318 of the Queen's Bench Act, 1895, which provides that the Court or a Judge may, at any stage of the proceedings, order to be struck out or amended any matter in the pleadings which may be scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action.

Held, that, as no provision is made in the Act for a plaintiff demurring to the statement of defence, any pleadings which would have been held bad on demurrer under the former practice, should now be struck out on application, or in a proper case amended on terms.

The 5th and 6th paragraphs of the defence alleged payment, but omitted the words "before action," and leave was given to amend these paragraphs; but the other paragraphs objected to were all held to be bad in law and struck out with costs, to be costs in the cause to the plaintiffs in any event. *Ætna Life Ins. Co.* v. *Sharp*, 11 M.R. 141.

2. Delay in making application—*Striking out plea as embarrassing—Laches.*

An application to strike out a plea as embarrassing should be made promptly.

When plaintiffs had allowed nearly two years to elapse, and had demurred to the plea, and obtained several orders for extending the time for demurring and replying, and for examining defendant on the plea,

Held, that an application to strike out the plea was too late, and that the plaintiffs, by their conduct, had waived any objection to the form of the plea. *British Linen Co.* v. *McEwan*, 8 M.R. 214.

3. Motion for, while demurrer pending—*Demurrer—Motion to strike out parts of statement of claim as embarrassing.*

After a defendant, in his statement of defence, has demurred to certain paragraphs of the statement of claim as disclosing no facts upon which the plaintiff would be entitled to recover, a motion to strike out the same paragraphs, as embarrassing and prejudicial to the fair trial of the action on the same grounds, should not be entertained while such demurrer is pending. *Smith* v. *Murray*, 21 M.R. 753.

XXIV. Substitutional Service.

1. Affidavit on application for.

An affidavit for substitutional service of a writ issued under the Bills of Exchange Act should show the attempts that have been made to serve the writ; that a copy of it has been left for the defendant, when that has been done; the locality of the defendant's residence when known; or, if not known, that

enquiries have been made to ascertain it without success, and it must show a search for appearance. *Bakewell* v. *McMicken*, 3 M.R. 244.

2. Publication of notice by advertisement—*Motion for final judgment—King's Bench Act, Rules* 182, 183.

Motion for final judgment after interlocutory judgment in default of defence in an action for a declaration that certain property standing in defendant's name in the Land Titles office was held by him as a bare trustee for the plaintiff and for an order, *inter alia*, vesting the title of the property in the plaintiff.

Plaintiff had obtained and acted upon an order of the Referee providing for service of the statement of claim by advertisement published in a Winnipeg daily newspaper, but his material showed that, if the notice had been published in either of two localities in the United States, it would have been more likely to come to the knowledge of the defendant.

Plaintiff had conveyed his interest in the land to the defendant by an assignment absolute in form, reciting payment of the sum of $1500 therefor, and there was no evidence or corroborating circumstances brought forward in support of the allegations in the statement of claim.

Held, notwithstanding the very wide provisions of Rules 182 and 183 of the King's Bench Act, that, when service by publication is asked, it should not as a rule be granted unless there is some reason for believing that the advertisement will come to the knowledge of the defendant: *Annual Practice*, 1910, pp. 64-66; that in the present case the probabilities were that the action had never come to the defendant's notice and that, in the exercise of the caution that the Court should observe where it is asked to take the property which apparently belongs to one man and vest it in another, the motion should be refused. *Howard* v. *Lawson*, 19 M.R. 223.

3. Publication of notice by advertisement—*Motion for final judgment—Kings' Bench Act, R.S.M.* 1902, *c.* 40, *Rules* 182, 183.

1. Substituted service by publication of notice by advertisement of a statement of claim, especially in an action in which the plaintiff seeks to deprive the defendant of a possible interest in land, should not be ordered under Rules 182 and 183 of The King's Bench Act, except upon affidavits showing a reasonable probability that the advertisement will come to the knowledge of the defendant.

Hope v. *Hope*, (1854) 4 De G. M. & G. 328; *Furber* v. *King*, (1881) 29 W.R. 535; *Alexander* v. *Alexander*, (1901) 1 O.L.R. 43, and *Howard* v. *Lawson*, (1909) 19 M.R. 223, followed.

2. The Court will not pronounce final judgment in such a case, notwithstanding that the Referee has made an order, not appealed from, permitting the plaintiff to sign interlocutory judgment after publication of notice, unless, upon an examination of the material filed, it appears that the order had been properly made: *Howard* v. *Lawson*, 19 M.R. 223. *Griffin* v. *Blake*, 21 M.R. 547.

XXV. Summary Judgment.

See Summary Judgment.

XXVI. Third Party Procedure.

1. Defendants' claim against third party founded on tort—*King's Bench Act, Rules* 246, 249.

The Rules of Court providing for a defendant bringing in a third party to contest the plaintiff's claim, Nos. 246 and 249 of the King's Bench Act, do not extend to a case in which the defendant's claim against the third party is founded on tort. The defendants, therefore, being called upon to account for a carload of wheat received from the plaintiffs to be shipped on their line, could not bring in, as third party to the action, another company which it was alleged had wrongfully got possession of the wheat and disposed of it.

Gagne v. *Rainy River Lumber Co.*, (1910) 20 O.L.R. 433, followed. *Western Canada Flour Mills Co.* v. *C.P.R.*, 20 M.R. 422.

2. Indorsee of promissory note against maker—*Defence that payee guilty of fraud—Maker not entitled to bring in payee for purpose of relief over.*

In an action by the indorsee of a promissory note against the maker, the defendant is not entitled to serve a notice on the payee, under Rule 246 of the King's Bench Act, calling him to come in and help to contest the plaintiff's claim, when the defence relied on is that the

payee was guilty of fraud in obtaining the note and that the plaintiff is not a holder in due course. Neither is the defendant entitled, in such a case, to an order under Rule 245 joining the payee as a party to the action. The procedure provided for in Rules 245 to 250 was intended mainly for cases in which the third party is supposed to have some ground which he may be able to urge against the plaintiff's right to recover from the defendant, the object being that, if he fails to come in and urge such ground, he would be precluded afterwards, when the defendant seeks indemnity or contribution or other relief over against him, from saying that the plaintiff should not have been permitted to get his judgment against the defendant. If there is power to make the order asked for in such a case it should be refused in the exercise of a proper judicial discretion under Rule 250, because the plaintiff might be unreasonably delayed in proceeding with his action.

Bower v. *Hartley*, (1876) 1 Q.B.D. 656, followed. *Daniels* v. *Dickson*, 17 M.R. 35.

XXVII. Transfer from Other Courts to King's Bench.

1. From County Court—*Statement of Claim—Queen's Bench Act*, 1895, *section* 86.

When an action is transferred from the County Court to the Queen's Bench, under section 86 of the Queen's Bench Act, 1895, it is necessary for the plaintiff to file and serve a statement of claim in the Queen's Bench before taking any other step in the cause. *Doll* v. *Howard*, 11 M.R. 73.

2. From Surrogate Court—*Surrogate Courts Act, R.S.M.* 1902, *c.* 41, *s.* 63.

When a contentious matter arising in a Surrogate Court between the proponents of two different wills of the deceased is transferred to the Court of King's Bench under section 63 of The Surrogate Courts Act, R.S.M. 1902, c. 41, it is necessary that a statement of claim in the King's Bench should be filed and served before any other step in the cause is taken.

Doll v. *Howard*, (1896) 11 M.R. 73, followed.

The party who commenced the litigation in the Surrogate Court by petitioning for probate should be the plaintiff in the King's Bench. *Re Jickling*, 20 M.R. 436.

XXVIII. Miscellaneous Cases.

1. Alimony—*Queen's Bench Act*, 1895, *s.* 31—*Registering certificate of decree for alimony—Retrospective legislation.*

A decree for alimony, although obtained before the coming in force of The Queen's Bench Act, 1895, may, under section 31 of that Act, be registered against lands, as legislation relating to procedure only, or improving the remedy, is *prima facie* applicable to existing proceedings or rights.

Wright v. *Hale*, (1860) 6 H. & N. 227, and *Weldon* v. *Winslow*, (1884) 13 Q.B.D. 784, followed.

The Queen v. *Taylor*, (1876) 1 S.C.R. 65, and *Hughes* v. *Lumley*, (1855) 24 L.J.Q.B. 29, distinguished. *Foulds* v. *Foulds*, 12 M.R. 389.

2. Attachment against the person—*King's Bench Act, Rule* 704—*Former equity practice.*

In applying for a writ of attachment against the person for contempt of Court, it is not necessary to show that the equity practice prior to the coming into force of The Queen's Bench Act, 1895, requiring that the copy of the order served should be indorsed with the memorandum prescribed by former Equity Rule 290 and schedule N, has been followed, as the words "circumstances" and "manner," used in Rule 704 of the King's Bench Act, which is the Rule prescribing the present practice, do not extend to the *material* to be used on applying for such writ of attachment. The Court drew a distinction between the procedure for obtaining the old *ex parte* writ of attachment and the present practice, under which notice is always necessary before the writ can be obtained. *Cotter* v. *Osborne*, 17 M.R. 164.

3. Certiorari—*Full Court—Master and Servant's Act, R.S.M., c.* 96—*Criminal matter—Procedure.*

Motion to the Full Court upon notice to a justice of the peace for a writ of *certiorari* to remove a conviction of the applicant under The Master and Servant's Act, R.S.M., 1892, c. 96, for non-payment of $18.00 wages.

Ordered, that the motion should be adjourned into Chambers to be heard by a single Judge if the parties consented,

otherwise that it should be dismissed without prejudice to a motion in Chambers. *Re Lupas*, 12 M.R. 53.

4. Consent order—*Application to enlarge time.*

An order made on consent cannot be varied or set aside, except by consent, without showing some ground of surprise, mistake or fraud, or other ground which would invalidate an agreement between the parties.

Harvey v. *Croydon*, 26 Ch. D. 249; *Australasian Automatic, etc., Co.* v. *Walter*, W.N. [1894] 170; *Huddersfield Banking Co.* v. *Lister*, [1895] 2 Ch. 273, followed. *Grant* v. *McKee*, 11 M.R. 145.

5. Costs—*Action against member of legal firm defended by firm, one of whom is not a solicitor—Taxation of defendant's costs in such a case—Counsel fees paid to partners in law firm—Law Society Act, R.S.M.* 1902, *c.* 95, *ss.* 52 *and* 59.

1. No solicitor's fees should be allowed on the taxation as against the plaintiff of the costs of the successful defence of an action against one member of a legal firm for whom the firm acts as solicitors, when another member is not a solicitor.

Plisson v. *Skinner*, (1902) 5 Terr. L.R. 391, and *Brown* v. *Moore*, (1902) 32 S.C.R. 97, followed.

2. The defendant however, may, in such a case, tax counsel fees actually paid to his partners.

Johnston v. *Ryckman*, (1903) 7 O.L.R. 511, followed. *Wright* v. *Elliott*, 21 M.R. 337.

6. Defective material — *Judicature Act, Rule* 413.

Held, that Rule 413 of the Queen's Bench Act, 1895, applies to all applications and motions made after the Act came into force, whether in suits or actions commenced after or before that date, notwithstanding Rule 983, and that it is now imperative to give an opportunity to the applicant to make good any defective material upon payment of the costs occasioned to the opposing party by his additional attendance. *Elliott* v. *Robertson*, 10 M.R. 628.

7. Demurrer—*Queen's Bench Act*, 1895, *Rules* 280, 426 *and* 440.

The proper practice, under Rules 426 and 440 of the Queen's Bench Act, 1895, where a demurrer is incorporated in the statement of defence, is to apply for an order of a judge if it is desired to have the demurrer heard before the trial of the issues of fact. And without such order the matters of law should be disposed of at the trial along with the issues of fact.

In the present case the demurrer had been set down for hearing on a Wednesday, without a Judge's order, but had been heard and overruled.

Held, on appeal from the overruling order, that, as the defendants could not now argue the demurrer at the trial, the appeal must be proceeded with. *Foster* v. *Mun. of Lansdowne*, 12 M.R. 41.

8. Examination of judgment debtor—*Production of books — Notice to produce.*

For the purpose of compelling a defendant upon his examination as a judgment debtor under Rule 732 and following rules of the Queen's Bench Act, 1895, to produce any books and documents required, it is sufficient to serve a notice upon him to produce them, and it is not necessary under Rule 736 that the judgment debtor should be served with a *subpœna duces tecum*, as in the case of a witness at a trial.

Russell v. *Macdonald*, 12 P.R. 458, and *Lavery* v. *Wolfe*, 10 P.R. 488, followed. *Whitla* v. *Agnew*, 11 M.R. 66.

9. Exhibits—*Analysis of medicinal preparations produced by plaintiffs.*

In an action for an injunction restraining the defendants from passing off upon the public certain medicinal preparations manufactured and sold by them so as to deceive the public into the belief that they were the preparations of the plaintiffs, the defendants are not entitled to an order for the analysis of the samples of the preparations of the plaintiffs, though produced by them for all purposes, and although they contended that such analysis was necessary to test the claims made by the plaintiffs that their preparations were cures for cancer and other diseases.

The defendants' object could be as well attained by an analysis of what might be freely purchased in the open market without the destruction of any of the plaintiffs' property. *Theo. Noel Co.* v. *Vitæ Ore Co.*, 18 M.R. 46.

10. Filing pleadings—*Date of pleadings.*

Held, 1. Pleadings must be dated of the day of the month and the year when pleaded.

2. Pleadings must be filed as well as served. *Walker* v. *Cameron*, 2 M.R. 95.

11. Inspection of documents in possession of opposite party.

Held, upon an application for inspection of documents, an affidavit of the party, as well as of the attorney, is not necessary. *Merchants' Bank* v. *Murray*, 2 M.R. 31.

12. Interpleader—*Section 46 of The Common Law Procedure Act, 1854—Examination of witness on pending motion.*

On the return of a sheriff's interpleader summons, the evidence of the judgment debtor may be taken under section 46 of The Common Law Procedure Act, 1854, if the Judge or Referee see fit to direct it. *Phillips Electrical Works* v. *Armstrong. North-west Thompson & Huston Electric Co., Claimants*, 8 M.R. 48.

13. Lost note—*Indemnity—Bills of Exchange Act*, 1890, s. 69—*Costs—Reference to the Master.*

In an action on a lost promissory note, when the loss is pleaded, the plaintiff should, in general, tender the defendant a proper bond of indemnity with a sufficient surety or sureties before applying to set aside the plea under section 69 of the Bills of Exchange Act, 1890, in order to avoid paying the costs of this defence, and of the application.

Although the words of the statute are that an indemnity "to the satisfaction of the Court or a Judge" is to be given, the security may be left to the Master to settle.

Shoolbred v. *Clarke*, (1890) 17 S.C.R. 265, followed.

Adjudication as to costs of motion to strike out plea of loss of note when the bond tendered was insufficient. *Orton* v. *Brett*, 12 M.R. 448.

14. Mortgage suit—*Dispute note—Power of registrar to take accounts when dispute note filed—Costs of abortive sale.*

Held, that the registrar has power to include in the plaintiff's account costs of an abortive sale, on issuing a decree after dispute note filed; but, in case of a contest, has no power to adjudicate on the weight of evidence. The proper course is to take a decree with a reference to the Master. *Cameron* v. *McIlroy*, 1 M.R. 241.

15. Motion by outside party—*Statement of residence.*

In a notice of motion by a person not a party to the suit and taking his first proceeding in the suit, his residence should be stated. *Bole* v. *Rose*, 10 M.R. 633.

16. Order of Court, when effective—*Money paid into court by defendant—Impounding for costs taxed against plaintiff—Withdrawal by plaintiff—Time of operation of Judge's order.*

The Court cannot go behind the date appearing on the face of an order, inquire when it was pronounced and give it operation as of a prior date.

In general an order is not effective until it is drawn up, signed and served.

The defendant had paid a sum of money into court, which the plaintiff refused to accept as sufficient. The defendant had a verdict. A person to whom the plaintiff had assigned his interest in the suit then applied for payment out of court of the moneys paid in by defendant, but his application was, on 16th December, 1892, refused on the ground that the money should be impounded to answer the defendant's costs of suit.

No order impounding the money was taken out until 27th December, 1892, and in the meantime the money was taken out of court by the plaintiff on *præcipe*.

Held, that plaintiff had a right to do so, and an application by defendant for an order on the plaintiff's attorney for payment of the defendant's costs was dismissed, but without costs. *Young* v. *Hopkins*, 9 M.R. 310.

17. Order for payment of costs—*Effect of, as judgment—Entering upon judgment roll—R.S.M., c. 80, s. 3.*

Although the rules and orders at law for the payment of money or costs, referred to in R.S.M., c. 80, s. 3, "constitute judgments and have all the force and effect of judgments at law," yet there is nothing in the statutes or the practice of the Court to warrant the making up and entry of judgment rolls upon them as in the case of ordinary judgments, and what purported to be

a judgment roll entered herein upon such an order was ordered to be taken off the files of the court. *Gibbons* v. *Chadwick*, 9 M.R. 474.

Affirmed, 14 C.L.T. Occ. N. 9.

18. Party appearing in person—*Service—Filing affidavits on motion—Reference to Judge—Costs.*

Held, 1. Where a defendant appears in person he is entitled to receive the same notice of proceedings being taken, which a solicitor receives.

2. Where leave was given to file an affidavit in support of a motion, but the leave was not expressed in the notice, and the affidavit was not filed when the notice was served, but a copy was served with the notice of motion, *Semble*, sufficient.

3. The Referee cannot refer to a judge an application which has lapsed.

4. Where the opposite party does not appear, costs cannot be given to the applicant where not asked for by the notice of motion. *Geddes* v. *Miller*, 3 M.R. 368.

19. Payment into court—*Condition sought to be imposed on plaintiff getting money out of court—King's Bench Act, Rules* 530, 532.

When a defendant, under Rule 530 of The King's Bench Act, pays money into court in satisfaction of a specified part of the plaintiff's cause of action, he cannot by his pleading impose a condition on plaintiff getting the money out of court under Rule 532, "in satisfaction of the very cause of action for which it was paid in," that defendant's costs of action should be paid out of the money, and plaintiff will be entitled to an order for payment of the money out free from such condition.

Wheeler v. *United Telephone Co.*, (1884) 13 Q.B.D. 597, followed. *Canada Elevator Co.* v. *Kaminski*, 17 M.R. 298.

20. Petition by outside party—*Hearing of petition in Equity—Evidence in support of.*

When persons interested in the subject matter of a suit in equity, who are not parties to the suit, petition the Court for an order or decree which, if granted, would establish finally their alleged rights, and bring on their petition formally for hearing, it must be supported by direct, and not merely by hearsay or secondary, evidence, unless the Court, as a matter of indulgence, allows further evidence, either upon inquiry before the Master or before the Court itself.

Gilbert v. *Endean*, 9 Ch. D. 260, followed in this respect.

It is otherwise in case of a motion or petition, pending investigation of a claim put forward by the petitioners, to have certain directions given to the receiver in possession of the property claimed. *Allan* v. *Manitoba & N.W. Ry. Co., Re Gray*, 9 M.R. 388.

21. Production of documents—*Examination for discovery—King's Bench Act, Rule* 398—*Costs—Striking out defence.*

Failure to produce documents at the examination of a defendant for discovery, though called upon by a *subpœna duces tecum* to produce them, is not a ground, under Rule 398 of the King's Bench Act, for striking out the defence.

Neither should the defence be struck out for non-compliance with an order for production in a case where, subsequent to the service of the order, there were interviews from which the defendants might have inferred that the plaintiffs were not insisting on immediate compliance, and the plaintiffs gave no further intimation of a wish to have the order complied with at once, or for refusal to answer questions at the first sitting of an examination for discovery when the examination was adjourned and never properly closed, or for failure to attend at an adjourned examination in the absence of a certificate of default from the examiner or proof that he was in attendance at the time and place appointed or was at least near at hand.

Defendants, however, were ordered to pay costs, as they had been negligent and had not properly and reasonably met the demands made upon them, and to comply with the order for production within a time limited, and their manager was ordered to attend for examination at the defendant's expense upon 48 hours' notice. *Anderson* v. *Imperial Development Co.*, 20 M.R. 275.

22. Receivers—*Ex parte application—Trustee and cestui que trust.*

Motion made by two holders of bonds issued by the defendant Company and secured by a mortgage made to Grey and Heron, the plaintiffs in the second suit,

as trustees, for leave to bring an action to administer the trusts of the mortgage deed, for a declaration that the power of sale and other powers contained in that deed are valid, and for a declaration of the true construction of the mortgage as to certain matters.

The mortgage covered a portion of the line of the defendant's railway, known as the first division; but, as part of it was beyond the Province, it had been decided that the Court had no jurisdiction to order a sale. Receivers of the profits, tolls and revenues of the railway had been appointed in the respective suits, but they were not in possession of any part of the Company's property and had nothing to do with the management of the railway.

The trustees, Grey and Heron, had formerly applied to the Court and got leave to take certain proceedings which they had taken, but without any practical results to the bondholders, beyond the appointment of a separate receiver for the first division. It was deemed necessary to make the present application, because the Railway Company would have to be made a party to the action to be brought, and receivers had been appointed in the above actions.

Held, that leave should be granted as asked, and that the applicants were not precluded from bringing an action for the administration of the trusts on account of anything done by the trustees; also that no notice of the application need be given, as the receivers were not in any sense in possession of any part of the Company's property. *Allan* v. *Manitoba & N.W. Ry. Co. Gray* v. *Manitoba & N.W. Ry. Co.*, 12 M.R. 57.

23. Replevin — *Præcipe order for—King's Bench Act, Rules* 862, 864, 865, 869.

A præcipe order of replevin taken out under Rule 862 of the King's Bench Act must not contain a direction to the sheriff to replevy the goods to the plaintiff, as this is contrary to the express provisions of Rule 869.

When the sheriff acts upon such a direction in a replevin order, the defendant is entitled, under Rule 864, to have the order set aside with costs and the goods re-delivered to him by the sheriff. *Schatsky* v. *Bateman*, 17 M.R. 347.

24. Rescinding order—*Motion to rescind order not made ex parte—Jurisdiction of Referee in Chambers—King's Bench Act, Rules* 442, 449—*Dismissal of action—Entering judgment for defendant—Appeal from Referee.*

1. The Referee in chambers has no power to rescind his own order not made *ex parte*.

Re St. Nazaire Co., (1879) 12 Ch. D. 80, and *Preston* v. *Allsup*, (1895) 1 Ch. 141, followed.

2. An appeal will not lie from the refusal of the Referee to rescind such an order.

3. The Referee has no jurisdiction, under Rule 449 of The K. B. Act or otherwise, even with the consent of the parties, to make an order for the entry of judgment for the defendant, after the action has been entered for trial. Such a judgment can then only be pronounced by a Judge sitting in Court.

4. The Referee would have power, under Rule 422 (*d*) of the Act, to dismiss an action by the consent of the parties.

5. When the judgment entered in an action is unauthorized and unsupported by any order or pronouncement of the Court, an appeal will lie from the refusal of the Referee to set it aside on motion before him, although such motion also included an application to him to rescind his own order previously made not *ex parte* in the same action. *Walker* v. *Robinson*, 15 M.R. 445.

25. Res judicata—*Debtors' Arrest Act, R.S.M. c.* 43—*Capias—Second application on same grounds after first dismissed.*

The defendant having been arrested on a *capias* under an order issued by a County Court Judge, a summons was issued by him calling on the plaintiffs to show cause why an order should not be issued releasing the defendant from custody, on grounds stated in the defendant's affidavit. This summons was dismissed and on the same day a second summons was issued by the same Judge for the same purpose, which was also dismissed on the ground that the defendant's affidavit was defective in not complying with section 20 of The Debtor's Arrest Act, R.S.M. c. 43. Defendant then applied to a Judge of the Queen's Bench for practically the same relief, only asking in addition that the order for the writ of *capias* and the writ itself should be set aside.

Held, following *The Queen* v. *The Manchester & Leeds Railway Co.*, 8 A.

& E. 413, that a party, after once failing in consequence of a defect in the way in which he brings his case forward, is not entitled to renew the same application, and that the attempt to go back and set aside the order and the writ did not make the application so far different from the former as to take it out of the general rule, and that the application should be dismissed with costs: *Leggo* v. *Young*, 17 C.B. 549. *Smith* v. *Edmunds*, 10 M.R. 240.

26. Revivor—*Dismissal for not reviving —Costs.*

Where one of several plaintiffs dies, the order is that the survivors do revive within a limited time, and in default the bill is dismissed with costs.

In the case of a sole plaintiff the bill is dismissed without costs in case of failure to revive. *McMahon* v. *Biggs*, 4 M.R. 84.

27. Security for costs—*Payment out, when declaration not filed within year.*

The plaintiff did not declare within a year after the writ was returnable. He afterwards applied for payment out of court of $200, paid in as security for costs.

Held, 1. That, although the plaintiff is out of court after the expiry of the year, yet if he files his declaration it is irregular only, and not void, and the irregularity may be waived.

2. That the defendants could not sign judgment of *non pros.* so as to tax costs. *Cooper* v. *Nias*, 3 B. & Ald. 271, followed.

3. Although the defendants could not have sued on a bond for security or made a motion to have any of the money paid out to them, yet the plaintiff could not have an order that it be paid out to him without the consent of defendants, and defendants might impose the condition that their costs be first paid. *Dickson* v. *Mutual Reserve Fund Life Ass.*, 7 M.R. 125.

28. Solicitor and client—*Præcipe order for delivery of bill of costs—Undertaking to pay amount taxed—Solicitors' Act, 6 & 7 Vic., c. 73, s. 43—King's Bench Act, Rule 964A added by s. 12 of c. 17 of 10 Edw. VII, Form 104.*

1. A præcipe order for the delivery and taxation of a solicitor's bill of costs taken out by a client under Rule 964A, added to the King's Bench Act by 10 Edward VII, c. 17, s. 12, should, under s. 43 of the English Solicitors' Act, 6 & 7 Vic., c. 73, which is still in force in Manitoba, be styled in the matter of the solicitor and not in the action in which the costs were incurred.

2. It is not necessary that such an order should contain an admission of the retainer.

3. Neither is it necessary that such an order should contain a submission on the part of the client to pay the amount found due on the taxation ; King's Bench Act, Form 104 ; although, when the client applies after a month from the delivery of the bill for a reference to taxation, it would be proper to require such submission ; and in no case is there authority to impose such a condition when the application is merely for the delivery of the bill.

4. Under said Rule 964A, an order may be taken out for the delivery of a bill simply, without adding the words "and taxation."

In re West King and Adams, [1892] 2 Q.B. 107 ; *Duffett* v. *McEvoy*, (1885) 10 A.C. 300, and *Re McBrady* v. *O'Connor*, (1899) 19 P.R. 37, followed. *Desaulniers* v. *Johnston*, 20 M.R. 431.

29. Statutes, construction of—*Queen's Bench Act, 1895—Pending business—Jury trial.*

With respect to pending business, The Queen's Bench Act, 1895, Rule 983 (*a*), provided that "in all cases the action or suit should be continued up to the trial or hearing according to the previous practice of the said Court, and afterward according to the provisions of this Act."

Held, that the words "up to" in this rule are exclusive of the trial or hearing, which should therefore be conducted according to the provisions of the Act, and not according to the previous practice of the Court, and that the plaintiff was right in entering the record for trial as a jury case, the cause of action being one of those which, by section 49, it is provided should be tried by a jury, although the plaintiff would not have been entitled to a jury if the trial had been conducted according to the former practice. *Robertson* v. *Brandes*, 11 M.R. 264.

30. Stop order—*Charging order—Set-off of costs—Stay of proceedings to enable creditor to procure a charging order.*

A stop order in Equity gives no charge on a fund in court in favor of the party obtaining it, and he is not entitled to an order for payment out of court as against his judgment debtor without first getting a charging order on the fund.

The application of the judgment debtor for payment out to him of the fund in court to which he has been found entitled was, however, enlarged a week to enable the judgment creditors to apply for a charging order, and their stop order was continued meantime.

A set-off of costs of a former application against those of a later one can only be allowed as part of the order made on the later application, or upon a special application after both sets of costs are taxed. *McWilliams* v. *Bailey*, 9 M.R. 563.

31. Tender—*Plea of tender before action with payment into court—Effect of plaintiff taking money out—Costs.*

When the plaintiff takes money out of court paid in by the defendant with a plea of tender before action, he does not thereby admit the tender, and neither party has any right to tax costs against the other until the issue on the plea of tender is disposed of.

Griffiths v. *School District of Ystradyfodwg*, (1890) 24 Q.B.D. 307, and *American Aristotype Co.* v. *Eakins*, (1904) 7 O.L.R. 127, followed. *Nixon* v. *Betsworth*, 16 M.R. 1.

32. Trover—*Stay of proceedings on return of goods—Dispute as to identity of article offered to be returned.*

After the commencement of an action of trover for the conversion of a threshing engine, the defendants shipped to the plaintiffs an engine which the defendants alleged but the plaintiffs denied to be the one in question. The plaintiffs also claimed that, if it was the same, it was of very much less value than when converted.

Held, that the defendants were entitled on motion to an order permitting them to return the engine in question upon paying the costs of the action to date and of the motion within two weeks, and providing that, if thereafter the plaintiffs proceeded to trial and did not recover more than nominal damages, they should pay the costs subsequently incurred.

Phillips v. *Hayward*, (1834) 3 Dowl. 362; *Peacock* v. *Nichols*, (1839) 8 Dowl. 367, and *Earle* v. *Holderness*, (1828) 4 Bing. 462, followed. *Brown* v. *Canada Port Huron Co.*, 15 M.R. 638.

PRACTICE IN LAND TITLES OFFICE.

PRÆCIPE ORDER.

See SECURITY FOR COSTS, X, 9.

PRAIRIE FIRE.

See NEGLIGENCE, III.
— RAILWAYS, VII, 2.

PRAYER FOR FURTHER AND OTHER RELIEF.

See FURTHER RELIEF.

PRECAUTIONS AGAINST ACCIDENT.

See NEGLIGENCE, III, 3.

PRECEDENCE.

See QUEEN'S COUNSEL.

PRE-EMPTION.

See HOMESTEAD, 1.

PREFERENTIAL CLAIM.

See WINDING-UP, III, 2.

PRESENTMENT.

See BILLS AND NOTES, X.
— COUNTY COURT, II, 6.

PRESSURE.

See FRAUDULENT PREFERENCE, III, 1, 2, 7; IV; VI, 4, 5.

PRESUMPTION.

See BILLS AND NOTES, VIII, 10.
— CROWN PATENT, 5.
— DAMAGES, 4.
— ELECTION PETITION, VI, 3.
— FRAUDULENT CONVEYANCE, 6.
— HUSBAND AND WIFE, IV, 1.
— INFANT, 7.
— LOCAL OPTION BY-LAW, VI, 5.
— MASTER AND SERVANT, IV, 1.
— MUTUAL INSURANCE, 2.
— PRACTICE, XX, A, 2.
— RAILWAYS, III, 4.
— TRADE UNIONS, 1.

PRINCIPAL AND AGENT.

I. AUTHORITY TO AGENT.
II. COMMISSION ON SALE OF LAND.
III. CONTRACT BY AGENT.
IV. ESTOPPEL.
V. MISCELLANEOUS CASES.

I. AUTHORITY TO AGENT.

1. To buy goods on credit—*Liability of principal when agent supplied with cash to pay for goods purchased—Receipt of goods by purchaser—Admissions of agent, when evidence.*

The defendants, grain dealers, employed one B. to buy wheat for them at Virden, and supplied him with ready money to pay for it. B. then, with the knowledge of the defendants, and on their instructions, made arrangements with C., who had charge of an elevator there, to receive the wheat for them, to weigh it on receipt, and to give out receipts or tickets to the persons delivering the grain, signed by him as defendants' agent, showing names of purchasers, quantity and grade of wheat, price and the total amount of the purchase. These tickets were furnished to B. by the defendants. They were headed "Grain Warehouse, Virden," and had printed at the bottom the words "Atkinson & Co., per ." The custom was for the farmers, on receiving these tickets, to take them to B. or his bankers and get their money. The plaintiff's claim was for $828.80, the amount of two of these tickets, which were produced and proved. C. proved that B. had told him the prices and grades agreed on with the plaintiff and, this evidence not having been objected to at the trial, the

majority of the Court held that it must be considered that the prices, grades and quantities were sufficiently proved. The majority also held that the delivery of the wheat into the elevator must be considered as delivery to the defendants.

Neither the plaintiff, who was present in Court, nor B., gave evidence; and defendants gave no evidence in proof of payment, except that they had supplied B. with large sums of money to pay cash for any wheat he should buy for them.

Held, (KILLAM, J., dissenting), that the plaintiff could not recover, as B. had no authority to buy except for cash, and the defendants had supplied him with the cash.

Per BAIN, J.—There was nothing to show that the plaintiff had any reason to suppose that the tickets would be paid by the defendants; and, if plaintiff chose to deliver his wheat to B. without getting his money for it, he did so at his own risk, and could not now look to the defendants for the money. It is doubtful whether a principal would be liable for the price of goods purchased by his agent on credit, when he had given the agent ready money to pay for them, although he had actually received and used the goods: *Paley on Agency*, p. 164.

Per KILLAM, J.—The plaintiff's case was sufficiently proved, for the evidence showed that the agent was authorized to buy on the very terms on which he did buy, and that he was not to pay cash until after the delivery of the wheat. There was no evidence to show that he bought on credit or that the plaintiff was not entitled to demand his money immediately on getting the tickets, as the property in the wheat passed to the defendants upon delivery at the elevator. *Bennett* v. *Atkinson*, 10 M.R. 48.

2. To buy goods for principal—*Undisclosed principal—Inference to be drawn from undisputed facts—Liability of defendant for goods charged to another.*

Up to 1st July, 1906, the defendant's son, J. G. Leary, carried on a meat business in the firm name of J. G. Leary & Co., and plaintiffs supplied goods to him for that business. At that time the defendant, who was the principal creditor of J. G. Leary, employed one Schofield to manage the business at a salary of $75 a month.

Schofield afterwards represented to the plaintiffs, though without the defendant's authority, that the defendant would be responsible for future goods supplied for the business and that he, Schofield, would see the plaintiffs paid, and he then ordered more goods which the plaintiffs supplied. They, however, charged these goods to J. G. Leary & Co. and not to the defendant. The defendant was not asked by the plaintiffs whether he was the proprietor or not.

Held, reversing the decision of DUBUC, C. J., that the facts did not warrant the inference that the business had been in fact transferred to the defendant as his business, or that Schofield had any authority to order goods from the plaintiffs on the defendant's credit, and that the defendant was not liable. *Gordon* v. *Leary*, 17 M.R. 383.

3. To buy goods for principal—*Assignment for creditors—Sale of goods.*

The plaintiff's claim was for goods sold to one Pifer, who had been carrying on business as a general trader, but shortly before the sale had made a transfer of his stock-in-trade and other property to the defendant in trust for certain creditors. The plaintiff was not aware of this transfer, but sold the goods as he had frequently done before the transfer, believing that Pifer was still the principal and not an agent, as defendant had left him in charge of the business and employed him to carry it on for him, and on his behalf, in accordance with instructions to be received. The goods purchased from the plaintiff were such as would be reasonably required in the business, and the plaintiff supposed that they had been ordered for it.

Held, following *Armstrong* v. *Stokes*, (1877) L.R. 7 Q.B. 598, and *Watteau* v. *Fenwick*, [1893] 1 Q.B. 349, that defendant had constituted Pifer as his general agent for taking charge of and carrying on the said business, and was liable to the plaintiff for the price of the goods furnished by him.

Hechler v. *Forsyth*, (1893) 22 S.C.R. 489, distinguished. *Hutchings* v. *Adams*, 12 M.R. 118.

4. To receive money.

B., one of three executors (the defendants), agreed to permit the plaintiff to become assignee of a lease granted by their testator; that the plaintiff should be allowed to deduct from the rent the value of improvements to be placed by him upon the premises to the amount of $1,000; and that the rent should be

increased by 13 per cent. of the amount of such allowances.

The improvements were made, but the value was not deducted out of the rent.

In an action against the defendants personally, and not as executors, a verdict was given for plaintiff.

Held, 1. That, there being no proof of a joint promise, the verdict was wrong except as to B.

2. That the receipt of rent by B. only showed that he had power to receive the rent in money.

3. That an agent authorized to collect a debt can receive it in money only. *Paisley* v. *Bannatyne*, 4 M.R. 255.

5. To sell land—*Specific performance—Evidence to prove authority of agent to sell land—Implied powers of real estate agent—Appeal from trial judge's findings.*

1. Although an agent for the sale of land, having only a verbal authority from the owner, may sign for him a contract of sale of the land which will be binding under the Statute of Frauds, yet, if disputed, the evidence of the agent should not be accepted as sufficient proof of such authority without corroboration, unless it is of the clearest and most convincing kind and such as bears overwhelming conviction on its face.

2. The authority ordinarily conferred upon a broker employed in the sale of land is limited to the duty of finding a purchaser ready and willing to buy the property at the named price and on specified terms and to introduce him to his principal; and, without a clear and express provision, such authority does not warrant the agent in signing a contract of sale so as to bind the principal.

Hamer v. *Sharpe*, (1874) L.R. 19 Eq. 108; *Prior* v. *Moore*, (1887) 3 T.L.R. 624, and *Chadburn* v. *Moore*, (1892) 61 L.J. Ch. 674, followed.

3. Where the owner has authorized his agent to sell on terms requiring payment of $1,000 cash, this will not authorize him to sign an agreement of sale by which the purchaser is to pay the money "on acceptance of title."

4. Although accepting the findings of the trial judge as to the credibility of the witnesses, the Court in appeal may review the evidence and reverse the decision arrived at as to the legal conclusions to be drawn from the admitted facts.

Rosenbaum v. *Belson*, [1900] 2 Ch. 267, commented on and distinguished. *Gilmour* v. *Simon*, 15 M.R. 205.

Affirmed, 37 S.C.R. 422.

6. To give warranty on sale of chattels—*Warranty by special agent.*

A chartered bank employed an agent to sell certain agricultural machinery. He, without special authority in that behalf, warranted the machinery to work well and satisfactorily in the threshing of grain.

Held, that he was a special agent and could not bind his principals without express authority to warrant. *Commercial Bank of Manitoba* v. *Bissett*, 7 M.R. 586.

Distinguished, *Taylor* v. *Gardiner*, 8 M.R. 310. Next case.

7. To give warranty on sale of horse—*Undisclosed principal—Implied authority of agent to warrant—Stallion sold for breeding purposes—Implied warranty.*

The plaintiff was a saw-mill owner and farmer residing in Ontario. He gave a stallion into the custody of M., a horse dealer, to bring to Manitoba with other horses which he had, and he told M. to sell the horse to the best advantage. He gave M. no authority to warrant, but left the selling and price entirely in his hands. The horse was Canadian-bred, but from imported Clydesdale stock. M. brought the horse to Manitoba and sold him to the defendants for $750, taking in his own name two promissory notes of $375 each. The defendants knew nothing of the plaintiff, and dealt with M. as the owner. M. afterwards endorsed these notes to the plaintiff. To an action on one of the notes, the defendants set up a counter-claim for breach of warranty. The trial Judge found that M. sold the horse for breeding purposes, and warranted him to be an imported Clydesdale, and that the warranty was untrue. No other warranty was given. The horse proved useless for breeding purposes.

Held, that the plaintiff, by his conduct, clothed M. with the apparent ownership of the horse, and, by so acting, authorized M. to make all such warranties as are usual in the ordinary course of the business of selling horses.

Held, also, that the plaintiff, being an undisclosed principal, by suing on the note, adopted the contract made by M., and must take it subject to all the equities as between M. and the defendants.

Commercial Bank v. *Bissett*, 7 M.R. 586, and *Brady* v. *Todd*, 9 C.B.N.S. 592, distinguished.

Held, also, that, from the circumstance of the horse being sold for breeding purposes, there was an implied warranty of fitness for breeding.

Held, also, that the defendants were entitled to damages for breach of the warranty that the horse was an imported Clydesdale, and the measure of damages was the difference in value between an imported horse and a Canadian-bred one. *Taylor* v. *Gardiner*, 8 M.R. 310.

II. Commission on Sale of Land.

A. Breach of Duty of Agent.
B. Implied Representation of Authority from Principal.
C. Knowledge of Vendor that Purchaser Found by Agent.
D. Meaning of Words, "Completion of the Sale."
E. Revocation of the Agency.
F. When Earned in Full.
G. When Earned in Part.
H. When None Payable.

A. Breach of Duty of Agent.

1. Secret bargain between purchaser and agent of vendor.

F., an agent of the defendant company, agreed with the plaintiff that he would withhold 18,000 acres of the company's lands from sale for 16 days to give the plaintiff an opportunity to complete negotiations for the sale of the land and promised that if he sold the land he should receive a commission of 2½ per cent.

Plaintiff afterwards entered into negotiations with one G., who represented a number of investors desiring to purchase a large quantity of land, but G. was not prepared to bind himself at once and wanted time to make financial arrangements and at the same time to have the opportunity kept open and agreed to pay the plaintiff $500 if he would give him the desired time. Plaintiff then agreed to and did give the time and reported to F. that he had done so, but did not inform F. that he expected to be paid for it. Plaintiff never received the $500, or any part of it, and G. and his associates carried out the purchase of 18,400 acres of the company's lands at the price agreed on.

Held, Richards, J., dissenting, that, although the secret bargain was a breach of the plaintiff's duty to the defendants, and, if the money had been received, the plaintiff would have to account for it to them, yet it was not such as to disentitle the plaintiff to the stipulated commission for the service which he had fully performed.

Boston Deep Sea Fishing &c., Co. v. *Ansell*, (1888) 39 Ch. D. 339, and *Culverwell* v. *Birney*, (1886) 11 O.R. 265, followed. *Davidson* v. *Manitoba & N W. Land Corp.*, 14 M.R. 232.

Reversed, 34 S.C.R. 255, where it was *Held*, that the consent of D. to accept the $500 was a breach of his duty as agent for the Corporation which disentitled him from recovering the commission.

2. Secret agreement to divide commission with agent of vendor.

1. An agreement between the agent of the vendor company and the manager of the company for an equal division of the commission to be received by the agent on a sale of the company's real property, though kept from the knowledge of the company, is no bar to the right of such agent to recover the commission in case a sale is effected, as it places neither the agent nor the manager in a situation where their interests would be in conflict with their duty to their employers in getting the best possible price for the property.

Rowland v. *Chapman*, (1901) 17 Times L.R. 669, and *Scott* v. *Lloyd*, (1894) 35 Pac. Rep. 733, followed.

2. Unless, however, the company knew of and acquiesced in such an agreement, they could recover the half commission from their manager if he received it, and therefore the agent could have judgment for only half the commission. *Miner* v. *Moyie*, 19 M.R. 707.

B. Implied Representation of Authority from Principal.

Quantum meruit.

One Meredith, then a director of the defendant company, in a conversation with the plaintiff, assured him that if he, the plaintiff, would procure a purchaser for the property in question owned by the Company, he felt sure the Company would quote the price at $550,000 and, in the event of a sale, would pay the plaintiff a commission of $50,000, but any abatement of the price down to $500,000 was to be borne by the plaintiff.

There was no evidence that Meredith had any authority to sell the property or employ an agent to find a purchaser. After Meredith became president of the Company, the property was sold for exactly $500,000 by the Company to a purchaser to whom it had been introduced by the plaintiff to the knowledge of Meredith.

Held, that the Company was not liable to the plaintiff either for a commission on the sale or for the value of his services as on a *quantum meruit*.

Held, also, that Meredith was not liable to the plaintiff for any misrepresentation of authority from the Company to enter into the alleged contract with the plaintiff, or for failing to prevent the Company from selling the property for $500,000 or less. *Bent* v. *Arrowhead*, 18 M.R. 632.

An appeal to the Supreme Court was entered, but the case was settled before argument.

C. KNOWLEDGE OF VENDOR THAT PURCHASER FOUND BY AGENT.

1. Appeal from Judge's findings of fact.

Action for commission for finding and introducing a purchaser for land owned by defendant.

The plaintiffs were carpenters occupying a shop on the property as tenants of defendant. They were not real estate agents but had occasionally earned commissions on sales.

Plaintiffs had discussed price and terms with defendant on several occasions with the view of their effecting a sale and on one occasion had introduced to him a prospective purchaser and it was agreed that, if that sale went through, plaintiffs should be entitled to a commission, but no general agency to sell had been conferred upon them.

One Forrester, passing by the property and thinking that it might be suitable for his purpose, entered the plaintiffs' shop and inquired of the plaintiff Robertson if the property was for sale. Robertson informed him it was. Did he know the owner? Yes, Mr. Carstens. And the price? $16,000. Could it not be bought for less? Robertson would inquire and at once called up the defendant by telephone. What followed is thus stated in the judgment of the majority of the Court, reversing in part the findings of fact by the trial Judge. Robertson told the defendant he had a prospective purchaser for his property and asked his best terms. Defendant said $15,000. Robertson then asked if defendant would pay his commission out of that and defendant said he would. Robertson told defendant he would have the purchaser call and see him. He then quoted the new price to Forrester, wrote defendant's name and address on a card which he handed to Forrester and asked him to present it to defendant when they met. Defendant met Forrester by appointment the same evening, when after some negotiation he gave Forrester an option on the premises for $14,000 cash. The sale was completed next day for that sum. Forrester did not mention Robertson's name to the defendant and the latter said he did not associate Forrester with his telephone conversation with Robertson. Defendant saw plaintiffs a few hours after the completion of the sale when plaintiffs promptly claimed their commission.

Held, that the defendant was put upon inquiry when a prospective purchaser appeared a few hours after the conversation with Robertson and he should have ascertained that Forrester was the person referred to by Robertson, and that, upon the above findings, the plaintiffs were entitled to commission on the $14,000 at the usual rate.

Cathcart v. *Bacon*, (1891) 49 N.W.R. 331, and *Quist* v. *Goodfellow*, (1906) 110 N.W.R. 65, followed. *Robertson* v. *Carstens*, 18 M.R., 227.

2. Quantum meruit.

The defendant listed his property with the plaintiffs, real estate agents, for sale at a fixed price and on named terms. The plaintiffs mentioned the property to one Forrest who thereafter negotiated with defendant for the purchase of the property and concealed from him the fact that the plaintiffs had sent him. Defendant then, without any knowledge of the plaintiffs' intervention, sold to Forrest on terms less advantageous to himself than those contemplated in the agreement between the plaintiffs and himself.

There was nothing in the circumstances to put defendant upon his inquiry as to whether the plaintiffs had sent Forrest to him.

Held, that the plaintiffs could recover neither a commission on the sale nor

anything for the services by way of *quantum meruit*.

Cathcart v. *Bacon*, (1891) 49 N.W.R. 331, and *Quist* v. *Goodfellow*, (1906) 110 N.W.R. 65, followed.

Lloyd v. *Mathews*, 51 N.Y. 125; *Mansell* v. *Clements*, (1873) L.R. 9 C.P. 139, and *Green* v. *Bartlett*, (1863) 14 C.B.N.S. 681, distinguished. *Locators* v. *Clough*, 17 M.R. 659.

An appeal to the Supreme Court was entered, but subsequently abandoned.

3. Vendor put upon inquiry—*Vendor ignorant that purchaser sent by agent.*

A vendor who has placed his property in the hands of his agent for sale on commission will not be liable to the agent for commission if he afterwards sells to a purchaser in ignorance that such purchaser has been sent to him by the agent: *Locators* v. *Clough*, (1908) 17 M.R., 659, unless there are circumstances sufficient to put the vendor upon inquiry as to whether the purchaser was not in fact sent to him by the agent.

Lloyd v. *Matthews*, (1872) 51 N.Y. 124, followed.

In this case the circumstances set forth in the judgment were held to be such as to put the defendants upon such inquiry and that, as their manager had failed to make sufficient inquiry, and the purchaser had in fact been sent by the plaintiff, the defendants were liable for his commission on the sale. *Hughes* v. *Houghton Land Co.*, 18 M.R. 686.

D. Meaning of Words, "Completion of the Sale."

Agreement to pay on completion.

A dispute having arisen as to the plaintiffs' right to a commission on the sale of certain property belonging to the defendant, the former claiming $5,000, the latter denying liability for anything, the parties compromised at $2,000 and the defendant gave the plaintiffs a letter which was in part as follows:—"In connection with the sale of (*description*) from Mrs. Cordingly and myself to John A. Lock *et al.*, I hereby agree that, on the completion of the said sale, I will pay your firm a commission of $2,000. . . . This amount to be paid on completion of the deal."

The purchaser had previously made a deposit of $2,000, but had not signed a formal agreement of purchase. A few days afterwards the formal agreement was executed by all parties and a further payment of $8,000 was made. The purchaser made default in payment of further instalments of the purchase money, and the defendant took back the land, retaining all money paid, and released the purchaser from further liability.

The defendant resisted the action for the $2,000 commission on the ground that the sale had not been completed within the meaning of his letter. He had, however, on several occasions after the agreement had been executed asked time for payment of the $2,000.

Held, that, interpreting the letter in the sense in which the parties intended the words to be understood at the time, as gathered from the document itself and the surrounding circumstances and the defendant's promises to pay, what the parties meant by the words "completion of sale" and "completion of the deal" was the execution of a binding agreement of sale, and the plaintiffs were entitled to recover. *Haffner* v. *Cordingly*, 18 M.R. 1.

E. Revocation of the Agency.

1. Claim for work done before revocation — *Quantum meruit* — *Distinction between power to revoke authority and right to do so.*

An agent who has been given the exclusive sale of real estate for a limited period, on terms of being paid a commission in case of sale, is entitled to substantial damages upon revocation of his authority, if he has, within the time limited, found a purchaser for the property as the result of special efforts and the expenditure of money in advertising and otherwise which the principal knew or had reason to believe the agent would make and incur to find a purchaser.

Prickett v. *Badger*, (1856) 1 C.B.N.S. 296, and *Rowan* v. *Hull*, (1904) 2 Am. and Eng. Ann. Cas. 884, 47 S.E. Rep. 92, followed.

Simpson v. *Lamb*, (1856) 17 C.B. 603; *Toppin* v. *Healey*, (1863) 11 W.R. 466, and *Houghton* v. *Orgar*, (1885) 1 Times L.R. 653, distinguished.

Although the principal may have power to revoke the authority given to the agent, he has not always the right to do so without liability for damages. *Aldous* v. *Swanson*, 20 M.R. 101.

2. Claim for work done before revocation—*Quantum meruit.*

An agent who has been promised a commission on the sale of land, if made within a limited time at the price and on terms stipulated, although he had not an exclusive agency, is entitled to payment *quantum meruit* for his expenditure of time and money paid for advertising which resulted in his finding, within the time limited, a purchaser for the property able and willing to carry out the purchase, although the agency was revoked before the proposing purchaser had actually bound himself to buy the property, in a case when the principal, at the time of creating the agency, knew that the agent would, in reliance upon the terms of his employment, spend time and money in the hope of earning the commission agreed on.

Aldous v. *Swanson*, (1910) 20 M.R. 101, followed.

Verdict for half the amount of the commission the plaintiff would have earned, if the sale had been carried out. *Aldous* v. *Grundy*, 21 M.R. 559.

3. Contract—*Consideration.*

The plaintiffs, being entitled to a commission for finding a purchaser for the defendant's farm placed in their hands for sale, consented to forego the commission on the defendant giving them the special sole right to sell the land for a fixed higher price within a time named.

Held, that defendant could not revoke the agency thus conferred and was liable in damages for having, before the expiration of the time limited, notified the plaintiffs that he would not sell.

A special agreement of agency founded on a distinct and valuable consideration cannot be revoked at the will of the principal: *Pollock on Contract*, 26. *Richardson* v. *McClary*, 16 M.R. 74.

4. Introduction of prospective purchaser—*Subsequent sale by principal to same purchaser.*

Defendant authorized plaintiff to find a purchaser for the property in question. Plaintiff endeavored to induce one Gregory to buy the property; but, although the latter expressed a wish to acquire the property, he said he could not then undertake it. Defendant revoked plaintiff's authority to make a sale before Gregory's name was mentioned to him. Defendant afterwards entered into an agreement to sell the property to one Fisher, who assigned his right to Gregory, and the defendant afterwards conveyed the property to Gregory, who had in the meantime secured financial assistance from a friend. When defendant sold to Fisher he did not know that the latter was buying for Gregory.

Held, that, in the absence of any evidence to show any scheme or contrivance to deprive the plaintiff of his commission, he was not entitled to any. *Hunter* v. *Bunnell*, 3 W.L.R. 229.

F. When Earned in Full.

1. Appeal against findings of fact—*Evidence—Contradictory statements by witnesses of equal credibility.*

The defendant had a property for sale which he had placed in the hands of several estate agents. The plaintiff, who was not known to defendant to be a real estate agent, and who had no office as such, went to defendant, ascertained that the property was for sale and asked the terms which the defendant gave him. Plaintiff tried to find a purchaser; and, at a subsequent interview, he told defendant that he had found one. In answer to defendant, plaintiff gave the name of the purchaser. Defendant stated the terms as before, but said he would require a larger cash payment than plaintiff had previously understood would be accepted. Plaintiff then said that the purchaser would take the property on these terms, and brought the purchaser to the defendant. The purchaser then proposed that, instead of $10,000 cash, he should pay $5,000 cash and $5,000 in six months—the other payments to be as agreed on—to which the defendant acceded and the sale was carried out.

There was some conflict of testimony as to whether defendant understood that plaintiff was working for a commission on the sale, but the trial Judge, in dismissing the action, said that he did so with hesitation, and that all the witnesses had impressed him with the honesty of their belief in their statements.

Held, that the Court on appeal was in as good a position to judge of the evidence and its effects as the trial Judge, and that the plaintiff was entitled to the usual commission on the sale.

Wolf v. *Tait*, (1887) 4 M.R. 59, followed.

Where there are two persons of equal credibility, and one states positively that a particular conversation took place,

whilst the other positively denies it, the proper conclusion is to find that the words were spoken and that the person who denies it has forgotten the circumstances: *Lane* v. *Jackson*, (1855) 20 Beav. 535; *King* v. *Stewart*, (1902) 32 S.C.R. 483. *Wilkes* v. *Maxwell*, 14 M.R. 599.

2. Necessity to get purchaser bound in writing.

Where an agent is employed to find a purchaser, he is entitled to his commission upon production of a party ready and willing to complete the purchase by entering *bona fide* into an agreement to purchase upon the terms stipulated; or, if the terms be not fully prescribed, then upon the proposed purchaser and the principal entering *bona fide* into an agreement of purchase and sale.

The owner cannot refuse to pay the commission because no agreement in writing was actually entered into; at all events, when the reason was that he refused to sign it unless some unusual term was inserted, and where the vendor had accepted the purchaser and by various acts shewed that he considered that there was a valid verbal contract.

Nor can the owner refuse to pay merely because the purchaser afterwards makes default and unreasonably refuses to carry out the contract.

An agent to find a purchaser will not disentitle himself to his commission by receiving a deposit and giving a receipt for it; at all events where the vendor accepts the deposit.

Interest will not be allowed upon a commission unless after a demand in writing. And *quære*, whether the statute 3 & 4 Wm. 4, c. 42, s. 28, is in force in this province. *McKenzie* v. *Champion*, 4 M.R. 158.

Affirmed, 12 S.C.R. 649.

3. Necessity to get purchaser bound in writing.

When the agent has found a purchaser ready, willing and able to carry out the purchase for the price and on the terms stipulated for by his principal, he will be entitled to his commission, although he has not secured a deposit or got the purchaser bound by any writing, in a case where the principal, after being informed of the willingness of the purchaser to buy, simply ignored the agent and dealt directly with the purchaser by selling the land to him at the stipulated price less the commission. *Ross* v. *Matheson*, 19 M.R. 350.

4. Property in hands of two agents —*Liability of agent on contract made on behalf of principal.*

Defendant, living in New York, placed a farm in the hands of plaintiff and S., two different real estate agents in Winnipeg, for sale. Plaintiff found a purchaser at $12 per acre in cash and informed defendant by letter. Defendant replied accepting the offer, but asking plaintiff to call on S., and arrange regarding commission so as to avoid having to pay more than one commission. Plaintiff did not communicate with S., but introduced his purchaser to defendant's solicitor in Winnipeg. This purchaser paid the solicitor $500 on account, and was ready and willing to pay the balance on receipt of a transfer. Meantime S. also made a sale of the farm at the same price. This latter sale was carried through by defendant who paid S. the usual commission.

Held, that the plaintiff was also entitled to his commission, as he had done all that was necessary to earn it.

The title to the property was in defendant's father and plaintiff knew that; but defendant held a power of attorney to sell and convey it, and the Court held that the defendant's statements to the plaintiff, both verbally and in letters, and his conduct throughout, justified the plaintiff in looking to defendant alone for his commission.

Held, following *Story on Agency*, pp. 306, 309, and *Jones* v. *Littledale*, (1837) 6 A. & E. 490, that the defendant was personally liable for the commission. *Bell* v. *Rokeby*, 15 M.R. 327.

5. Purchaser dealing directly with principal.

Plaintiffs, whom defendant knew to be real estate agents, called on defendant and ascertained from him that his house was for sale at $14,000, nothing being said about a commission. Shortly afterwards plaintiffs introduced a purchaser for the property who, after inspection, authorized plaintiff to offer $12,500. On this offer being communicated to defendant, he told the plaintiffs that he would not accept any less than $14,000 and that he wanted that net, which plaintiffs understood meant clear of commission. Plaintiffs tried to induce the purchaser

to buy on these terms, but he afterwards dealt with defendant directly and bought the property for $14,000.

Held, (PERDUE, J., dissenting), that plaintiffs were entitled on a *quantum meruit* to recover the full amount of the usual commission on the $14,000.

Wolf v. *Tait*, (1887) 4 M.R. 59; *Wilkinson* v. *Martin*, (1837) 8 C. & P. 1, and *Morrison* v. *Burnside*, (1900) 31 O.R. 438, followed. *Aikins* v. *Allan*, 14 M.R. 549.

6. Variation of terms—*Amount of commission.*

The plaintiff was employed by the defendant to sell for him certain lands upon certain terms. He found a man willing to purchase upon less advantageous terms.

Held, that the defendant, having accepted the purchaser and ratified the variation of the terms, was liable for the plaintiff's commission.

The grounds upon which the finding of a judge upon a question of fact will be reversed, discussed.

An agent is usually entitled to commission upon the whole amount of the purchase money whether paid in cash or secured by mortgage; but, where the owner himself conducts a part of the negotiations, a verdict calculated upon the cash payment was not disturbed. *Wolf* v. *Tait*, 4 M.R. 59.

Distinguished, *Calloway* v. *Stobart*, 14 M.R. 650.

G. WHEN EARNED IN PART.

1. Cancellation of sale for defect in title—*Right to commission when sale falls through—Amount payable in that case—Duty of agent to secure contract binding on purchaser.*

After the plaintiff had procured a purchaser ready and willing to carry out the purchase of the property in question on terms satisfactory to the defendant, the proposed purchaser discovered that the north wall of the building on the property was out of plumb and slightly overhung the adjoining lot and called on the defendant to make good the title to the building which formed part of the property bought. Being unable or unwilling to make good the defect in title or to make satisfactory terms with the owner of the adjoining lot, defendant proposed to the purchaser that the agreement of sale should be cancelled and it was cancelled accordingly.

Held, following *McKenzie* v. *Champion*, (1887) 4 M.R. 158; *Wolf* v. *Tait*, (1887) 4 M.R. 59; *Prickett* v. *Badger*, (1856) 1 C.B.N.S. 296; *Roberts* v. *Barnard*, (1884) 1 Cab. & E. 336, and *Fuller* v. *Eames*, (1892) 8 T.L.R. 278, that plaintiffs had earned and were entitled to be paid a compensation for their services in finding a purchaser, not necessarily the amount agreed on as commission, but a compensation as on a *quantum meruit* or by way of damages, and that under the circumstances it was competent for the trial Judge to award compensation equivalent to the amount of the commission agreed on had the sale gone through.

Held, also, following *McKenzie* v. *Champion*, that plaintiffs were entitled to be paid notwithstanding the fact that they had not procured the purchaser to execute a binding agreement of purchase. *Brydges* v. *Clement*, 14 M.R. 588.

2. Exchange of lands—*Appeal from Judge's findings of fact.*

The defendant listed his property with the plaintiffs, real estate agents, for sale. They then introduced to him a probable purchaser who afterwards arranged with the defendant an exchange of some lots of his own for the defendant's property.

Held, that the plaintiffs were entitled to one-half the commission that they would have earned if they had effected a sale of the property. The Court reversed the trial Judge's findings of fact. *Thordarson* v. *Jones*, *Thordarson* v. *Heale*, 17 M.R. 295.

3. Necessity to get purchaser bound in writing.

The plaintiff, an agent employed by defendants to sell real estate, introduced a purchaser who paid him a deposit and afterwards carried out the purchase at the price agreed on, but with the principals direct. The agent did not procure the purchaser to sign any written contract, but the circumstances showed that he was not expected to do so in the first instance.

Held, that he was entitled to some remuneration, though not to the full commission payable in case he should procure the purchaser's signature to a binding contract, and his verdict in the County Court for the full commission was reduced on appeal to one half without

costs. *Boughton* v. *Hamilton Provident Society*, 10 M.R. 683.

4. Subsequent sale through another agent—*County Courts Act, R.S.M., c. 33, ss. 308, 319.*

Defendant authorized plaintiffs, real estate agents, to sell certain property of his for $14,400, and agreed in the event of sale to pay the usual commission. Plaintiffs then introduced to defendant an investor, showed him the property and tried to effect a sale.

The same person afterwards purchased the property for $14,000, but through another agent.

Held, that the plaintiffs were not entitled to the full commission, and that the verdict of the County Court Judge allowing half commission should not be disturbed.

A County Court Judge has jurisdiction under section 308 of The County Courts Act to reduce the amount of a verdict.

The respondent in a County Court appeal cannot, without entering a cross appeal, have any relief against the verdict appealed from. *Glines* v. *Cross*, 12 M.R. 442.

H. When None Payable.

1. Sale completed by agreement but afterwards cancelled because of mistake as to the land purchased.

The agent of the vendor is not entitled to any commission on the sale of land to a purchaser who, after binding himself to buy and making payments on account, discovers that the land shown to him by the vendor is not the land he agreed to purchase and succeeds in an action for the rescission of the agreement on the ground of mistake and the return of the money paid. *Carruthers* v. *Fischer*, 5 W.L.R. 42.

2. Contract to be inferred from furnishing particulars of property to real estate agent.

Defendant having placed his property in the hands of several real estate agents for sale, plaintiff called upon him and asked him if it was for sale and inquired as to the price and terms. Defendant then wrote out the price and terms on a slip of paper, which he gave to plaintiff knowing that plaintiff's object was to try to find a purchaser, effect a sale and earn a commission although nothing was said about it.

Plaintiff shortly afterwards found and introduced to defendant a purchaser for the property ready, willing and able to take it on the terms mentioned, but after some negotiations defendant refused to carry out the sale and sold to another purchaser at a higher price.

Held, affirming the judgment of Killam, C. J., (Perdue, J., dissenting), that the plaintiff had only been authorized to find a purchaser who would be accepted by the defendant and that, in the absence of any express contract for remuneration to the plaintiff, the only promise that could be implied from what had taken place amounted to this: "My property is for sale in the hands of several agents at the price and on the terms which I give you; I do not ask you or employ you to sell it for me; but I will allow you to try to sell it and, if you succeed in finding a purchaser whom I shall accept, I will pay you the usual commission," and that, as defendant did not sell to the purchaser introduced by plaintiff, the latter was not entitled to anything for his work.

Wolf v. *Tait*, (1887) 4 M.R. 59, distinguished.

Per Perdue, J.: The proper conclusion to be drawn from the evidence is that there was an implied promise that, if the plaintiff found a purchaser ready, willing and able to buy on the terms furnished, he should be paid the ordinary commission even if defendant should afterwards refuse to sell to such purchaser. *Calloway* v. *Stobart*, 14 M.R. 650.

Affirmed, 35 S.C.R. 301.

3. Introduction of terms not authorized by vendor.

To entitle himself to a commission for finding a purchaser of land for his principal, the agent must show that the purchaser found was not only in a situation and ready and able to carry out the purchase, but was also willing to carry it out on the terms authorized by the principal, so that, if the purchaser stipulates for an additional term giving him the privilege of paying off, at any time, the part of the purchase money to be secured by mortgage and the vendor has not authorized, or does not agree to, such additional term, the agent is not entitled to any commission.

Perdue, J. A., dissented, holding that plaintiff was entitled to succeed. *Egan* v. *Simon*, 19 M.R. 131.

III. Contract by Agent.

1. Contract by agent of two firms—*Sale of goods for lump sum—Excess of authority.*

An agent of two independent and unconnected principals has no authority to bind his principals or either of them by the sale of the goods of both in one lot, when the articles included in such sale are different in kind and are sold for a single lump price not susceptible of a rateable apportionment except by the mere arbitrary will of the agent.

There can be no ratification of such a contract unless the parties whom it is sought to bind have, either expressly or impliedly by conduct, with a full knowledge of all the terms of the agreement come to by the agent, assented to the same terms and agreed to be bound by the contract undertaken on their behalf. *Cameron* v. *Tate*, 9 C.L.T., Occ. N. 19, 15 S.C.R. 622.

2. Contract with agent under seal—*Liability of principal.*

Plaintiffs as assignees of W. & B. declared upon a contract under seal made between W. & B. and M., whereby W. & B. agreed to erect a certain building for M.; it was further alleged that M. was authorized by the defendants to make the contract for them in his own name as their agent; that W. & B. entered into the contract with M. as and being the duly authorized agent of the defendants; that the defendants duly authorized all the work and took the benefit of the contract and the work.

Upon demurrer,—

Held, that the defendants were not liable upon the contract. *Ashdown* v. *Manitoba Land Co.*, 5 M.R. 444.

IV. Estoppel.

1. Ostensible agency to receive chattels.

The plaintiff bailed a horse to the defendant to be returned to him at a certain time. Before the time elapsed, the defendant, not requiring the horse any longer, returned it to H., who was in the plaintiff's employment both at the time of bailment and return, and who told the defendant that the plaintiff had sent him for the horse. H. was known to the defendant, and to others generally, as being in the employment of the plaintiff as a general manager of his business. In trover for the horse—

Held, that the delivery to H. was a good delivery to the plaintiff.

About two months after the return of the horse the defendant met the plaintiff and told him that he had delivered it to H. The plaintiff neither approved nor disapproved of this. Three years after this action was brought.

Held, that the plaintiff was estopped by his conduct from complaining of the delivery to H. *Bouchette* v. *Anderson*, T. W., 64.

2. Set-off.

When a party deals with an agent supposing him to be the sole principal, without the knowledge that the property involved belongs to another person, that party is to be protected. When a party allows his agent to act as though he were principal, and a third party deals with him as owner, the principal is bound by the act of his agent, even if he exceeded his authority. If a purchaser purchases goods from an agent, without any notice that the goods are not the goods of the agent, he is entitled to set off the amount due to him from the agent against the price of the goods. The above principles applied to the purchase of goods from the manager of a store upon an agreement by him for payment by set-off of his personal debt. *Smith v. Grouette*, 2 M.R. 314.

V. Miscellaneous Cases.

1. Adoption of acts of agent—*Ratification—Effect of taking possession of building—Corporation—Money advanced by officer of, for corporate expenses.*

On the failure of the contractor to complete the erection of a school for the plaintiff school district, the defendant, as secretary treasurer, and another trustee, without the authorization of formal trustee meetings, expended certain moneys of the corporation in completing the building which was afterwards taken over by the corporation and used as a school house. There were only three trustees and the third was not in the Province that season.

Held, that there had been such an adoption by the plaintiff corporation of the acts of the defendant and the other trustee, that the defendant was entitled to credit in his accounts as treasurer for the moneys so paid out.

French v. *Backhouse*, (1771) 5 Burr. 2728; *Sentance* v. *Hawley*, (1863) 13 C.B.N.S. 458, and *Bristow* v. *Whitmore*, (1861) 31 L. J. Ch. 467, followed.

Held, also, that, as the school building was built upon land which was not the property of the school district, the rule that an employer does not, as against a contractor, accept the work done in the erection of a building merely by re-occupying his own land, did not apply. *School District of Vassar* v. *Spicer*, 21 M.R. 777.

2. Constructive notice—*Fraud—Evidence of accomplice in fraud—Corroboration—Parties—Lien for taxes paid by mortgagees.*

As executrix of the will of L., the plaintiffs' mother held certain lands then valued at over $7,000 in trust for the plaintiffs with power to sell but not to mortgage the same. Wishing to borrow money on the land, a pretended sale was made for the expressed consideration of $5,000 to M., who then raised $2,000 for the executrix by mortgaging the land to the defendant company, and immediately reconveyed the land to the executrix for the nominal consideration of $1,000. This scheme was carried out mainly by the plaintiffs' father, who swore at the trial that the agent of the company was aware of the plan adopted if he did not himself suggest it. The plaintiffs' father and mother then lived on the property and had lived there ever since.

Held, that the defendants were affected through their agent with notice of the fraud and breach of trust committed, and that the mortgage, together with two subsequent mortgages taken from the executrix on the same lands, should be declared to be fraudulent and void as against the plaintiffs.

Quære, whether constructive notice should not also be imputed to the company through the solicitor, who would have detected the fraud if he had followed up the inquiries suggested by the amounts of the considerations expressed in the deeds and mortgage, and by the fact that M. did not take possession of the property: *Kennedy* v. *Green*, (1834) 3 M. & K. 699.

Held, also, that, although the agent of the company was dead and the evidence of the plaintiffs' father, who was mainly concerned in the fraud and directly benefited by it, was the only evidence to show that the agent was aware of it, it was competent for the trial Judge to believe him and no corroboration was necessary. The rule as to corroboration of the evidence of an accomplice is not one of strict law but only one of prudence, and does not apply to civil actions.

Held, also, that under the circumstances, although the land was still vested in their mother the executrix, the plaintiffs could sue without joining her as plaintiff. *Travis* v. *Milne*, (1851) 9 Ha. 150, followed.

Stainton v. *Carron Co.*, (1853) 18 Beav. 146, and *Yeatman* v. *Yeatman*, (1877) 7 Ch. D. 210, distinguished.

The defendants had paid taxes on the mortgaged properties for a number of years, and had redeemed them from a sale for taxes.

Held, that they had no right to a lien on the lands for the amount.

Falcke v. *Scottish Imperial Insurance Co.*, (1886) 34 Ch. D. 234, and *Leslie* v. *French*, (1883) 23 Ch. D. 552, followed. *Graham* v. *British Canadian Loan & Inv. Co.*, 12 M.R. 244.

3. Husband and wife—*Evidence to prove husband's agency for wife.*

Held, that a husband's authority to enter into a contract on behalf of his wife, for the construction of stone foundations on four lots of land belonging to her, was sufficiently established by proofs of the following facts:—

1. Prior to the date of the contract the wife entered into what was called a building loan agreement in respect of each of the four lots. Each agreement provided, amongst other things, that she would forthwith proceed to erect a frame building with stone foundation on the lot named. These agreements were signed by the wife personally. Subsequently four several applications for loans on the several lots were made. These applications were signed by the husband in the wife's name and the wife acted upon them and recognized the loans made pursuant thereto.

2. During the progress of the plaintiff's work the wife came with her husband and saw the work proceeding but made no objection to it, and she and her husband went frequently to the Loan Company's office together and gave directions as to the buildings. *Gillies* v. *Gibson*, 17 M.R. 479.

4. Implied obligation of agent—*Improper use of information obtained during employment—Breach of confidence.*

The plaintiff, being employed as agent of the defendants on commission to procure orders in a defined territory for the purchase of the defendants' goods, agreed that he would to the best of his ability serve their interest. He rented an office in his own name for the purposes of the business and paid the rent himself. During his employment, the plaintiff prepared a mailing list of customers and prospective customers in his own territory for use in carrying on the defendants' business, also a card index of 500 or 600 names of such customers, and he kept a ledger containing particulars of sales made for defendants.

During the last three months of his employment, the plaintiff made an agreement with another firm in the same line of business as defendants to enter their service on the expiration of his then current engagement, and made use of the information in his possession to the detriment of the defendants in many ways and planned to take with him to the other firm as much as possible of the business worked up by him for the defendants.

The defendants, on learning of this, dismissed the plaintiff, entered his office and took away or destroyed the mailing list, card index and ledger above referred to, and also a list the plaintiff had prepared of likely calendar buyers all over Canada chiefly outside of the plaintiff's territory.

Held, (1) The plaintiff was entitled to damages for the trespass committed by defendants in entering his office, fixed at $50, and for the destruction of the list of likely calendar buyers, fixed at $250.

(2) The defendants were entitled to damages on their counterclaim against the plaintiff, for breach of his agreement to serve their interest to the best of his ability, on account of his conduct as above stated, fixed at $500.

(3) The mailing list, card index and ledger were the property of the defendants and the plaintiff could not recover anything in respect of them.

Robb v. *Green*, [1895] 2 Q.B. 315, and *Lamb* v. *Evans*, [1893] 1 Ch. 218, followed.

Plaintiff to have costs of suit, and defendants of their counterclaim, and judgment to be entered against the party found indebted after set-off of results. *Martin* v. *Brown*, 19 M.R. 680.

5. Liability of principal to agent on contract entered into by agent in his own name—*Sales on Grain Exchange—Commission—Agent.*

The custom on the Winnipeg Grain Exchange, by which brokers trading there, and acting on instructions from customers to sell grain for future delivery, enter into contracts for such sales in their own names without disclosing the names of their customers, thus making themselves personally liable, is reasonable and necessary for the prompt dispatch of business, and, if a customer makes default in carrying out any such contract and the broker suffers loss in consequence of having to carry it out himself, he is entitled to recover the amount of such loss from his principal.

Robinson v. *Mollett*, (1874) L.R. 7 H.L. 802, distinguished.

Thacker v. *Hardy*, (1878) 4 Q.B.D. 687; *Bayley* v. *Wilkins*, (1849) 7 C.B. 886, and *Scott* v. *Godfrey*, [1901] 2 K.B. 726, followed. *Murphy* v. *Butler*, 18 M.R. 111.

On appeal to the Supreme Court,

Held, reversing the above judgment, that the authority so given did not authorize the plaintiffs to make a sale under the Grain Exchange Rules binding upon their principal; that no contract binding on the principal outside of these rules had been entered into, and, consequently, that he was not liable to indemnify them for any loss sustained by reason of their contract. *Murphy* v. *Butler*, 41 S.C.R. 618.

6. Misrepresentation of authority of agent—*Liability for—Measure of damages—Specific performance.*

1. An agent who, by misrepresentation of his authority, procures a person to enter into an agreement with his principals for the purchase of land will be personally liable to the intending purchaser for damages in an action for specific performance against himself and his principals, if they afterwards repudiate the agreement and prove that the agent had no authority to bind them.

Collen v. *Wright*, (1857) 8 E. & B. 647; *Halbot* v. *Lens*, [1901] 1 Ch. 344, and *Starkey* v. *Bank of England*, [1903] A.C. 114, followed.

2. In such a case, the plaintiff is entitled, not only to the expenses actually incurred, but also to the loss of the profit he would have made if the bargain had been carried out.

Robinson v. *Harman*, (1848) 1 Ex. 850; *Engell* v. *Fitch*, (1869) L.R. 4 Q.B. 659, and *Richardson* v. *Williamson*, (1871) L.R. 6 Q.B. 276, followed. *Mancer* v. *Sanford*, 15 M.R. 181.

7. Purchase by agent in his own name—*Statute of Frauds.*

Plaintiff, desirous of purchasing property from one T., employed defendant as his agent to negotiate the purchase. Defendant purchased the property, using his own money, and took the conveyance to himself.

Held, affirming decree that defendant was trustee for plaintiff, and that the Statute of Frauds was no protection. *Archibald* v. *Goldstein*, 1 M.R. 45.

8. Purchase of shares on margin—*Sale by broker without notice—Acquiescence.*

Defendant instructed plaintiffs' manager at Winnipeg to purchase for him, on a margin of 3 per cent., 100 shares of Erie Railway stock. Plaintiffs, through their agents, bought the shares on the New York Stock Exchange, and the agents thereafter held them subject to the control and order of the plaintiffs. Defendant was informed within an hour of the purchase and the price paid. The next day he received the usual advice note of the transaction in which it was stated that on all marginal business the plaintiffs reserved the right to close transactions when margins are running out without further notice. Two weeks afterwards the price of the shares began to fall, and the margin became so small that the manager telegraphed defendant at Gladstone to send $500 additional margin; and later on the same day, the margin being entirely lost, he telegraphed defendant to put up $1,000 further margin. Defendant replied to these telegrams: "Will attend message, down to-morrow." The manager gave no express notice that he would sell the shares unless the margins demanded were put up, but waited until delivery of the mail from Gladstone the next morning. Then, not having heard from defendant, he telegraphed to have the shares sold, which was done at a loss of $1,150.

Held, (1.) There was an actual purchase of the shares for the defendant, and it was not necessary that the shares should have been actually transferred on the books of the railway company, either to the defendant or to the plaintiffs.

(2.) There was an actual sale of the shares regularly made on defendant's account, according to the usages of the stock-broking business.

(3) The plaintiffs were entitled, under the terms of the notice sent to the defendant, to sell the shares without notice to him when the margin was exhausted, as the defendant, not having objected to these terms, must be taken, after a reasonable time, to have assented to them. *Van Dusen-Harrington Co.* v. *Morton*, 15 M.R. 222.

9. Revocation of agent's authority—*Collection by agent — Security — Further directions, what can be read.*

Held, that, on further directions, a defendant may, on the question of costs, read his answer, although it cannot, where replication has been filed, be read as evidence upon the question in dispute except by consent. Only the decree and master's report, with any intermediate orders or certificates, can be made use of for that purpose.

In a suit for an account by principal against agent, the decree on further directions contained a declaration that the agency of the defendant was revoked.

Held, that the decree must be varied, as the plaintiff had power to revoke the authority independently of any decree and had already revoked it.

The decree further declared that the plaintiff should have the exclusive right to the collection of moneys and debts,

Held, the decree must be varied, as the moneys and debts were the plaintiff's own moneys and he had a right to collect them without any such declaration.

The defendant claimed to be entitled to a commission of twenty per cent. upon any moneys which might afterwards be received by the plaintiff. The decree directed the plaintiff to give security that he would pay over to the defendant, what the defendant might be entitled to receive.

Held, the decree must be varied, as, if defendant had a right to the commission, he could take such steps as he might be advised to obtain an account and payment. *Vivian* v. *Scoble*, 1 M.R. 192.

10. Undisclosed principal—*Payment to agent, when a discharge to principal.*

A person who sells goods to the agent of an undisclosed principal, believing the agent to be the principal, may sue the principal on discovery of the facts, and the principal will not be discharged from liability by having made payment to the agent before such discovery, unless the conduct of the seller has been such as to make it unjust for him to call upon the principal for payment, or unless the character of the business is such as naturally to lead the principal to suppose that the seller would give credit to the agent alone.

Irvine v. *Watson*, (1879) 5 Q.B.D. 102; *Heald* v. *Kenworthy*, (1855) 10 Ex. 739; *Pollock on Contracts*, p. 104, and *Broom's Common Law*, p. 585, followed. *Arbuthnot* v. *Dupas*, 15 M.R. 634.

See ARBITRATION AND AWARD, 2.
— COMPANY, I, 1.
— CONDITIONAL SALE, 6.
— CONTRACT, V, 1, 3.
— EXAMINATION FOR DISCOVERY, 11.
— JURISDICTION, 5.
— MASTER AND SERVANT, II.
— MISREPRESENTATION, III, 1.
— RATIFICATION.
— SET OFF, 3.
— TRADE UNIONS, 2.

PRINCIPAL AND SURETY.

1. Contribution between co-sureties—*Degrees of suretyship.*

The defendant and Eli Grobb were joint makers of a promissory note given to MacLennan for an indebtedness of Eli Grobb. When this note fell due, Eli Grobb and his brother, the plaintiff, signed a renewal note in favor of MacLennan after promising the defendant that they would try to get MacLennan to accept this renewal for the former note and so release the defendant. MacLennan, however, was not willing to release the defendant and insisted on his joining in the new note. Plaintiff paid this when due and claimed contribution of one half the amount from the defendant. At the trial in the County Court, the Judge found that Eli Grobb and the plaintiff agreed with the defendant to assume the debt due to MacLennan and gave the note in question in pursuance of such agreement, and that the defendant signed the note as surety that it would be paid by one or other of the Grobbs; that the defendant was not a co-surety with the plaintiff and therefore not liable to reimburse him in any amount.

The plaintiff appealed.

Held, (PHIPPEN, J. A., dissenting,) that the evidence did not support such finding, and that the defendant was liable as a co-surety.

Whiting v. *Burke*, (1871) L.R. 6 Ch. 345, and *Ianson* v. *Paxton*, (1872) 22 U.C.C.P. 505, followed. *Grobb* v. *Darling*, 17 M.R. 211.

2. Discharge of surety—*Concealment of dishonesty of servant—Default by servant before bond of suretyship executed.*

Declaration in two counts on a bond of the defendant, conditioned for the fulfilment by an agent of the plaintiff Company of its regulations, and for payment to the Company, monthly, of such sums as the agent should receive for the use of the Company, and, at the expiration of his agency, of all moneys belonging to the Company. One count alleged the receipt by the agent of divers sums and non-payment of the same monthly or at all. The other count alleged a termination of the agency, receipt by the agent during its continuance of large sums of money and non-payment thereof.

Pleas on equitable grounds,

7. That, before the defaults alleged and before the execution of the bond, the agent had been the plaintiff's agent in a like capacity and, while such agent, had, as such, committed divers other defaults of the same kind, and that the plaintiff, well knowing these defaults, neglected to inform the defendant thereof, but retained the agent as such, and that the defaults sued for occurred during such continuance.

9. That, while the agent was so acting and before the defaults complained of, the agent had committed during his service divers other defaults of the same kind, and for which the Company might lawfully have dismissed him, yet the plaintiff, well knowing thereof, omitted to inform the defendant thereof and continued the agent in the service, and that the defaults complained of were committed during such continuance.

On demurrer to these pleas,

Held, 1. That the seventh plea was bad on the ground that the party in whose favor a contract of suretyship is made is

not necessarily bound to communicate to the surety every fact material to the risk, as in the case of an applicant for insurance, but that the non-communication must occur under such circumstances as to be fraudulent towards the surety.

The North British Insurance Co. v. *Lloyd*, 10 Ex. 523, followed.

2. That the ninth plea was good on the authority of *Sanderson* v. *Aston*, L.R. 8 Ex. 73. *British Empire &c. Ass. Co.* v. *Luxton*, 9 M.R. 169.

3. Guaranty insurance—*Conditions of insurance—Stipulation that insured shall furnish proof to the satisfaction of insurer—Expenses of prosecuting employee at request of insurer—Notice of loss—Waiver of conditions.*

One of the conditions of the guarantee policy sued on required the employer, immediately after the discovery of any fraud or dishonesty on the part of the employee, to give notice thereof in writing to the insurer stating the cause, nature and extent of the loss. No formal notice, fully complying with this condition, was ever given, but information of the loss was promptly communicated to the defendants and they took steps themselves to ascertain the facts fully.

Held, that defendants could waive strict performance of this condition and had in fact waived it.

The policy had been issued on the faith of the statements and answers to questions contained in the written application or proposal for the insurance signed on behalf of the plaintiffs, and contained the condition that, "if any suppression, mis-statement or material omission shall have been made by the employer in his proposal, or at any time whatever, of any fact affecting the risk of the corporation or in any claim made under this agreement, ... , this agreement shall be null and void."

As to the proofs of claim for a loss, the stipulations were that the employer should furnish his claim, with such full particulars thereof as should prove to the satisfaction of the insurer the cause, nature and extent of the loss and the correctness of the claim, and that the particulars furnished should include all reasonable verification of the statements made in the proposal and of the compliance therewith, and should be verified by affidavits duly certified if required by the insurer.

Two of the answers in the proposal were found to have been incorrect and the evidence showed that the plaintiffs had failed to carry out the promises or undertakings implied in them, namely: (1) that the employee's receipts of money were to be entered in receipt pass-books furnished to borrowers and subscribers for shares, which pass-books would be checked monthly by the head office list, and (2) that the bank pass-book would be inspected and checked monthly by the head office.

After furnishing certain proofs of the loss, the plaintiffs' manager, in response to demands made on behalf of the defendants, sent in several statutory declarations intended to verify the correctness of the answers set forth in the proposal and to prove compliance, but the trial Judge found as a fact that the proofs furnished were inaccurate and untrue in respect of the two statements last referred to.

Held, (1) The condition requiring the furnishing of proof to the satisfaction of defendants should not be so construed as to compel the employer to establish to the satisfaction of the guarantor the absolute liability of the latter and the absence of any defence.

(2) The condition requiring "all reasonable verification of the statements in the proposal and of the compliance therewith" meant subsequent compliance with the indicated future course of conducting the business.

(3) That defendants were entitled to rely on the two statements in the answers as to the receipt pass-books and the monthly examinations of the bank pass-book as indicating and promising the existence of safeguards against loss by embezzlement which in fact never existed; that the plaintiffs had failed to furnish "reasonable verification" of the statements made in the proposal or of "the compliance therewith" in respect to matters which were conditions of the liability of defendants under the policy; and that, upon principles of equity, the surety should be considered as discharged from his liability by a departure from the course of business indicated by the answers, whether or not the incorporation of the application in the policy should be treated as creating a warranty that the employer would adhere to the indicated course.

Lawrence v. *Walmsley*, (1862) 12 C.B.N.S. 799, followed.

The plaintiffs had, after being requested so to do by defendants in pursuance of a condition of the policy, prosecuted the employee to conviction for the embezzlement of the various sums of money which he had taken, and they claimed payment of the expenses of the prosecution in addition to their other claim.

Held, that defendants were only liable for such expenses so far as said prosecution related to the offences committed before they received notice of the defalcations, but that liability was not dependent upon their liability under the policy.

Plaintiffs to pay defendants' costs of contesting the liability for the loss, and defendants to pay plaintiffs' costs of establishing their claim for the expenses of the prosecution. *Globe Sav. & Loan Co.* v. *Employers' Liability Ass. Corp.*, 13 M.R. 531.

4. Release of one of two or more joint and several guarantors—*Plea of non est factum—Liability of wife under document signed at request of husband—Guaranty.*

1. If an instrument in the form of a joint and several guaranty to a number of creditors is altered after the signature of one of the guarantors by inserting the name of an additional creditor without the knowledge or consent of such guarantor, such alteration vitiates the instrument not only as against him but as against all the others who have signed, although such others signed after the alteration and with knowledge of it.

Ellesmere Brewing Co. v. *Cooper*, [1896] 1 Q.B. 75, followed.

2. A person who signs a document knowing its general character cannot succeed on a defence of *non est factum*, because it contains larger powers than he was led to believe by the person who induced him to execute it, or because he executed it without knowing or asking what it contained.

National v. *Jackson*, (1886) 33 Ch. D. 1, and *Howatson* v. *Webb*, [1908] 1 Ch. 1, followed.

It is otherwise, however, when the document turns out to be of a character essentially different from what he supposed it to be, as in *Foster* v. *Mc Kinnon* (1869) L.R. 4 C.P. 704, and *Bagot* v. *Chapman*, [1907] 2 Ch. 222.

3. A creditor cannot enforce a guaranty given by a married woman at the request of her husband at a time when, to the creditor's knowledge, she was not in a condition to take much interest in any document presented by her husband to her for signature, if it is proved that, as a matter of fact, the husband did not explain the nature of the document to her and she signed it without asking any questions, supposing it to be something to assist her husband in his business.

Chapman v. *Bramwell*, [1908] 1 K.B. 233, and *Turnbull* v. *Duval*, [1902] A.C. 434, followed.

4. When a married woman is induced by fraud and misrepresentation on the part of her husband and son to give her husband a power of attorney containing provisions of which she was not aware, under circumstances that should have put the husband's creditors upon inquiry as to whether deception was not being practised upon her in the matter, such creditors will not be allowed afterwards to enforce as against her a guaranty signed in their favor by the husband in her name under such power of attorney.

National v. *Jackson*, (1886) 33 Ch. D. 1, followed. *Canada Furniture Co.* v. *Stephenson*, 19 M.R. 618.

5. Release of retiring partner—*Suretyship—Retiring partner a surety for the continuing partner—Merger.*

Defendants, W. & O'N., being in partnership, gave a promissory note and an I. O. U. to plaintiff for the amount of the firm's indebtedness. The partnership was dissolved, and an agreement entered into between the partners, that O'N. should pay all liabilities. Plaintiff, being aware of this arrangement, took from O'N. his separate promissory note, extending the time for payment.

Held (DUBUC, J., dissenting), that W. had become a surety only for the debt, and that he had been released by the giving of time to O'N.

O'N., at the time of giving his separate note, executed a mortgage upon real estate, conditioned to be void upon payment of the note and of any renewal thereof.

Held, that the plaintiff's remedy upon the original note and indebtedness had not merged. *Munroe* v. *O'Neil*, 1 M.R. 245.

6. Release of surety by giving time to principal debtor—*King's Bench Act*, s. 39, *s-s.* 14.

A surety relying on the giving of time by the creditor to the principal debtor

as a defence to an action for the debt must now, under sub-section 14 of section 39 of The King's Bench Act, 58 & 59 Vic., c. 6, show that he has suffered pecuniary loss or damage as the reasonably direct and natural result of the creditor having given the extension of time.

The defendant, claiming that he was entitled to be treated as a surety, proved that, relying on the representations of his co-debtor that the debt had been paid and satisfied, he had made a settlement of their partnership affairs and paid a large sum of money to him and given him a formal release besides handing over to him a large quantity of goods.

Held, that this was not evidence to show that the defendant had been prejudiced by the plaintiffs having given time to the co-debtor, as what the defendant had done was done on the strength of the statements made to him by his co-debtor, and not in reliance on anything the plaintiffs had done or omitted to do. *Blackwood* v. *Percival*, 14 M.R. 216.

7. Right of surety to securities held by creditor—*Further advance by creditor—Marshalling assets.*

A as surety for B joined him in a mortgage of their respective properties to secure an advance by C who was aware of the suretyship, and C afterwards lent a further sum to B on mortgage of the latter's property alone.

Held, that, after payment of the amount due to C on the joint mortgage, A was entitled to the benefit of that security in priority to the subsequent advance made by C on B's property ; and it made no difference that C's claim against A and B was paid off, not directly by A, but in consequence of a sale of both properties under a prior mortgage.

Drew v. *Lockett*, 32 Beav. 499, and *Higgins* v. *Frankis*, 15 L.J. Ch. 329, followed.

Duncan Fox & Co. v. *North and South Wales Bank*, 6 App. Cas. 1, distinguished. *In Re Hamilton Trusts*, 10 M.R. 573.

See WARRANTY, 5.

PRIOR INCUMBRANCE.

See PRACTICE, XVII, 3.
— RAILWAYS, X, 1.

PRIORITY.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 3.
— ATTACHMENT OF GOODS, 6.
— CHATTEL MORTGAGE, II, 1; III, 1.
— CHOSE IN ACTION, 4.
— CONDITIONAL SALE, 1.
— CONSTRUCTIVE NOTICE.
— DEED OF LAND, 2.
— ESTOPPEL, 5.
— FI. FA. GOODS, 2, 4.
— FRAUDULENT PREFERENCE, I, 1.
— GARNISHMENT, VI, 5, 9.
— HIGHWAY, 1.
— MECHANIC'S LIEN, I; IV, 1; VI.
— MORTGAGOR AND MORTGAGEE, VI, 5.
— OWNERSHIP OF CROPS.
— PARTNERSHIP, 6.
— PRACTICE, XX, A, 2.
— RAILWAYS, XI, 3.
— REAL PROPERTY ACT, IV, 1; V, 5.
— REGISTRATION OF DEED.
— REGISTRY ACT, 1, 2.
— SHERIFF, 5.
— SOLICITOR'S LIEN FOR COSTS, 6.
— WAGES, 2.
— WILL, I, 1.

PRIVATE INTERNATIONAL LAW.

Comity—*Assets within jurisdiction of foreign insolvent—Appointment of receiver by foreign court—King's Bench Act, R.S.M.* 1902, c. 40, *Rules* 202, 507—*Service outside of the jurisdiction—Affidavits.*

1. The appointment by a court of a foreign State of a receiver of the assets of an insolvent corporation domiciled in such State does not necessarily effect a transfer to such receiver of assets of such corporation in Manitoba, and, upon the plaintiffs showing that a resident of Manitoba was indebted to such corporation in a sum exceeding $200, which could be garnished, they were held entitled, under rule 202 of the King's Bench Act, to an order allowing service of the statement of claim outside the jurisdiction.

In re Maudslay Sons & Field, [1900] 1 Ch. 602 ; *Woodward* v. *Brooks*, (1889) 128 Ill. 222, followed.

Brand v. *Green*, (1903) 13 M.R. 101, distinguished.

2. A motion for the allowance of service of a statement of claim out of the jurisdiction is an interlocutory and not a final motion, and, under Rule 507 of the King's Bench Act, an affidavit

in support making statements on information and belief with the grounds thereof is sufficient. *Bank of Nova Scotia* v. *Booth*, 19 M.R. 471.

PRIVILEGE.

See LIBEL, 7.

PRIVILEGED COMMUNICATIONS.

See EXAMINATION FOR DISCOVERY, 11.
— PRODUCTION OF DOCUMENTS, 3, 13.
— SOLICITOR AND CLIENT, III, 4.

PRIVILEGED DOCUMENTS.

See PRODUCTION OF DOCUMENTS, 13, 14.

PRIVITY.

See GARNISHMENT, VI, 10.

PRIVITY OF CONTRACT.

Liability of purchaser of equity of redemption to mortgagee—*Jurisdiction in equity—Parties to mortgage bill—Demurrer at hearing—Costs.*

M. mortgaged land to McK., who assigned to the plaintiffs, covenanting that the money would be paid. The mortgagor conveyed to P., subject to the mortgage; the expressed consideration was $3,500, which was the amount agreed to be paid for the equity of redemption; there was no covenant by P. that he would pay the mortgage. P. afterwards made payments to the plaintiffs on account of interest, and to obtain an extension of time for payment. Upon a bill for foreclosure, and for a personal order against M., McK., and P.,

Held, 1. No personal order could be made against P. for want of privity between him and the plaintiffs.

2. Nor as against M. or McK., there being a complete remedy against them at law. *Boultbee* v. *Shore*, 1 M.R. 22, discussed. (Obsolete.)

3. A surety for payment of a mortgage cannot be made a party to a foreclosure bill, and the Court in such a case has no jurisdiction to make a personal order against him for payment.

4. A demurrer *ore tenus* can be urged at the hearing upon the ground of want of equity, but not for multifariousness. *Real Estate Loan Co.* v. *Molesworth*, 3 M.R. 116.

See CONTRACT, IV, 2.
— VENDOR AND PURCHASER, VI, 13.

PROBATE.

See EVIDENCE, 26.
— REAL PROPERTY ACT, V, 6.
— RECTIFICATION OF DEED, 1.
— TITLE TO LAND, 4.

PROCEDENDO.

See PROHIBITION, III, 2.

PROCEDURE.

See COMPANY, IV, 4.
— PRACTICE.

PRODUCTION OF DOCUMENTS.

1. Application for further affidavit—*Practice—Affidavit on production.*

A contentious affidavit is not admissible to contradict an affidavit on production, but it may be shown from admissions in letters written by the party making the affidavit or in his pleadings that he has or had in his possession or power other documents relevant to the issue. In that case, a further affidavit will be ordered.

An affidavit verifying such letters is not a contentious affidavit. *Cowan* v. *Drummond*, 7 M.R. 575.

2. Better affidavit on production.

When a party to an action has made and filed an affidavit on production of documents in the ordinary form in obedience to an order to produce served upon him, the opposite party must be satisfied with such affidavit unless he

can show, from admissions or former statements on oath of the affiant, that there is a reasonable suspicion that he has in his possession or power other documents relating to the matters in question.

Lyell v. *Kennedy*, (1884) 27 Ch. D. 20 ; *Moxley* v. *Canada Atlantic Ry. Co.*, (1885) 11 P.R. 39 ; *Wright* v. *Pitt*, (1868) L.R. 3 Ch. 809 ; *Compagnie Financier* v. *Peruvian Guano Co.*, (1882) 11 Q.B.D. 55 ; *Hall* v. *Truman*, (1885) 29 Ch. D. 319, and *Bray on Discovery*, 181, followed.

The party seeking discovery cannot get an order for a better affidavit merely by showing that there are in the possession or power of the opposite party letters or other documents not mentioned in the affidavit which might contain relevant matter, in the face of the statement in the affidavit that there are none such. *Muir* v. *Alexander*, 15 M.R. 103.

3. Better and further affidavit.

In the affidavit of the defendants' manager, on production of documents, he stated that the defendants had in their possession "The books of the said Bank, consisting of deposit ledgers and liability ledgers, manager's register of collateral securities, letter books ;" and also letters that had passed between the managers at Brantford and Winnipeg, which he objected to produce on the ground that they were privileged communications relating solely to the defendants' case and defence, and did not concern the plaintiff's case.

Held, that the description of the books was too indefinite, and that the defendants should file a further affidavit showing how many, and which of the books referred to, contained any entry relating to the matters in question in the cause ; the rule being that, when objections against productions are made, the affidavit must describe the documents with sufficient distinctness to enable the Court to order production, if the objections should be over-ruled : *Taylor* v. *Batten*, 4 Q.B.D. 85.

Held, also, following *Morris* v. *Edwards*, 15 A.C. 309, that sufficient had been stated to excuse production of the letters between the managers. *Hector* v. *Canadian Bank of Commerce*, 11 M.R. 320.

4. Copies of claim papers in insurance case—*Discovery.*

In an action upon an insurance policy the plaintiff may be compelled to produce, upon his examination in the cause, copies of the claim papers sent by him to the Insurance Company.

Semble, in all actions the parties may upon such an examination be compelled to produce all documents which they would be bound to produce if called upon for discovery in Equity. *Morrison* v. *City of London Fire Ins. Co.*, 6 M.R. 222.

5. Dismissal of bill for want of prosecution — *Non-production by defendant— Undertaking as to damages.*

On a motion to dismiss the bill for want of prosecution, it was objected that one of the defendants had not obeyed an order to produce.

Held, that mere default on the part of a defendant to obey an order to produce does not preclude him from moving to dismiss, unless the plaintiff has been taking active steps to enforce the production.

On appeal, the recital in the order of the material used will govern in case of dispute.

The Referee in chambers has no jurisdiction to order a reference as to damages caused by the issue of an injunction. *Toronto Land Co.* v. *Scott*, 1 M.R. 105.

6. Evidence exclusively in support of case of party producing.

A party to an action is not entitled to discovery of the evidences in the possession of the opposite party which exclusively relate to the case of the latter, and the truth of a statement to that effect respecting any particular document, made in the affidavit on production of documents sworn to by one party, cannot be questioned on an application by the opposite party to compel production of that document.

Lyell v. *Kennedy*, (1883) 8 A.C. 217 ; *Bidder* v. *Bridges*, (1884) 29 Ch. D. 29, and *Morris* v. *Edwards*, (1890) 15 A.C. 309, followed. *Von Ferber* v. *Enright*, 19 M.R. 383.

7. Examination on affidavit as to documents—*Officer of company—Privileged communications—Discovery.*

1. When an affidavit on production of documents is made by an officer of a company, any other examinable officer of the company may be examined upon it, and his answers may be used to impeach the affidavit on an application to compel the filing of a further and better affidavit.

2. If such last-mentioned officer on his examination states that he does not know whether or not certain documents exist which, by the rules of the company, should be in existence, he will be ordered to inquire and obtain the information necessary to enable him to answer fully and explicitly.

3. Reports of the various officials and servants of a railway company upon the occurrence of a fire alleged to have been caused by sparks from a locomotive, and as to the condition of the locomotive, if made in the regular course of duty under the rules of the company, are not privileged from production.

4. The fire having occurred on the 20th day of the month, the officer was ordered to produce all reports on the condition of the locomotive from the first to the last day of the month. *Bain* v. *C.P.R.*, 15 M.R. 544.

8. Foreign Corporation — *Affidavit under sec. 50 of C. L.P. Act, 1854—Appeal from discretionary order—Practice—Discovery.*

An action against a foreign corporation, upon a cause of action which arose out of the jurisdiction, was brought in Manitoba, under 49 Vic., c. 35, s. 32 (M. 1886), on the ground of the defendant having assets in the Province. On an application by the plaintiffs for discovery under section 50 of C.L.P. Act, 1854,

Held, 1. Officers of the corporation, residing out of the jurisdiction of the Court, will not be required to make discovery.

2. The local officers are not bound to inform themselves of the transactions of the corporation, out of which the cause of action arose, which took place in the foreign territory, for the purpose of affording discovery to the plaintiff, and the corporation is not bound to make discovery through its local officers.

It is otherwise, if the corporation has voluntarily become a suitor by invoking the aid of the Court in its own behalf.

There is an appeal from an order granting or refusing discovery.

The application must be supported by an affidavit of the plaintiff; but, if there are more than one plaintiff, the affidavit of one is sufficient.

Per TAYLOR, C. J.—The Court will not make an order for discovery when it is clear that documents would not be open for inspection, but where there is doubt the order will be made, and the privilege may be shewn in the affidavit made in obedience to the order. *McDonald* v. *C.P.R.*, 7 M.R. 423.

9. Inspection — *Production of documents used upon examination.*

A party producing documents upon his examination in the cause is bound to allow the opposite party to inspect and take copies of them. *Evans* v. *Balfour*, 3 M.R. 243.

10. Issue under Real Property Act —*Barring party in default—Practice.*

Under Rule 6 of Schedule R. of The Real Property Act, R.S.M. c. 133, the plaintiff, in an issue under The Real Property Act, obtained an order for production by the defendant within ten days after service of the order upon him or his attorney. The order was served upon the attorney. The defendant did not comply with the order, but his attorney filed his own affidavit. Upon an application to bar the defendant or commit him for contempt,

Held, that the attorney's affidavit was insufficient.

Held, also, that, rule 6 being silent as to the method by which production may be enforced, if the equity rule were adopted, four clear days notice must be given, or, if the common law rule were adopted, there must be personal service; as neither condition was complied with, the summons was dismissed.

Held, also, that an application to bar must be made in the original cause or matter and not in the issue, as in this case.

Semble, it must be within the power of the Court to deal with disobedience of such an order in some way, as by barring the party in default. *Hardy* v. *Desjarlais*, 8 M.R. 401.

11. Not belonging to defendants—*Set off.*

Defendants pleaded a set off, the items of which were contained in the books of the N.W.L. Co. Defendants were shareholders in the Company, and originally the sole owners of the stock.

Plaintiff obtained an order to examine the defendant Carman on his pleas, and gave him notice to produce the book containing the items of the set off, upon such examination. Production was refused.

Held, reversing the order of DUBUC, J., that Carman could not be compelled to produce the books. *Bradbury* v. *Moffatt*, 1 M.R. 92.

12. Not in custody or control of party—*Striking out defence for non-production.*

A defendant should not have his defence struck out for non-production of documents which are not in any way in his custody or control but are in the custody of the officials of an incorporated body, having its head office in a foreign country and not being a party to the action.

Kearsley v. *Philips*, (1882) 10 Q.B.D. 36, and *Fraser* v. *Burrows*, (1876) 2 Q.B.D. 624, followed. *Vulcan Iron Works* v. *Winnipeg Lodge No.* 122, 18 M.R. 137.

13. Privileged documents—*Reports of officials to company respecting accidents—Practice—Discovery—Examination.*

1. Reports made by the employees of a railway company to their superior officers in accordance with its rules concerning an accident resulting in death, and immediately thereafter, are not privileged from production in an action against the company for damages arising out of the accident, if they were made in the discharge of the regular duties of such employees and for the purpose of furnishing to their superiors information as to the accident itself and were not furnished merely as materials from which the solicitor of the company might make up a brief, and an officer of the company who has made an affidavit on production of documents, must, on his examination on such affidavit, answer questions as to whether such reports were made, who received them, and how they came to be made, and generally furnish such information concerning them that the Court may be in a position to decide, on a further motion, whether they are privileged or not.

Wooley v. *North London Railway Co.*, (1869) L.R. 4 C.P. 602, and *Anderson* v. *Bank of British Columbia*, (1876) 2 Ch. D. 644, followed.

2. If any of the information sought on such examination, and to which the plaintiff is entitled, is not within the knowledge of the deponent, he must ascertain the facts and give the information.

Harris v. *Toronto Electric Light Co.*, (1899) 18 P.R. 285, followed.

3. That the names of some of the defendants' witnesses would be disclosed if the questions were answered is not a sufficient reason for refusing to answer.

Marriott v. *Chamberlain*, (1886) 17 Q.B.D. at p. 165, and *Humphries* v. *Taylor*, (1888) 39 Ch. D. 693, followed.

4. Questions as to whether reports had been sent in as to the condition of the locomotive before the accident, and as to repairs thereto, must also be answered. *Savage* v. *C.P.R.*, 15 M.R. 401.

14. Privileged documents—*Reports of officials of company respecting accidents—Discovery—Examination—Evidence to contradict affidavit on production.*

1. In an action for damages resulting from a railway accident, when negligence is charged, reports of officials of the company as to the accident made before the defendants had any notice of litigation, and in accordance with the rules of the company, are not privileged from production, although one of the purposes for which they were prepared was for the information of the company's solicitor in view of possible litigation.

Wooley v. *North London Ry. Co.*, (1869) L.R. 4 C.P. 602, followed.

2. The fact that the reports sought to be withheld were written on forms all headed, "For the information of the solicitor of the company and his advice thereon," is not sufficient of itself to protect them from production.

Hunter v. *G.T.R. Co.*, (1895) 16 P.R. 385, distinguished.

3. When the officer of the defendants who made the affidavit on production was cross-examined upon it and as a result made a second affidavit producing a number of documents for which he had claimed privilege in the first, the examination on the first affidavit may be used to contradict the statements in the second, although there was no further examination.

4. An affidavit on production cannot be contradicted by a controversial affidavit; but, if from any source an admission of its incorrectness can be gathered, the affidavit cannot stand.

Jones v. *Monte Video Gas Co.*, (1880) 5 Q.B.D. 556; *Bewicke* v. *Graham*, (1881) 7 Q.B.D. 400, and *Roberts* v. *Oppenheim*, (1884) 26 Ch. D. 734, followed. *Savage* v. *C.P.R.*, 16 M.R. 381.

15. Receiver — *Railway Company — Practice.*

The opposite party in a suit is entitled to the production of the books of a railway company, although the company may be in the hands of a receiver, who is entitled to the custody of the books and documents, if he has not actually taken possession of them.

The usual order for production was varied in this case by directing only that the books and documents be produced to the plaintiffs or their solicitors, on demand after twenty-four hours' notice at the company's general offices, and that the plaintiffs or their solicitors be allowed to take copies of, or extracts from, such portions of the contents as related to the matters in question. *Maxwell* v. *Manitoba & N.W. Ry. Co.*, 11 M.R. 149.

See AMENDMENT, 9.
— EXAMINATION FOR DISCOVERY, 6.
— EXAMINATION OF JUDGMENT DEBTOR, 10, 11.
— MANDAMUS, 4.
— PRACTICE, XXVIII, 8, 21.
— SECURITY FOR COSTS, I, 1.

PROHIBITION.

I. COUNTY COURT, JURISDICTION OF.

1. Abandonment of excess—*Costs on rule nisi.*

The plaintiff sued in the County Court to recover $250; on the trial he proved that the debt amounted to $573. The defendant objected to the jurisdiction of the Court, as the claim exceeded the amount allowed in the County Courts Act, 50 V., c. 9, s. 45. The County Court Judge then allowed the plaintiff to amend by abandoning the excess over $250, and gave judgment for that amount.

On application for prohibition,

Held, that, so far as jurisdiction was concerned, the action could not be entertained without an abandonment of the excess being made in the first instance, and that there was no power of amendment where this was not done.

The rule *nisi* did not ask for costs. No one appeared for the plaintiff.

Held, that, where a rule *nisi* does not ask for costs, costs are not given unless cause be shown to the rule.

Dougall v. *Leggo*, 10 C.L.T. Occ. N. 387.

2. Abandonment of excess — *Unsettled account—Attachment.*

Section 45 of the County Courts Act, 1887, provides that "No greater sum than $250 shall be recovered in any action for the balance of an unsettled account, nor shall any action for such balance be sustained where the unsettled account, forming the subject matter to be investigated, in the whole exceeds $400."

Sub-section (1) of above section provides that "a claim in contract for any amount may be sued or pleaded as a set off in the County Court, provided the excess over $250 is abandoned . . . . Provided that in no case shall a greater amount than $250 be recovered in the County Court."

Held, (KILLAM, J., dissenting), that, where the balance of an unsettled account of over $400 exceeds $250, the plaintiff may abandon the excess and sue in the County Court for and recover $250.

Per KILLAM, J. The section and sub-section are inconsistent and the rule that, the Court being an inferior court and having only the jurisdiction conferred by statute, this jurisdiction must not be presumed where it is not distinctly given, should be applied; and the clause, limiting the jurisdiction in cases of unsettled accounts to those accounts which originally did not exceed $400, must prevail.

Held, also, sections 40 to 45 inclusive of the County Courts Act, 1887, fix the limits of the jurisdiction of the Court, and in that respect control the sections relating to attachment. *Dougall* v. *Leggo*, 7 M.R. 445.

3. Acquiescence in jurisdiction—*Waiver—Assets in Manitoba of value of $200—Allowing service out of jurisdiction.*

G. issued a writ in the County Court of Selkirk against C. for breach of contract. C. lived in Ontario, and the cause of action arose there. G. obtained an order from the County Court Judge allowing service on C. out of the jurisdiction, on an affidavit that C. had assets in Manitoba to the value of $200 at least. C. then applied to have the writ and service set aside for want of

jurisdiction, but the application was dismissed. Counsel for C. attended at the trial and again objected to the jurisdiction, but cross-examined plaintiff's witness. A verdict was entered for plaintiff. Afterwards counsel for defendant obtained a summons from the County Court Judge to set aside the verdict, on the grounds of surprise and want of good faith. On this application no reference was made to the question of jurisdiction. While this motion was pending defendant applied to this Court for prohibition.

Held, that the defendant, having taken exception to the jurisdiction, had not lost his right to prohibition merely because he allowed the case to be tried and judgment signed, especially as on the trial he still took exception to the jurisdiction; but that, on the subsequent motion to set aside the judgment, there was such a complete acquiescence in the jurisdiction with full knowledge of the facts, that this Court should not interfere.

Held, also, that the provisions of section 32 of The Administration of Justice Act, 1886, (R.S.M., c. 1, s. 24) for allowing service of writs of summons out of Manitoba, do not apply to the County Courts. *Gibbins* v. *Chadwick*, 8 M.R. 209.

4. Discretion to order—*County Court —Practice—Jurisdiction.*

Where the want of jurisdiction of an inferior Court does not appear on the face of the proceedings and the application for prohibition is not made until after the judgment or verdict in that Court, the applicant is not as of right entitled to the writ, but the Superior Court has a discretion to refuse it if it seems inequitable to grant it.

In this case the objection to the jurisdiction was on account of the residence of the defendant being in Ontario, but such objection was not taken in the dispute note although such ground of defence is one that should be taken thereby. The Judge of the County Court before whom the action was tried refused to allow an amendment setting up the objection. The claim was not a large one, the plaintiffs had apparently gone to considerable trouble and expense to meet the defence raised in the dispute note, and the defendant had not accounted for his failure to object to the jurisdiction by his dispute note, or to come into this Court before judgment and ask for prohibition.

Held, that under these circumstances the Court, having a discretion, should refuse the writ of prohibition.

Held, also, that the rule for prohibition should have been directed to the regular and duly appointed Judge of the County Court, and not to another Judge who had merely acted for the regular Judge at that particular trial, and who was now *functus officio*. This objection, however, was not raised on the application before a single Judge of this Court, and the Full Court did not decide whether it should give effect to it on rehearing, as prohibition was refused on the other grounds. *Maxwell* v. *Clark*, 10 M.R. 406.

5. Discretion to order.

This action was commenced in the County Court of Brandon on a promissory note dated and payable at Winnipeg. In the writ of summons the defendant, the maker of the note, was described as "of Carberry," where he resided. A dispute note was filed stating that defendant was not indebted to the plaintiff as alleged.

When the case came on for trial, the defendant was not present or represented by any one. A verdict was then entered for the plaintiff, but as, from circumstances connected with the service of the summons, it seemed possible that the defendant might have been misled as to the date of the trial, the Judge stayed proceedings until the next Court to permit him to apply to re-open the case.

On the next court day, defendant applied to have the case re-opened, and to amend the dispute note, having given the plaintiff's solicitor notice of his intention to do so, and at the same time he raised, although not by dispute note, the question of jurisdiction, claiming that the want of it was apparent on the face of the proceedings. The Judge re-opened the case and directed it to be tried at the next sitting of the Court, allowing an amendment of the dispute note so as to raise some proposed defences, but refused to entertain the question of jurisdiction, holding that defence to have been waived. Defendant then moved for a writ of prohibition.

Held, that the want of jurisdiction was not apparent on the face of the proceedings, as there might be a place called "Carberry" within the Judicial Division of Brandon, so far as the Court

knew ; and, following *Maxwell* v. *Clark*, 10 M.R. 406, and *Gibbins* v. *Chadwick*, 8 M.R. 209, the Court had the discretion to grant or refuse prohibition, which should, in this case, be exercised in favor of plaintiff, as it was not a case of a total want of jurisdiction in any County Court, but only a question as to which particular Court could entertain the case. *Elliott* v. *May*, 11 M.R. 306.

6. Non-resident defendant — *Acquiescence—Judge's order under sec.* 48.

Where an action in a County Court is brought in a county other than the one in which the cause of action arose, or the defendant resides or carries on business, and the defendant, in applying for a writ of prohibition, in his affidavit makes the general statement "that the said Court has no jurisdiction to entertain the suit," the onus is on the plaintiff to shew that a judge has made an order, under section 48 of the County Courts Act, 1887, authorizing the suit to be brought in the Court in which it was brought.

A defendant filed a dispute note in the County Court, setting up a defence on the merits, and also expressly objecting to the jurisdiction of the Court.

Held, the rule is, that, when the want of jurisdiction arises, not from the nature of the subject of the suit, but because the defendant is not resident within the jurisdiction, then, if the defendant appears for the purpose of entering into the merits of the suit, he cannot afterwards apply for prohibition ; but if he takes express objection to the jurisdiction, and promptly applies for prohibition, he cannot be said to have submitted to the jurisdiction. *Bank of Montreal* v. *Poyner*, 7 M.R. 270.

7. Non-resident defendant—*Notice of objection to jurisdiction—Dispute note—Costs—Meritorious defence.*

The plaintiff sued the defendant in a County Court, within the jurisdiction of which he did not reside and the cause of action did not arise. The defendant did not file a dispute note, but notified the plaintiff that he disputed the jurisdiction of the Court, and intended to apply for prohibition if the action were persisted in. Notwithstanding this notice, the plaintiff proceeded to judgment. The defendant then applied for prohibition.

Held, that the defendant was entitled to the prohibition with costs, although he did not show a meritorious defence.

Held, also, that, when there is nothing on the face of the proceedings to show want of jurisdiction, and the objection arises only upon shewing the residence of a party and the local origin of the cause of action, and the facts are not brought forward until after judgment, the granting of prohibition is in the discretion of the Court.

Robertson v. *Cornwell*, 7 P.R. 297, followed. *Rutherford* v. *Walls*, 8 M.R. 96.

8. Title to land—*Effect of raising objection to jurisdiction in dispute note—Taxes—Assessment of homestead before patent—Liability of occupant—Rates—Evidence—Owner or occupant.*

The plaintiff, a rural municipality, sued the defendant in a County Court for the taxes on a half section of land for the years 1888, 1889, 1890 and 1891. The defendant paid into court the taxes for 1891, and defended as to the taxes for the other years. In his defence note, the defendant took objection to the jurisdiction of the Court, on the ground that the title to land was in question. At the opening of the trial, the objection was again taken, but the Judge proceeded with the trial. The defendant was called as a witness, and stated that he took up the land in 1882 as a homestead and pre-emption, but never occupied it more than a few weeks at a time. That he last occupied it in 1887 or 1888 ; that his entry was cancelled in 1890 ; that he paid taxes from 1882 to 1887 ; that the Government allowed him to nominate a purchaser ; that he arranged with M. to buy for him ; that letters patent were granted to M., and that he afterwards repaid M. the purchase money and interest, and was at the time of the trial the owner of the land.

The plaintiff put the assessment and collection rolls in evidence. In the assessment rolls, the defendant was assessed as owner. In the collection rolls as "owner or tenant."

Held, 1. That the assessment rolls were not conclusive as to the defendant's liability, but that lands of the Crown held under homestead or pre-emption entry were assessable as against the person so holding.

2. That the mode of describing the defendant in the assessment roll, whether

as owner or otherwise, was immaterial to his liability.

3. That, as the defendant admitted his liability, no question of title was in dispute.

4. That a dispute note does not stand in the same position as a plea at law under the old practice, and that the Judge originally, and the Court on motion for prohibition, must enquire into and determine the question as to whether there was a real dispute concerning the ownership of the land, upon which the liability of the defendant was contingent. *Rural Mun. of South Norfolk* v. *Warren*, 8 M.R. 481.

II. JUDGE IN CHAMBERS, JURISDICTION OF.

1. Powers of Judge.

A Judge sitting in Chambers has no power to order the issue of a writ of prohibition to a County Court Judge. *Watson* v. *Lillico*, 6 M.R. 59.

2. A Judge in Chambers has no jurisdiction to entertain a motion for a prohibition to a County Court Judge.

Watson v. *Lillico*, 6 M.R. 59, followed. *Re Landsborough*, 21 M.R. 708.

III. MISCELLANEOUS CASES.

1. Irregularity—*County Court—Judgment not delivered within period prescribed by County Courts Act, R.S.M., c. 33, s. 130, as amended by s. 1 of c. 6 of 56 Vic. (M.)*

Application for a writ of prohibition against a judgment of the County Court of Selkirk, entered 11th January, 1899, on the decision then rendered in an action tried in August, 1898. Defendant resided in Ontario and notice of the judgment was at once given to her solicitor here.

On 25th April an action was brought in an Ontario Division Court on the judgment in question, and judgment thereon was recovered there on 17th May. Notice of the application for prohibition was not served until 20th May.

Held, that the provision requiring the Judge to announce his decision within 60 days is a mere matter of procedure and the delivery of judgment afterwards is to be considered only an irregularity; that the proper remedy was to appeal against the judgment under the provisions of The County Courts Act; and that in the exercise of the discretion of the Court, under all the circumstances of this case, the writ of prohibition should be refused, more especially as defendant was not prejudiced by the delay in rendering judgment, and it was shown that plaintiff did not intend to take any steps to enforce the judgment in this Province. *Doidge* v. *Mimms*, 12 M.R. 618.

2. Liquor License Act, s. 174—*Certiorari—Procedendo—Second summons on original information after conviction quashed—Return of information to Justices—Justice of the Peace.*

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 applies to 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*.

Appeal from judgment of BAIN, J., refusing prohibition allowed, and prohibition granted without costs. *Reg.* v. *Zickrick*, 11 M.R. 452.

3. Preparation of Voters' Lists—*The Manhood Suffrage Registration Act, 63 & 64 Vic., c. 25 (M.)—The Manitoba Voters' Lists Act, 63 & 64 Vic., c. 62.*

A person claiming to be entitled to be registered as an elector in the Electoral

Division of South Winnipeg and to have had his name on the last revised list of electors for the division applied for a prohibition to restrain the Board of Manhood Suffrage Registrars, as constituted under The Manhood Suffrage Registration Act, 63 & 64 Vic., c. 25 (M.) from proceeding to prepare the lists of voters for that constituency under the provisions of the Act, which they were about to do for the purpose of a bye-election then pending. On the motion coming on for hearing, it was claimed that the Board had no power to go on with their proceedings because, under section 70 of The Manitoba Voters' List Act, 63 & 64 Vic., c. 62, the former revised lists were to be used until new lists had been prepared and revised throughout the Province, and, further, that, even when that was done, the Board were not to prepare the whole list, but only lists supplemental to the lists prepared under The Voters' Lists Act. It was contended on behalf of the Board that there was no power in the Court to interfere with a Board of that kind by prohibition.

Held, (1) That a Judge should not undertake to decide difficult questions of that kind on a summary application such as was made, but that the parties should be left to declare in prohibition which might still be done under The Queen's Bench Act.

(2) Although the Board was about to prepare and revise lists of electors under the Act, it could not be assumed that they would decide or attempt to decide what lists the returning officer should use at the coming election, or would determine or attempt to determine whether the vote of the applicant should be received or not in the event of his name not being put on the list they were about to prepare; and therefore the applicant could not say that the Board intended to take away any of his rights, and there was no necessity for an immediate prohibition.

Motion dismissed without costs. *Re The Board of Manhood Suffrage Registrars for South Winnipeg*, 13 M.R. 345.

4. Transcript of judgment from County Court—*Judgment thereon in Q.B.*

The plaintiff obtained a judgment in a County Court by default, and then entered judgment in the Queen's Bench on a transcript of that judgment. Afterwards defendant obtained a writ of prohibition against the County Court, and then moved in Chambers to have the Q.B. judgment set aside.

Held, that the Q.B. judgment depended on the one in the County Court and, prohibition having been granted, it must be set aside. *Labatt* v. *Chisholm*, 7 M.R. 502.

See Appeal from Order, 5.
— Costs, XIII, 21.
— County Court, I, 7, 8, 11, 12.
— Criminal Law, I, 2.
— Magistrate.
— Municipal Elections, 5.
— Municipality, I, 2; VIII, 3.

PROHIBITION OF SALE OF LIQUOR.

Liquor License Act, R.S.M. 1892, c. 90, s. 58—*Ultra vires—Quashing by-law—Local option.*

It is *ultra vires* of a Provincial Legislature to empower a municipality to pass by-laws which have the effect of prohibiting the sale of intoxicating liquor in its territory, at least to any greater extent than such selling was prohibited in the case of *Huson* v. *South Norwich*, 19 A.R. 343, 24 S.C.R. 155, viz.: small retail sales which could be forbidden under the police powers proper to be committed to municipal bodies without interfering with trade and commerce.

Under section 58 of the Liquor License Act, R.S.M. c. 90, the defendant municipality passed a by-law forbidding the receiving of any money for a license, and under the same section and section 94 the commissioners are forbidden to grant a license without evidence that the proper fees have been paid, whilst other sections of the Act prohibit the sale of liquors without such license having been obtained.

Held, that section 58, taken along with the other sections referred to, must be construed as an attempt to confer upon municipalities the power to totally prohibit the liquor traffic within its boundaries, and that the by-law in question should be quashed.

In re Prohibitory Liquor Laws, 24 S.C.R. 170, followed. *Crothers* v. *Rural Mun. of Louise*, 10 M.R. 523.

This case was practically overruled by the decisions of the Privy Council in *A. G. for Ontario* v. *A. G. for Dominion*, [1896]

A.C. 348, and *A. G. of Manitoba* v. *Manitoba License Holders' Association*, [1902] A. C. 73.

PROHIBITORY LIQUOR LEGISLATION.

See CONSTITUTIONAL LAW, 12.

PROLIXITY.

See PLEADING, VII.

PROMISSORY NOTE.

See ACCORD AND SATISFACTION, 3.
— BILLS AND NOTES.
— COUNTY COURT, II, 6.
— FRAUDULENT CONVEYANCE, 13.
— MECHANIC'S LIEN, IX, 2, 3.
— SUMMARY JUDGMENT, I, 3.
— WARRANTY, 5.

PROMULGATION OF BY-LAW.

See MUNICIPALITY, V, 2.

PROOF—FAILURE OF

See VENDOR AND PURCHASER, VI, 17.

PROOF OF HANDWRITING.

See CRIMINAL LAW, XVII, 11.
— EXTRADITION, 2.

PROOF OF JUDGMENT.

See INTERPLEADER, III.

PROPERTY IN SAND AND GRAVEL ON HIGHWAYS.

See APPEAL FROM COUNTY COURT, IV.

PROPERTY PASSING.

See SALE OF GOODS, II; IV, 4; VI, 2, 6.
— WARRANTY, 2.

PROSTITUTE.

See CRIMINAL LAW, XV, 4.

PROVINCE OF JUDGE AND JURY.

See MASTER AND SERVANT, I, 1.

PROVINCIAL LEGISLATURE, POWERS OF.

See CONSTITUTIONAL LAW.
— FOREIGN COURT, 2.
— LAW STAMPS.
— LIQUOR LICENSE ACT, 11.
— MUNICIPALITY, VII, 6.
— PROHIBITION OF SALE OF LIQUOR.
— SOLICITOR AND CLIENT, I, 3.
— WINDING-UP, I, 3.

PROWLING ASSIGNEE.

See VENDOR AND PURCHASER, IV, 2.

PUBLIC BUILDINGS.

See MECHANIC'S LIEN, VII, 1.

PUBLIC CONVENIENCE.

See CROWN LANDS, 1.

PUBLIC DOCUMENT.

See CONSTITUTIONAL LAW, 2.
— EVIDENCE, 3.

PUBLIC HEALTH ACT.

R.S.M. 1902, c. 138, ss. 32, 67, 95, 101, 102—*Liability of municipality for services of physician and nurse employed*

by health inspector to take care of a small-pox patient.

Section 67 of the Public Health Act, R.S.M. 1902, c. 138, which enables the health officer to act by removing a person afflicted with any infectious or contagious disease to a separate house or by otherwise isolating him, "and by providing nurses and other assistance and necessities for him at his own cost and charge or the cost and charge of his parents or other person or persons liable for his support if able to pay for the same, *otherwise* at the cost and charge of the municipality," should be read and construed together with sections 95, 101 and 102 of the Act, and, by the true interpretation of all these provisions, persons performing services as nurses or furnishing necessities at the request of a health officer for a small-pox patient are entitled to be paid at once by the municipality, without proving that the parents or other persons liable are unable to pay for the same.

Under section 32 of the Act, an inspector appointed by the Government has the same powers as a health officer, and may exercise such powers without having first suspended or superseded the local health officer.

Although the Act does not distinctly provide for the employment of a physician, yet a person who is a physician, and is employed to act both as doctor and nurse for a small-pox patient, may recover at least for his services as nurse, and $15 per day was not considered excessive for the services of so skilled a nurse as a physician should be, considering also the special risk he ran.

Quære, whether the employment of a physician is not authorized by the words "providing other assistance and necessities" in section 67. *Cameron* v. *Dauphin*, 15 M.R. 573.

PUBLIC INCONVENIENCE.

See INJUNCTION, I, 4.

PUBLIC OFFICER.

Action against—*Neglect to execute warrant—Sheriff's bailiff not a public officer.*

The plaintiff claimed damages for the defendant's failure to execute a warrant of distress issued by two justices of the peace under The Master and Servant's Act. The warrant was addressed to all or any of the constables or other peace officers in the district of Carberry, and was handed to the defendant, a sheriff's bailiff. He at first undertook to execute it, but afterwards on taking advice refused to go on with it, and returned it to the plaintiff's attorney.

Held, that a sheriff's bailiff is not a general but a special agent of the sheriff who employs him, and cannot be treated as a public officer or as a peace officer within the meaning of sub-section 8 of section 3, of the Criminal Code, 1892, and that the defendant had no right to execute the warrant entrusted to him, and could not be made liable for refusing to do so. *Latta* v. *Owens*, 10 M.R. 153.

See CRIMINAL INFORMATION.

PUBLIC PARKS ACT.

R.S.M. 1902, c. 141, ss. 39, 43, 44—*Municipal Act, R.S.M.* 1902, *c.* 116, *ss.* 755, 769—*Entry by Parks Board on land prior to expropriation—Powers of Parks Board—Right of action—Arbitration—Injunction—Construction of Statutes.*

1. Section 755 of the Municipal Act, R.S.M. 1902, c. 116, giving power to the council of a city to acquire by purchase or expropriation land for park purposes, read together with section 769, does not authorize the council to enter upon the land, without the consent of the owner, without first taking steps to expropriate the land and obtain an award of arbitrators and paying the amount awarded for compensation to the County Court Clerk.

2. Section 44 of the Public Parks Act, R.S.M. 1902, c. 141, giving the Parks Board of a town all the powers of the council under the Municipal Act in regard to all expropriations of lands and property deemed necessary to be taken or entered upon for the purposes of a park, does not warrant the Board in entering upon land, or doing anything to injuriously affect it, without the consent of the owner, until after they have regularly expropriated and paid for the property; and a person whose land has been thus entered upon or injuriously affected has a right of action for damages against the Parks Board, and is not restricted to the remedy

by arbitration under the expropriation and arbitration clauses of the Municipal Act.

North Shore Ry. Co. v. *Pion*, (1889) 14 A.C. 612; *Parkdale* v. *West*, (1887) 12 A.C. 602, and *Arthur* v. *G.T.R. Co.*, (1895) 25 O.R. 40, followed.

3. Statutes which encroach upon the rights of the subject in respect of his private property, or which enable public corporations to take his property without his consent, must be construed with the greatest strictness: *Maxwell on Statutes*, 399; *Dillon on Mun. Corp.*, s. 603, *et seq.*

4. When a trespass is being continued and substantial damage is being caused, the Court will generally interfere to restrain the further commission of the trespass and may grant a mandatory injunction.

Kerr on Injunctions, 84, 114; *Wright* v. *Turner*, (1863) 10 Gr. 67, and *C.P.R.* v. *Parke*, [1899] A.C. 535, followed. *Smith* v. *Public Parks Board of Portage la Prairie*, 15 M.R. 249.

See GARNISHMENT, V, 8.
— ILLEGALITY, 4.
— MISREPRESENTATION, IV, 1.

PUBLIC SCHOOLS ACT.

1. Election of school trustee—*Neglect to make declaration of office—Powers of inspector—Practice.*

An inspector appointed under the Public Schools Act, R.S.M. 1902, is not authorized by section 32 of the Act or otherwise to inquire whether a trustee duly elected has forfeited his office under section 243 of the Act by refusing or neglecting to take the declaration of office required by section 31. Where an inspector undertook such inquiry and declared the seats of two trustees vacant and two new trustees were subsequently elected at a meeting of the ratepayers called by direction of the inspector, the proceedings were declared null and void, and the plaintiff corporation held entitled to succeed in an action of replevin commenced by direction of the old board against the two new trustees and others who had broken into the school building and taken away the furniture.

Chaplin v. *Woodstock*, (1886) 16 O.R. 728, followed.

Quære, whether defendants could resist the action which was brought in the name of the school corporation, the acknowledged owner of the goods, and whether defendants in any case could do more than apply to the Court to stay the use of the name of the corporation in the action on the ground that its use was not authorized by those who were lawfully the trustees. *School District of Youville* v. *Bellemere*, 14 M.R. 511.

2. School taxes—*Assessment—Collection—Construction of statutes imposing taxation.*

Held, upon demurrer, 1. The rule that, upon the argument of a demurrer, only the pleadings can be looked at does not apply where statutes which affect the question raised have to be considered.

2. The power of taxation must be expressly conferred, it cannot be given by implication.

3. There is no power given in the School Acts to a board of school trustees in a city or town, to assess, levy or collect a tax or school rate, except that given to levy a small rate upon the parents or guardians of the children attending school. *School Trustees for the Protestant School District of the City of Winnipeg* v. *C.P.R.*, 2 M.R. 163.

See CONSTITUTIONAL LAW, 13.

PUBLICATION FOR ONE MONTH.

See LOCAL OPTION BY-LAW, II, 1; V, 3.

PUIS DARREIN CONTINUANCE.

See PLEADING, VIII.

PURCHASE ON MARGIN.

See PRINCIPAL AND AGENT, V, 8.

PURCHASER FROM MORTGAGEE.

See PARTIES TO ACTION, 7.

PURCHASER WITH NOTICE.

See CHATTEL MORTGAGE, IV, 1; V, 1.
— REGISTRY ACT, 1.

PURCHASER WITHOUT NOTICE.

See Breach of Trust.
— Conditional Sale, 7.
— Crown Patent, 5.
— Equitable Mortgage.
— Fixtures, 2.
— Fraudulent Conveyance, 20, 21.
— Mortgagor and Mortgagee, V, 3.
— Registration of Deed.
— Sale of Land for Taxes, V, 2.
— Vendor and Purchaser, VI, 12.
— Warehouse Receipt.

QUALIFICATION.

See Quo Warranto, 1, 3.

QUANTUM MERUIT.

See Contract, VIII, 4; X, 2; XI, 2; XV, 9.
— Pleading, VIII, 2.
— Principal and Agent, II, B, C, E.
— Statute of Frauds, 4, 8.

QUASHING BY-LAW.

Liquor License Act, R.S.M. 1902, c. 101, s. 61—*The Municipal Act, R.S.M.* 1902, *c.* 116, *s.* 428—*Local Option by-law—Application to quash for defects in proceedings.*

A by-law of a municipality requiring the assent of the ratepayers, which has in fact been submitted to them and received their assent, cannot, under section 428 of The Municipal Act, R.S.M. 1902, c. 116, be quashed on application to the Court after one year from its passage, although it had not been signed by the reeve or sealed with the corporate seal and the proceedings attending its submission were in other respects informal and defective.

In re Vivian and the Rural Municipality of Whitewater, (1902) 14 M.R. 153, not followed. *Re Houghton and Rural Mun. of Argyle*, 14 M.R. 526.

See Constitutional Law, 16.
— Local Option By-Law, I, 1; V, 1, 3; VI, 3.
— Municipality, I, 4; V, 1, 2; VII, 1, 2, 6, 8; VIII, 5.
— Prohibition of Sale of Liquor.

QUASHING CONVICTION.

See Costs, XIII, 20.
— Liquor License Act, 1, 8.

QUIT CLAIM DEED.

See Registration of Deed.

QUEEN'S COUNSEL.

Precedence.

In the case of Queen's Counsel in Manitoba, where their patents are of even date, in the absence of any express provision as to their respective priority of rank contained in the patents, and of any other guide in determining the question, the order of precedence which they had as members of the Bar in Manitoba before the patents were issued and irrespective of them must prevail. *In the Matter of Her Majesty's Counsel*, 8 M.R. 155.

QUESTIONS FOR JURY.

See False Imprisonment, 3.
— Libel, 5.
— Malicious Prosecution, 5.
— Negligence, I, 2.

QUO WARRANTO.

1. Municipal election—*Quo warranto after statutory proceedings.*

Held, 1. The Court will not readily grant leave to file a *quo warranto* after proceedings taken under the statute have been dismissed.

2. Can a ratepayer who is not an elector be the relator in *quo warranto* proceedings? *Quære.*

3. The evidence as to want of qualification shewed that the respondent was assessed for a sufficient amount. There was an affidavit that there was a *fi. fa.* lands in the sheriff's hands for $56,000 against the respondent; that the attorney who issued the writ informed the deponent that nothing had been paid upon it. There was not, however, any certificate from the sheriff, or any evidence of

inquiry from him; nor was there any evidence as to *fi. fa.* goods in the same case, or the existence of goods sufficient to pay it. *Held*, that there was no sufficient evidence of want of qualification.

4. An affidavit of a person who said that he was present at a meeting of Council and saw the respondent take the oath of office without the declaration of qualification, and that he has reason to believe that he, the respondent, has never made the declaration of qualification, is insufficient. The affidavit should show that the deponent was present during the whole meeting of the Council.

5. On an application for *quo warranto* the utmost strictness of proof is required. *Reg.* v. *Calloway*, 3 M.R. 297.

2. Civil or criminal proceeding—*King's Bench Act, R.S.M.*, 1902, *c.* 40, *s.* 92, *Rule* 1.

Quo warranto proceedings to test the right of a person to hold a seat as school trustee are purely civil proceedings and an application for leave to file an information by way of *quo warranto* for such a purpose is properly made by notice of motion and not by rule *nisi*.

The Crown side of the Court of King's Bench referred to in Rule 1 and section 92 of the King's Bench Act is only that part of the business of the Court which it gets by virtue of the Dominion legislation in the Criminal Code. *Tuttle* v. *Quesnel*, 19 M.R. 20.

3. Qualification of relator—*Relator put forward by real prosecutor.*

An application for leave to exhibit an information by way of *quo warranto* to unseat a person as school trustee should be dismissed if the relator is a person not really interested in the matter complained of but merely put forward as a nominal relator by the real prosecutor because of the latter's want of qualification to be such relator.

Rex v. *Daws*, (1767) Burr. 2120; *King* v. *Parry*, (1837) 6 A. & E. 810, and *Reg ex rel. Stewart* v. *Standish*, (1884) 6 O.R. 408, followed.

A member of the board who voted for payment of the account of a brother member for wood supplied for the school would not be qualified to be relator in proceedings to unseat the latter by reason of such payment. *Rex el rel. Tuttle* v. *Quesnel*, 19 M.R. 23.

RAILWAY COMMISSIONERS FOR CANADA, BOARD OF.

Making order of, a rule of Court—*Railway Act, R.S.C.* 1906, *c.* 37, *s.* 46—*Vagueness and uncertainty in language of order.*

An order of the Board of Railway Commissioners for Canada requiring a railway company to put a highway "in satisfactory shape for public travel" should not be made a rule of this Court under section 46 of the Railway Act, R.S.C. 1906, c. 37, on the application of the municipality interested, because the wording of it is too vague and uncertain to permit of its enforcement afterwards if made such a rule.

A Court of Equity would not decree specific performance of an agreement couched in such vague terms and the cases are analogous.

Taylor v. *Portington*, (1855) 7 De G.M. & G. 328, referred to. *Strathclair* v. *C.N.R.*, 21 M.R. 555.

See INJUNCTION, I, 3.
— RAILWAYS, V, 5; VIII, 1; XI, 4

RAILWAYS.

I. ARBITRATION.

1. Appointment of arbitrators by Judge—*Persona designata—Power to rescind order making appointment—Railway Act, R.S.C.* 1906, *c.* 37, *s.* 196.

A Judge in exercising the power conferred by section 196 of the Railway Act, R.S.C. 1906, c. 37, to appoint arbitrators to assess the compensation to be paid to the owners by a railway company for land compulsorily taken, acts as *persona designata*, and, after making the appointment, he is *functus officio* and has no

jurisdiction to rescind the order of appointment, even if it is shown that such order had been made without jurisdiction.

C.P.R. v. *Little Seminary of St. Therese*, 16 S.C.R. 606, followed. *Re Chambers and C.P.R.*, 20 M.R. 277.

2. Costs—*Railway Act, R.S.C.* 1906, c. 37, *s.* 199—*Taxation—Fees of arbitrator who resigned pending the arbitration.*

Application by the Railway Company under section 199 of the Railway Act, R.S.C. 1906, c. 37, to have its costs of an arbitration to determine the amount of compensation to be paid for land taken taxed by the Judge, the board of arbitrators having awarded only the sum previously offered by the company.

Mr. Johnson, one of the arbitrators first appointed, resigned before the award was made and a new arbitrator was appointed in his stead. The owner took up the award, paying the fees of all the arbitrators but Mr. Johnson, who came in on this application and asked that his fees be paid.

Held, that he could have no relief on this application, but must be left to his remedy, if any, against the owner by action.

In taxing the costs of the arbitration under the statute, the Judge acts ministerially and cannot decide anything as to the right to costs.

Ontario & Quebec Ry. v. *Philbrick*, (1886) 12 S.C.R. 288, followed. *Blackwood* v. *C.N.R.*, 20 M.R. 161.

II. Baggage of Passengers.

1. Implied contract to carry—*Action by owner of goods or his assignee, neither being the passenger—What included in term "personal baggage"—Negligence—Loss of baggage.*

1. Only the passenger or his assignee can sue a railway company on the implied contract with a passenger to carry safely his personal baggage arising from his having purchased a ticket for his conveyance.

Great Northern Ry. v. *Shepherd*, (1852) 8 Ex. 30; *Gamble* v. *G.W.R.*, (1865) 24 U.C.R. 409, and *Beecher* v. *Great Eastern Ry.*, (1870) L.R. 5 Q.B. 241, followed.

2. If the action were founded in tort and it was shown that the goods were lost through the defendant's negligence, the owner of the goods, though he was not the passenger, could sue.

Meux v. *Great Eastern Ry. Co.*, [1895] 2 Q.B. 387, followed.

3. In the absence of proof of negligence, the passenger can only recover for personal baggage lost, and only on clear evidence that such were contained in the missing pieces.

4. In the case of a married woman travelling with infant children to join her husband, the husband's clothing, household effects and the clothing of grown up daughters cannot be classed as personal baggage.

McCaffrey v. *C.P.R.*, (1884) 1 M.R. 350, followed. *Callan* v. *C.N.R.*, 19 M.R. 141.

2. Liability as carriers or warehousemen—*Baggage left at station—Pleading—Demurrer.*

Held, 1. It is the duty of the railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform, at the usual place of delivery, till the owner, in the exercise of due diligence, can call and receive it; and it is the passenger's duty to call for and receive it within a reasonable time; if he does not so call for and receive it, it is the company's duty to put it into their baggage room and keep it for him, being liable only as warehousemen.

2. The question whether the consignee of goods carried as freight, or a passenger taking luggage with him, has in a particular case applied for the goods or luggage within a reasonable time after their arrival, is a question of fact to be determined in each case from circumstances.

3. Whether it is to be considered ordinarily as a matter of law to be the duty of the passenger by railway train to call for his luggage before leaving the station, and whether in case of his failing to do so or to make any arrangement about it, the company becomes merely warehousmen of it, *Quære*.

4. On the hearing of a demurrer the Court will look at the whole record and not merely at the particular pleading demurred to; and ordinarily, although such pleading be bad in law, if that to which it is pleaded also be bad, judgment will be given against the party demurring. But, when the same pleading which is bad, and is demurred to, is pleaded at once to two former pleadings, one of which is good and the other bad in law, judgment will be given in favor of the

party demurring, notwithstanding the defect in his former pleading, for the pleading demurred to being bad in part must be taken as wholly bad.

5. To an action for losing luggage the company pleaded as follows: "For a tenth plea to the said declaration the defendants say that they did safely carry the said luggage from the said city of Emerson to the city of Winnipeg, to their station at the said city of Winnipeg, but the plaintiff left the said railway train and said station without calling for his luggage or taking the same, and that, after waiting a reasonable time for the plaintiff to call and take away his luggage, and the plaintiff not having called within said time for or taken the said luggage, the defendants stored the same in the station baggage room of the defendants, which was a reasonably secure place to put and keep the same, and without any charge to the plaintiff the defendants kept and stored the luggage for the plaintiff; and, while the luggage was in the baggage room waiting for the plaintiff to call, the said baggage room with all its contents including the luggage was burned without any default or negligence on the part of the defendants; and the plaintiff did not call for the said luggage until after its destruction by fire as aforesaid, whereby and for no other cause the said luggage became lost to the plaintiff."

Held, a good plea.

6. To this plea the plaintiff replied as follows: "And for a third replication to the eighth, ninth and tenth pleas of the defendants the plaintiff says that, on the twenty-third of February last past, in company with his sister of whom he had charge, he left Portland in the State of Maine as a passenger by rail from that city to the city of Winnipeg with the luggage in the declaration mentioned; and the plaintiff travelled continuously from the one city to the other; and the plaintiff, while at the city of Minneapolis on the line of route between Portland and Winnipeg, made enquiries from the baggage-master of The St. Paul, Minneapolis & Manitoba Railroad, being one of the railways over which the plaintiff was carried on his journey, and the plaintiff was informed by the said baggage-master that his said luggage was not being carried on the same train with himself; and the plaintiff when he had completed his journey above mentioned immediately on his arrival at Winnipeg looked in at the door of the baggage car of the train on which he had travelled for the purpose of finding his said luggage, but did not see the same although the interior of the car was sufficiently clear to allow him to see it if it had been there; and the plaintiff then looked around the station platform in the immediate vicinity of the baggage car but could not see his said luggage; and then the plaintiff, relying on the information received from the said baggage-master and on the result of his said search at Winnipeg station, as above described, did not apply to any officer of the defendants for the said luggage, but within a reasonable time thereafter to wit on the day following he made application to the proper officer of the defendants for his said luggage, but the same was wholly destroyed."

Held, bad on demurrer. *Brown* v. *C.P.R.*, 3 M.R. 496.

3. Liability as carriers or warehousemen—*Loss of baggage.*

Held, 1. A Railway Company is liable for the loss of a passenger's ordinary travelling baggage, but not for such articles as window curtains, blankets, cutlery, books, ornaments, &c., even when these are packed with the baggage for which they are liable.

2. When goods remain at the station at which a passenger alights, but it does not appear that the Railway Company has charged, or is entitled to charge, for storage, the Company is not liable as warehousemen. *McCaffrey* v. *C.P.R.*, 3 M.R. 350.

III. Common Carriers.

1. Delivery of goods to carrier—*Admission by agent.*

Plaintiff sent by S. a box of goods to defendants' station at W. to be carried to Y. at P. S. saw several men working at defendants' freight shed and told one of them he had brought a box for Y.; the man told him "to bring it in and put it there," and S. put it where he was told. He got no receipt. The box was lost. Plaintiff then went to the station at W. and saw the man already referred to, who admitted that he got the box but could not say what he had done with it.

Held, that whether the goods were to be carried at the risk of the consignor

or of the consignee was a question for the jury, and the Court would not disturb their verdict.

Held, that the admission of the man, whom plaintiff saw, was not admissible as evidence against the defendants, and as it was the only evidence of delivery, the plaintiff should be non-suited. *Young* v. *C.P.R.*, 1 M.R. 205.

2. Loss of goods through negligence—*Loss of wheat shipped by railway—Railway Act*, 1888, *s.* 246, *s-s.* 3—*Weights and Measures Act, R.S.C., c.* 104, *s.* 21—*Manitoba Grain Act*, 1900 (*D*), *c.* 39, *s.* 9—*Indorsement of bill of lading.*

1. When it clearly appears that the loss of goods shipped by railway must have been caused by the negligence or omission of the railway company or its servants, the company is precluded by sub-section 3 of section 246 of the Railway Act, 1888, from relying on a condition of the bill of lading exempting it from liability for any deficiency in weight or measurement.

McMillan v. *G.T.R.*, (1889) 16 S.C.R. 543, followed.

2. The certificate of a weighmaster under section 9 of The Manitoba Grain Act, 1900, being only *prima facie* evidence of the weight of grain in a car, may be rebutted.

3. The indorsement of a bill of lading to a bank for collection, though it passes the property in the goods, does not prevent the shipper from bringing an action in respect of the loss of the goods, if he still has an interest in them.

Leggett on Bills of Lading, 626; *Brill* v. *G.T.R.*, (1880) 20 U.C.C.P. 440, and *G.W. Ry. Co.* v. *Bagge*, (1885) 15 Q.B.D. 625, followed.

4. Section 21 of The Weights and Measures Act, R.S.C., c. 104, does not apply to a contract for carrying wheat by the carload, although the number of bushels in the car had been ascertained by bag measurement.

Manitoba Electric & Gas Co. v. *Gerrie*, (1887) 4 M.R. 210, and *Macdonald* v. *Corrigal*, (1893) 9 M.R. 284, distinguished. *Ferris* v. *C.N.R.*, 15 M.R. 134.

3. Negligence—*Liability as warehouseman—Notice of arrival of goods—Reasonable time.*

The plaintiff's claim was for the loss of goods shipped to him at Emerson over the defendants' railway, which were destroyed by fire while still in the car. The car arrived at noon, and the station agent immediately gave verbal notice to a drayman, according to the usual custom, that there was some freight to be delivered. The plaintiff had been accustomed to have his goods delivered by the drayman. He was out of town that afternoon, and received no other notice of the arrival of the goods. The car was left standing near the elevator, and was burned during the following night. It was supposed the fire originated in the furnace of the elevator.

Held, that under the circumstances the customary notice to the drayman was sufficient notice to the plaintiff of the arrival of the goods, and that a reasonable time had elapsed for such notice to reach the plaintiff, and for him to remove the goods; that the *transitus* was at an end and the liability of the defendants as common carriers had ceased before the fire took place, and that the evidence did not warrant the finding that the defendants had been guilty of negligence in leaving the car where they did, and that therefore they were not liable for the loss of the goods in question. *Burdett* v. *C.P.R.*, 10 M.R. 5.

4. Action for non-delivery of goods—*Condition indorsed on shipping bill—Liability of carrier.*

In an action brought for non-delivery of sawn lumber delivered to defendants at P. to be carried by them to B., defendants pleaded a condition indorsed on the shipping bill, as follows: "That the company will not be responsible for any deficiency in weight or measure of grain, in bags or in bulk, nor for loss or deficiency in the weight, number or measure of lumber, coal or iron of any kind carried by the car load."

The evidence shewed that the lumber was loaded at P. and that a portion of it was not delivered at B. There was no evidence as to how the loss occurred.

Held, 1. That by the Statute 42 Vic., c. 9, s. 25, s-s. 4, the defendants were precluded from setting up the indorsed condition, when a loss is charged as happening through their own negligence.

2. That, in the absence of evidence, the non-delivery might be assumed to have arisen from misdelivery to some other person, or from the actual use of the property by the defendants for their own purposes, in which cases the condition

would be no protection. *Henry* v. *C.P.R.*, 1 M.R. 210.

5. Non-delivery of goods—*Liability of Railway Company as carriers.*

Plaintiff delivered certain goods to the Grand Trunk Railway for carriage to Winnipeg. Defendants in the course of transit received the goods and were paid freight charges over their line. Defendants delivered the goods at Winnipeg to a cartage company to be delivered to plaintiff, but some of them were not so delivered.

Held, defendants liable. *Roach* v. *C.P.R.*, 1 M.R. 158.

6. Smuggled goods—"*By reason of the railway.*"

The statutory limitation of actions for "damages or injury sustained by reason of the railway" does not apply in an action, either contract or tort, for damages for non-delivery of goods delivered to the railway for carriage.

To a declaration against a carrier for non-delivery defendants pleaded that the goods had, prior to the delivery to the carrier, been forfeited to the Crown for non-payment of customs dues,

Held, not a valid defence.

A carrier pleaded a lien for tolls, to which plaintiff replied that he was ready and willing and within a reasonable time offered to pay the tolls, and requested delivery, but defendants neglected and refused to deliver and thereby discharged plaintiff from tendering the tolls.

Held, bad on demurrer. *White* v. *C.P.R.*, 6 M.R. 169.

IV. Crossings and Cattle Guards.

1. Approaches.

Where a railway company has crossed a highway, the duty of the company is not merely to provide a crossing upon which the rails do not rise more than one inch above, or sink one inch below the level; but it is also the company's duty to construct and maintain such approaches as may be necessary to enable persons using the highway to avail themselves of the crossing.

Therefore, where a railway company laid a plank 14 feet long outside the rail, and did not grade the road up to the plank at one end of it, but left the ends of the ties exposed,

Held, that the company was liable for an accident occurring to the plaintiff's mule, by reason of the whiffletree catching upon one of these ties. *Moggy* v. *C.P.R.*, 3 M.R. 209.

2. Cattle guards—*Accident — Liability of Company—Contributory negligence.*

Action for the value of a cow, killed by defendants' locomotive. A boy was in charge of the cow but it ran away and got on the track through the cattle guards being full of snow.

Held, defendants liable. *Phillips* v. *C.P.R.*, 1 M.R. 110.

3. Omission to ring bell or sound whistle—*The Railway Act*, 1888, *c.* 29, *s.* 2, *s-s.* (*g*), and *s.* 256—*Contributory negligence—Highway crossing.*

1. The word "highway" in section 256 of The Railway Act, 1888 (D), 51 Vic., c. 29, requiring a bell to be rung or a whistle sounded by a railway locomotive engine on approaching a crossing over a highway, means a public highway, which is so as of right.

Semble, the question whether there is a public highway at any point is one which a County Court is precluded by *s-s.* (*d*) of section 59 of the County Courts Act, R.S.M., c. 33, from trying.

2. Where a trail or way over a railway track is used by the public by invitation or license of the Railway Company, a person crossing the track upon the same is bound to observe reasonable precautions to avoid injury by trains; and, where the evidence shows that he has not done so, he cannot recover from the Company for such injuries without proving that they were immediately caused by the negligence of the Company's servants only.

Quære, whether the failure of the person in charge of a locomotive to ring a bell or sound a whistle or observe other precautions on approaching such a crossing constitutes actionable negligence.

Cotton v. *Wood*, (1860) 8 C.B.N.S. 568, and *Weir* v. *C.P.R.*, (1889) 16 A.R. 100, followed. *Royle* v. *C.N.R.*, 14 M.R. 275.

V. Expropriation.

1. Acceptance of amount offered by Company—*Railway Act*, 1903, *s.* 159.

Under section 159 of The Railway Act, 1903, if the owner of land sought to be expropriated by the railway company

does not accept the offer of the railway company within ten days, the company may at once proceed to have the amount of the compensation payable determined by arbitration; but the owner may accept the offer at any time after the expiration of ten days if in the meantime the company has taken no further proceedings, and such offer and acceptance will constitute a binding contract between the parties upon which the owner may proceed in an action to recover the amount offered. *Bennetto* v. *C.P.R.*, 18 M.R. 13.

2. Appeal from award of arbitrators —*Interest on amount awarded—Railway Act, R.S.C.* 1906, *c.* 37, *ss.* 192-214.

1. Upon an appeal, under section 209 of the Railway Act, R.S.C. 1906, c. 37, from an award of arbitrators determining the compensation to be paid to an owner for the compulsory taking of his lands by a railway company, the Court will not assume the function of the arbitrators and make an independent award, but will rather treat the matter as it would an appeal from the decision or verdict of a Judge, and the award will not be disturbed, unless the arbitrators manifestly erred in some principle in arriving at their conclusion.

2. Interest on the amount awarded should not be added by the arbitrators, especially in a case where the claimant remains in possession of the property until after the date of the award.

3. It is proper that the claimant should be allowed the actual value of the property to him, and not merely the market value as on a sale.

4. The arbitrators are not bound to allow ten per cent. extra on the amount of the compensation for the compulsory taking, although that is frequently done, and the Court will not interfere with their refusal to allow such percentage. *Re Canadian Northern Railway and Robinson*, 17 M.R. 396.

3. Appointment of sole arbitrator —*"Opposite party," meaning of—Evidence by affidavit.*

The Railway Company having served on both the owner of the land and the mortgagee the notice and certificate prescribed by sections 146 and 147 of The Railway Act, 51 Vic. (D.), c. 29, the owner refused the sum offered and notified the Company of the name of her arbitrator, but the nortgagee gave no such notice.

Held, that, under section 150 of the Act, the Company was entitled to apply to have a sole arbitrator appointed, as the mortgagee should be treated as an "opposite party" within the meaning of that section.

After giving notice to the Company of the name of her arbitrator, the owner sold and conveyed the property to another person. The land had been brought under The Real Property Act and on the certificate of title issued to the purchaser there was endorsed a memorandum of the deposit in the Land Titles Office of the Minister's certificate and the plan and book of reference.

Held, that the purchaser must be deemed, under section 145 of the Act, to have had notice of the expropriation proceedings and was bound by them.

Evidence in support of an application under section 150 of the Act may be by affidavit. *Re C.P.R. and Batter*, 13 M.R. 200.

4. Compensation for lands injuriously affected—*Danger to children—Statutes — Retroactive — Expropriation — Appeal from award — Parties.*

After an award and before the expiration of the time for appeal, a statute came into operation amending the previous provisions respecting appeals.

Held, that the new statute applied to the case.

A statute provided that a notice of appeal from an award should be given to all interested parties.

Held, that the notice was sufficient if signed by the attorney of the party appealing.

Such a notice need not be served upon the arbitrators.

Service of such a notice upon the cashier of a foreign corporation is sufficient service.

The promoter of a railway had power to expropriate land making compensation "for the value of the land taken, and for all damages to land injuriously affected by the construction of the railway," with a proviso for setting-off the increased value of the lands not taken, by reason of the passage of the railway through or over the same, "against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession of, or using, the said lands or grounds as aforesaid."

A portion of certain lands having been taken by the railway,

Held, 1. That the compensation should be the difference between the value of the land as it existed before, and of the remaining portion after the construction of the railway.

2. That inconveniences arising not only from the construction, but from the operation of the railway, such as noise, ringing of bells, smoke and ashes, might be included in the estimate.

3. Danger to children and others should not be included.

Upon appeal to the Court in *banc*,

Held, that compensation was correctly allowed for depreciation in the value of the land not taken, occasioned by the anticipation of the subsequent operation and user of the railway on the land taken.

Per KILLAM, J.—The appeal having been limited to a part of the order, the respondent could not attack the other part of the order in arguing the appeal.

Per BAIN, J.—That evidence of an arbitrator as to whether, in estimating the compensation, he had taken into consideration matters which were not within his jurisdiction, was admissible. *Re Scott & Railway Commissioner*, 6 M.R. 193.

5. Possession before payment of compensation—*Railway Act, R.S.C.*, 1906, *c.* 37, *s.* 217—*Board of Railway Commissioners, jurisdiction of.*

An order of the Board of Railway Commissioners for Canada giving leave to a railway company to construct an extension of a spur track and authorizing the expropriation of the necessary land is conclusive, unless reversed on appeal to the Supreme Court, as to the right of the company to expropriate the land and construct the extension, and the fact that the owner of the land is *bona fide* proceeding to appeal to the Supreme Court from such order would not justify a delay in granting a warrant, under section 217 of the Railway Act, R.S.C., 1906, c. 37, to put the Company in possession of the required land before payment of the compensation, as that section makes it the duty of the judge to grant the warrant on affidavit to his satisfaction that immediate possession is necessary.

Such a warrant should, however, not be granted unless there is some urgent and substantial need for immediate action n the interest of the railway itself or of the public, and it is not sufficient to show that the interests of an individual, whose property would be reached by the spur line when built, urgently call for such construction in order that he may profitably carry on his business on such property.

Kingston and Pembroke Ry. Co. and Murphy, (1886) 11 P.R. 304, and *C.P.R.* v. *Little Seminary of Ste. Therese*, (1889) 16 S.C.R. at p. 617, followed. *Re C.N.R. and Blackwood*, 20 M.R. 113.

6. Possession before proceedings for expropriation—*Railway Act*, 1903, *ss.* 152-171—*Right of action where land entered upon by railway company before expropriation proceedings begun.*

The filing of a plan, profile and book of reference under The Railway Act, 1903, showing the land required for the railway, does not warrant the company in taking possession of it before proceedings for expropriation are commenced, unless by agreement with the owner; and, if such possession is taken, the company is a trespasser, and the owner is not limited to the remedy by arbitration provided by the Act, but may proceed by an ordinary action at law against the company. *Wicher* v. *C.P.R.*, 16 M.R. 343.

VI. FENCES.

A. NEGLIGENCE OF COMPANY.
B. NEGLIGENCE OF OWNER OF ANIMALS.
C. OBLIGATION TO FENCE.

A. NEGLIGENCE OF COMPANY.

Accident—*Liability of Company.*

Action for the value of an ox, killed by defendants' locomotive. The animal was on the prairie close to the track. The engineer reversed the engine and whistled, but, before the train could be stopped, the animal, having got on the track, was run over and killed.

Held, 1. That the evidence did not disclose such negligence as would entitle the plaintiff to recover.

2. That, where the land adjoining the railway is unoccupied, the company is not bound to erect fences at that part of their line. *McFie* v. *C.P.R.*, 2 M.R. 6.

B. NEGLIGENCE OF OWNER OF ANIMALS.

1. Liability for animals killed on track—*Animals at large through negli-*

gence of owner—Obligation to fence—Railway Act, R.S.C. 1906, *c.* 38, *ss.* 254, 284, 427.

1. When it is proved that animals killed by a train of a railway company had been allowed to go at large on a public road through the negligence or wilful act or omission of the owner or his agent and, in consequence thereof, got upon the right of way through a defect in the railway fence, sub-section 4 of section 237 of the Railway Act, 1903 (s. 294 of c. 37 of R.S.C. 1906) protects the Company from any claim for damages, although the Company had failed to observe the requirement of section 199 (now 254) by neglecting to keep the fence along the right of way in proper repair.

Murray v. *C.P.R.*, (1907) 7 W.L.R. 50; *Becker* v. *C.P.R.*, (1906) 7 Can. Ry. Cas. 29, and *Bourassa* v. *C.P.R.*, (1906) 7 Can. Ry. Cas. 41, followed.

2. Said section 237 deals completely with the question of animals at large getting upon the railway track and being killed or injured and, therefore, section 294 (now 427), being only of general application, cannot be interpreted so as to make the Company liable in a case in which, by section 237, it is expressly relieved from liability.

HOWELL, C.J., dissenting. *Clayton* v. *C.N.R.*, 17 M.R. 426.

2. Liability for animals killed on track—*Railway Act, R.S.C.* 1906, *c.* 37, *s.* 294, *s-s* 4 *and* 5—*Construction of statutes—Negligence or wilful act or omission of owner of animals getting at large.*

The liability of a railway company, under sub-sections 4 and 5 of section 294 of the Railway Act, R.S.C. 1906, c. 37, for damages in the case of animals at large killed or injured by a train is not limited to territory where the company is by section 254 obliged to erect suitable fences, and the company can only escape such liability by showing that the animals got at large through the negligence or wilful act or omission of the owner or his agent or the custodian of such animals or his agent.

The Railway Act of 1903 changed the law in this respect.

Bank of England v. *Vagliano*, [1891] A.C., per Lord Herschell at p. 144, followed as to the interpretation of a statute intended to be a code of law on the subject referred to.

Arthur v. *Central Ontario Ry. Co.*, (1906) 11 O.L.R. 537; *Bacon* v. *G.T.R.*, (1906) 12 O.L.R. 196; *Lebu* v. *G.T.R.*, (1906) *Ib.* 592; *Carruthers* v. *C.P.R. Co.*, (1906) 16 M.R. 323, 39 S.C.R. 251, and *Becker* v. *C.P.R. Co.*, (1906) 7 Can Ry. Cas. 29, 5 West.L.R. 569, followed.

The plaintiff had for two years been accustomed to turn his horses out of the stable in the winter to go without halters to a watering trough about fifteen yards away and driving them back to the stable after drinking. On the occasion in question the plaintiff and his hired man were carrying out the usual routine when three of the horses after drinking, without their noticing it, walked off in the direction of the road instead of returning to the stable. When the fourth had finished drinking it started to walk after the others. The plaintiff observed this and immediately tried to intercept the horses, but the three escaped and, although the plaintiff followed them up at once and did his best to recover them, they eventually got on to the defendants' railway track and were killed by a train on a bridge.

Held, that the plaintiff was not guilty of negligence or of any wilful act or omission in the matter so as to disentitle himself to recover. *Parks* v. *C.N.R. Co.*, 21 M.R. 103.

C. OBLIGATION TO FENCE.

1. Cattle killed by train.

A railway company is under no obligation to erect fences along their line where the land adjoining is unoccupied.

Cattle straying upon the line across such unoccupied land are trespassing and, if injured there by accident without negligence, the railway company is not responsible.

In such case the *onus* as to negligence is upon the party asserting it.

Plaintiff's cattle, having been in his yard at nine o'clock one evening, were discovered about ten o'clock the next morning lying wounded alongside the defendants' line of railway—one had a hind foot "mashed up," and one had "a big gash in her leg."

Held, That it could be fairly inferred that the injury was caused by an engine or cars running upon the defendants' railway, and under the control of the defendants' servants.

In such a case the presence of certain employees of the railway at the killing and cutting up of the cattle or even their participation in these acts would not

establish any liability of the company. *McMillan* v. *Manitoba & N.W.R.*, 4 M.R. 220.

2. Adjoining Owners.

The liability of a railway company to fence arises by statute only. There is no common law liability to fence, either as respects the highway, or as respects adjoining proprietors.

A statute provided that, "When a Municipal Corporation for any township has been organized, and the whole or any portion of such township has been surveyed and sub-divided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township," &c.; and further that, "Until such fences and cattle-guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the company shall be liable for all damages done by its trains and engines to cattle, horses and other animals not wrongfully on the railway and having got there in consequence of the omission to make, complete and maintain such fences and cattle-guards as aforesaid."

(*a*) *Held*, that, having regard to the current of previous legislation, the liability of the railway to fence existed only in favor of the owners or occupants of lands adjoining the railway. *Westbourne Cattle Co.* v. *The Manitoba & N.W.R.*, 6 M.R. 553.

(*a*) Recent legislation has altered this. —Ed.

3. Adjoining land, where animals might properly be—*Permission of owner of land contiguous to railway—Liability for animals killed on railway track.*

The plaintiff's horses were being wintered on his own land adjacent to the property of his father, through which the defendants' railway ran. In March, 1893, the horses strayed along a private road across the father's land, through a broken gate on this road, and on to the railway track, where they were killed by a train of the defendants.

According to the evidence of the plaintiff and his father, the latter had several times in previous years given the plaintiff permission to pasture and water his stock on the father's land, or to allow them to run there, but there was no special permission asked or given for that winter, nor was there sufficient evidence of a general permission for the plaintiff to allow his stock to run there.

Held, that it could not be said that the horses got upon the railway track from land where they might properly be, and therefore the defendants were not, under The Railway Act of Canada, 51 Vic., c. 29, s. 194 (as amended by 53 Vic., c. 28, s. 2) and ss. 196 and 198, liable for the loss.

Westbourne Cattle Co. v. *M. & N.W. Ry. Co.*, 6 M.R. 553, followed. *Ferris* v. *C.P.R.*, 9 M.R. 501.

Not followed, *Carruthers* v. *C.P.R.*, 16 M.R. 323.

4. Death of animal not actually struck by train or engine—*Railway Act, s.* 194, *s-s.* 3, *as re-enacted by* 53 *Vic., c.* 28, *s.* 2.

Under sub-section 3 of section 194 of The Railway Act, as re-enacted by 53 Vic., c. 28, s. 2, a railway company is not liable in damages for the death of an animal which, having got on the track through a defective fence, is frightened by a train and then runs into a barbed wire in another part of the fence and is so cut by the barbs that it dies.

The damage to the animal cannot be said to be "caused by any of the Company's trains or engines," unless the animal is actually struck by the train or engine.

Dicta of the Judges in *James* v. *Grand Trunk Ry. Co.*, (1901) 1 O.L.R. 127, 31 S.C.R. 420, and decision in *Winspear* v. *The Accident Insurance Co.*, (1880) 6 Q.B.D. 42, followed. *McKellar* v. *C.P.R.*, 14 M.R. 614.

5. Adjoining land—*Obligation to fence right of way—Railway Act*, 1903, *s.* 199, *s-s.* 3.

1. Under section 199 of the Railway Act, 1903, a railway company is required to erect and maintain fences suitable and sufficient to prevent cattle from getting on the railroad from adjoining land which is cultivated and settled on, although not inclosed.

2. The words "not improved or settled, and inclosed," in sub-section 3 of that section, describing lands in respect of which the company is not required to fence, should either be construed to mean "not improved and not inclosed, or not settled and not inclosed," or should be read with the comma put after the word "improved," instead of after the

word "settled," thus, "not improved, or settled and inclosed," so that, either way, the obligation to fence exists as to land that is either (1) improved, or (2) settled and inclosed. *Dreger* v. *C.N.R.*, 15 M.R. 386.

Not followed, *Schellenberg* v. *C.P.R.*, 16 M.R. 154.

6. Adjoining land—*Obligation to fence—Railway Act*, 1903 (*D*), *s*, 199, *s-s.* 3.

Under sub-section 3 of section 199 of the Railway Act, 1903 (D), a railway company is not required to fence off lands on either side of the right of way unless they are inclosed, as the plain meaning of the words "not improved or settled, and inclosed" is the same as if they were "not improved and inclosed, or not settled and inclosed."

Dreger v. *C.N.R. Co.*, (1905) 15 M.R. 386, not followed. *Schellenberg* v. *C.P.R.*, 16 M.R. 154.

7. For the protection of others than the lawful occupants of adjoining lands—*Railway Act*, 1903 (*D*), *ss.* 199 *and* 237.

Under sections 199 and 237 of The Railway Act, 1903, the obligation of a railway company to fence off its right of way is a duty which it owes to the public at large and is not imposed upon it solely for the benefit of the occupants of the lands adjoining the right of way; and, therefore, the owner of animals which, without negligence on his part, escape from his enclosed pasture into a highway, thence into a neighbor's field adjoining the right of way of a railway company, and thence through an opening in the fence along the right of way on to the railway track, and which are then killed by a train of the company, is entitled to recover against the company for the loss, when the company has neglected to place a gate at such opening.

Fensom v. *C.P.R.*, (1904) 8 O.L.R. 688, and *Bacon* v. *G.T.R.*, (1906) 7 O.W.R. 753, followed.

Ferris v. *C.P.R.*, (1894) 9 M.R. 501, not followed. *Carruthers* v. *C.P.R.*, 16 M.R. 323.

Affirmed, 39 S.C.R., 251.

8. Injury to crops caused by cattle straying from railway line not fenced—*Railway Act, R.S.C.* 1906, *c.* 37, *ss.* 254, 427.

The duty of a railway company to provide, under section 254 of the Railway Act, R.S.C. 1906, c. 37, fences and cattle guards suitable and sufficient to prevent cattle and other animals from getting on the railway, is prescribed only to protect the adjoining land owners from loss caused by their animals being killed or injured on the track; and, notwithstanding the general language of section 427 of the Act which gives a right of action to any one who suffers damages caused by the breach of any duty prescribed by the Act, an adjoining owner whose crops are injured by cattle straying on to his land from the railway track, in consequence of the absence of fences and cattle guards, has no right of action against the railway company in respect of such injury.

James v. *G.T.R.*, (1901) 31 S.C.R. 420, *Gorris* v. *Scott*, (1874) L.R. 9 Ex. 125, and *McKellar* v. *C.P.R.*, (1904) 14 M.R. 614, followed. *Winterburn* v. *Edmonton Ry. Co.*, (1908) 8 W.L.R. 815, not followed.

RICHARDS, J. A., dissented. *Hunt* v. *G.T.P.*, 18 M.R. 603.

9. Animal getting on track through open gate at farm crossing—*Non-suit—New action.*

If a gate in the fence at a farm crossing of a railway is left open by the person for whose use the crossing is provided or any of his servants or by a stranger or by any person other than an employee of the company, the company is relieved by section 295 of the Railway Act, R.S.C. 1906, c. 37, from the liability imposed by sub-section 4 of section 294 to compensate the owner for the loss of an animal at large, without his negligence or wilful act or omission, getting upon the railway track through such gate and killed by a train.

Flewelling v. *Grand Trunk Ry. Co.*, (1906) 6 Can. Ry. Cas. 47, followed.

Per PERDUE, J.A.—Some negligence or breach of statutory duty on the part of the railway company in respect of such gate would have to be shown to render the company liable in such a case.

Per HOWELL, C. J. A.—If railway fences or gates are torn down or get open by the action of the elements or by some accident or default not caused by the act of man, and an animal thereby gets upon the track and is killed, none of the exceptions in section 295 would apply

and the company would be liable under sub-section 4 of section 294.

Non-suit ordered, reserving right to plaintiff to bring another action. *Atkin* v. *C.P.R.*, 18 M.R. 617

VII. Fire Started by Sparks from Locomotive.

1. Contributory negligence—*Action for injury to land out of the jurisdiction—Railway Act, R.S.C.* 1906, *c.* 37, *s.* 298—*Evidence.*

The plaintiffs' premises, adjoining the defendants' railway, were discovered to be on fire about five minutes after the passage of one of the defendants' trains hauled by two engines up a heavy grade. It was proved that the wind at the time would have carried any sparks from the engines directly towards the premises and that it is usual for engines, under such circumstances, although well and properly equipped, to throw off sparks and cinders. The evidence also satisfied the trial Judge that it was in a high degree improbable that the fire could have been caused in any other way, although no negligence in the operation of the train was shewn and no one saw any sparks alight.

Held (1) The evidence warranted the Judge's finding that the fire had been caused by sparks from the locomotives. *Tait* v. *C.P.R.*, (1906) 16 M.R. 391, followed.

(2) The plaintiff was entitled to a verdict for the amount of the damage to the contents of the building caused by the fire, under section 298 of the Railway Act, R.S.C. 1906, c. 37, which makes the Railway Company liable for losses caused by fire started by a locomotive "whether guilty of negligence or not."

(3) No contributory negligence on the part of the owner, unless it is wanton or such as amounts to fraud in increasing the risk of fire, is available as a defence.

Vaughan v. *Taff Vale Ry. Co.*, (1858) 3 H. & N. 743; *Campbell* v. *McGregor*, (1889) 29 N.B. 644; *Jaffrey* v. *T.G. & B. Ry. Co.*, (1874) 23 U.C.C.P. 560; *McLaren* v. *Canada Central*, (1882) 32 U.C.C.P. 341; *Bowen* v. *Boston & A.R. Co.*, (1901) 61 N.E.R. 142; *Matthews* v. *Missouri Pacific*, (1897) 44 S.W.R. 802; and *Mathews* v. *St. Louis & S.F. Ry. Co.*, (1893) 24 S.W.R. 602, followed.

(4) The plaintiffs could not recover for the damage to the building caused by the same fire for want of jurisdiction in the Court, as it was part of the realty which was in another Province, and the title to it was in issue in this action.

Brereton v. *C.P.R.*, (1898) 29 O.R. 57, and *British S.A. Co.* v. *Companhia de Mocambique*, [1893] A.C. 602, followed. *Winnipeg Oil Co.* v. *C.N.R.*, 21 M.R. 274.

2. Evidence of cause of fire—*Joinder of plaintiffs having separate causes of action arising out of same event—King's Bench Act, Rule* 218—*Costs.*

If it appears from the evidence that there was no other possible cause for the starting of a prairie fire near a railway track than sparks from a passing locomotive, the proper conclusion to be drawn is that a railway company is liable, notwithstanding that the sparks must have carried the fire an unusual distance and that no evidence was given as to the condition of the smokestack and netting at the time.

A number of plaintiffs joined in the Tait case presenting separate claims for losses by the same fire which plainly appeared by the statement of claim, to which the defendants filed a statement of defence without having moved to strike out any of the claims.

Held, without deciding whether Rule 218 of the King's Bench Act justified the joinder of plaintiffs in this case, that it was too late to take the objection of misjoinder at the trial.

A deduction was ordered to be made from plaintiffs' counsel fees for the trial, because considerable time was taken up in proving title to the property destroyed which the defendants had not been asked to admit, and which would be presumed from mere possession as against tort feasors. *Tait* v. *C.P.R.*; *Bain* v. *C.P.R.*; *Kellett* v. *C.P.R.*, 16 M.R. 391.

3. Right of company to benefit of insurance against same loss—*Action by insured against insurer after recovery of judgment against railway company.*

This was an action to recover from an insurance company the amount of a policy against loss by a fire caused by sparks from a railway locomotive. The plaintiff had recovered judgment against the railway company for the amount of his loss under section 298 of the Railway Act, which judgment had been paid less the amount of the policy sued on. The

last paragraph of that section, as amended by 9 Edward VII, c. 32, s. 9, is as follows : "Provided further that the Company shall, to the extent of the compensation recoverable, be entitled to the benefit of any insurance effected upon the property by the owner thereof. Such insurance shall, if paid before the amount of compensation has been determined, be deducted therefrom ; if not so paid, the policy or policies shall be assigned to the Company, and the Company may maintain an action thereon."

Held, that the statute did not of its own force vest the policy in the railway company and that, unless it had demanded an assignment, the plaintiff was not bound to give it and might maintain an action against the insurance company upon the policy.

Corporation of Oldham v. *Bank of England*, [1904] 2 Ch. 716, distinguished. *Banting* v. *Western Ass. Co.* ; *Banting* v. *Law Union & Crown Mortgage Co.* 21 M.R. 142.

VIII. Negligence.

1. Condition requiring notice of claim for damage to goods—*Railway Act*, 1903, *s.* 214, *s-s*, 3, *s.* 275.

A condition in a shipping bill providing that there should be no claim for damage to goods shipped over a railway unless notice in writing and the particulars of the claim are given within thirty-six hours after delivery, if it has been approved by order or regulation of the Board of Railway Commissioners of Canada under section 275 of the Railway Act, 1903, is binding upon the shipper even if negligence on the part of the railway company is proved, notwithstanding the language of sub-section 3 of section 214 of the Act enacting that, "subject to the Act," the company shall not be relieved from an action by any notice, condition or declaration if the damage arises from any negligence or omission of the company or of its servants, as both sections of the Act must be read together.

G.T.R. v. *McMillan*, (1889) 16 S.C.R. 543, and *Mason* v. *G.T.R.*, (1875) 37 U.C.R. 163, followed. *Hayward* v. *C.N.R.*, 16 M.R. 158.

2. Engine moving backwards in railway yard without man in front to warn pedestrians—*Contributory negligence—Use of bell and whistle—Trespasser, right of action for injury to.*

Under section 276 of the Railway Act, R.S.C. 1906, c. 37, as amended by 9 & 10 Edw. VII, c. 50, s. 7, it is only when a train is passing or about to pass over or along a highway that the railway company is required, in case the train is not headed by an engine moving forward in the ordinary manner, to station a man on that part of the train, or of the tender if that is in front, which is then foremost, to warn persons standing on or crossing or about to cross the track, and section 274 of the Act, requiring the use of the bell and whistle, should be interpreted as limited in the same way.

The plaintiff's husband, an employee of the defendant company, while proceeding through the railway yards on business of his own, stepped off the track on which he was walking, to avoid an approaching express train, and stepped on to another track, when he was struck and killed, at a point which was not near any highway crossing, by a yard engine moving reversely without any person stationed on the part of the tender which was foremost. There was a path between the two tracks on which the deceased might have walked safely.

Held, without a finding on the evidence as to whether or not the bell of the yard engine had been rung, that the defendants were not liable, as they had not been guilty of any negligence and the deceased was guilty of contributory negligence in going upon the other track.

Semble, the deceased had no right to be where he was at the time of the accident and was therefore a trespasser : *Deane* v. *Clayton*, (1817) 7 Taunt. 489, and *Jordin* v. *Crump*, (1847) 8 M. & W. 782, and no action was maintainable without evidence of intention to injure. *Skulak* v. *C.N.R.*, 20 M.R. 242.

3. Failure to blow whistle and ring bell on approaching crossing—*Railway Act*, 1903, *c.* 58, *s.* 224—*Onus of proof as to existence of by-law of municipality—New trial—Evidence by affidavit.*

Action for damages for the killing of plaintiff's horses at a highway crossing by an engine of the defendants.

The learned trial Judge did not think it necessary to decide, upon the conflicting evidence, whether the whistle had been blown as required by section 224 of the Railway Act, 1903, but he

found that the bell had not been rung and the defendants had, therefore, been guilty of negligence. He was, however, inclined to believe that the plaintiff's driver had been guilty of contributory negligence in not looking out for the engine. The action was dismissed on the ground that the plaintiff had not proved that there was no by-law of the city prohibiting the blowing of whistles and ringing of bells because, under that section, if such a by-law was in force, the whistle should not be blown nor the bell rung.

Held, on appeal, that, upon the plaintiff filing an affidavit proving the non-existence of such a by-law, there should be a new trial, as the evidence strongly indicated negligence and there was no positive finding of contributory negligence.

Quære, whether the *onus* was on the plaintiff to prove the non-existence of such a by-law.

Semble, the trial Judge might properly have allowed such proof to have been made by affidavit. *Pedlar* v. *C.N.R.*, 18 M.R. 525.

4. Failure to blow whistle and ring bell—*Liability for accident at level crossing—Railway Act, R.S.C.* 1906, *c.* 37, *s.* 274—*Contributory negligence.*

Two of the plaintiff's teams driven by his servants were approaching the level crossing of the highway with defendants' railway. The drivers were on the look-out for trains but saw and heard nothing and proceeded to drive across the track when a train struck and killed one of the teams and damaged the wagon and harness.

The engineer and fireman both swore that the whistle had been sounded as required by section 274 of the Railway Act, R.S.C. 1906, c. 37; but they did not claim that the bell had been rung as that section also required. The two drivers swore that they did not hear the whistle. The defendants also contended that the drivers should have seen the headlight of the engine and therefore were guilty of contributory negligence, but there was some evidence that the headlight might have been obscured at the moment by escaping steam.

Held, that the plaintiff was entitled to a verdict for the amount of his loss. *Pedlar* v. *C.N.R.*, 20 M.R. 265.

5. Limitation of time for action—*Railway Act, R.S.C.* 1906, *c.* 37, *s.* 306—*Demurrer—Damages sustained by reason of the construction or operation of the railway.*

The statement of claim alleged that the plaintiff was employed by the defendant company as a laborer and as such took part in blasting and in thawing frozen dynamite for that purpose under the order and directions of the defendant's roadmaster, that he was injured by an explosion of such dynamite, and that the defendant was a railway company owning and operating lines of railway within the Province and was guilty of negligence in certain particulars specified.

Held, on demurrer, that these allegations did not of themselves show that the action was one to recover damages for injury sustained by reason of the construction or operation of the railway within the meaning of section 306 of the Railway Act, R.S.C. 1906, c. 37, and therefore barred by the lapse of one year from the date of the injury. *Anderson* v. *C.N.R.*, 20 M.R. 19.

6. No platform—*Station grounds not lighted.*

The plaintiff was a passenger on defendants' train from Winnipeg to Deloraine. The train arrived at Deloraine at 10.30 p.m. The night was dark and the station grounds were not lighted. There was no platform on which to alight, but the ground was smooth and level. A brakeman came with a lantern, carried out the plaintiff's valise and assisted her to alight. The lowest step of the carriage was 26 inches from the ground. Before assisting her to alight, the brakeman placed the lantern on the ground. It cast a light 20 or 30 feet around. In alighting, the plaintiff injured her knee and was compelled in consequence to abandon her employment as cook in a hotel at Deloraine. It appeared at the trial that the plaintiff's knee had been weak for sometime previously and that she had been affected with synovitis in a sub-acute form. She did not tell the brakeman of this weakness of the knee.

In an action brought for this injury,

Held, that the defendants were not guilty of negligence which should render them liable for the injury and that, if there was any negligence at all, it was attributable to the plaintiff in not telling

the brakeman of her feeble and delicate knee. *McGinney* v. *C.P.R.*, 7 M.R. 151.

Distinguished, *Guay* v. *C.N.R.*, 15 M.R. 275.

7. Passenger alighting from train where no platform—*Obligation to inform conductor of physical condition.*

If there is a platform at a railway station, the railway company is bound to bring the passenger car of a train stopping there up to the platform to permit passengers to step down on it in alighting, or to provide some other safe means for passengers to alight.

Robson v. *N.E. Ry. Co.*, (1876) 2 Q.B.D. 85, followed.

The plaintiff was a passenger on one of defendants' trains. On stopping at the station where she wished to get off, the train was left so that the car, in which the plaintiff was, stood entirely behind the station platform. The conductor having offered plaintiff his hand to assist her in alighting, she took it and jumped to the ground, three feet below. The ground at that point sloped slightly downwards from the track and was slippery with snow or ice. The plaintiff received serious injury in consequence of the jump. She was two months advanced in pregnancy, was very unwell for the next six days and then had a miscarriage, from which she suffered great weakness for a considerable time. Plaintiff did not know at the time she jumped that there was a platform at the station.

Held, (1) The defendants were liable in damages for the injury suffered by plaintiff, as the conductor had been guilty of negligence.

Quebec Central Ry. v. *Lortie*, (1893) 22 S.C.R. 336, and *Curry* v. *C.P.R.*, (1889) 17 O.R. 65, distinguished.

(2) The plaintiff was not bound to disclose her pregnancy to the conductor, so that he might know that special care was necessary in aiding her to alight.

McGinney v. *C.P.R.*, (1890) 7 M.R. 151, distinguished. *Guay* v. *C.N.R.*, 15 M.R. 275.

IX. Power to Mortgage or Pledge Railway.

1. Lien on railway, equipment and land grant—*Parties to action.*

The plaintiff's bill alleged that the defendant company was a duly incorporated company, with its head office at Ottawa, Ontario; that the plaintiff entered into an agreement with the defendant company to build and equip fifty miles of the railway in Manitoba for £200,000, which the company agreed to pay him; that he built and equipped the fifty miles of the railway according to the terms of the agreement; that under the terms of the agreement he was entitled to a lien on and to hold possession of the fifty miles of the railway and the franchise, rolling stock, land grant, &c., as security for the amount due him, and that in September, 1891, there was due him over $600,000. It also alleged that he obtained a judgment by consent in Ontario, by which it was declared that he had a lien on the railway, land grant, &c. for $622,226, and it was ordered that the defendant company should, within six months, pay the said sum with interest; that the judgment also declared, at the request of plaintiff, that certain specified amounts of the said sum should be paid to certain named third parties, and the fund was charged with these payments as a first charge; that the defendant made default in payment, and the plaintiff obtained a second judgment in Ontario to enforce the first judgment; that by this judgment it was ordered the company should pay the $622,226, and should forthwith deliver up possession of the railway, land grant, &c. to the plaintiff, and the company was perpetually restrained from selling or negotiating the bonds of the company, making and issuing bonds, and from dealing with the land grant. The bill prayed amongst other things that the company be ordered to pay the $622,226 and interest, and forthwith to deliver possession of the said railway, rolling stock, &c., and that it be restrained from interfering with the plaintiff in his possession thereof; and also that the company be restrained from alienating or encumbering the railway, land grant, &c., and from issuing bonds, &c.

The defendants demurred to so much of the bill as sought payment of the money to persons other than the plaintiff, and to so much of the bill as sought to obtain an order for delivery of the possession of the railway, &c., on the ground these third persons were necessary parties to the suit. It also demurred for want of equity to so much of the bill as sought to restrain the defendants from alienating or otherwise disposing of the railway, land grant, rolling stock, &c.

Held, that, at this stage of the proceedings, the third parties did not appear to be necessary parties, and that, if it should prove to be necessary at the hearing, a decree could be made saving their rights.

Held, also, that the clause in the contract giving the plaintiff a lien and first charge on the fifty miles of railway, land grant, rolling stock, &c., until he was paid, was *intra vires*. A railway company has a general power to give securities for purposes within the scope of the power conferred upon the company to construct and operate the railway, unless this power is expressly negatived in the Act of Incorporation, and express power to borrow and give specified securities will not exclude the general power.

Bickford v. *Grand Junction Railway Company*, 1 S.C.R. 696, followed.

Charlebois v. *Great N.W. Central Railway Company*, 9 M.R. 1.

2. Ratification of contract—*Bonds—Raising money—Validity of bonds wrongly charging land grant.*

The president of a Railway Company, purporting to act on behalf of the Company, entered into a contract with certain contractors for the construction of forty miles of road. By the contract, bonds to double the amount of the moneys to be secured were to be deposited in a bank to secure to the contractors payment of a portion of the price of the construction of the railroad.

The president afterwards agreed that, in default of payment within a limited time, the contractors should take the bonds in payment at fifty cents on the dollar.

Two years after the bonds were delivered to the contractors, the Company filed a bill repudiating the contract and asking that the bonds be declared null and void.

It appeared that the defendants had obtained a judgment at law against plaintiffs for a large amount on the contract, in which action the Company had set up as a defence that the contractors had accepted the bonds in payment, that the plaintiffs had begun an action then pending on the contract against defendants, claiming damages for non-completion of work, that an Act of Parliament had been passed in the interest of the Company, which recited the construction and completion of the work, and that during two years no steps had been taken to repudiate the contract or to question the president's authority, and that the Company had taken possession of and the benefit of the work.

Held, 1. That the Company must be taken to have ratified the contract.

2. That the Company could not take the benefit of a part of the contract and repudiate it as to another part.

The Act of Incorporation gave the directors power to "issue and sell or pledge all or any of the said bonds for the purpose of raising money for the prosecution of the said undertaking."

Held, that the expression, "raising money," should be given a liberal construction, and that using the bonds in the way above mentioned was really a raising money for the prosecution of the undertaking.

A by-law of the Company authorized the president of the Company to "sell or pledge the same at such price or prices and upon such terms and considerations as he shall see fit."

Held, that, in the absence of evidence that more favorable terms could have been made, the president, in thus agreeing to give the contractors bonds at fifty cents on the dollar instead of cash, was only disposing of them at such price and on such terms as he could.

The Company by its Act of Incorporation had power to issue bonds which should "constitute a first mortgage and preferential lien, charge, claim and privilege upon the said railway constructed, and upon its Government land grant to be earned, and the undertaking." By an amending Act the words, "and upon its government land grant to be earned," were struck out. Subsequently the Company issued bonds which purported to charge the land grant of the Company.

Semble, that the Company had no power to charge the land grant to be earned, but,

Held, that, assuming the bonds not to be a valid charge upon the land grant, they were not on that account void, but were valid as to the rest of the property charged and as evidence of debt. *The Winnipeg & Hudson's Bay Railway Co.* v. *Mann*, 7 M.R. 81.

X. Receiver.

1. Borrowing money on pledge of future revenues—*Prior incumbrances.*

The plaintiffs, as judgment creditors of the defendant Company, having obtained a decree for the appointment of a receiver of the railway, and a receiver having been appointed who was in possession of the property, joined with the defendants in an application for an order authorizing the receiver to borrow on the security of the railway and its earnings, in priority to all other charges thereon, a large sum of money required to pay working expenditure. Certain bond-holders having a first incumbrance and charge upon 180 miles of the railway and its revenues, who were not parties to the suit, were notified of the application and opposed the making of the order. It was contended on behalf of the applicants that the bond-holders' lien did not attach upon revenues required for working expenses.

Held, that the question whether it did or not could not be decided in this suit, and that an order authorizing the loan as desired could not be made without showing on its face that it would not insure a security which would take precedence over the claim of the bond-holders. *Allan* v. *Manitoba & N.W.R.*, 10 M.R. 143.

2. Working expenses of railway—*"Working expenditure."*

The railway of defendants being in possession of a receiver and manager, whose duties, as defined by the order appointing him, were to receive and manage the railway property and assets, to operate, carry on and superintend the said railway, to receive the revenue, to pass his accounts from time to time, and pay into court whatever balance should be found due from him after paying the expenses of operation and management of the said railway, the defendants applied for payment, by the receiver or out of moneys paid into court by him, of the salary of the secretary of the Company, directors' fees, expenses of an office for the Company and of meetings of directors, etc.

Held, that these matters had nothing to do with the operation and management of the railway, and that the receiver could not be authorized to pay them.

Held, also, that, as by another order all proceedings had been stayed except such as might be necessary in connection with the management of the railway by the receiver, no application for payment of such expenses out of the money in court could be entertained pending the stay of proceedings.

The term "expenses of operation and management" in the Court order should not be given the extended meaning of the term "working expenditure," as defined in s. 2, s-s. (*x*), of The Railway Act, 51 Vic., c. 29. *Charlebois* v. *Great N.W. Ry. Co.*, 11 M.R. 135.

XI. Miscellaneous Cases.

1. Compensation for land injuriously affected, though not encroached upon by work—*Winnipeg Charter*, 1 & 2 *Edw. VII*, *c.* 77, *s-s* (*c*) *added to s.* 708 *by s.* 15 *of* 3 & 4 *Edw. VII*, *c.* 64.

Where the statute under which a claim was made for damages to land, caused by the construction of certain works and the closing up of certain streets, provided that any advantage which the real estate might derive from the contemplated works should be deducted from the sum estimated for damage done to the land in arriving at the compensation to be paid, and it was found that the detriment to the claimant's property caused by the closing of the streets was more than offset by the advantage accruing to it from the construction of the works; it was

Held, that the claimant could not recover anything in respect to such detriment.

Held, also, that, even if the detriment to the claimant's land should alone be considered, he is not entitled to compensation by reason only that he is, by the construction of a public work, deprived of a mode of reaching an adjoining district from his land and is obliged to use a substituted route which is less convenient, if the consequent depreciation in the value of his property is general to the inhabitants of the particular locality affected, though his property may be depreciated more than that of any of the others. The claimant in such a case would have no right of action at common law, and therefore his land was not injuriously affected within the meaning of the statutes, the test in such cases being, would the complainant have a right of action if the work had been done without statutory authority?

King v. *McArthur*, (1904) 34 S.C.R. 570, followed.

Chamberlain v. *West End &c., Ry. Co.*, (1863) 2 B. & S. 617; *Metropolitan* v. *MacCarthy*, (1874) L.R. 7 E. & I. App. 243; *Caledonian Ry. Co.* v. *Walker's Trustees*, (1882) 7 A.C. 259, and *Re Tate and Toronto*, (1905) 10 O.L.R. 650, distinguished. *Re Shragge and City of Winnipeg*, 20 M.R. 1.

2. Limitation of time for commencing action—*Injury received while working at icehouse for railway company—What included in word "railway" as used in section 306—Railways subject to Dominion Legislation—Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178—Distinction between rights of action arising under the Railway Act, and those given by the Common Law or Provincial legislation, as respects the limitation of time for commencing suit—Railway Act, R.S.C. 1906, c. 37, s. 2 (21) and s. 306.*

1. An injury caused by the defective state of a scaffold being used in the construction of an ice house for the use of a railway company is not one "sustained by reason of the construction or operation of the railway," within the meaning of section 306 of the Railway Act, R.S.C. 1906, c. 37, and therefore an action to recover damages for such injury is not barred by that section by the lapse of a year.

Ryckman v. *Hamilton, etc. Ry. Co.*, [1905] 10 O.L.R. 419, and *C.N.R.* v. *Robinson*, [1910] 43 S.C.R. 387, followed.

2. The limitation of time prescribed by section 306 relates only to actions against railway companies provided for in the Railway Act itself, and was not intended to apply to actions the rights of which exist at Common Law or under Provincial legislation.

3. Dominion railways are subject to Provincial legislation on the relations between master and servant, such as The Workmen's Compensation for Injuries Act, unless the field has been covered by Dominion legislation ancillary to Dominion legislation respecting railways under the jurisdiction of Parliament, and sub-section 4 of section 306 qualifies its main clause and excludes its operation where the injury complained of comes within the jurisdiction of, and is specially dealt with by the laws of, the Province in which it takes place, provided such laws do not encroach on Dominion powers.

C.P.R. v. *Roy*, [1902] A C. 220, distinguished.

Canada Southern v. *Jackson*, (1890) 17 S.C.R. 325, followed.

Per CAMERON, J. A. Although the definition of the word "railway" in paragraph (21) of section 2 of the Railway Act would seem to include the ice house in question, yet that is subject to the qualifying provision "unless the context otherwise requires," at the beginning of section 2, and the context in section 306 does otherwise require. *Sutherland* v. *C.N.R. Co.*, 21 M.R. 27.

3. Sale of railway under mortgage—*Jurisdiction where part of railway is outside the Province—Priority of working expenses of whole railway over mortgage of part.*

The plaintiffs, being first mortgagees, in trust for bond holders, of a section of the defendants' railway line 180 miles in length, of which a small portion, 9½ miles in length, was outside of the Province, together with certain chattel property, took proceedings for a sale of the property and the appointment of a receiver, interest being in arrears on their mortgage.

Held, that the Court could not decree a sale of the whole of the real property mortgaged to the plaintiffs, because a portion of it was outside of the jurisdiction, nor could the Court decree a sale of that portion within the jurisdiction, because it was not a portion proper to be cut off and operated separately by a purchaser: *Redfield* v. *Wickham*, 13 A. C. 467.

Held, also, that the plaintiffs were entitled to have a receiver appointed, an account taken, and an order for payment into court, also an inquiry as to what personal property was embraced in their security and to have that sold; but that, under the statute authorizing the plaintiffs' mortgage, 46 Vic., c. 68, s. 5 (D), the working expenses of the whole railway were a first lien on the revenues thereof, and must be provided for in priority to the claim of the plaintiffs under their mortgage. *Gray* v. *Manitoba & N.W.R.*, 11 M.R. 42.

Affirmed, [1897] A.C. 254.

4. Spur track facilities—*Damages for refusal to supply—Limitation of time for bringing action for—Board of Railway Commissioners—Jurisdiction of—Railway Act*, 1903, *ss.* 24, 214, 242, 253.

Action for damages for taking away spur track facilities formerly enjoyed and refusing to restore same for plaintiffs' use on their land adjoining the railway yards,

The Board of Railway Commissioners had, by order dated 19th February, 1906, made under sections 214 and 253 of the Railway Act, 1903, found as a fact that the defendants had refused to afford "reasonable and proper facilities" as required by section 253, and directed the defendants to restore these spur track facilities within four weeks, which order was affirmed by the Supreme Court of Canada, 37 S.C.R. 541.

Held, (1) An action lies for such damages under the circumstances, the finding of fact by the Board being conclusive under section 42 (3) of the Act, and the Court has jurisdiction to find and assess the damages.

(2) Plaintiffs were entitled to damages from the date of the breach and not merely from the date of the Board's order.

(3) The Board had no jurisdiction to deal with the question of damages and, not having assumed to do so, the plaintiffs were not estopped from bringing this action by any adjudication of the Board.

(4) Damages should be allowed during the time taken up by the appeal to the Supreme Court and *Peruvian Guano Co.* v. *Dreyfus*, [1902] A.C. 166, did not apply.

(5) Section 242 of the Act, limiting the time for bringing "all actions or suits for indemnity by reason of the *construction*, or *operation* of the railway," does not apply to an action for a breach of a statutory duty in neglecting and refusing to supply reasonable and proper facilities.

Per CAMERON, J. A. The word "railway," under ss-s. 5 of s. 2 of the Railway Act of 1903, includes stations and sidings, not only those constructed and in use, but also those which the company has power to construct or operate. In this respect the statutory provisions in Canada are widely different from those in Great Britain.

South Eastern R. Co. v. *Railway Commissioners*, 6 Q.B.D. 586, and *Darlaston Local Board* v. *London & North Western R. Co.*, [1894] 2 Q.B. 694, distinguished. *Robinson* v. *C.N.R.*, 19 M.R. 300.

Affirmed, 43 S.C.R. 387.
Affirmed, [1911] A.C. 739.

5. Statutory powers, exercise of—*Railway Act*, 1888, *ss.* 90, 92, 146—*Action for damages in running trial line—When remedy limited to arbitration—Damages resulting from exercise of statutory powers.*

If damages are occasioned to a landowner by the exercise of the powers conferred on a railway company by the Railway Act and there is no negligence in the mode of exercising such powers, the person injuriously affected is limited to the provisions of the Act for compensation: *Roy* v. *C.P.R.*, [1902] A.C. 220, and *Bennett* v. *G.T.R.*, (1901) 2 O.L.R. 425. But, if there is negligence in such exercise of statutory powers, or if damages are unnecessarily inflicted, then an action will lie and the complainant is not limited to the remedy given by the arbitration clauses of the Act.

The plaintiff's claim was for damages for cutting down trees in his grove through which the defendants were making a survey for a trial line for a proposed branch of their railway, but the possibility of running the trial line through the grove without cutting down the trees by making a rectangular detour around it was not raised at the trial and the trial Judge did not pass upon it.

Held, that the plaintiff, who had been non-suited at the trial, was entitled to a new trial to determine whether the line could not have been run in the manner suggested. *Barrett* v. *C.P.R.*, 16 M.R. 549.

At the new trial ordered in the foregoing case, the County Court Judge again non-suited the plaintiff who appealed to the Court of Appeal.

Held, that the evidence showed that it was unnecessary to cut down the trees for the purpose of running the required trial line and that the plaintiff was entitled to recover in the action, and that judgment should be entered for him for $250.00 damages and costs of both trials and both appeals. 16 M.R. 558.

See ARBITRATION AND AWARD, 6.
— CONSTITUTIONAL LAW, 15.
— CROWN LANDS, 1.
— INJUNCTION, I, 2, 10.
— MORTGAGOR AND MORTGAGEE, VI, 13, 14.
— NEGLIGENCE, II, 2; V.
— PRODUCTION OF DOCUMENTS, 15.
— STATUTES, CONSTRUCTION OF, 2.
— SUMMARY JUDGMENT, III, 1.
— WORKMEN'S COMPENSATION FOR INJURIES ACT, 4.

RATE BY-LAW.

See SALE OF LAND FOR TAXES, IX, 1.

RATIFICATION.

Of sale made by agent without authority — *Relation back — Intervening right of third party—Injunction—Damages—Undertaking to pay damages—Sale of land.*

M., as agent of S., on 18th July, 1910, made a sale of the land in question to the plaintiff conditional on its being approved by S., who lived in Victoria, B.C. There was no evidence of such approval prior to 5th October, 1910, when S. conveyed the land to the plaintiff,

Held, that, although the making of the conveyance was a ratification of the sale made by M. in the previous July relating back to the date of the contract, such ratification would not operate so as to affect the rights of the defendant who had been cutting hay on the land under a permit given to him in February, 1910, by M., with the authority of S., granting him the right to cut and remove the hay on the land "providing that the land is *unsold* before the hay is cut."

Patterson v. *Tingley*, 10 N.B.R. 553, and *Nicholson* v. *Page*, 27 U.C.R. 318, followed.

This action was begun on 18th August, 1910, when the defendant had cut part of the hay under his permit, and the plaintiff, upon the usual undertaking as to damages, obtained an *ex parte* injunction against the defendant's doing anything more on the premises until the 25th of the same month, when the injunction was dissolved as to the cut hay, and continued to the hearing as to the uncut hay only. There was nothing at the hearing to show whether or not the undertaking as to damages was continued after the 25th of August.

Held, that it could not be assumed that it was, and that, in the absence of such undertaking, although the action was dismissed with costs, the defendant could only recover in this action such damages as he had sustained by reason of the injunction as to the cut hay from the 18th to the 25th of August. *Oliver* v. *Slater*, 16 W.L.R. 107.

See BOUNDARY LINES.
— COMPANY, IV, 1.
See FRAUD, 2.
— INFANT, 1.
— LANDLORD AND TENANT, I, 5.
— MUNICIPALITY, VI, 2.
— PARTNERSHIP, II.
— PRINCIPAL AND AGENT, I, 7; III; V, 1.
— RAILWAYS, IX, 2.
— RECTIFICATION OF DEED, 1.
— SHERIFF, 7.

REAL PROPERTY ACT.

I. CAVEAT.
II. ISSUE UNDER.
III. PETITION UNDER.
IV. TRUSTS OF PROPERTY UNDER.
V. MISCELLANEOUS CASES.

I. CAVEAT.

1. Addition of caveator—*Estate or interest of caveator—Directions in statute imperative.*

In an application under The Real Property Act the caveat gave no addition for the caveator, though the affidavit in support described him as an accountant.

Held, that the addition of the caveator must be set out in the caveat.

The statement of the caveator's estate and interest in the land, both in the caveat and in the affidavit, was only: "I have an attachment against T. M., who owns, or has a personal interest in, the land described."

Held, insufficient. *Jones* v. *Simpson*, 8 M.R. 124.

2. Address and description of caveator—*Signature of caveat by company—Foreign corporation claiming interest in land.*

(1) In proceeding by way of caveat and petition under The Real Property Act, if the caveator is an incorporated company, it is sufficient to state the full name of the company without further description, although section 143 of The Real Property Act, R.S.M., c. 133, says that "every caveat filed with the District Registrar shall state the name and addition of the person by whom or on whose behalf the same is filed."

Shears v. *Jacob*, (1866) L.R. 1 C.P. 513, and *Woolf* v. *The City Steamboat Co.*, (1849) 7 C.B. 103, referred to.

(2) The signature to the caveat was the name of the company with "O., H. & N., managers," underneath, without the corporate seal.

Held, sufficient.

(3) A registered judgment creditor has a right, under The Real Property Act, to claim an estate or interest in the lands bound by the judgment.

(4) It is not necessary for the petitioners, although a foreign corporation, to show that they are authorized to hold real estate in this Province. *North of Scotland Canadian Mortgage Co.* v. *Thompson*, 13 M.R. 95.

3. Affidavit to be filed with caveat.

An affidavit filed in support of a caveat did not state that, in the deponent's belief, the applicant had a good and valid claim upon the land, as required by the statute.

Held, that the filing of a caveat that complies with the statute is a condition precedent to the jurisdiction of the Court to entertain a petition upon it. The petition was, therefore, dismissed with costs. *McArthur* v. *Glass*, 6 M.R., 224.

4. Description of land.

A caveat filed under the Real Property Act must contain a proper description of the land in question, and it is not sufficient that such description is given in the affidavit verifying the caveat which is filed with it.

The petition of the caveators, following a caveat which was defective in this respect, was dismissed with costs.

Jones v. *Simpson*, 8 M.R. 124, and *McKay* v. *Nanton*, 7 M.R. 250, followed. *Martin* v. *Morden*, 9 M.R., 565.

5. Description of property—*Second caveat.*

The direction in Schedule O to The Real Property Act does not require that the description of the land given in the caveat should be word for word the same as that in the application, but the caveat will be sufficient if the description given is such as will enable the property to be located on the ground.

The description in the caveat was as follows: "Lot No. 32 in block 15, as shown upon a plan of Oak Lake, being a subdivision of the N½ of section 23, in township 9, in range 24 W. of the P.M. in the Province of Manitoba," and it was shown that there were four plans filed in the Registry Office relating to different portions of the town of Oak Lake.

Held, nevertheless, that, as it was not shown that there was a lot No. 32 in block 15 in more than one of such plans, the description was sufficient.

The caveat was filed in the names of Charles Adams and John H. Adams as partners in the firm of Adams Bros., as creditors of a certain insolvent, and Charles Adams had previously filed a caveat as assignee in trust against the same application, and based upon the same allegations as to title.

Held, that the objection that the present was a second caveat filed without leave by the same person could not be sustained. *Adams* v. *Hockin*, 12 M.R. 433.

6. Mistake in name of Applicant—*Place to serve notices.*

Augustus Meredith Nanton having applied for a certificate of title of the lands in question under The Real Property Act of 1889, M. filed a caveat claiming an estate in fee simple in the lands, and he then filed a petition to establish his claim. In the caveat the name of the applicant was stated to be Augustus Meredith *Newton*. It appeared that in the usual notice served upon the caveator by direction of the District Registrar, under section 52, the name "Nanton" was not written plainly, and that the application number was correctly given, and the lands correctly described in the caveat.

Held, that the direction in Schedule O of the statute, as to stating the name of the applicant is not imperative, and that the mistake was only an irregularity, and the caveat was not invalid on account of it.

The petition alleged that the caveatee had applied to bring the lands under the Real Property Act, and that the petitioner had filed a caveat forbidding this, but did not expressly allege that the lands had not been registered under the Act.

Held, that on the facts stated the Court will assume that the caveat was lodged before the registration of the certificate of title.

Section 130, sub-section 8, of The Real Property Act of 1889 provides that every caveat "shall state some address or place within the Province of Manitoba at which notices and proceedings relating to caveats may be served."

The caveat did not name a place at which notices, &c., might be served, but said, "I appoint A. N. McPherson, Commissioner of Railways, office, Winni-

peg, my agent, on whom notices and proceedings thereto may be served."

Held, that the statute requires the caveat to state some place at which notices may be served, and that the statutory direction in this respect must be deemed to be imperative. The caveat in this case merely naming a person, the petition could not be entertained.

McArthur v. *Glass*, 6 M.R. 224, followed. *McKay* v. *Nanton*, 7 M.R. 250.

Distinguished : *Sprague* v. *Graham*, 7 M.R. 398.

7. Petition following—*Description of land — Statement of interest claimed — Address of caveator—New evidence on appeal —Rule* 476, *Q.B. Act*, 1895.

In the caveator's petition his name was given without any address or description, and a statement of facts on which he relied was given, from which it might be inferred what interest or title he claimed in the lands, but the petition did not state specifically what estate, interest or charge he claimed as required by Rule 1 of Schedule R.

The land was described in the caveat and petition as "Lot 32 in block 15 as shewn upon a plan of Oak Lake, being a sub-division of the north half of section 23, in township 9, range 24 west of the principal meridian of Manitoba."

Held, 1. That the description of the land was not necessarily indefinite and uncertain, unless it was shewn that there was more than one plan of Oak Lake ; and that, if it followed the description given in the application of the caveatee, it would, according to the form in Schedule O of The Real Property Act, be sufficient.

2. That both the caveat and petition showed sufficiently what estate, interest or charge the caveator claimed.

3. That there was no rule of Court requiring the address or description of the caveator to be stated in his petition.

This being an appeal to the Full Court from the decision of Taylor, C. J., allowing an appeal from the Referee, the respondent applied under Rule 476 of The Queen's Bench Act, 1895, for permission to put in evidence to show that the description in the caveat differed materially from that in the application.

Ordered, that, upon payment of the costs of the appeal within five days after taxation, such evidence should be received, and the matter referred back to the Referee with leave to adduce it, but that, if the costs should not be so paid, the order for an issue should stand confirmed with costs. *Adams* v. *Hockin*, 12 M.R. 11.

8. Petition of caveator must be founded on caveat.

A caveat filed under section 133 of The Real Property Act, R.S.M. 1902, c. 148, must accurately set forth the title, estate or interest in the land claimed by the caveator, and a petition filed by the caveator, after notice served upon him by the caveatee, under section 131 of the Act, requiring the caveator to take proceedings upon his caveat, must be one asserting substantially the same title, estate or interest as that stated in the caveat or it will be dismissed.

McArthur v. *Glass*, (1889) 6 M.R. 224 ; *McKay* v. *Nanton*, (1891) 7 M.R. 250, and *Martin* v. *Morden*, (1894) 9 M.R. 565, followed. *Re Cass & McDermid*, 20 M.R. 139.

9. Second caveat.

The caveatee having applied for a certificate of title under The Real Property Act, the caveators filed a caveat forbidding the same. Three weeks afterwards, owing to there being a defect in the first caveat, they filed a second without having an order from a Judge giving them leave to do so. The first caveat had not lapsed or been withdrawn or discharged before the second was filed. The petition of the caveators was based on the second caveat.

Held, that there was no authority given by the Act for filing the second caveat without a Judge's order, and that the petition based on such second caveat was invalid, and should be dismissed with costs. *Frost, Caveator and Driver, Caveatee*, 10 M.R. 209.

Distinguished, *Alloway* v. *St. Andrews*, 15 M.R. 188.

10. Filing second caveat based on additional right or title.

1. The words "a caveat" in section 127 of The Real Property Act, R.S.M. 1902, c. 148, in view of s-s. *(m)* of s. 8 of The Interpretation Act, R.S.M. 1902, c. 89, cannot be construed to mean "only one caveat;" and, if the caveator, after filing his caveat and taking proceedings under it for the trial of an issue, pending such trial acquires a new title

or estate in the land in question, he may file a new caveat thereon without getting a judge's order for leave to do so.

2. The provisions of section 140 of the Act only apply to a second caveat "in relation to the same matter," that is the same estate or interest on which the first caveat was based.

Frost v. *Driver*, (1894) 10 M.R. 209, distinguished.

3. When such a second caveat is properly filed, the trial of the issue under the first caveat should be postponed to enable proceedings to be taken upon such new caveat, so that the trial of the issues under both caveats may take place at the same time, and, if convenient, the issues might be consolidated. *Alloway* v. *Rural Mun. of St. Andrews*, 15 M.R. 188.

II. Issue Under.

1. Form of order for trial of—*Costs.*

An order directing the trial of an issue under The Real Property Act should reserve all further questions, including the question of costs, until after the trial of the issue. *Lavalle* v. *Drummond*, 6 M.R. 120.

2. Effect of non-suit—*New trial—Discretion.*

Where the plaintiff in an issue under The Real Property Act is non-suited, a Judge has full discretion to allow or refuse a new trial of the issue.

H. applied to bring certain lands under The Real Property Act, when G. filed a caveat, which she followed up with a petition. Upon the petition coming on for hearing, an issue was directed in which G. was made plaintiff. At the trial G. did not give sufficient proof of her title to the land, and was non-suited. G. then applied for a new trial, in order to produce further evidence. This evidence might have been given at the first trial

Held, that, taking all the circumstances of this case into consideration, but without laying down an absolute rule, the application for a new trial should be refused and the petition dismissed, with costs. *Grant* v. *Hunter*, 8 M.R. 220.

3. Parties to issue—*Practice.*

N. applied to bring certain lands under the provisions of The Real Property Act and in his application directed that the certificate of title should be issued in the name of W. Notice of the application was served on H. who filed a caveat and followed it up with a petition. On the return of the petition an issue was directed. H. applied to have W. added as a party to the issue, he being the true owner of the land.

Held, that both N. and W. should be parties to the issue. *Hay* v. *Nixon*, 7 M.R. 579.

4. Practice—*Who should be plaintiff in issue.*

In 1882, B. agreed to purchase certain lands from the Government, and paid a portion of the purchase money. In 1891, he gave a quit claim deed to G., who paid the balance of the purchase money and obtained a patent from the Crown. G. then applied for a certificate of title under The Real Property Act. R. then lodged a caveat, and presented a petition in which he claimed title under a tax sale deed issued in 1889. Both parties agreed that it was a matter in which a bill should be filed. The question was who should be plaintiff.

Held, that R., the caveator, should be plaintiff.

Held, also, that, as a general rule, the caveator should be plaintiff. *Ruddell* v. *Georgeson*, 8 M.R. 134.

5. Practice—*Who should be plaintiff.*

The caveators, by their petition under The Real Property Act, claimed a charge on the land in question by virtue of a writ of execution against the lands of one Andrew Morden, whom they alleged to have been the owner of the land when their writ was placed in the sheriff's hands.

The caveatee, who had applied for a certificate of title, claimed the land under a tax sale deed, and in answer to the petition further set up that the land was exempt from seizure under execution as having been the homestead of Andrew Morden, also that he was advised and believed that the caveators' writ had not been kept in force by renewal, but these matters were not sufficiently proved by his affidavit.

Held, that the burden of proof was on the caveatee, and that he must be the plaintiff in the issue directed on the petition. *Martin* v. *Morden*, 9 M.R. 567.

6. 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 he should be the plaintiff. *Bucknam* v. *Stewart*, 11 M.R. 491.

7. Security for costs.

B. applied for a certificate of title. McC. filed a caveat and an order was made for the trial of an issue in which he was made plaintiff. B. applied for security for costs. His title was founded on a sale for taxes.

Held, that B. was in reality the plaintiff and could not obtain security for costs. *McCarthy* v. *Badgley*, 6 M.R. 270.

8. Security for costs.

A. applied for a certificate of title. B. filed a caveat. Both parties claimed under conveyances from the patentee.

Held, that, in an issue to try the right, A. should be plaintiff and, being out of the jurisdiction, should give security for costs.

McCarthy v. *Badgley*, 6 Man. R. 270, considered. *Grant* v. *Hunter*, 6 M.R. 550.

9. Tax sale deed—*Who should be plaintiff—Onus of proof.*

In a petition under The Real Property Act, the petitioner alleged that he had a title in fee simple to the lands in question. The caveatee claimed under a tax sale deed, but did not distinctly negative the petitioner's title, except as a consequence of the tax sale.

Held, that the *onus* of establishing his title was on the caveatee, and that he should be made plaintiff in the issue. *Howell* v. *Montgomery*, 8 M.R. 499.

III. Petition Under.

1. Affidavits in support of petition after caveat.

It is not necessary to file affidavits in support of a petition based upon a caveat in the Land Titles Office. Cause may be shewn by argument upon the allegations in the petition, or by affidavits; after which the Judge may, if necessary, permit the petitioner to adduce evidence, or may direct an issue. *Re McArthur & Glass*, 6 M.R. 301.

2. Dismissal for want of prosecution—*Rule* 16 *modifies Rule* 13—*Husband and wife — Married woman—Separate estate.*

G. filed a petition to enforce a caveat under The Real Property Act, but did not serve the petition within the time prescribed by rule 13 of said Act. A motion was made to dismiss the petition for want of prosecution.

Held, that there could not be a dismissal in the first instance, that rule 16 modifies rule 13, and that the only order that could be made was one giving time to serve.

The caveatee was a married woman, and it was held that the facts set out in her affidavit were insufficient to shew that the land in question was her separate estate. *Graham* v. *Hamilton*, 8 M.R. 459.

3. Married woman—*Next friend—Appointment of—Dismissal of petition—Discretionary order—New petition—Leave to file—Right to file when dismissal not on merits.*

S., a married woman, filed a petition upon a caveat under The Real Property Act. The petition shewed that S. was a married woman, and that, "under and by virtue of a certificate of title issued to the caveator under the provisions of The Real Property Act of 1885, the caveator claimed to be entitled to an estate in fee simple in the above-mentioned lands, and to be the owner thereof." When the petition came on for hearing in Chambers, it was objected that S. should have petitioned by her next friend, and an enlargement for a week was granted for her to have one appointed. As this was not done within the time allowed, a further peremptory enlargement of three days was granted. On the day that the petition finally came on for hearing, counsel for the petitioner filed the consent of B. to be appointed next friend, and asked to have him appointed *ex parte*; but the Judge would only grant a summons, and he afterwards, that day in Chambers, dismissed the petition. The petitioner applied to the Full Court to have the order dismissing

the petition set aside, or varied by granting leave to file a new petition.

Held, that, as it did not clearly appear on the face of the petition that the property in question was the separate property of the caveator, it was necessary for her to have a next friend appointed.

Held, also, that the Judge in Chambers, having all the circumstances before him, had exercised his discretion in dismissing the petition, and the Court should not interfere.

Held, also, that nothing had been shewn to warrant a positive order granting leave to file a new petition.

Per DUBUC, J. The petition was not dismissed on the merits, and the caveator might file a new one without special leave. *Schultz* v. *Frank*, 8 M.R. 345

4. Pleading in—*Allegation in petition—Affidavit supporting caveat.*

In a petition under The Real Property Act, it is not necessary to allege that the caveat was supported by an affidavit or statutory declaration. When the petition alleges that a caveat was filed in the prescribed form, it is presumed that the requirements of the Act have been complied with. *Downs* v. *Campbell*, 7 M.R. 34.

5. Pleading in—*Necessary allegation—Practice.*

Where a petition to enforce a caveat, lodged pursuant to section 130 of The Real Property Act of 1889, is filed after the expiration of one month from the receipt of the caveat by the District Registrar, it is necessary to allege in the petition that a certificate of title has not been issued.

McKay v. *Nanton*, 7 M.R., 250, distinguished. *Sprague* v. *Graham*, 7 M.R. 398.

6. Pleading—*Statement of objections to validity of tax sale.*

The caveator filed a petition under Schedule L, Rule 1, of The Real Property Act, 1 & 2 Edw. VII, c. 43, to prevent the caveatees, tax sale purchasers, from getting a certificate of title applied for by them; and, after setting out the nature of her title by grant from the Crown, alleged that the caveatees claimed title to the same land under certain alleged sales of same for taxes and that the said tax sales and all proceedings connected therewith under which the caveatees claimed title were illegal, null and void, and that the caveatees were not at the time of their application the owners of the land.

Held, without deciding whether it is necessary in such a petition to go further than to set forth fully the title of the caveator, that, as the petitioner had set out the claim of the caveatees and the nature of it, he should also have shown in what particulars the title of the caveatees was defective or invalid, and what facts were relied on to have the tax sales declared void and *prima facie* to displace the adverse claims of the tax purchasers.

The order of the Chief Justice giving leave to the petitioner, within a limited time and upon payment of the costs of the appeal to him from the Referee and of the hearing before the Referee, to amend the petition as she might be advised and to bring it on for further hearing before the Referee, and that in default the petition should be dismissed with costs, was affirmed with costs. *Iredale* v. *McIntyre*, 14 M.R. 199.

7. Security for costs—*Practice—Irregularity—King's Bench Act, Rule* 342.

1. A caveator proceeding under The Real Property Act by way of petition to establish a claim to the land, after service of notice at the instance of the applicant for a certificate of title, must, as a general rule, be treated as the plaintiff in the proceedings and, if he is resident out of the jurisdiction, must give security for the caveatee's costs.

2. That the caveator's claim is in respect of a registered mortgage on the land, upon which he swears there is money owing and unpaid, will not take the case out of the general rule, if the caveatee in good faith disputes that there is anything due or owing on the mortgage.

3. Under such circumstances the ownership of the mortgage within the jurisdiction will not relieve a caveator from the necessity of furnishing other security for costs.

Armstrong v. *Armstrong*, (1898) 18 P.R. 55, distinguished.

Objection was taken to the regularity of the præcipe, being the first proceeding taken by the caveatee in the matter, for want of the indorsement of his place of residence and description upon it as required by the practice of the court.

Held, that, under Rule 335 of The King's Bench Act, no effect should be given to the objection, as it was purely

technical and it did not appear that the interests of the caveator had been or could be affected by the irregularity, if it were one. *Leng* v. *Smith*, 14 M.R. 258.

8. Staying proceedings until costs of former suit in Queen's Bench paid—*Laches.*

The Court has no jurisdiction to stay proceedings on a petition filed to enforce a caveat under The Real Property Act, because the costs of an action or suit in the Court of Queen's Bench relating to the same matter have not been paid.

Where a petition to enforce a caveat under The Real Property Act alleged that the land had been conveyed years before, but claimed a lien for unpaid purchase money,

Held, that, until The Statute of Limitations barred the claim, delay in enforcing it could not be made a ground for the Court refusing relief. *Graham* v. *Hamilton*, 8 M.R. 443.

IV. Trusts of Property Under.

1. Priority between registered fi. fa. and unregistered transfer.

After a *fi. fa.* against the registered owner of lands had been registered, a prior transferee of the whole estate registered his transfer.

Held, that a transfer gives to the transferee the right to have the land registered in his name, but until it is registered it has no effect upon the land; and that the execution creditor was therefore entitled to priority. *Re Herbert & Gibson*, 6 M.R. 191.

2. Priority between registered fi. fa. and unregistered transfer—*Petition—Affidavit evidence.*

On the 23rd February, 1888, G. was the registered owner in fee simple of certain lands under The Real Property Act of 1885. On or about that day G. executed a transfer of the lands to H. and was paid the purchase money, but the transfer was not registered until the 1st May, 1888. In the meantime a writ of execution against the lands of G. was registered. The Registrar-General, under section 110 of The Real Property Act of 1885, submitted for the opinion of a Judge the question whether the land was bound by the execution. The question was argued before Bain, J., who gave an opinion that the land was bound. H. afterwards transferred to S., who filed this petition for a direction to register the transfer, and to issue to him a clear certificate of title. The petition came up in chambers, and both sides filed affidavits, after which Dubuc, J., referred the petition to the Full Court.

Held, 1. That Bain, J., did not decide the question, but merely gave an opinion for the guidance of the Registrar-General, leaving the parties to raise the question again, as they had by this petition.

2. That the Registrar-General could not inquire into the existence of a beneficial interest apart from the registered title. The petitioner's remedy, if any, was in a Court of Equity.

Semble, a petition under the 118th section of The Real Property Act of 1889 may be summarily disposed of on affidavits, but, at all events, the respondent, having filed affidavits in reply, was too late to raise the objection.

The statute does not by registration recognize trusts, or the separation of legal and beneficial ownerships, but, as against the registered owner, Courts of Equity will recognize and give effect to trusts and contracts by acting *in personam*. *Re Herbert & Gibson*, 6 M.R. 191, explained. *Re Massey & Gibson*, 7 M.R. 172.

3. Trusts and powers not appearing on the certificate—*Certificate of title final at each stage.*

A certificate of title for certain lands had been issued to M., (described therein as sole surviving executrix and devisee under the will of B.,) which stated that M. was seized of an estate in fee simple in the lands subject to the following incumbrances: 1st, a mortgage made by B. to C.; 2nd, a lien or charge for $5,000 in favor of M.B. under the said will; 3rd, a mortgage made by M. herself to C., attaching upon M.'s interest as such devisee only. Afterwards M. sold part of the land to D. and executed a transfer thereof to him, and the District Registrar, holding that M. had a power of sale as executrix under B.'s will, which enabled her to sell the land for the purpose of paying debts and legacies, and finding, as the fact was, that the sale was necessary for that purpose, decided to issue a new certificate of title to D., free and clear of all incumbrances except the mortgage made by the testator.

To this C. objected, and the matter was referred to the Court on appeal from the District Registrar.

Held, that it was not competent for the District Registrar to go behind his former certificate, and find in the registered owner a power inconsistent with the title stated in it, and thus cut out two of the incumbrances therein set forth.

Re Massey and Gibson, 7 M.R. 172, followed.

Held, also, that, even if the former certificate could have been corrected by the District Registrar as erroneous, such power of correction was in him and could not be exercised by the Court on the appeal.

The 122nd section of The Real Property Act applies where the holder of a certificate of title has died or become bankrupt and there is a transmission of his interest, but has no application where the land transmitted had not been brought under the Act. *Re Moore and Confederation Life Ass.*, 9 M.R. 453.

V. Miscellaneous Cases.

1. Action for damages against District Registrar — *Pleading — Denial of notice.*

In declaring against the District Registrar as nominal defendant in an action under The Real Property Act, to recover damages out of the Assurance Fund for being deprived of one's land by the issue of a certificate of title to another, it is necessary to allege that the action is brought under the statute and that the act complained of was done contrary to the provisions of the statute.

It is not necessary in such declaration to allege that no notice of the proceedings leading to the grant of the certificate had been served upon the plaintiff, or to negative any of the matters which section 168 of the Act says shall be a bar to the action. These are properly the subject of a plea or pleas to the declaration. *Wilson* v. *District Registrar, Winnipeg*, 9 M.R. 215.

2. Cancelling certificate of title issued in error, where no fraud is shown—*Title to lands bought at tax sale —Real Property Act, R.S.M., c.* 133, *ss.* 126, 127, 128—60 *Vic., c.* 21, *s.* 1—61 *Vic., c.* 33, *ss.* 8-10.

A certificate of title issued through an error on the part of a District Registrar may be ordered to be cancelled pursuant to the provisions of sections 126 and 127 of The Real Property Act, R.S.M., c. 133, notwithstanding the proviso in section 128 of the Act and that there was no fraud on the part of the holder of the certificate.

Under the Act 60 Vic., c. 21, s. 1, as amended by 61 Vic., c. 33, ss. 8-10, which prescribes the proceedings for obtaining certificates of title for lands purchased at tax sales, it was error in law for the District Registrar to issue the certificate in question within six months from the date of the application, as he did, although he had the consent of the only persons who to his knowledge had any interest in opposing the issue.

When the certificate in question was issued, the District Registrar was not aware that other parties were interested in the land who should have been served with notice under section 49 of the Act, and this was error in point of fact sufficient with the error in law to warrant an order for cancellation. *Re Buchanan*, 12 M.R. 612.

3. Evidence of Intestacy—*Power of personal representative.*

A mortgagor of lands died intestate. His administrator released the equity of redemption to the mortgagee, who applied for a certificate of title. The land had not previously been brought under the provisions of the Act.

Held, 1. That production of letters of administration was not sufficient proof of the death intestate.

2. That the administrator had no power to release the equity of redemption, because the property had not theretofore been brought under the provisions of the Act, and, even in case of land under the Act, a personal representative cannot convey until he has been registered as owner. *Re Lewis*, 5 M.R. 44.

4. Foreign corporation—*Company— Provincial license to hold real estate.*

Certain property having been brought under The Real Property Act, a certificate of title was issued to the C.P.R. Co. The Company had not taken out a Provincial license, and desired to transfer a part of the property.

Held, that the question was settled when the certificate of title issued, and could not now be raised. *Re C.P.R., Re Douglas Lots*, 6 M.R. 598.

5. Probate.

Held, before executors can apply for registration as owners of the testator's land they must prove the will in the Surrogate Court. *Re Bannerman*, 2 M.R. 377.

6. Removal from files of document improperly placed in Registrar-General's office.

A document drawn up as for registration under the Mechanic's Lien Act was filed in the Registrar-General's office. Upon an application to remove it from the files,

Held, that the Court had no power to order its removal. But, as it was improperly placed there, the application was refused without costs. *Galt* v. *Kelly*, 5 M.R. 224.

7. Unpatented lands.

Held, 1. By section 28 of the Real Property Act of 1885, lands, "when alienated" by the Crown, "shall be subject to the provisions of this Act." The word "alienated" means completely alienated—that is by patent.

2. Lands unalienated, by patent, on the 1st July, 1885, remain under the old law until brought under the provisions of the Act.

3. Lands brought under the Act become chattels real for the purpose of devolution at death, but are lands in other respects, and are not exigible under *fi. fa.* goods.

4. A person entitled to a patent for a homestead, or pre-emption, having received a certificate of recommendation for patent, countersigned by the Commissioner of Dominion Lands, may bring such lands under the operation of the Real Property Act, 1885. TAYLOR, J., diss.

5. After application under the Act no deeds can be registered in the county registry offices.

6. Conveyances of lands, patented after the 1st July, 1885, in the statutory short form may be treated as substantially in conformity with the forms given in the Act. *Re Irish*, 2 M.R., 361.

8. Withdrawal of application—*Effect of—Rights of caveator—Jurisdiction of Court—Non-suit—Costs.*

A. made an application to bring certain lands under The Real Property Act. C. filed a caveat, which he followed up with a petition. Upon the petition coming on for hearing, an issue was directed in which A. was made plaintiff. A. claimed under a tax sale deed. On the trial of the issue a non-suit was entered. The Full Court afterwards dismissed an application to set aside the non-suit. The petition was then brought on for hearing again, when it appeared that A. had withdrawn his application for a certificate of title.

Held, that the application was the foundation of the proceedings in court, and when it was withdrawn the jurisdiction of the Court was at an end, otherwise than to order the caveatee to pay the costs of the proceedings. *Campbell* v. *Alloway*, 8 M.R. 224.

See AFFIDAVIT.
— AMENDMENT, 8.
— DOMINION LANDS ACT, 3.
— EVIDENCE, 3, 11.
— INDIANS, 1.
— MORTGAGOR AND MORTGAGEE, I, III, 2, IV, 2, 4.
— PLEADING, XI, 1.
— PRODUCTION OF DOCUMENTS, 10.

REAL PROPERTY LIMITATION ACT

1. Action for damages for breach of covenant in agreement for sale of land—*Distinction between covenant that there are no incumbrances and covenant to indemnify against incumbrances—Measure of damages for breach of such covenants.*

1. A claim for damages for breach of a covenant against incumbrances on land is not a claim "to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent" within the meaning of section 24 of The Real Property Limitation Act, R.S.M. 1902, c. 100, and an action to recover such damages is therefore not barred under that section by the lapse of ten years.

Re Powers, (1885) 30 Ch. D. 291, followed. *Sutton* v. *Sutton*, (1883) 22 Ch. D. 511, and *Fearnside* v. *Flint*, (1883) 22 Ch. D. 579, distinguished.

2. Where the covenant for the breach of which an action is brought is one against incumbrances, the plaintiff is not entitled to recover as damages the amount of all incumbrances, but only such as have been actually enforced, though it would be otherwise if the covenant had been that the land was free from incumbrances.

The defendant covenanted that he would give the plaintiff a deed clear of all incumbrances except a mortgage of $1,000.

Held, that the plaintiff's damages should be limited to the excess of the mortgagee's claim over $1,000, notwithstanding there were at the time registered judgments against the land for further sums of money. *Wilson* v. *Graham*, 16 M.R. 101.

2. Payment on account of judgment—*Assignment in trust—Limitation of actions.*

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.M., 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 M.R. 540.

3. Possession—*Mortgage.*

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 A.C. 793, and *Delaney* v. *C.P.R.*, 21 O.R. 11, followed.

Doe dem. McLean v. *Fish*, 5 U.C.R. 295, dissented from. *Bucknam* v. *Stewart*, 11 M.R. 625.

4. Possession — *Evidence required to prove adverse possession—Claim set up by wife living with husband—Amendment of issue under Real Property Act, R.S.M.* 1902, *c.* 148.

1. A party asserting a title to land by adverse possession should prove it most clearly and, although there is no statutory requirement that the evidence of such party and members of his family must be corroborated, it would be unsafe, unless such evidence appears to be correct beyond reasonable doubt, to hold that a title by possession has been gained in the absence of strong additional evidence by disinterested witnesses.

2. When a husband and wife are living together, the possession of any property on which they are living or which is occupied by them must ordinarily be attributed to the husband as the head of the family, and the wife cannot acquire title to the property for herself by length of possession under The Real Property Limitation Act, R.S.M. 1902, c. 100.

3. Permission should not be given, even if the Judge has power to allow it, to amend an issue under the Real Property Act, R.S.M. 1902, c. 148, between a married woman claiming by such possession and the holder of the paper title, by setting up that her husband had acquired such title and given the plaintiff a quit claim deed of the property, for no one claiming a title by length of adverse possession is entitled to any such indulgence from the Court.

Sanders v. *Sanders*, (1881) 19 Ch. D. 373, distinguished. *Callaway* v. *Platt*, 17 M.R. 485.

5. Retrospective statute.

Although The Real Property Limitation Act, R.S.M. c. 89, passed in 1883, did not commence and take effect until 1st January, 1885, yet it applies to rights and causes of action which existed or accrued before as well as after the last mentioned date.

Plaintiff's claim was for foreclosure of a mortgage which fell due on 1st January, 1884; no sum had been paid on account of principal or interest, and the mortgagor and his heirs continued in possession up to the filing of the bill in March, 1894.

Held, following *Doe d. Bennett* v. *Turner*, 7 M. & W. 226, and *Doe d. Jukes* v. *Sumner*, 14 M. & W. 39, that the plaintiff's claim was barred either by section 4 or section 24 of the statute. *Stover* v. *Marchand*, 10 M.R. 322.

6. Right of action, when accrued—*Onus of proof—Evidence of default in payment—Estoppel.*

To an action on a covenant in a mortgage dated 2nd January, 1883, for payment of $2400.00 on 1st January, 1886, with interest half yearly, the defendant among other defences pleaded the Statute of Limitations and the plaintiff joined issue

The mortgage contained the usual proviso that on default of payment of interest the principal should become payable. At the trial the plaintiffs put in evidence their mortgage deed and the defendant gave no evidence.

Held, following *Reeves* v. *Butcher*, [1891] 2 Q.B. 509, and *Hemp* v. *Garland*, 4 Q.B. 519, that the statute began to run from the time the first default in payment of interest was made, since the right of action then accrued to the plaintiffs; but that the onus lay upon defendant to prove that default was made earlier than the time fixed for payment of principal, and, there being no evidence of this, the issue was decided in favor of the plaintiffs.

The defendant also pleaded that plaintiffs were not a body corporate or entitled to sue in this Province or to take mortgages by said name and style.

Held, that this defence was not open to defendant, for a man cannot set up the incapacity of the party with whom he contracted in bar of an action by that party for breach of the contract. *Manitoba Mortgage & Inv. Co.* v. *Daly*, 10 M.R. 425.

7. Sale of land for taxes—*Limitation of actions—Mortgagor and mortgagee—Foreclosure—Tax sale—Assessment Act, s.* 194—55 *Vic., c.* 26, *s.* 8, *M.* (1892).

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.M., c. 89, s. 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 favor.

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 s. 194 of The Assessment Act, as amended by 55 Vic., 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 incumbrance 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. *Re Bain and Chambers*, 11 M.R. 550.

8. Sale of land for taxes—*Right of municipality to sell after ten years.*

1. Statutes of Limitation apply to municipal and other corporations as well as to persons.

Hornsey Local Board v. *Monarch, etc., Society*, (1890) 24 Q.B.D. 1, followed.

2. Section 24 of The Real Property Limitation Act, R.S.M. 1902, c. 100, applies to proceedings taken by a municipality to sell lands for taxes which are a lien or charge on the land, and the municipality will be restrained by injunction from taking such proceedings after the lapse of ten years from the time when the taxes fell due.

Neil v. *Almond*, (1899) 29 O.R. 63, and *McDonald* v. *Grundy*, (1904) 8 O.L.R. 113, followed.

3. The plaintiff is also entitled, under section 17 of the Act, to a declaration that neither the levy of taxes nor the rate remains any longer a lien or charge on the land. *Royce* v. *Macdonald*, 19 M.R. 191.

See MORTGAGOR AND MORTGAGEE, VI, 15. — RECTIFICATION OF DEED.

REASONABLE AND PROBABLE CAUSE.

See PLEADING, X, 7.

REASONABLE TIME.

See Banks and Banking, 6.
— Bills and Notes, X, 7.
— Contract, I, 2.
— Railways, II, 2; III, 3.
— Vendor and Purchaser, IV, 2, 8, 9; VII, 10.

REBUTTAL OF EVIDENCE.

See Evidence.
— Libel, 5.

RECEIVER.

Accounts—*Municipality — Liability of receiver for loss of interest by non-deposit in bank of moneys collected.*

The receiver of a town municipality will be responsible to the corporation for loss of interest occasioned by his neglect to deposit in the bank moneys collected by him for the town. *Town of Emerson* v. *Wright*, 5 W.L.R. 365.

See Equitable Execution.
— Garnishment, V, 5.
— Mortgagor and Mortgagee, VI, 13.
— Practice, XXVIII, 20, 22.
— Private International Law.
— Production of Documents, 15.
— Railways, X.

RECEIVING STOLEN GOODS.

See Conviction, 1.
— Criminal Law, XVII, 17.

RECITAL.

See Indemnity, 4.

RECOGNIZANCE.

See Election Petition, VII; IX, 2.
— Summary Conviction.

RECOGNIZANCE OF BAIL.

See Criminal Law, XVII, 14.

RECOMMENDATION FOR PATENT.

See Homestead, 2, 3, 5.
— Real Property Act, V, 8.
— Registered Judgment, 4.

RECOUNT OF BALLOTS.

See Dominion Elections Act.
— Election Petition, VIII.
— Parliamentary Elections, 1.

RECOVERY BACK OF MONEY PAID.

See Bills and Notes, IV, 1.
— Contract, XV, 1.
— Duress, 2.
— Mistake, 2.
— Vendor and Purchaser, II, 6, 7; IV, 5; V, 1; VI, 11; VII, 4, 7.

RECTIFICATION OF AGREEMENT.

See Contract, IX, 1, 3.

RECTIFICATION OF CONTRACT.

See Contract, IX, 2, 4, 5.
— Covenants, 8.

RECTIFICATION OF DEED.

1. Mistake — *Parties — Mortgagee enforcing mortgagor's remedies over—Evidence of agency—Escrow—Trustee for sale—Power to mortgage—Ratification—Indemnity of trustee—Appeal—Points open without cross-appeal—Foreign executors—Partnership or co-partnership—Evidence as against answer.*

The defendant D. executed a mortgage in favor of the plaintiff, in which was the usual covenant for payment. He appended the word "trustee" to his signature, thinking that thereby he pledged himself not personally but in his representative capacity only. When sued upon his covenant,

Held, *per* Dubuc, J., that there was no mutual mistake, and therefore no

case for rectification, but a unilateral mistake, and that of law only.

If mistake is positively denied by any party to an instrument, parol evidence is inadmissible to prove it.

In a suit upon a mortgage against a trustee who gave it, the trustee in his answer set up his trust, gave the names of his *cestuis que trustent*, and submitted they were necessary parties to the suit, but asked no relief over against them. The *cestuis que trustent*, having been added, the plaintiff asked that their liability to indemnify the trustee should be enforced in the plaintiff's favor.

Held, that the plaintiff was so entitled.

A bond was executed by D. for V. as his attorney. D. on examination by the plaintiff as to his authority said that he had a power of attorney (not produced) from V. and had acted for him in relation to the matter in respect of which the bond was given, for several months.

Held, that D. was properly authorized to execute the bond.

A number of persons interested in certain land executed a bond as collateral to a mortgage of the land given by their trustee. B., one of these persons, obtained the various signatures, some of them upon the agreement that the bond was not to be delivered until all the persons interested had executed it. B. delivered the bond without obtaining all the signatures, and the mortgagee upon the faith of it advanced the money.

Held, that all the persons signing it were liable on the bond.

A trustee for sale of land upon which there was a mortgage executed a new mortgage paying off the old one.

Held, that he had power to do so, and that his *cestuis que trustent* were bound to indemnify him.

M., one of the *cestuis que trustent*, assigned his interest to C. previous to the giving of the second mortgage. C. thereafter attended meetings of the association and paid two calls made by the trustee, being thus known and accepted as the assignee of the share.

Held, that the trustee was entitled to no relief as against him.

Upon re-hearing DUBUC, J., remained of the above opinion.

Per TAYLOR, C. J. When some of the defendants re-hear, the whole case is open as between them and the plaintiff; but the plaintiff can ask for no variation of the decree as against the other defendants unless he also re-hears.

2. The *cestuis que trustent* of a mortgagor are not necessary parties to a bill for sale, but they are not improper parties.

3. Foreign executors who have not proved the will in this Province do not sufficiently represent the estate.

4. A trustee for the sale of an estate has not power to mortgage. Acts of ratification by the *cestuis que trustent* discussed and held sufficient.

5. Whether a voluntary association of persons formed for the purpose of buying a piece of land with a view to resale is a partnership, discussed.

6. Parol evidence of a single interested witness not sufficient to set aside a deed. The rule as to two witnesses to overcome the answer doubted.

7. There is an implied agreement on the part of the *cestuis que trustent* to indemnify the trustee against all loss which may accrue in the proper execution of the trust. But where there is an express agreement upon the subject none can be implied.

8. Persons against whom the plaintiff's debtor is entitled to relief over should not on that account be made parties to the bill, and the plaintiff cannot enforce such relief in his own favor. It is not all persons who have an interest in the *subject matter* of the suit, but in general those only who have an interest in the *object* of the suit, who are ordinarily required to be made parties. *Balfour* v. *Drummond*, 9 C.L.T. Occ. N. 201.

2. Mistake — *Description of land — Inner and outer two miles of parish lot—Real Property Limitation Act—When right of action on covenant for payment barred —Possession—Occasional hay cuttings—Interest, rate of—Meaning of "liabilities" in chapter* 29 *of* 63 & 64 *Vic.* (*D.*)*—What arrears of interest recoverable in foreclosure action.*

Action for foreclosure of a mortgage by defendant to plaintiffs of land described as lots 19 and 20 of the Parish of Headingly containing by admeasurement 418 acres more or less and for rectification of the mortgage so as to make it cover the outer two miles of said lots as well as the inner, plaintiffs alleging that such was the intention of the parties at the time the loan was made and that the outer two miles had been omitted by mutual mistake.

Held, that rectification as asked for should be ordered on the following grounds :—

(1) Because the defendant, who was a man of intelligence and good education, had signed a mortgage giving the acreage as 418 more or less, whereas without the outer two miles the two lots only contained 223.65 acres and with them only 421.22 acres.

(2) The defendant had, three years after the date of the mortgage, asked the plaintiffs to discharge it as against the right of way of a railway running to his knowledge only through the outer two miles of the lots, and had arranged that the price of such right of way should be paid by the railway company to the plaintiffs in reduction of the mortgage debt.

Defendant had left the land in 1892, seven years after the last payment on account of the mortgage, and had never paid or attempted to pay any taxes on it since those for 1887, after which the plaintiffs paid all the taxes.

The mortgage contained the usual provisions for quiet possession to the mortgagees on default and for possession by the mortgagor until default.

Held, following *Bucknam* v. *Stewart*, (1897) 11 M.R. 625, and *Trustees, &c. Co.* v. *Short*, (1888) 13 A.C. 793, that defendant had not been in actual adverse possession for a sufficient length of time to acquire title under The Real Property Limitation Act against the plaintiffs, and that occasional entries upon the land by a relative of the defendant for the purpose of cutting hay, for several years after the defendant had left the land vacant, had not the effect of continuing his actual possession beyond that time.

The principal of the mortgage fell due on 25th May, 1884, and it was provided that interest at the rate of eight per cent. per annum was to be paid half yearly . . . . till the whole of the principal should be paid.

Held, (1) Following *Freehold Loan Co.* v. *McLean*, (1891) 8 M.R. 116, and *Man. & N.W. Loan Co.* v. *Barker*, (1892) 8 M.R. 296, that interest after the due date was only recoverable as damages and only at the statutory rate and only for the six years prior to the commencement of the action.

(2) That, although 63 & 64 Vic. (D.), c. 29, making five per cent. the legal rate, provides that "the change in the rate of interest in this Act shall not apply to liabilities existing at the time of the passing of this Act," the interest for that part of the six years since the passing of that Act should only be allowed at the rate of five per cent per annum, for the word "liabilities" in that Act does not refer to the principal debt but only to the obligation to pay interest as damages. 16 *Am. & Eng. Encyc. of Law*, 1061 & 1062, and cases there cited followed.

(3) It is only in an action for redemption, or one in which the question of the number of years arrears of interest to be allowed is to be treated as if the action were one for redemption, that more than six years arrears are allowed on the principle that he who comes into equity must do equity.

Dingle v. *Coppen*, [1899] 1 Ch. 726, and *In re Lloyd*, [1903] 1 Ch. 385, distinguished.

Held, also, that section 24 of The Real Property Limitation Act barred the right of the plaintiffs to a personal order against the defendant for payment of the mortgage debt after ten years from the last payment. *British Canadian Loan and Agency Co.* v. *Farmer*, 15 M.R. 593.

RECTIFICATION OF INSTRUMENTS.

See LANDLORD AND TENANT, IV, 2.

RE-DEMISE.

See MASTER AND SERVANT, II.

REDEMPTION.

See BREACH OF TRUST.
— MORTGAGOR AND MORTGAGEE, I, 2, 3; IV; VI, 9, 10.
— PARTIES TO ACTION, 7.
— REGISTERED JUDGMENT, 5.
— VENDOR AND PURCHASER, VII, 6.

REDEMPTION FROM TAX SALE.

See SALE OF LAND FOR TAXES, X, 9.

REFEREE IN CHAMBERS, JURISDICTION OF.

Queen's Bench Act, 1895, Rules 26 and 804—*Sale of land under registered certificate of judgment—"Now."*

Held, that Rule 26 of The Queen's Bench Act, 1895, which empowered the Referee in Chambers "to do such things . . . . . and exercise all such authority and jurisdiction as . . . . . are *now* done . . . . . or exercised by him or by any Judge of the Court sitting in Chambers," with certain specified exceptions, did not authorize the Referee to make any order for the sale of land under Rule 804, and that it applied only to the powers, authority and jurisdiction which at the time of the coming into force of the Act and Rules, but independently thereof, a Judge in Chambers had. *Watson* v. *Dandy*, 12 M.R. 175.

See ADMINISTRATOR PENDENTE LITE, 1.
— AMENDMENT, 3.
— EVIDENCE ON COMMISSION, 9.
— INTERPLEADER, IV, 3; VIII, 5; IX, 3.
— JURISDICTION, 5.
— JURY TRIAL, I, 10.
— PRACTICE, XXVIII, 24.
— PRODUCTION OF DOCUMENTS, 5.
— SECURITY FOR COSTS, I, 2.
— SUMMARY JUDGMENT, I, 2.

REFERENCE TO MASTER.

See COSTS, XIII, 22.
— PRACTICE, XXVIII, 13.
— WINDING-UP, II, 4.

REFUSAL TO ACCEPT.

See SALE OF GOODS, III.

REGISTERED DEED.

See PLEADING, XII, 2.

REGISTERED JUDGMENT.

1. Assignment of certificate—*Remedies by issuing writs of execution and registering certificate of judgment—Certificate of judgment.*

Bill by the assignee of a registered judgment, for sale of lands. Upon demurrer,—

Held, 1. The judgment having been assigned, it was immaterial that the judgment remained registered in the name of the original creditor.

2. That an assignee of a judgment may file a bill to enforce it.

3. That the issue of execution upon the judgment does not prevent proceedings by bill. *Arnold* v. *McLaren*, 1 M.R. 313.

2. County Court—*Exemptions—Residence commenced after judgment registered—Dissolution of partnership—Registration—Continuance of liability—Costs.*

A County Court judgment for less than $100 registered before the County Courts Act of 1887, and re-registered under section 135 of that Act before the 1st November, 1887, was held valid, and could be enforced by bill in equity. After a judgment was registered the judgment debtor took up his residence in a house which he owned, and claimed its exemption.

Held, that it was not exempt.

Plaintiff's claim being small, his costs were fixed at $50. *Burt* v. *Clarke*, 5 M.R. 150.

3. County Court—*Queen's Bench Act, 1895, Rules 804–6—Sale of land under judgment.*

The provisions of Rules 804–6 of the 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 M.R. 485.

See now, however, Rule 744 of The King's Bench Act, R.S.M. 1902, c. 40.

4. Form of certificate—*Agreement to assign homestead—Patent.*

The omission by a registrar to endorse upon an instrument registered the certificate prescribed by Con. Stat. Man., c. 60, s. 15, does not prevent the instrument binding the lands.

A certificate of judgment was signed by the deputy prothonotary and was under the seal of the Court of Queen's Bench.

Held, insufficient because the date of the judgment was 18 October, 1883, whereas the certificate referred to a judgment of 18 October, 1884, (the number of the roll not appearing upon the certificate) and because the certificate did not show that the judgment was recovered in the Queen's Bench.

Under the 13th sub.-sec. of the 34th sec. of 42 Vic., c. 31, homesteads cannot be bound by executions in the sheriff's hands prior to patent.

Since that Act a certificate of judgment will bind the homestead of the defendant immediately after recommendation for patent.

A registered judgment attaches upon land acquired subsequent to its registration (*per* KILLAM, J.). *Harris* v. *Rankin*, 4 M.R. 115.

5. Lien of, under County Courts Act, R.S.M. 1902, c. 38, s. 213, against debtor's interest under agreement of purchase of land—*Purchase of land to be paid for only by delivery of share of crops—Relief against forfeiture—Cancellation of agreement by vendor—Right of redemption as between judgment creditor of purchaser and vendor.*

The binding effect of the registration of a certificate of a County Court judgment against the lands of the judgment debtor, under section 213 of the County Courts Act, R.S.M. 1902, c. 38, is not nearly so extensive as in the case of a registered judgment of the Court of King's Bench under The Judgments Act, R.S.M. 1902, c. 91 ; and, when the only interest or estate of the judgment debtor in the land in question is under an agreement of purchase providing for payment by delivery of one half of each year's crop and in no other way, the judgment creditor, having only a registered County Court judgment, does not acquire all the rights or position of an assignee of the benefits of the agreement, and is not necessarily entitled to notice of a cancellation of the agreement by the vendor in pursuance of a stipulation contained therein, or to insist on taking the place of the purchaser in all respects or to redeem the vendor, nor is he entitled to an order for the sale of the land after such cancellation.

When the vendor in such a case declares the agreement forfeited and cancels same by notice under one of its terms, whether or not the purchaser could get relief in equity against the forfeiture, the judgment creditor has no standing to claim such relief. *McGregor* v. *Withers*, 15 M.R. 434.

6. Multifariousness — *Exemptions — Bill to realize registered judgment.*

The plaintiff had a registered judgment against five defendants. Upon a bill filed to obtain a sale of lands held by each separately from the others—

Held, 1. That the bill was not multifarious.

2. That no personal order for payment could be made. *Real Estate* v. *Molesworth*, 3 Man. L.R. 116, followed.

3. That a bill and not a petition in the old suit was the proper proceeding.

4. Such a suit need not be preceded by any proceeding upon execution or otherwise.

5. Such a bill should show that the lands are not exempt from seizure. *Fonseca* v. *MacDonald*, 3 M.R. 413.

Distinguished, *Keewatin Lumber Co.* v. *Wisch*, 8 M.R. 365

7. Retrospective Act — *Registered County Court judgment—49 Vic., c. 35.*

No statute prior to 49 Vic., c. 35, made any lands exempt from a judgment registered under the County Courts Act.

A judgment registered before the 49 Vic. may be enforced after its passage. *Hopkins* v. *Beckel*, 4 M.R. 408.

8. Revivor of judgment — *Trusts under Real Property Act—Exemption—Certificate of judgment—Parties.*

In 1884 the plaintiffs recovered a judgment for $682.76 against A. M. and B. Certain lands in the City of Winnipeg were owned by Mrs. G. M., subject to two mortgages. Mrs. G. M. died intestate and the lands were afterwards sold under the mortgages and bought in in the name of A. C. M. A portion of the purchase money was paid, and mortgages on portions of the lands given for the remainder. The purchase money paid was the money of G. M., father of A. M. and A. C. M., and the learned Judge at the hearing found that the purchase was really made by him, A. C. M. being merely a trustee. The evidence showed that G. M. intended the lands should be used as a home for A. M. and his wife. The property was, at the time the bill was filed, and for some time previously, occupied by A. M. as his residence, but

he never paid any rent for it. A. C. M. had never occupied or used any portion of it or asserted any claim over it. A. C. M. in 1889 obtained a certificate of title under The Real Property Act. Afterwards, at an election trial in which it was sought to unseat A. M., who had been elected as alderman, on the ground that he did not possess sufficient property, A. C. M. endorsed on his certificate of title a declaration that he held those lands in trust for A. M. After this declaration, and after B.'s death, the judgment being still unsatisfied, the plaintiffs registered a certificate of judgment and filed a bill thereon to have the lands sold, alleging that they were held in trust by A. C. M. for A. M. In his answer A. M. stated that all the lands except Lot 1 were exempt from seizure, as he actually lived thereon, and parts of Lots 3 and 4 were subject to a mortgage for $2,000. A. C. M. in his answer, and at the hearing, alleged that he had included Lot 1 in the declaration of trust by error.

Held, 1. That a certificate of judgment could be issued and registered without a revivor of the judgment, or a suggestion of the death of B., but it could only be enforced against the lands of the survivor.

2. That the personal representative of the deceased was not a necessary party to the bill.

3. That, where lands under The Real Property Act are held in trust, a registered judgment against the *cestui que trust* may be enforced against the lands so held, and the trustee holder of the certificate of title compelled to make the necessary transfer.

Re Massey & Gibson, 7 M.R. 172, followed.

By the sub-section substituted by 49 Vic., c. 35, s. 3 (M. 1886), for the original sub-section 11 of section 117 of The Administration of Justice Act, 1885, "the actual residence or home of any person other than a farmer," is exempt from seizure under execution, "provided the same does not exceed the value of $1,500; and, if the same does exceed the value of $1,500, then it may be offered for sale," &c. 49 Vic., c. 35, s. 4 (M. 1886), makes this exemption apply to proceedings in equity to enforce a judgment.

Held, that when the property is mortgaged it is necessary that the equity of redemption should be above the prescribed value to make it chargeable with a judgment debt. It is only the interest of the debtor that is charged, not the entire fee simple. The land is only to be sold if more than $1,500 be offered for it, which cannot be expected if the equity of redemption be not above that value, and the onus of shewing the value is upon the plaintiff. *Ontario Bank* v. *McMicken*, 7 M.R. 203.

See DEVOLUTION OF ESTATES, 2.
— EVIDENCE, 9.
— EXEMPTIONS, 4, 7, 10.
— FRAUDULENT CONVEYANCE, 9, 10, 15, 19.
— GARNISHMENT, VI, 2.
— HOMESTEAD, 2, 4, 5.
— INFANT, 13.
— PLEADING, IX, 1.
— PRACTICE, XXVIII, 1.
— REAL PROPERTY ACT, I, 2.
— REFEREE IN CHAMBERS.
— REGISTRY ACT.
— STATUTES, CONSTRUCTION OF, 5.

REGISTRAR OF COURT—POWERS OF.

See PRACTICE, XXVIII, 13.

REGISTRATION OF DEED.

Priority—*Quit claim deed—Notice—Affidavit of execution.*

A quit claim deed is within the Registry Act, and by registration defeats a prior unregistered grant of the interest of the same grantor.

Registration is effectual without an affidavit of execution by the grantee.

M. was entitled to a conveyance in fee simple of the lands in question, upon the payment of a small balance of purchase money. Under these circumstances he executed an assignment of his interest in the land to A. Subsequently M. executed a quit claim deed of the lands to B. B. registered first. B. had notice that A. had been negotiating for the purchase of the land, and that there had been a verbal arrangement for a transfer to A. He asked M. if he had given any written agreement to A., but did not inquire of A. himself.

Held, that there was not sufficient proof of actual notice to defeat B.'s prior registration.

Held, also, that in order to bring abstinence from inquiry within the category of actual notice, there must be wilful abstinence and fraudulent determination not to be informed. *Stark* v. *Stephenson*, 7 M.R. 381.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 4.
— DEED OF LAND, 2.
— EQUITABLE ASSIGNMENT, 2.
— ESTATE TAIL.
— ESTOPPEL, 5.
— REGISTRY ACT, 2.
— SALE OF LAND FOR TAXES, IX, 2.

REGISTRY ACT.

1. Actual notice.

H. J. B., on 24th December, 1873, conveyed a parcel of land to D., and on the 24th of September, 1874, conveyed the same piece of land to M. D.'s conveyance was registered on 11th May, 1875, and M.'s on 25th September, 1874.

M. was the solicitor for H. J. B. on the sale to D., and on the 5th of May, 1874, made the usual affidavit of the execution of the deed to D.

Held, that M. had actual notice of D.'s deed at the date of the affidavit of execution. That such notice would be assumed to have continued until the date of M.'s deed. That it would be no use for M. to say that it did not; and that his deed must be postponed to D.'s.

Held, that, under the Registry Act then in force, 36 Vic., c. 18, priority of registration did not apply to conveyances registered before the issue of the patent. *Agnew* v. *Morphy*, 1 M.R. 49.

2. Real Property Act, R.S.M. 1902, c. 148, s. 34—*Effect of filing deed after application for certificate of title under Real Property Act—Priority as between such deed and an unregistered prior conveyance.*

The filing of a deed with an application for a certificate of title under The Real Property Act, as one of the evidences in support of the title, does not constitute a registration of the deed under The Registry Act, R.S.M. 1902, c. 150, so as to give it priority over a prior unregistered conveyance, although the practice in the Land Titles Office is to make certain entries in the abstract book kept under the old system and to give the deed a number.

Farmers' & Traders' Loan Co. v. *Conklin*, (1884) 1 M.R. 181, and *Renwick* v. *Berryman*, (1886) 3 M.R. 400, followed. *Re Stanger and Mondor*, 20 M.R. 280.

3. Unregistered prior charge — 56 *Vic. (M.), c. 17—57 Vic. (M.), c. 14—Registered judgment—Priority.*

The Master having allowed the plaintiffs' claim to priority for their charge on defendant's land for the price of certain machinery given by an instrument which, under 56 Vic., c. 17, could not be registered, as against the subsequent registered judgments of the appellants;

Held, notwithstanding the Statute 57 Vic., c. 14, and ss. 68, 69 and 72 of the Registry Act, that the registration of the judgments bound only the estate or interest the debtor then had in the lands which was subject to the charge then existing in the plaintiffs' favor, and that the Master was right in making the appellants subsequent incumbrancers.

Eyre v. *McDowell*, [1861], 9 H.L.C. 619, followed.

Miller v. *Duggan*, [1892] 21 S.C.R. 33, distinguished. *Case* v. *Bartlett*, 12 M.R. 280.

REJECTION OF GOODS.

See SALE OF GOODS, II, 1; IV.

RELATOR.

See INFORMATION TO RESTRAIN NUISANCE.

RELEASE.

See BANKS AND BANKING, 3.
— EVIDENCE, 19.
— JOINT DEBTORS.
— PLEADING, VI, 1.
— VENDOR AND PURCHASER, VII, 1.

RELEASE OF EQUITY OF REDEMPTION.

See MERGER.
— REAL PROPERTY ACT, V, 3.

RELEASE OF SURETY.

See PRINCIPAL AND SURETY, 2, 4, 5, 6.

RELEVANCY OF EVIDENCE.

See EXAMINATION FOR DISCOVERY, 12, 13, 14.
— EXAMINATION OF JUDGMENT DEBTOR, 13, 14.

REMAINDERMAN.

See ADMINISTRATION, 1.

REMANET.

See PRACTICE, XV, 3.

REMEDIAL CLAUSE IN ACT.

See FIRE INSURANCE, 3.

REMEDY OVER AGAINST THIRD PARTY.

See MUNICIPALITY, III, 1.

REMOTENESS OF DAMAGE.

See NEGLIGENCE, I, 5.

REMOVAL OF BUILDINGS.

See INJUNCTION, III, 2.

REMOVAL OF LIQUIDATOR.

See WINDING-UP, II, 3.

REMUNERATION.

See EXECUTORS AND ADMINISTRATORS, 4.
— TRUSTEES, 3.
— TRUSTEE AND CESTUI QUE TRUST, 2.
— WILL, III, 6.
— WINDING-UP, II.

RENT.

See SHERIFF, 2.

RENT PAYABLE IN KIND.

See LANDLORD AND TENANT, I, 5; IV, 2.

RE-OPENING TRIAL.

See COUNTY COURT, II, 5.
— ELECTION PETITION, VI, 2; X, 6.
— EVIDENCE, 10, 13.
— NEW TRIAL, 3.

REPAIR OF ROADS AND BRIDGES.

See MUNICIPALITY, IV.
— NEGLIGENCE, IV, 3, 4.
— NUISANCE, 3.

REPAIRS TO BUILDINGS.

See MUNICIPALITY, I, 2.

REPEAL OF BY-LAW.

See LOCAL OPTION BY-LAW, I, 1; VI, 4.

REPEAL OF STATUTES.

See EXEMPTIONS, 1.
— SALE OF LAND FOR TAXES, VI, 3.

REPLEVIN.

1. Action on replevin bond — *Impossibility of fulfilment of condition.*

After the determination of a replevin action, brought by S. against R., in which R. was successful, R. distrained the goods in question, for rent due by S., and then sued S. upon the replevin bond, for non-delivery of the goods.

Held, that the defendant could not shield himself on the ground of the impossibility of delivering to the plaintiff that which the plaintiff had himself taken. *Robinson* v. *Scurry*, 1 M.R. 257

2. Action on bond—*Original action still pending—Court of Assize.*

To an action upon a replevin bond for failure to prosecute "with effect," the defendant pleaded that, the original action was still pending and undetermined. Replication, "that the suit referred to in the bond mentioned in the declaration herein was at and before the commencement of this action determined in the manner following, that is to say, The said suit was entered for trial at the Sittings of Assize and Nisi Prius of this Court in and for the Eastern Judicial District of the Province of Manitoba, beginning on the fourth day of March in the year one thousand eight hundred and eighty-four, and was on the eighteenth day of June in the said year brought on for trial before Mr. Justice TAYLOR, the learned Judge then holding the said Sittings, and the said learned Judge thereupon decided and determined that the said Court had no jurisdiction over the said suit, and struck the said suit out of the list of suits then and there entered for trial at the said Sittings, and declined to give judgment therein."

Demurrer to the replication.

Held, by KILLAM, J., that the replication was bad, there being nothing to show that the suit was determined by the adjudication of the Court before which it was in due course brought, or that such Court or the Court in which it was commenced had no jurisdiction to entertain the suit.

The Court of Assize and Nisi Prius is a Court distinct from the Court of Queen's Bench. *Conway* v. *Scott*, 3 M.R. 557.

After the judgment in this case as reported in 3 M.R. at p. 557, was given, the replication demurred to was amended by the addition of the words "and no other judgment has been given therein."

The defendant again demurred.

Held, by WALLBRIDGE, C. J., that the replication as so amended was good. *Conway* v. *Scott*, 3 M.R. 636.

3. Action on bond—*Pleading.*

To an action upon a replevin bond for not proceeding with effect, a plea that the replevin action is still pending is sufficient.

And a replication to such a plea, disclosing delay, is bad, unless the delay itself has terminated the action.

The condition in a replevin bond to prosecute with effect, is separate and distinct from the condition to prosecute without delay. *McIntosh* v. *Nickel*, 4 M.R. 51.

4. Action against sheriff—*Writ improperly issued.*

To an action of trover against a sheriff the defendant justified under a writ of replevin. Replication that the writ was "improperly and without any right or authority whatever in that behalf sued and prosecuted out of the said court; and was not to recover goods wrongfully distrained; and afterwards, to wit on the twenty-first day of April, 1884, the said matters in the said writ contained having been brought before the said Court for adjudication, Mr. Justice TAYLOR, then sitting in the said court for the hearing of cases, determined that the said Court had not jurisdiction to issue the said writ of replevin in the said plea mentioned, and to try the action consequent thereon, and that the said writ was of no force and effect whatever and was absolutely null and void."

Rejoinder "that the said writ of replevin was good and valid on its face, and appeared to be regularly issued and was signed by the proper official in that behalf, and the defendant had, at the time he received the same and at the time of the execution thereof, no notice or knowledge that the said writ was issued improperly and without any legal authority, and the said writ has not been set aside, nor has any judgment of any kind been entered in the said suit which was commenced by the said writ of replevin."

Demurrer to the rejoinder.

Held, that the rejoinder was good.

If a writ be issued by a proper officer and from the proper office for such a writ in a proper case to issue from, it is not wholly void, so far as the sheriff who executes it is concerned. *Beemer* v. *Inkster*, 3 M.R. 534.

5. Fixtures—*Goods affixed to realty.*

A writ was issued to recover certain machinery in a planing mill. Plaintiffs claimed the goods as vendors, under a hire and sale receipt. Defendants claimed property as part of the realty under a mortgage from the purchaser under the same receipt. On motion to set aside the writ,

Held, 1. That replevin would lie.

2. Upon the affidavits filed, that the machinery was personalty. *Waterous Engine Works Co.* v. *Henry*, 1 M.R. 36.

6. Land scrip issued under Dominion Lands Act, R.S.C., c. 54, s. 90, ss. (f), as re-enacted by 62 and 63 Vic., c. 16, s. 4—*Assignability of scrip*—*Illegality of contract.*

Under an order of the Governor in Council made pursuant to sub-section (*f*) of section 90 of The Dominion Lands Act, R.S.C., c. 54, as re-enacted by 62 and 63 Vic., c. 16, s. 4, the defendant Annie Battley became entitled to scrip for land to be located by her. She sold the right to the scrip to the plaintiff and gave him an order on the Commissioner for it. After delivery by the latter to the plaintiff, Mrs. Battley, knowing that the scrip was in the plaintiff's possession, deliberately assigned it to him for valuable consideration. She afterwards took the scrip from the plaintiff and refused to return it.

The Order in Council prohibited the Commissioner from recognizing or accepting assignments of land scrips and from delivering them to assignees.

Held, nevertheless, that the contract of sale of the scrip was valid and that the plaintiff was entitled to recover possession of it in an action of replevin. *Wright* v. *Battley*, 15 M.R. 322.

See County Court, I, 9; II, 1.
— Landlord and Tenant, I, 3.
— License to Take Possession of Goods.
— Sale of Goods, II, 2.
— Parties to Action, 3.
— Practice, XXVIII, 23.

REPRESENTATION OR WARRANTY.

See Misrepresentation, V, 2.

REPUDIATION OF CONTRACT.

See Contract, X, 1, 2.
— Infant, 2.
— Sale of Goods, III, 1.
— Vendor and Purchaser, VII, 7.

RES GESTÆ.

See Criminal Law, II, 1.

RES JUDICATA.

See Capias, 3.
— Conviction, 5.
— County Court, I, 10.
— Crown Patent, 6.
— Estoppel, 5.
— Injunction, I, 3.
— Nul Tiel Record, 1, 2.
— Practice, XX, C; XXVIII, 25.
— Real Property Act, IV, 1.

RE-SALE.

See Sale of Goods, III, 1.

RESCINDING AGREEMENT OF SALE

See Vendor and Purchaser.

RESCINDING ORDER.

See Interpleader, VIII, 5.
— Practice, XIV, 2; XXVIII, 24.
— Railways, I, 1.

RESCISSION OF CONTRACT.

See Bills and Notes, IV, 4; VIII, 1, 8.
— Contract, III, 1; VII, 2, 3; X, 2, 3; XI, 1, 2.
— Evidence, 17, 28.
— Infant, 2.
— Limitation of Actions, 1.
— Misrepresentation, III; VI.
— Mistake, 1.
— Pleading, III, 2.
— Sale of Goods, IV, 1.
— Vendor and Purchaser, II, 3, 4; IV; V, 1; VI, 3, 15.

RESERVATION IN DEED.

See Deed of Land, 1.

RESERVATION OF EXEMPTIONS.

See FRAUDULENT CONVEYANCE, 1.

RESERVATION OF TRAVELLED ROAD.

See HIGHWAY, 2.

RESIDENCE.

Public Schools Act, R.S.M. 1902, c. 143, ss. 22, 175, 239—*Qualification of trustee.*

The defendant, one of the trustees of a rural school district, worked and slept on his farm in the district, but his wife and some of his children lived in the City of Portage la Prairie, where he visited them at regular intervals.

Held, that he was not disqualified by sections 22 and 175 of The Public Schools Act, R.S.M. 1902, c. 143, to be elected as a trustee of the district, as he might be deemed to be an actual resident thereof, and, in any event, the case was not within section 239, which only applies when a trustee, after election, ceases to be an actual resident.

The definition of the word "residence" in the Manitoba Election Act, as the place where a man's wife and family live in the case of a married man, is only for the purposes of that Act, and should not be applied in interpreting another Act.

The word "residence" has a flexible meaning and should be construed according to the object and intent of the particular legislation in which it may be found.

Regina v. *Fermanagh Justices*, [1897] 2 I.R. *per* GIBSON, J., at p. 563; *Regina* v. *Tyrone Justices*, [1901] 2 I.R. *per* HOLMES, L. J., at p. 510, and *Reg. ex rel Forward* v. *Bartels*, 7 C.P. 533, followed. *McCuaig* v. *Hinds*, 11 W.L.R. 652.

See SECURITY FOR COSTS, IX, 2.

RESIGNATION OF OFFICE.

See MUNICIPAL ELECTIONS, 5.

RES IPSA LOQUITUR.

See NEGLIGENCE, III, 3.

RESISTING OFFICER.

See COUNTY COURT, I, 9.
— CRIMINAL LAW, X, 2, 3.

RESOLUTIONS OF MUNICIPAL COUNCIL.

See MUNICIPALITY, VII, 7, 8.

RESTITUTIO IN INTEGRUM.

See BILLS AND NOTES, VIII, 1.

RESTITUTION.

See CONTRACT, II, 1.
— PLEADING, III, 2.

RESTRAINING WASTE.

See FIXTURES, 8.

RESTRAINT OF TRADE.

Covenant not to carry on named business in certain territory during specified term—*Injunction—Evidence.*

On transferring to the plaintiffs his shares in a company dealing in automobiles and their accessories, the defendant covenanted that he would not engage in, carry on, be interested in, have money invested in or hold shares in any business similar to or in competition with the business carried on by the said company in the Province of Manitoba, Saskatchewan or Alberta for a period of five years.

The company had power to engage in other lines of business.

Held, (1) The covenant only extended to the business actually carried on by the company at the time of the signing of it and was, therefore, not too wide to be enforceable.

Maxim v. *Nordenfelt*, [1893] 1 Ch. 630, [1894] A.C. 535, distinguished.

(2). Extrinsic evidence might be given to show what was the business carried on by the company at the time.

(3) The plaintiffs were entitled to an injunction in the terms of the covenant against the defendant who had accepted the position of manager for another company carrying on, at Winnipeg, the business of dealers in automobiles, limited to dealing in automobiles. *Kelly* v. *McLaughlin*, 21 M.R. 789.

See Conspiracy in Restraint of Trade.
— Contract, IV, 1; XV, 14.
— Municipality, I, 7.

RESULTING TRUST.

See Deed of Settlement.
— Voluntary Conveyance.

RESUMING POSSESSION OF GOODS.

See Sale of Goods, VI, 4.

RE-TAKING POSSESSION.

See Limitation of Actions, 1.

RETENTION OF GOODS.

See Sale of Goods, IV, 4.

RETROSPECTIVE STATUTES.

See Growing Crops.
— Mechanic's Lien, III, 1.
— Pleading, IX, 2.
— Practice, XXVIII, 1.
— Railways, V, 4.
— Real Property Limitation Act, 5.
— Registered Judgment, 7.
— Statutes—Construction of.
— Workmen's Compensation for Injuries Act, 1.

RETURNING OFFICER.

See Municipal Elections, 2.
— Parliamentary Elections, 3.

REVENUES AND EMBLEMENTS.

See Crown Lands, 2.

REVERSING JUDGE'S ORDER.

See Evidence on Commission, 9.

REVERSION.

See Landlord and Tenant, I, 6.
— Nuisance, 2.

REVIEW OF ORDER.

See Fraudulent Preference, VI, 3.

REVIEW OF TAXING MASTER'S REPORT.

See Solicitor and Client, II, 1.

REVISING OFFICER.

See Contempt of Court, 3.

REVISION OF VOTERS' LIST.

See Mandamus, 5.

REVIVOR.

See Practice, XXVIII, 26.
— Registered Judgment, 8.

REVOCATION.

See Assignment for Benefit of Creditors, 4.
— Life Insurance, 5.
— Principal and Agent, II, E; V, 9.

REVOCATION OF AGENCY.

See Principal and Agent, II, E; V, 9.

REVOCATION OF LEGACY.

See WILL, II, 3.

RIGHT OF ACTION.

Action—*Covenant of indemnity—Assignment of—Sale subject to unpaid purchase money—Liability of sub-purchaser—Implied contract.*

One Galbraith agreed in writing to purchase certain lands from the plaintiff and paid $200 on account of the purchase money. He afterwards transferred his interest in the lands under the agreement to the defendant by an assignment endorsed thereon signed by himself, but not by the defendant. The defendant did not make any of the payments remaining due to the plaintiff under the agreement and Galbraith then assigned to the plaintiff "all and every covenant, agreement and obligation of the said A. B. McClelland, of any and every nature and kind whatsoever, whether expressed in the assignment hereinbefore mentioned to the said McClelland or implied from any or all of the transactions between them and also all obligations both legal and equitable" of the defendant.

Held, that, upon plaintiff adding Galbraith as a party defendant with his consent, for which leave was given, the plaintiff was entitled under the assignment from Galbraith to him to recover from the defendant the amount remaining due under the original agreement of sale to Galbraith.

Maloney v. *Campbell*, (1897) 28 S.C.R. 228, and *Cullin* v. *Rinn*, (1888) 5 M.R. 8, followed. *Brough* v. *McClelland*, 18 M.R. 279.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 5.
— CHATTEL MORTGAGE, II, 2.
— CHOSE IN ACTION, 5.
— COMPANY, IV, 12.
— EJECTMENT, 3.
— FENCES.
— MISREPRESENTATION, III, 2.
— MORTGAGOR AND MORTGAGEE, I, 1.
— MUNICIPALITY, III, 2, 3, 4.
— PLEADING, XI, 17.
— PUBLIC PARKS ACT.
— RAILWAYS, II, 1; V, 1, 6; VIII, 2; XI, 1.
— REAL PROPERTY LIMITATION ACT, 6.
See SALE OF LAND FOR TAXES, X, 5.
— TRESPASS.
— SET OFF, 2.
— VENDOR AND PURCHASER, III, 1.
— WARRANTY, 1.
— WORKMEN'S COMPENSATION FOR INJURIES ACT, 4.

RIGHT OF APPEAL IN CRIMINAL MATTERS.

See LIQUOR LICENSE ACT, 8.

RIGHT OF POSSESSION.

See CONDITIONAL SALE, 4.

RIGHT OF WAY.

See WAY OF NECESSITY.

RIGHT TO REPLY.

See TRIAL.

RIOT.

See INJUNCTION, I, 2.

RIPARIAN OWNER.

See INJUNCTION, I, 5.

RIVER BED, OWNERSHIP OF

See INJUNCTION, I, 5.

ROAD ALLOWANCE.

See BOUNDARY LINES.
— MUNICIPALITY, V, 1.

RULE AGAINST PERPETUITIES.

See DEED OF SETTLEMENT.

RULE OF COURT.

See RAILWAY COMMISSIONERS FOR CANADA, BOARD OF.

SALE AFTER FORECLOSURE.

See MORTGAGOR AND MORTGAGEE, V, 1.

SALE BY AUCTION.

See SALE OF LAND FOR TAXES, X, 3.

SALE BY THE COURT.

See HALF BREED LANDS ACT, 3.
— PRACTICE, XVIII, 2.
— VENDOR AND PURCHASER, VII, 8.

SALE OF GOODS.

I. BILLS OF SALE AND CHATTEL MORTGAGE ACT.
II. PROPERTY PASSING.
III. REFUSAL TO ACCEPT.
IV. REJECTION.
V. WARRANTY.
VI. MISCELLANEOUS CASES.

I. BILLS OF SALE AND CHATTEL MORTGAGE ACT.

1. Immediate delivery — *Change of possession.*

Interpleader issue respecting the ownership of certain horses seized in execution against the defendant and claimed by his mother.

On the 2nd of October, 1894, a verbal sale of the horses in question was made to the claimant, and part of the purchase money was then paid, and the claimant stated in her evidence that the horses were "hers from the 2nd of October." For the convenience of the claimant, however, and at her request, the defendant continued in actual possession of the horses until the 12th of November following, when he called upon the claimant and told her that he was going away, but had left everything all right, and that a boy who had been in his employment could take care of everything; and thereafter the claimant, by her servants remained in actual possession of the horses.

The Judge at the trial found that the sale was *bona fide*. The execution was not issued until January, 1895.

Held, that the sale was good as against the plaintiffs, notwithstanding the Bills of Sale Act, R.S.M., c. 10, s. 2, and that this case might be distinguished from *Jackson* v. *Bank of Nova Scotia*, 9 M.R. 75, on the ground that here there was a delivery by the vendor on the 12th of November, and that what then took place brought the case within the rule laid down by Patterson, J., in *Whiting* v. *Hovey*, 13 A.R. 14, that, although a grantee could not by any act of his own in seizing the goods, give himself a better title than he had under his deed, yet the grantor might, by making a delivery which would operate as a conveyance of goods capable of passing at law by delivery, effectually cure a prior defective conveyance. *Trust and Loan Co.* v. *Wright*; *Wright, Claimant*, 11 M.R. 314.

2. Delivery—*Agreement that purchaser should bear any loss by fire, effect of.*

B. agreed to deliver to defendant at Carman 195 cords of wood to be taken out of two piles of wood containing 200 cords lying at another railway station and received the consideration therefor. Before anything was done towards delivery of the wood or setting apart the 195 cords from the rest of the wood, B. assigned to plaintiff for the benefit of his creditors.

Held, that defendant had acquired no title to the wood as against the plaintiff, as section 3 of The Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11, had not been complied with.

Held, also, that the defendant's agreement to bear the loss if the wood should be burned was not sufficient to vest the title in him in the face of the other facts. *Haverson* v. *Smith*, 16 M.R. 204.

II. PROPERTY PASSING.

1. Place of inspection—*Acceptance of part—Rejection of residue as not in accordance with contract.*

Contract for sale of butter then manufactured and also for all butter to be manufactured during the season; quality to be "fine;" delivery to be f.o.b. cars, Birtle. Purchaser carried on business in

Winnipeg. No inspection took place at time of contract.

Vendor shipped car load at purchaser's request to Winnipeg. Purchaser refused to accept because of defect in quality. Vendor re-sold and sued for difference between contract price and amount realized.

Held (1) The agreement as to quality was a condition of the contract.

(2) The property in the butter had not passed.

(3) The place for inspection was Winnipeg.

(4) The purchaser's duty to accept depended upon the quality of the butter.

(5) The fact that the purchaser had accepted other car loads of "fine" butter did not bind him to accept one that was not.

Dyment v. *Thompson*, (1886) 9 O.R. 566, 12 A.R. 658, 13 S.C.R. 303, commented on.

(6) The onus was on the vendor to prove the quality of the butter.

(7) Such evidence could not be given in rebuttal. *Lewis* v. *Barré*, 14 M.R. 32.

2. Sale or consignment—*Replevin.*

Defendant ordered certain goods through plaintiffs' traveller. Plaintiffs on 12th December wrote defendant that they would consign only, and not sell. This letter was never received, but defendant did receive a telegram as follows:—"Can only fill order forty off hardware, forty and ten flatware, you paying express, answer if satisfactory." Defendant replied, "All right, send goods at once." On the 16th, the goods were shipped. On the same day plaintiffs wrote defendant that the goods were consigned only and not sold, but this letter was not mailed until the 18th, and was not received until after the goods had been received and accepted. The invoice was headed "consigned to" the defendant.

Held, (TAYLOR, J., dissenting). That there was a completed sale to the defendant and that the property in the goods had vested in him. *Acme Silver Co.* v. *Perret*, 4 M.R. 501.

3. Breach of contract—*Non-delivery—Goods in storage—Failure of vendor to deliver warehouse receipt—Absence of acknowledgment by warehousemen of transfer to vendee—Sale of Goods Act, sec. 29 (b)—Sale of goods by warehousemen for storage charges to agent of vendee—Effect of—Damages.*

The defendant, on the 26th November, 1910, had a car-load of fish in storage, and on that day agreed to sell it to the plaintiffs for $1,000; of that sum, $130 was paid in cash; $370 was to be paid by payment of storage charges direct to the storage company, and the balance by a post-dated cheque, which was given by the plaintiffs to the defendant. The defendant, in writing, agreed to deliver to the plaintiffs "warehouse receipt covering fish in . . . . . storage sold to them. Warehouse receipt covering goods must be signed for in good order and delivered to the plaintiffs not later than December 5, 1910." A warehouse receipt had been issued by the storage company to the defendant, containing a condition that "the goods are to be delivered only upon the surrender of this receipt." The receipt was never delivered to the plaintiffs.

Held, that the facts brought the case within the provision of clause (*b*) of sec. 29 of the Sale of Goods Act, that there is no delivery by seller to buyer unless and until the third person in possession of the goods acknowledge to the buyer that he holds the goods on his behalf; and, upon the evidence in this case, the storage company did not acknowledge to the plaintiffs that they held the goods on the plaintiffs' behalf. Delivery of the document of title, at the time specified, was an essential term of the contract. The mere intimation by the defendant to the storage company that he had sold to the plaintiffs did not affect their relations.

The contract of bailment (the warehouse receipt, a duplicate of which was produced by the storage company) stated that the goods might be sold for non-payment of charges. On the 3rd January, 1911, the storage company notified the plaintiffs that they (the storage company) were about to sell the fish to pay storage charges, and gave them the opportunity to get the fish by paying the charges before the 7th January. After this notification, another firm of fish dealers, acting at the request of the plaintiffs, bought the fish from the storage company for the amount of the charges. The plaintiffs took over the fish, paying the other dealers the amount paid by them, and giving them a portion of the fish as remuneration for their services.

Held, that this transaction did not amount to an acceptance of the fish by the plaintiffs under the contract.

Held, therefore, that the plaintiffs were entitled to recover, as damages for the breach of the contract, the $130 paid to the defendant, and $250 for loss of profit; and to a return of the post-dated cheque. *Cheekik* v. *Price*, 18 W.L.R. 253.

III. Refusal to Accept.

1. Damages for—*Duty of seller in making resale of the goods—Repudiation of contract by buyer—Failure of seller to prepay freight as agreed.*

1. When the purchaser of an article has absolutely refused to accept it because he had changed his mind about buying it, he cannot avoid paying damages on the ground that the seller was to prepay the freight and had not done so.

Braithwaite v. *Foreign Hardwood Co.*, [1905] 2 K.B. 543, followed.

2. When the seller of the rejected goods has resold them by auction, fairly conducted and reasonably advertised, due notice having been given to the buyer, he is entitled to recover the difference between the contract price and the net amount realized, and he is not required to exercise the utmost amount of diligence and skill and the most accurate judgment in an endeavor to save the wrong-doer from loss.

Dunkirk Colliery Co. v. *Lever*, 41 L.T. (1880) per James, L. J. at p. 635, followed.

The expenses of storing the article in question in this case, a cab, for an unnecessary length of time, and of sending it from Brandon to Winnipeg to be sold were disallowed.

Richards, J. A., agreed with the trial Judge in holding that the plaintiff could and should have sold the cab at a higher price than that obtained at the auction, and should, therefore, be charged with such higher price as against the contract price. *Greer* v. *Dennison*, 21 M.R. 46.

2. Damages for wrongful refusal to accept, measure of—*Sale of Goods Act, R.S.M. 1902, c. 152, s. 49—Breach of contract to purchase.*

In estimating the amount to be allowed to the vendor for damages for the deliberate and unjustifiable refusal by the buyer to accept the goods bargained for, the Judge or jury trying the action is not limited by sub-section (b) of section 49 of The Sale of Goods Act, R.S.M. 1902, c. 152, to the difference between the contract and the market price, but may, under sub-section (a), allow any loss directly and actually resulting, in the ordinary course of events, from the buyer's breach of contract, so that, in the case of a contract for the delivery of hay in successive lots, the following elements may be taken into consideration in computing the damages: the contract price; the market price and the condition of the market for hay at the times when deliverable under the contract; the quality of the hay at such times; the quantity of hay deliverable under the contract really in the possession or under the control of the seller; the efforts made by the seller to dispose of the hay (which need not be especially diligent: *Brown* v. *Muller*, L.R. 7 Ex. 322, and *Smith* v. *Maguire*, 27 L.J. Ex 472); the prices subsequently realized by the vendor; the profits primarily and properly obtainable by the vendor, had the contract been performed, and the expenses reasonably incurred for storage, loading, insurance, etc., as a consequence of the buyer's refusal to accept.

In such a case the vendor is entitled to the benefit of all presumptions as to the advantages that might have accrued to him had the contract been carried out in good faith by the buyer.

Wilson v. *Northampton*, L.R. 9 Ch., *per* Lord Selborne at p. 285, followed.

Bank of Ottawa v. *Wilton*, 10 W.L.R. 331.

IV. Rejection.

1. After acceptance—*Warranty or condition—Rescission for misrepresentation—Delivery and acceptance — Damages — Breach of warranty.*

The purchaser of a specific lot of eggs at fixed prices cannot, after delivery and acceptance, reject and return them because of a representation, made in good faith by the vendor, that the proportion of good eggs in the lot was greater than it turned out to be, but is entitled to a deduction from the vendor's claim by reason of getting a smaller quantity of good eggs than he was led to expect, such deduction being allowed by way of damages for breach of warranty. *Prout* v. *Rogers Fruit Co.*, 18 M.R. 240.

2. After delivery — *Rescission of contract — Appeal from findings of trial Judge — Partial inspection by purchaser of goods sold by specific description.*

A purchaser of goods ordered to be sent by railway does not lose his right of rejecting the goods by unloading them from the cars on arrival and teaming them to his own premises, if he finds them to be inferior to what he had ordered and so notifies the vendor within a reasonable time.

Taylor v. *Smith*, [1893] 2 Q.B. 65, followed.

Under the Queen's Bench Act, 1895, s. 48, and Rules 638, 640, the Full Court *in banc* is a Court of Appeal from the decisions of a single Judge on questions of fact as well as of law, and must weigh conflicting evidence, and draw its own inferences and conclusions, whilst bearing in mind that it has neither seen nor heard the witnesses, and making due allowance in this respect.

The principles laid down in this regard in *The Glannibanta*, (1876) 1 P.D. at p. 287; *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *Smith* v. *Chadwick*, (1884) 9 A.C. 187, and *The North British and Mercantile Ins. Co.* v. *Tourville*, (1895) 25 S.C.R. 177, should be followed.

Held, on the evidence set out in the judgments, BAIN, J., dissenting, that the finding of DUBUC, J., who tried the case, in favor of the defendants should be reversed and a verdict entered for the plaintiff with costs. *Creighton* v. *Pacific Coast Lumber Co.*, 12 M.R. 546.

3. Retention of bill of lading—*Sale of Goods Act, R.S.M.* 1902, *c.* 152, *s.* 30—*Rejection.*

When the buyer of goods exercises his right, under section 30 of The Sale of Goods Act, R.S.M. 1902, c. 152, to reject the goods because the seller delivered a quantity larger than that contracted for and also delivered goods contracted for mixed with goods of a different description not included in the contracts, the retention by the buyer of the bill of lading creates no liability on his part. *Schweiger* v. *Vineberg*, 19 M.R. 328.

4. Retention of goods without notice of rejection to seller within reasonable time—*Damages for breach of warranty as to quality of goods—When property passes—Sale of Goods Act, R.S.M.* 1902, *c.* 152, *ss.* 33-36, 52.

The purchasers of goods sold by sample, although they claimed that the goods when received were not what they had bargained for and made a number of complaints by letter to the sellers and verbally to their agent, made sale of considerable portions of the goods and did not expressly notify the sellers that they rejected the goods until about six weeks after they had received them into stock.

Held, that the purchasers had retained the goods without rejecting them within a reasonable time and, under sections 55 and 36 of The Sale of Goods Act, R.S.M. 1902, c. 152, had lost the right of rejection and, therefore, were liable for the price agreed on, subject to their right, under section 52 of the Act, to whatever deduction they could establish a claim for by reason of any breach of warranty as to quality or for damage by way of counterclaim.

Couston v. *Chapman*, (1872) L.R. 2 H.L. Sc. 250, and *Grimoldby* v. *Wells*, (1875) L.R. 10 C.P. 393, followed.

The Court held, on the evidence set out in the judgment, that the purchasers had failed to establish any such claim for damages.

Held, also, following *Benjamin on Sales*, 5th ed. at pp. 355, 639, and *Badische* v. *Basle*, [1898] A.C. 207, that, although delivery to a carrier is *prima facie* an appropriation of the goods, yet the seller may contract to deliver them to the buyer at their destination, in which case the property does not pass till such delivery. *Whitman Fish Co.* v. *Winnipeg Fish Co.*, 17 M.R. 620.

On appeal to the Supreme Court,

Held, reversing the above judgment, that the sale had been made subject to delivery at Winnipeg, that any loss occasioned by deterioration in transit not necessarily incident to the course of transit should be borne by the sellers, that the loss in this case was not so incident, and that, under the circumstances, the purchasers had notified the sellers of the rejection within a reasonable time, as contemplated by the Sale of Goods Act, R.S.M. 1902, c. 152; that the plaintiffs could not recover and that the defendants were entitled to have damages on their counterclaim.

Whitman Fish Company v. *Winnipeg Fish Company*, 41 S.C.R. 453.

V. Warranty.

1. Express and implied warranty—*Interest on damages—Sale of Goods Act, R.S.M. 1902, c. 152, ss. 15, 16.*

1. Under sub-section (d) of section 16 of The Sale of Goods Act, R.S.M. 1902, c. 152, an express warranty in a contract for the sale of goods by description does not exclude the implied warranty provided for by section 15 of the Act that the goods shall correspond with the description, and on the sale of a threshing engine by description there is an implied warranty that it shall be reasonably fit for the work that the vendor knew the buyer wanted it for, which is not inconsistent with any of the express warranties usually inserted in such a contract.

2. Where a contract for the sale of a threshing engine contains the usual warranties and also a provision that in case the engine is not satisfactory the company may supply another engine and, if it does, "the terms of the warranty shall be held to be fulfilled, and the company shall be subject to no further liability," this should not be construed to mean that the company would be exonerated after supplying another engine no matter whether it was as defective as the first one or not.

3. Defendant should be allowed interest on the amount allowed him as damages as he had to pay interest on the promissory notes sued on. *North-West Thresher Co.* v. *Darrell*, 15 M.R. 553.

As to 1 above, see now *Clark* v. *Waterloo Mfg. Co.*, 20 M.R. 289, which would seem to overrule it.

2. Implied condition—*Sale of Goods Act, R.S.M. 1902, c. 152, ss. 13, 16.*

Action for breach of warranty of threshing machinery consisting of an engine, separator and several other articles sold by defendants under an agreement in writing containing the following among other clauses :

"The said machinery is warranted to be made of good material, to be durable, and, with good care, to do good work if properly operated by competent persons."

"This warranty does not apply to second-hand machinery."

"There are no other warranties, guarantees or agreements other than those contained herein."

Held, that, as there was no complaint respecting anything but the separator which was admitted to be "second-hand," there was no warranty under the agreement.

Held, also, that the agreement and the plaintiff's course in suing only for a breach of warranty excluded the operation of section 16 of The Sale of Goods Act, R.S.M. 1902, c. 152, which would otherwise import "an implied condition that the goods shall be reasonably fit" for the particular purpose for which they are required.

Quære, whether the agreement did not in any case exclude the statutory implied condition.

Sawyer-Massey v. *Ritchie*, 13 W.L.R. 89, reversed in the Supreme Court, 43 S.C.R. 614, referred to. *Clark* v. *Waterloo Manufacturing Co.*, 20 M.R. 289.

VI. Miscellaneous Cases.

1. Animals' Diseases Act—*Warranty—Caveat emptor—Sale of horse—Contagious disease.*

The Diseases of Animals Act, 54 Vic., c. 17, s. 16, (R.S.M., c. 5, s. 25) provides that, "Any person who sells or disposes of . . . . . any animal infected with or labouring under any infectious or contagious disease, or any animal respecting which there is cause of suspicion that such animal is infected . . . . . shall for every such offence incur a penalty of one hundred dollars."

The defendant sold to plaintiff a horse suffering from glanders, but the trial Judge found that he had no cause for suspicion that the animal was infected. There was no warranty. In an action for damages,

Held, that the defendant was not liable. Even if there had been a breach of the statutory duty, the rule of *caveat emptor* would apply. *Rothwell* v. *Milner*, 8 M.R. 472.

2. Authority to buy, of person in charge of business.

Defendant was in partnership with Mrs. P., in a business of which Mr. P. had the management under a power of attorney from both partners, and carried on under the name of P. & Co. Defendant himself took no part in the management, further than being sometimes consulted about purchases.

Mrs. P. died and P. was left in charge, to take stock and wind up the business

and to obtain a purchaser for it. The firm name remained over the store and there was no outward change.

While so in charge P. ordered goods from the plaintiffs, their agent entering up the order in the name of P. & Co. After the goods had been delivered, defendant took possession of the whole stock, including the goods supplied by plaintiff, and eventually sold it. Before the sale, the plaintiff demanded the goods from the defendant, but was refused.

In an action for goods sold and delivered,

Held, 1. That P. had no authority to bind the defendant by the purchase.

2. If plaintiff thought he was selling to the defendant, and defendant did not purchase, the property would not have passed and defendant would have been liable in some form of action. But these facts were not clearly proved. *Vineberg* v. *Anderson*, 6 M.R. 335.

3. Collateral agreement—*Demurrer —Sale of machine—Agreement under seal.*

To a declaration on an agreement, under seal, for the purchase by the defendant of a separator, for which he was to pay $300 cash and to give three promissory notes, the defendant pleaded, by his 5th and 14th pleas, that, in consideration of his entering into that agreement, the plaintiffs agreed to purchase from him a second-hand separator for $200, the $200 to be credited on the first note falling due; that he delivered the second-hand machine, etc. The defendant also filed a counter-claim setting up a similar state of facts, and claiming damages for breach of agreement in not applying the purchase money in payment of the note. The plaintiffs replied to these pleas and counter-claimed that the agreement set up by the defendant was not under seal.

On demurrer,

Held, that the agreement set up in the pleas was an independent collateral agreement, and the pleas were, or amounted to, pleas of accord and satisfaction.

Held, also, that the agreement set up in the counter-claim was an independent collateral agreement, for a breach of which damages could be claimed. *Case* v. *Laird*, 8 M.R. 204.

4. Conditional sale —*Lien note — Vendor resuming possession — Rights of vendor in dealing with the goods afterwards —Exchange of goods not the same as a sale.*

When the vendor of horses under a conditional sale, having taken from the purchaser a lien note containing the usual provisions allowing him, in case of default, to take possession of the horses and hold them, "or sell the same at public or private sale," etc., does retake the horses, he has no right to trade one of the horses for another and still hold the maker of the note liable upon it. Such an exchange cannot be treated as a sale within the meaning of the note. *Harris* v. *Dustin*, 1 Terr. L.R. 6, and *Sawyer* v. *Pringle*, 18 A.R. 218, followed. *Moore* v. *Johnston*, 9 W.L.R. 642.

5. Delivery — *Partial delivery — Refusal to accept excusing further delivery.*

Defendant ordered goods—some manufactured and some to be manufactured—from plaintiff. Defendant contended that the agreement was that the goods were to be shipped not later than the 6th of October, while plaintiff and his witnesses swore to the 20th of October, as the date agreed upon. On the 16th of October defendant wrote, cancelling the order. This letter was received by the plaintiff on the 19th of October, and on that day he shipped a portion of the goods. In an action for the price of the goods shipped,

Held, that, even if the plaintiff's contention as to the date were upheld, yet the defendant was not bound to accept a portion of the goods, and that the letter of the 16th of October did not excuse a complete performance. *McPhail* v. *Clements*, 1 M.R. 165.

6. Estoppel—*Sale of chattel—Work and labor.*

Plaintiff agreed with defendant as follows: "I will put you up building with frame for tent 75 by 24, according to plan, for the sum of $500; starting at once and completing as soon as possible." After completion the plaintiff tore down the building and carried it away without the defendant's knowledge. In an action for the contract price the jury was told that it was the plaintiff's duty to notify the defendant of the completion, and tender it to him.

Held, 1. That, if the contract was for the sale of a chattel, the charge was right; but, if for work and labor, that it was wrong.

2. That, although the circumstances might tend to support the view that the contract was for work and labor, yet that the plaintiff having, without the defendant's sanction, pulled down and carried away the building, he could not be heard to say that it was not a sale of a chattel, the property in which had not passed to the defendant. *Ross* v. *Doyle*, 4 M.R. 434.

See BAILMENT, 6.
— BANKS AND BANKING, 5, 7.
— BILLS OF SALE, 2.
— CHATTEL MORTGAGE, II, 2.
— CONDITIONAL SALE, 6.
— CONTRACT, I, 2; XII, 1, 2, 3; XIV, 1, 2.
— COUNTY COURT, II, 4.
— FI. FA. GOODS, 4.
— HAY.
— LIMITATION OF ACTIONS, 1.
— PRINCIPAL AND AGENT, I, 1, 3, 6; V, 5.
— WARRANTY, 2, 4.

SALE OF GOODS UNDER FI. FA.

See SHERIFF, 3.

SALE OF LAND.

See AGREEMENT FOR SALE OF LAND, 2.
— EVIDENCE, 9.
— MISREPRESENTATION, V, 2.
— MUNICIPALITY, I, 3.
— PLEADING, IX, 2.
— RATIFICATION.
— REFEREE IN CHAMBERS, 2.
— REGISTERED JUDGMENT, 3.
— STATUTE OF FRAUDS, 8.
— TAXATION, 4.
— VENDOR AND PURCHASER.

SALE OF LANDS FOR TAXES.

I. ADVERTISEMENT OF THE SALE.

1. Injunction.

Lands were advertised for sale for taxes in two numbers of the Gazette, but those numbers although dated upon certain days did not in fact issue until later dates—dates too late to comply with the statute. Upon a motion for an injunction to stay the sale,

Held, 1. That the statute was not sufficiently complied with, but

2. That insufficient advertising would not, under the present statutes, render the sale void, and that therefore no injunction to stay it should be granted. *Wood* v. *Birtle*, 4 M.R. 415.

2. Parcels advertised as "Patented"—*Warranty—Assessment Act, R.S.M.* 1902, c. 117, *ss.* 162, 166, 168, 229.

When the secretary-treasurer of a municipality, acting under section 162 of The Assessment Act, R.S.M. 1902, c. 117, advertises lands to be sold for arrears of taxes as "Patented," although in fact they are unpatented, and the purchaser, relying on that statement, buys without making any investigation of the title, he is entitled to recover from the municipality as damages for a breach of warranty the amount he paid for the lands, also all sums paid for subsequent taxes on them with interest.

Such statement should be held to be a positive statement of fact made with the intention that it could be relied upon, and not merely an expression of opinion and, being untrue, amounts to a misrepresentation excluding the operation of the rule of *caveat emptor*.

McSorley v. *St. John*, (1882) 6 S.C.R. 544; *De Lassalle* v. *Guildford*, [1901] 2 K.B. 215; *Chapman* v. *Brooklyn*, (1869) 40 N.Y. 379, and *Pearson* v. *Dublin*, [1907] A.C. 351, followed.

Austin v. *Simcoe*, (1862) 22 U.C.R. 73, and *McLellan* v. *Assiniboia*, (1888) 5 M.R. 265, distinguished on the ground of differences in statutory enactments.

Held, also, (1) That section 166 of the Act does not prevent the plaintiff in such a case from recovering back his money.

(2) That, notwithstanding section 229 of the Act, the Court could add the subsequent taxes paid by the plaintiff to the amount paid by him for the land in the first place, and treat the whole as damages suffered by reason of the breach of warranty.

(3) That the defendant municipality should be allowed one month within which to redeem the lands under section 168 of the Act, as having been sold through error, and that, in case of redemption within that time, the judgment should be for costs only. *Alloway* v. *Morris*, 18 M.R. 363.

II. Crown Lands.

1. Sale of, for taxes before Patent issued — *Subsequent issue of Patent to assignee of original purchaser from the Crown.*

B. agreed to purchase Dominion lands, and paid a large proportion of the purchase money; by divers assignments B's interest became vested in defendant. The land was subsequently bought by plaintiff at a tax sale; he obtained a deed therefor, and after payment to the Crown of the balance of the purchase money obtained a patent for the land.

Plaintiff filed his bill praying for a declaration that defendant held the legal estate in the land as trustee for the plaintiff.

Held, on demurrer, that the plaintiff could not ask that the defendant be ordered to convey the legal estate to him, until he had paid, or tendered to the defendant, the amount that he paid to acquire the legal estate. The Municipality was empowered, on the tax sale, to convey only such interest in the lands as the Crown might have given or parted with, or might be willing to recognise or admit. The Crown was free to recognise such right as the plaintiff acquired under the tax deed or to disregard it and recognize the defendant as the person entitled to the patent. Having done the latter, the fact that thereby the defendant was enabled to hold the land free from the taxes which had been imposed, and from the consequences of the non-payment of these, was no ground for the Court interfering. *Ruddell* v. *Georgeson*, 9 M.R. 43.

2. Taxation of, before issue of patent—*Sale of same for taxes—Estate or interest held by purchaser of lands from Crown before full payment.*

B., in 1881, agreed to purchase Dominion lands and paid a great part of the purchase money. By successive transfers, the defendant acquired B.'s interest in the lands, and in 1891 he paid the balance of the purchase money to the Dominion Government and received a patent for the lands. Meantime the lands were, in 1887, sold by the Municipality for several years arrears of taxes to the plaintiff, who, in 1889, obtained a tax deed for the same.

He then, in this suit, sought to obtain a decree declaring that the defendant held the lands as trustee for him, and, offering to pay the defendant the amount he had paid the Crown to complete the original purchase, asked to have the defendant ordered to convey the lands to him.

Held, that the lands in question were not liable to be assessed and sold for taxes until the issue of the patent, or at least until the Crown had received full payment for the same.

Held, also, that, by the contract in question, B. acquired no interest or estate in the lands which could be made subject to assessment and taxation by the Provincial Legislature, or in any way enforced against the Crown.

Whelan v. *Ryan*, 20 S.C.R. 65, and *Cornwallis* v. *C.P.R.*, 19 S.C.R. 702, considered. *Ruddell* v. *Georgeson*, 9 M.R. 407.

III. Injunction.

1. Appeal to Court of Revision.

An injunction may be granted to restrain a tax sale. The limits of such jurisdiction discussed.

It is not necessary that exemption from taxation should be raised before the Court of Revision, and the party wrongly assessed is not estopped by not taking that step. *C.P.R.* v. *Calgary*, 5 M.R. 37.

2. Against conveyance after tax sale—*Offer to refund tax purchaser his money—Application to Municipality to cancel sale—Demurrer for want of equity—Assessment.*

The plaintiff's bill alleged that the defendant, the City of Winnipeg, had sold the plaintiff's land to the defendant Alloway for arrears of taxes, but that the assessments had been defective and did not properly or sufficiently describe the plaintiff's land, and that the description given in the assessment notices included other property not claimed by the plaintiff and did not include all of her property sold; also that, in consequence, there were no taxes legally in arrear and unpaid at the time of the sale, and that such sale was a wholly void proceeding; and an injunction was claimed to prevent the

City of Winnipeg from carrying out the sale by giving a conveyance of the land to the purchaser.

Held, on demurrer *ore tenus* for want of equity,

1. That, although the bill alleged that there were no taxes in arrear and that the sale was a wholly void proceeding, the plaintiff might still be entitled to relief by injunction because the issue of a deed would, under the statute 55 Vic., c. 26, s. 6, be evidence that there were taxes in arrear, and the plaintiff might, therefore, be prejudiced thereby. *Archibald* v. *Youville*, 7 M.R. 473, distinguished.

2. That it was not necessary that the bill should contain an offer to pay the purchaser the amount paid by him at the sale, and subsequently for taxes and otherwise, notwithstanding s. 186 of the Assessment Act, R.S.M., c. 101, because that section does not apply where there are no legal arrears of taxes as the bill in this case alleged.

3. That the plaintiff ought to have applied to the City Council to cancel the sale before the filing of the bill, to give the City an opportunity of considering whether or not it would do so; but that this objection should not now prevail after the City had put in an answer which set up the validity of the sale.

4. That, although the plaintiff might have a remedy at law by redeeming the land and then suing the City to recover back the money, yet such a remedy would not be adequate under the circumstances, and the plaintiff was entitled to have the merits of the application for an injunction considered.

The plaintiff and the former owner had received notices of the assessment from year to year and had never appealed therefrom, and although these notices in some respects described her land inaccurately, it was admitted that the description of the land in the advertisement of the sale was correct. At the trial a good deal of evidence was given for the purpose of showing that the north and south boundaries of the property in question, as described, were entirely different from the boundaries as laid out on the ground and occupied by the buildings, but the Judge found as a fact that the only proved discrepancy in the boundaries was on the eastern side of the property, where a slight error, not exceeding three feet, had been made, which, however, was unimportant otherwise.

Held, that, as the owners had never objected to the assessments, and a conveyance of the land by the plaintiff, by the description in the assessment rolls, would have been effectual to transfer all of her land in question excepting a little on the eastern side, the assessment was equally effectual to charge all the land which the Court could see was clearly included in the description, and an injunction should not be granted, but the plaintiff should be left to any remedy she might have at law.

The statement in *Blackwell on Tax Titles*, ss. 518 and 519, "When part of the land sold is liable to sale and the residue is not, the sale is void *in toto*."

Held, not to apply to a case like the present.

Hayden v. *Foster*, 13 Pick. 492, and *Moulton* v. *Blaisdell*, 24 Me. 283, distinguished. *Schultz* v. *Alloway*, 10 M.R. 221.

3. Sale rescinded—*Costs—Injunction to restrain issue of deed.*

Bill filed to set aside a tax sale and to restrain the mayor and secretary-treasurer of the town of Portage la Prairie from issuing a tax sale deed. The objection taken to the sale was that no by-law had been passed authorizing the same.

Prior to the return of the motion for injunction, the sale was rescinded by the council.

Held, that, as the plaintiff's own bill showed that no by-law had been passed, the issue of a deed could not prejudice the plaintiff's right to set aside the sale, even after a deed had been issued (see *Ryan* v. *Whelan*, 6 M.R. 565); therefore the plaintiff was not justified in applying to restrain the mayor and treasurer from issuing the deed.

Held, also, that the mayor and treasurer were entitled to the costs of the motion. *James* v. *Bell*, 11 C.L.T. Occ. N. 57.

IV. Irregularities.

1. Assessment—*Non-resident lands.*

On a bill to set aside a sale for taxes,

Held, 1. That, when, at a public meeting, the ratepayers had determined to raise $300 for the erection of a schoolhouse, the trustees had no power to increase the amount.

2. That there is no power to assess unoccupied or non-resident lands under 36 Vic., c. 22.

3. That the absence of a warrant from a justice of the peace to the secretary-treasurer, and of a return by the latter to the trustees, are each fatal to the validity of the sale.

4. That the fact that the *Gazette* was not published in three consecutive weeks prior to the sale, was no sufficient excuse for non-compliance with the statute.

5. That the requirements of statutes working forfeitures are to receive a strict construction. *Gemmel* v. *Sinclair*, 1 M.R. 85.

2. Demurrer for want of equity.

In a bill to avoid a sale for taxes, plaintiff alleged as objections to the sale:

That the lands were never assessed according to law.

That the assessment rolls were never returned according to law, or with the certificate or oath required by law.

That no taxes were levied by the council for either 1880 or 1881.

That in the alleged assessment rolls for the years 1880 and 1881, the alleged assessment and the levy alleged and claimed to have been made were of, and were assumed to be made upon, the north half of the section as one parcel.

That the half section was advertized as one parcel.

That at the sale the land was offered for competition in two parcels of a quarter section each.

That the lands were not advertized in the manner and for the length of time required by law.

On a demurrer for want of equity,

Held, that the allegations contained in the bill were sufficient in form, and if proved, alleged grounds for setting aside the sale.

Held, that where land was assessed as one parcel, a treasurer when selling has no right to offer it in two or more parcels. *Reed* v. *Smith*, 1 M.R. 341.

3. Method of sale—*Sale for nominal price — Illegal addition to amount — Name of corporation—Adoption of seal—Onus of proving invalidity — Bill attacking void transaction — Liability of lands to sale—Furnishing lists to clerks.*

Lands were by virtue of the local statutes liable in 1885 to be sold for taxes.

Furnishing to the municipal clerks lists of lands in arrear under section 272 of the Act of 1883, and section 289 of the Act of 1884, is not a condition precedent to the sale of land for taxes.

Per DUBUC, J. Any such objection would be cured by the Act of 1886, s. 673, as amended by the Act of 1887, s. 52.

Under the Act of 1884 the treasurer in selling lots, not divided into legal sub-divisions, should determine whether, having regard to the interests of both owner and municipality, he will offer the whole parcel of land or some definite part. Having so determined, he should sell for the highest price obtainable. He is not, however, "bound to enquire into or form any opinion on the value of the land." And not having done so forms no reason for avoiding the sale.

Land worth $700 was sold for taxes for the sum of $17. The evidence showed, however, that there was great difficulty in selling lands at all.

Held, that these facts did not shew that the sale was not conducted in a fair, open and proper manner.

The amount for which lands were sold for taxes was illegally increased by the addition of interest.

Held, not to invalidate the sale.

The use of a seal as the corporate seal with the knowledge and tacit consent of the governing body is a sufficient adoption of it.

Per DUBUC, J. A misnomer or variation from the precise name of the corporation in a grant or obligation by, or to, it, is not material, if the identity of the corporation is unmistakeable either from the face of the instrument or from the averments and proof.

Per KILLAM, J. 1. In a suit attacking a tax sale deed the *onus* of proving its invalidity is upon the plaintiff.

2. The Municipality of Kildonan was not dissolved by the Municipal Act of 1886.

3. A bill to set aside a tax sale deed alleged that the official who conducted the sale had no authority to do so; and that the deed was not executed by the officers or under the seal of the proper municipal corporation.

Quære, whether, it thus appearing that the deed was wholly void, a bill would lie to have it so declared. *McRae* v. *Corbett*, 6 M.R. 426.

V. MORTGAGOR AND MORTGAGEE.

1. Application for payment of overplus by mortgagee.

Land was sold for taxes and realized more than the amount due upon it,

Upon an application by a mortgagee of the land for payment to him of the overplus,

Held, that notice of the application must be given to the mortgagor. *Re Anon*, 3 M.R. 687.

2. Purchase at tax sale by wife of mortgagor—*Assignment of tax sale certificate—Purchaser for value without notice—Pleading—Joinder of causes of action—Onus probandi—Assessment Act, R.S.M., c.* 101, *s.* 186.

The plaintiff's claim was for foreclosure of a mortgage made by the defendant O. G. Rutledge and possession of the land. His wife, who had before the making of the mortgage purchased the land at a sale by the municipality for arrears of taxes, and one Lawlor who, having purchased the tax sale certificate from one McCubbin, to whom it had been assigned by Mrs. Rutledge, had afterwards obtained a deed from the municipality for the land, were made parties defendant in the action. The statement of claim made a number of allegations with a view to showing that the purchase at the tax sale was invalid as against the plaintiff or generally, and claimed that the tax deed to Lawlor was void, but did not formally ask to have it set aside, though it concluded with the general prayer for further relief.

The following points were decided :—

1. An objection by Lawlor to the statement of claim for multifariousness on the ground that a separate action should be brought to set aside the tax deed to him could not succeed ; *Cox* v. *Barker*, 3 Ch. D. 359 ; *Child* v. *Stenning*, 5 Ch. D. 695. The objection should have been to the joinder of other causes of action to an action for possession of land, without leave as required by Rule 251 of The Queen's Bench Act, 1895, if in fact no such leave had been given.

2. The plaintiff was entitled to meet the defendant Lawlor's allegation of a title paramount under the tax deed and its statutory effect as evidence by showing omissions or informalities which would invalidate the proceedings, and to have an adjudication upon the question of title without any specific prayer for relief against the deed.

3. When the tax sale took place, the wife of the mortgagor was as free as any stranger to acquire for her own benefit any title to or interest in the land paramount to that of the mortgagee, either by using money of her own, if she had any, or by inducing a third party to advance it on her separate account, provided the transaction was not merely colorable and really carried out on behalf of the mortgagor.

4. There was not sufficient evidence of any trust as between the defendant Lawlor and the Rutledges, and for all that appeared in the evidence there was an actual sale of the tax sale certificate and the rights conferred by it to Lawlor for valuable consideration, and the *onus* was not thrown upon him to prove that Mrs. Rutledge acted on her own account and not as agent for her husband in making the tax purchase.

5. Although Mrs. Rutledge by her conduct after she had purchased, in concealing the fact from the mortgagee at a time when in the opinion of the Court she ought to have disclosed it, had disentitled herself to proceed with her purchase and acquire a valid title as against the mortgagee ; yet it did not follow that a person purchasing her apparent rights under the tax sale certificate for value, and without notice or knowledge of her special incapacity, might not have acquired a title under a tax deed which would have cut out the plaintiff's mortgage.

6. To entitle Lawlor to claim protection as a purchaser for value without notice of Mrs. Rutledge's fraudulent conduct he should have pleaded this as a defence and given evidence of it, although the plaintiff had not in his pleading alleged notice to Lawlor of the concealment by Mrs. Rutledge.

McAlliste v. *Forsyth*, (1885) 12 S.C.R. 1 ; *Attorney General* v. *Wilkins*, (1853) 17 Beav. 285, followed.

7. As Lawlor had neither pleaded nor proved such want of knowledge or notice, the plaintiff was entitled to judgment without being called upon to prove any notice to Lawlor, the Court not having been asked for relief on the ground that such defence had been omitted through any error or slip and that it could be successfully raised, and there being nothing to suggest that the defendant had been taken by surprise or misled in any way.

8. The case did not come within section 186 of The Assessment Act, and Lawlor was not entitled to any lien on the land for the taxes paid as against the plaintiff's mortgage.

Judgment for foreclosure in the usual form with a declaration that any title to the lands in question which Lawlor took or held under the tax sale deed was held by him subject to the plaintiff's mortgage. *Day* v. *Rutledge*, 12 M.R. 299.

Affirmed, 29 S.C.R. 441.

VI. Statutes Confirming.

1. Certificate vesting land in municipality — *Assessment Act, R.S.M., 1892, c. 101, ss. 166, 188, 191—55 Vic., c. 26, s. 7—Statutory effect of vesting certificate as evidence of regularity of tax sale proceedings — Estoppel — Assessment of land.*

1. Although, by section 166 of The Assessment Act, R.S.M., 1892, c. 101, vesting certificates issued by a municipality in its own favor, upon sales of land for taxes bought in for the municipality, are to have the same effect in all respects as deeds of sale of land for taxes, and by section 191 of the same chapter, as re-enacted by 55 Vic., c. 26, s. 7, a tax deed is made conclusive evidence of the validity of the assessment of the land, the levy of the rate, the sale and all the other proceedings leading up to the execution of the deed, yet it does not follow that such vesting certificate should have the same effect as evidence as tax deeds would have, and the mere production and proof of the vesting certificate does not shift the *onus*, from the municipality claiming title under it, of furnishing proof of the validity of the tax sale.

Alloway v. *Campbell*, (1891) 7 M.R. 506, and *Ryan* v. *Whelan*, (1891) 20 S.C.R. 65, followed.

2. The provisions of sections 6 and 7 of 55 Vic., c. 26, as to the evidential value of a tax sale deed, do not apply to vesting certificates, and leave it open to the former owner to show, if he can, that there was no legal assessment or levy for the years in respect of which the land was sold for taxes.

3. A municipality is estopped from questioning the regularity of its own proceedings relating to a tax sale, or of the assessment upon which the same were founded, as against a purchaser in good faith who has paid the purchase money and obtained a deed under the corporate seal of the municipality.

Re Laplante and Peterborough, (1884) 5 O.R. 634, followed.

4. The assessment of the land in question for the year 1891 was null and void because, (a) the assessor had not signed the assessment roll as required by 53 Vic., c. 45, s. 42, although he had signed the certificate appended to the roll as required by section 43 of the same chapter, and (b) the land was only described as the "N.W. quarter 27," without any mention of the township or range. *Alloway* v. *Rural Mun. of St. Andrews*, 16 M.R. 255.

2. Irregularities.

Land was sold in 1882 for the taxes of 1880 and 1881. No by-law levying a rate was passed in either year after the revision of the assessment roll. The statute then in force authorized a sale when two years arrears were due. Upon the deed in pursuance of such sale being attacked,

Held, 1. (Overruling Taylor, C. J.). That the sale and deed were invalid.

2. That the Act 47 Vic., c. 11, s. 340, providing that "all lands heretofore sold for school, municipal and other taxes, for which deeds have been given to purchasers, shall become absolutely vested in such purchasers . . . . . unless the validity thereof has been questioned . . . . . before the 1st day of January, 1885," and the Act 49 Vic., c. 52, s. 673, as amended by 50 Vic., c. 10, s. 52, only applied where there were two years arrears legally due.

Per Bain, J. The Act 51 Vic., c. 101, s. 58, which provides that "all assessments heretofore made and rates heretofore struck by the municipalities are hereby confirmed and declared valid and binding upon all persons and corporations affected thereby," only extends to remedying and supplying irregularities and defects in assessments and rates that were actually made and struck in substantial conformity with the directions of the statutes.

Per Killam, J. That Act, having been passed after the execution of the deed, could not operate to pass to the purchaser a title which previously he had not obtained. *Ryan* v. *Whelan*, 6 M.R. 565.

Affirmed, 20 S.C R. 65.

3. Void proceedings—*Deed not in duplicate—Seal of corporation—Repealed statute—Assessment Act, R.S.M., c. 101,*

ss. 190 *and* 191—*Description of land in assessment roll.*

At the trial of an issue under The Real Property Act, the plaintiff claimed the land in question under a tax sale deed from the Rural Municipality of St. Francois Xavier. The defendants were the owners of the land at the time of the tax sale.

No evidence was given to show that the tax sale deed had been made and executed in duplicate as required by section 187 of The Assessment Act, R.S.M., c. 101.

Held, that this was no objection to the validity of the sale.

The old seal of the municipality had been used for the deed, whilst the name of the municipality had been changed by the statutory addition of the word "Rural." The municipality had, however, adopted and used the old seal.

Held, following *McRae* v. *Corbett*, 6 M.R. 426, that this objection was not fatal to the deed.

Held, however, that the tax sale in question was void on the following grounds :—

1. The warrant given by the reeve, authorizing the treasurer to hold the tax sale, was dated 18th August, 1891, and professed to be given under the Municipal Act of 1886, which had been repealed by the Municipal Act of 1890, which came into force before the date of the warrant, and such warrant conferred no authority upon the treasurer to sell the land in question.

2. The land in question, consisting of the inner and outer two miles of Lot No. 59 as described in the deed and the advertisement of the sale, was described simply as "Lot 59" on the assessment roll, and as this is not sufficiently certain, being understood by some to include only the inner two miles of the lot, it does not comply with the requirement of The Assessment Act, that every piece or parcel of land be entered "by a true and accurate description" in the roll.

And that these defects or irregularities are not cured by ss. 190 and 191 of The Assessment Act, R.S.M., c. 101, as amended by 55 Vic., c. 26, ss. 6 and 7, which, on the authority of *O'Brien* v. *Cogswell*, 17 S.C.R. 420 ; *Archibald* v. *Yowille*, 7 M.R. 473, and *Alloway* v. *Campbell*, 7 M.R. 506, cannot be held to extend to cover irregularities and defects connected with the assessment, the imposition of the rate, and other steps required to be taken before the land could be sold for taxes. *Nanton* v. *Villeneuve*, 10 M.R. 213.

4. Void proceedings — *Assessment Act, R.S.M., c.* 101, *ss.* 148, 190, 191 — 51 *Vic., c.* 36, *ss.* 6 *and* 7.

Issue under The Real Property Act between plaintiff, claiming under a tax sale deed, and defendant, the owner subject to the tax sale.

Held, that the tax sale should be set aside on the following grounds :—

(1) No resolution of the council of the municipality was passed as required by The Assessment Act, R.S.M., c. 101, s. 148, directing the treasurer to prepare a list of lands liable to be sold for taxes prior to the preparation of same, or until after the reeve had signed the warrant to the treasurer to proceed with the sale.

(2) Only one of the two lists of lands for sale was authenticated by the signature of the reeve and the seal of the municipality, whereas section 148 of the Act requires that both lists should be so authenticated.

(3) There was no resolution of the council directing the treasurer in what newspaper the advertisement of the sale should be published, as the statute requires when there is no newspaper published in the municipality, as in this case.

(4) At the sale, the land was bought for the municipality, but no resolution was passed by the council prior to the sale authorizing the reeve or any other member of the council to attend and bid.

Held, also, that the effect of sections 190 and 191 of the Act, as amended by 55 Vic., c. 26, ss. 6 and 7, is to remedy only irregularities and not absolute nullities, and not to validate sales made on the basis of absolutely void proceedings as in this case.

O'Brien v. *Cogswell*, (1889) 17 S.C.R. 420, and *Nanton* v. *Villeneuve*, (1894) 10 M.R. 213, followed. *Tetrault* v. *Vaughan*, 12 M.R. 457.

VII. Surplus from Sale.

1. Forfeiture of surplus purchase money remaining in the hands of the treasurer for six years—*From what time the six years begin to run—R.S.M.* 1892, *c.* 101, *s.* 193.

Where lands have been sold for taxes under the Assessment Act, and the price amounts to more than the taxes due,

and the purchaser at the end of two years from the day of sale pays the surplus purchase money to the Treasurer of the Municipality, the same cannot be claimed by the Municipality as forfeited until after the lapse of six years from the receipt thereof by the Treasurer, although the language of section 193 of the Act is ambiguous and speaks of the money remaining in the hands of the Treasurer for six years from the day of sale of the land of which it formed part of the purchase money. *Re Carey and Lot* 65, *Sub-Division of Lot* 39 *E., St. John*, 9 M.R. 483.

2. Mortgagor and mortgagee—*Purchase by mortgagee—Right to overplus.*

Where a mortgagee purchases the mortgaged lands at a tax sale and receives a tax deed therefor, he is entitled to the surplus moneys realized by the municipality from such sale in excess of the taxes and costs. *Re Grant*, 7 M.R. 468.

3. Order for payment of overplus.

District registrars or County Court Judges have jurisdiction, under section 158 of the Assessment Act, to make orders for payment over to the owners by Municipalities of the overplus resulting from tax sales, only in cases where the land has been sold under the provisions of the Assessment Act.

The overplus from prior tax sales must be dealt with under the provisions of sections 675 and 676 of the Municipal Act, 1886. *Re John Henderson*, 7 M.R. 481.

VIII. Tax Sale Deed.

1. Action for not executing.

A statute authorizing the sale of lands for taxes, provided that the deeds "shall be executed by the reeve and treasurer, and under the seals of the said municipalities respectively." In an action for refusal to execute a deed to a purchaser, the declaration alleged a demand upon the municipality.

Held, that the action would not lie, for the deed ought to be executed by the reeve and treasurer, and not by the municipality.

Every count in a declaration must contain in itself a complete cause of action. And where several counts showed a cause of action in A., and at the foot of the declaration an assignment was alleged to the plaintiff of "all of the aforesaid causes of action," etc.

Held, that those words formed no part of the counts and could not be looked at upon demurrer to some of them. *McLellan* v. *Mun. of Assiniboia*, 5 M.R. 127.

2. Action for not executing.

A statute authorizing the sale of land for taxes, provided that the deeds "shall be executed by the reeve and treasurer and under the seals of the municipalities respectively." In an action against a municipality for refusal to execute a deed,

Held, (Killam, J., diss. and affirming Dubuc, J.) That the action would not lie, for the deed ought to be executed by the reeve and treasurer, and that not as agents of the municipality. *McLellan* v. *Mun. of Assiniboia*, 5 M.R. 265.

Distinguished: *Alloway* v. *Morris*, 18 M.R. 364.

3. Effect of—*Onus of proof.*

In an issue under the Real Property Act as to the ownership of certain lands, the plaintiff claimed title under a tax sale deed from the Mayor and Treasurer of the City of Winnipeg.

Held, that the *onus* was on the plaintiff to prove the assessment, the imposition of the rate, and the taking of every step which it was by statute necessary to take, for imposing the tax and making it a binding charge on the land.

Doe Dem. Bell v. *Beaumore*, 3 O.S. 243; *McKay* v. *Crysler*, 3 S.C.R. 436; and *O'Brien* v. *Cogswell*, 17 S.C.R. 420, considered and commented on. *Alloway* v. *Campbell*, 7 M.R. 506.

IX. Void Proceedings.

1. Defective assessment — *By-law to levy rate ambiguous—Court of Revision—Sale of two parcels may be good for one, although bad for the other parcel.*

This was a suit in Equity to have a tax sale deed of the west half of section 22-7-8 W. declared void, and set aside as a cloud on plaintiff's title. The north-west quarter was only granted by the Crown on the 29th October, 1888, but it and the other quarter were sold together in 1890 for arrears of taxes for 1888 and 1889.

Held, that the sale of the north-west quarter was void, because the land was not subject to be taxed in the year 1888, but that, following *Schultz* v. *Alloway*, 10 M.R. 221, the tax sale in question

might have been good as to the south-west quarter, but for the other objections.

Held, however, that the sale was void on the following grounds :—

1. That there was no record in the proceedings of the Municipal Council of any report to the Council by the Court of Revision as required by section 586 of the Municipal Act then in force. The minutes showed that the Council had resolved itself into a Court of Revision, that the Court of Revision had dealt with the appeals brought before it, and that a motion had been carried "that the Court of Revision do now adjourn," followed immediately by a motion "that the Council now take up the general business," but there was no mention of any report to Council by the Court.

2. That the rate by-law passed by the Council for the levying of taxes in 1888 was ambiguous, providing merely, "that a rate of six mills be struck for general purposes," and other rates of so many mills and fractions of a mill for other purposes, not saying whether these mills were to be levied on each section or quarter section or upon each inhabitant or upon every dollar in value of property ; and, although by section 603 of the said Act taxes were required to be levied equally on all taxable property in the proportion of its value as determined by the assessment roll in force, yet, following the principle laid down in the case of *O'Brien* v. *Cogswell*, 17 S.C.R. 420, it could not be assumed that the rate was intended to be struck upon every dollar of value, as enactments imposing and regulating the collection of taxes are to be construed strictly and, in all cases of ambiguity which may arise, that construction is to be adopted which is most favorable to the subject. *Colquhoun* v. *Driscoll*, 10 M.R. 254.

2. Illegal sale not a cloud on title— *Bill to set aside—Demurrer allowed—Proceedings illegal—Deed null and void.*

Bill to set aside a sale of lands for taxes. The plaintiffs alleged they bought the lands in 1888 and received a certificate from the treasurer of the defendants that there were then no taxes in arrears. In 1890 the defendants sold the lands for taxes claimed to be due in 1883 and the following years.

The bill prayed that the sale might be declared null and void, and the defendants restrained from conveying lands to the purchaser.

The defendants demurred on the ground that, the sale having once been made, they had nothing further to do with the matter, and that if, as the bill alleged, the sale was wholly null and void, the Court would not interfere.

Held, that, upon the facts set out in the bill, the sale of the lands by the defendants was illegal, and a deed in pursuance of the sale, were one issued, would be null and void. If such a deed were executed, but not registered, the Court would not, under ordinary circumstances, interfere to set it aside. Even if it were registered it might be questionable if the Court would interfere.

The plaintiffs alleged in their bill that the lands were not in fact assessed at all, and that no by-law appointing an assessor or striking a rate of taxation was passed by the defendants in either or any of the years for which taxes were charged.

Held, that the proceedings were not valid on their face, and so the illegal sale could not be considered to be a cloud upon the title, in the sense in which the term is used in the authorities. *Archibald* v. *Municipality of Yonville*, 10 C.L.T. Occ. N. 388.

See next case.

3. Injunction to restrain issue of tax deed.

A municipality assumed to sell certain lands for taxes, although no tax had ever been assessed and levied upon them, and none was in arrear. The lands were also exempt by statute.

On a bill filed by the owner to set aside the sale, and for an injunction restraining the issue of a tax deed,

Held, 1. That, as the proceedings were void upon their face, the Court would not grant an injunction, or make a decree declaring the sale void.

2. At all events, before he may resort to the extraordinary remedy of injunction, the owner must make an application to the Municipal Council to rescind the sale, under the provisions of 52 Vic., c. 27, s. 39, (M. 1888).

Under our Acts, a tax sale deed is conclusive evidence of the validity of the sale, and of all the prior proceedings in and about the sale, but it is not even *prima facie* evidence of the assessment

or of the imposition of the rate. *Archibald* v. *Yowille*, 7 M.R. 473.

Distinguished, *Schultz* v. *Alloway*, 10 M.R. 221.

See previous case.

X. Miscellaneous Cases.

1. Assignment of tax certificate by municipality.

The lands in question were sold for arrears of taxes by the Municipality of St. Laurent.

At the tax sale the Municipality became the purchaser under the provisions of section 656 of The Municipal Act, 1886. It subsequently assigned the tax certificate to N., to whom a tax deed was issued.

N. conveyed to A., who applied for a certificate of title under The Real Property Act, 1889, and contended that he was entitled to receive from the District Registrar (under section 57, Real Property Act) notices to be served on all persons who, except for the tax deed, would be interested in said lands.

On a reference by the District Registrar,

Held, that the tax sale deed was valid and A. was entitled to receive said notices for service. *Re Allan*, 7 M.R. 28.

2. Canadian Pacific Railway Lands—*Construction of C.P.R. Contract—Voluntary payment.*

The Canadian Pacific Railway Company by its contract with the Crown was entitled to a grant of certain lands upon completion of certain portions of the railroad, and these lands were exempted from taxation for 20 years from the grant thereof from the Crown, unless sooner sold or occupied. This contract was ratified by statute. After the making of said contract, but before the patent for the lands had been issued, the defendant municipality, within which the lands in question lay, assumed to tax certain parcels of the said lands, and afterwards sold them for taxes. The Judge at the trial found that the Railway Company had performed its part of the contract, entitling it to a grant of said lands before the sale was held. Shortly before the time for redemption expired, the Railway Company paid the taxes to the municipality under protest to avoid tax deeds being issued, and afterwards brought an action to recover the money.

Held, 1. (Killam, J., dissenting.) That the plaintiff was entitled to recover.

2. (Killam, J., dubitante.) That the plaintiff had an interest in the lands prior to patent issuing.

3. (Killam, J., dissenting.) That, under the terms of the contract, the lands were exempt from taxation from the date of the contract until 20 years after the issue of the patent unless sooner sold or occupied.

4. (Killam, J., dissenting.) That the money was not paid voluntarily and might be recovered back.

Canadian Pacific Railway v. *Burnett*, 5 M.R. 395, followed and approved.

C.P.R. v. *Rural Mun. of Cornwallis*, 7 M.R. 1.

Affirmed, 19 S.C.R. 702.

Distinguished, *Water Commrs. of Windsor* v. *Can. Sou. Ry.*, 20 A.R. 388.

3. Conducting sale in a fair and open manner—*Place of sale.*

This was an issue under The Real Property Act to determine the validity of a sale of land for taxes due to the Municipality of Winchester. Section 154 of the Assessment Act provides that a sale for arrears of taxes shall take place at such place as the council shall by resolution or by-law appoint, or, in the absence of such appointment, at such public place in the assize town or city of the Judicial District wherein the municipality is situated as may be chosen by the treasurer.

The council did not appoint any place for the holding of the sale, and the treasurer appointed the sale to take place at a small hall in the municipality, and not at the assize town or city of the Judicial District, which is Brandon. Moreover the sale began at 11 o'clock in the morning, was continued for about an hour, and then the auctioneer, officials and audience all went away to dinner and were absent for about an hour, during which time no one was left in charge of the hall which was locked up, nor was any notice put up at the door with reference to the sale, and the land in question was sold after the sale was resumed in the afternoon, and for just the amount of the taxes.

Held, that under these circumstances it could not be considered that the sale had been conducted in a fair and open manner, and that under section 190 of the Assessment Act the tax sale should

be set aside and a verdict entered for defendants as mortgagees. *Scott* v. *Imperial Loan Co.*, 11 M.R. 190.

4. Costs—*Bill to set aside.*

Where a purchaser at a tax sale is not a party to any irregularity or impropriety, he will not be ordered to pay the costs of a *pro confesso* suit to set it aside, unless he has been afforded an opportunity of investigating the matter, and electing to abandon any claim without suit. *Blanchard* v. *Scanlan*, 3 M.R. 13.

5. Damages against municipality—*The Assessment Act, R.S.M., c. 101, s. 192—Right of action — Compensation.*

Where the owner of land, which has been sold for arrears of taxes when no taxes were due thereon, cannot recover it back by reason of its having been brought under the operation of The Real Property Act, his right of action against the municipality under section 192 of the Assessment Act, R.S.M., c. 101, for the loss or damage sustained by him on account of such sale, is not complete until the amount of the indemnity to be paid is first settled in the manner pointed out by that section, namely: either by agreement or arbitration; and, where the plaintiff, in his declaration claiming damages under that section for the wrongful sale of his lands by the defendant municipality for alleged arrears of taxes, showed that the lands had been brought under The Real Property Act by the tax purchaser, but did not show any agreement with defendants as to the amount of indemnity, nor that any arbitration had been held to ascertain such amount, a demurrer was allowed. *Clemons* v. *St. Andrews*, 11 M.R. 111.

6. Expropriation Act, R.S.M., c. 56—*Assessment Act, R.S.M., c. 101, s. 168.*

Under section 168 of The Assessment Act, R.S.M., c. 101, a tax purchaser bidding more for the land than the amount due for taxes and costs forfeits all claim to the land purchased and to the money paid at the time of sale, unless he pays the balance of his purchase money within two months after the expiration of the time allowed the owner for redemption; and it makes no difference if in the meantime the land is taken by the Provincial Government for a public work under the Expropriation Act, R.S.M., c. 56, and the value thereof paid into Court.

In such a case, notwithstanding the consent of the solicitor of the Public Works department,

Held, that the tax purchaser had no right or claim upon the money paid into court by the Government. *Re Dunn and The Expropriation Act*, 12 M.R. 78.

7. Half-breed lands — *Liability to taxation before patent — Municipal Acts.*

The children of half-breed heads of families residing in Manitoba at the time of the transfer of this Province to Canada, to whom lands were allotted in pursuance of the statutes in that behalf, have, after the allotment and before patent, a property or interest in the lands which it is competent for the Provincial Legislature to make liable to taxation.

These lands were made liable to be assessed and taxed by the Municipal Acts of 1883 and 1884, and a sale of such lands in November, 1887, for arrears of taxes for the years 1884 and 1885, (the proceedings being regular) is valid, although the patent was not issued until 1886. *Re Mathers*, 7 M.R. 434.

8. Purchase by Municipality—*Authority for reeve to bid at sale—Assessment Act, R.S.M. 1902, c. 117, s. 176.*

Under section 176 of The Assessment Act, R.S.M. 1902, c. 117, which provides that a municipality may bid for lands within its boundaries which are being sold for arrears of taxes and become the purchaser through the mayor or reeve, or any member of the council duly authorized by the council so *to bid*, it is not sufficient that the council should authorize the reeve to *attend* the tax sale on behalf of the municipality, and a purchase by the reeve without express authority to bid is invalid and ineffectual to pass title to the municipality or to a purchaser from it.

None of the curative clauses of the Act avail to support the claim of the purchaser in such a case. *Bannatyne* v. *Pritchard*, 16 M.R. 407.

9. Redemption of whole by owner of part—*Lien for redemption money.*

Where land has been sold for taxes in one parcel, different parts of which were owned by separate owners, an owner may not redeem his part without redeeming the whole unless the land was composed of more than one lot or parcel according to a registered plan as provided

for by section 668 of The Municipal Act, 1886.

The provision in sec. 638, for the payment of the proportionate amount of taxes chargeable upon any sub-division, only applies to the payment of taxes before sale.

F. and S. jointly owned certain land. This land they subsequently sub-divided, each taking one half, and the proper conveyances were made. The land was afterwards sold for taxes in one parcel. F. redeemed the whole.

Held, that F. was entitled to a lien on S.'s land for the proportion of the redemption money chargeable to that land.

Payne v. *Goodyear*, 26 U.C.R. 448, discussed and distinguished. *Fonseca* v. *Schultz*, 7 M.R. 458.

See C.P.R. Lands, 3.
— Foreign Corporations, 1.
— Real Property Act, II, 9; III, 6; V, 2.
— Real Property Limitation Act, 7, 8.
— Statutes, Construction of, 7.
— Taxation, 4.

SALE OF LIQUOR.

See Liquor License Act, 11.

SALE OF MORTGAGED RAILWAY PROPERTY.

See Mortgagor and Mortgagee, VI, 13.
— Railways, XI, 3.

SALE OF RIGHT TO CUT TIMBER.

See Contract, V, 4.

SALE OF SHARES.

See Contract, XIII, 1.

SALE UNDER MORTGAGE.

See Mortgagor and Mortgagee, V.

SATISFACTION OF JUDGMENT.

See Sheriff, 3.

SCANDALOUS MATTER.

In affidavits—*Disclosure by solicitor of confidential communications from client.*

Plaintiff's claim was for payment of $6,000 which she alleged defendant had received for her as the purchase money of certain real estate belonging to her which she had employed defendant to sell for her. She alleged that he had only paid over $500 of the money. Defendant, who was a solicitor of this Court, applied for an order for security for costs on the ground that the plaintiff was permanently resident out of Manitoba and, in support of the application, defendant filed his own affidavit in which he set forth certain communications alleged to have been made by the plaintiff to him as her solicitor and which, if true, showed that she was not legally married to her alleged husband, and stated in effect that plaintiff had returned to and was living with such alleged husband who was a non-resident. On plaintiff's application to have the affidavit taken off the files of the Court, it was argued on behalf of the defendant that the facts thus sworn to were relevant to the question whether plaintiff was permanently resident out of the jurisdiction or not, as tending to show that she was greatly under the influence of the alleged husband and therefore likely to remain permanently with him.

Held, allowing with costs an appeal from the Referee, that the affidavit should be ordered off the files as containing matter which plaintiff was entitled to have treated as privileged from disclosure, and which was scandalous and irrelevant to the application. *A.* v. *B.*, 14 M.R. 729.

SCHOOL DISTRICTS.

Award of arbitrators — *School house non-existent.*

After a division of the Donore school district, an award was made under section 14 of the Manitoba School Act, 1881, of the existing school houses, school sites and other school property and

assets within the territories re-adjusted. After the division, but previous to the sitting of the arbitrators, the school house of the district was destroyed by fire.

Held, that, as the school house was not in existence at the time of the arbitration, it was not proper for the arbitrators to charge the new district, within whose limits the building had been, with its value as an asset, and the matter was referred back to the same arbitrators to correct the mistake. *Re Donore and Wheatlands*, 1 M.R. 356.

See CORPORATION, 1.
— GARNISHMENT, V, 8.
— MANDAMUS, 6.

SCHOOL INSPECTOR.

See PUBLIC SCHOOLS ACT, 1.

SCHOOL TAXES.

See MUNICIPALITY, VIII, 6.
— PUBLIC SCHOOLS ACT, 2.

SCHOOL TRUSTEE—ELECTION OF.

See PUBLIC SCHOOLS ACT, 1.
— QUO WARRANTO, 3.
— RESIDENCE.

SCHOOLS.

See CONSTITUTIONAL LAW, 13, 14.
— PUBLIC SCHOOLS ACT.

SCIRE FACIAS.

Against Shareholder — *Exhausting remedies against Company.*

Sci. Fa. will lie against a shareholder by a creditor of the Company under 40 Vic., c. 43, s. 47 (D).

An objection to that form of proceeding is not open upon demurrer.

Persons who are shareholders when the *sci. fa.* proceedings are commenced are liable, although the execution against the Company may have been returned *nulla bona* before they acquired their shares.

Judgment was recovered in Manitoba against a corporation, incorporated under the Canada Joint Stock Companies' Act, 1877, having its head office in the Province of Quebec, and an execution was returned *nulla bona*.

Held, that *sci. fa.* might be brought against a shareholder in Manitoba, although the Company had assets in Quebec; and, although money sufficient to pay the plaintiff's claim had, with the assent of the plaintiff, been paid to a third person in Quebec, for the purpose of paying off the plaintiff, and that such third person was able and willing to pay the amount to the plaintiff; and although the Company had lands in Manitoba sufficient to answer the plaintiff's claim. *Crawford* v. *Morton*, *Crawford* v. *Duffield*, 7 C.L.T. Occ. N. 93.

SCRUTINEERS.

See LOCAL OPTION BY-LAW, II, 1.

SCRUTINY OF VOTES.

See ELECTION PETITION, X, 6.

SEAL.

See BOND.
— PLEADING, VI, 1.

SEAL OF CORPORATION.

See COMPANY, II, 2; III, 3, 4.
— CORPORATION.
— MASTER AND SERVANT, IV, 1, 2, 4.
— MUNICIPALITY, I, 4; II, 3.
— NEGLIGENCE, VII, 7.
— PLEADING, VI, 1; XI, 17.
— PRINCIPAL AND AGENT, III, 2.
— SALE OF LAND FOR TAXES, IV, 3; VI, 3.

SEARCH WARRANT.

See MALICIOUS PROSECUTION, 5.

SECOND ACTION FOR SAME CAUSE.

See STAYING PROCEEDINGS, II.

SECOND CAVEAT.

See REAL PROPERTY ACT, I, 9, 10.

SECOND TRIAL.

See CRIMINAL LAW, VI, 5.

SECRECY OF THE BALLOT.

See CRIMINAL LAW, XVII, 15.
— LOCAL OPTION BY-LAW, V, 2.
— MUNICIPAL ELECTIONS, 4.

SECURITY FOR COSTS.

I. ALLOWANCE OF.
II. OF APPEAL.
III. DEFENCE ON MERITS.
IV. FOREIGN COMPANY PLAINTIFF.
V. FURTHER SECURITY.
VI. LIBEL IN NEWSPAPER.
VII. NOMINAL PLAINTIFF.
VIII. OWNERSHIP OF PROPERTY WITHIN JURISDICTION.
IX. RESCINDING ORDER ON PLAINTIFF COMING TO RESIDE PERMANENTLY.
X. MISCELLANEOUS CASES.

I. ALLOWANCE OF.

1. Cross-examination of surety — *Justification by surety—Refusing to answer questions.*

Upon the examination as to his solvency, of a surety upon a bond for security for costs :

1. The surety cannot be compelled to produce his title deeds.

2. The examining party has no right to enquire as to all the property which the surety may own. The surety may say "I own a certain property and I claim that to be of sufficient value to qualify me to be a surety."

3. The surety will not be committed because he gives unsatisfactory answers, as that he cannot remember the description of his lands. This is not a refusal to answer. *Re Assiniboia Election*, 4 M.R. 346.

2. Extension of time after party barred—*Interpleader.*

An interpleader order directed that the plaintiffs should give security for costs to the satisfaction of the prothonotary on or before the 10th April, and that in default they should be barred from all claim to the goods.

On the day named the plaintiffs paid $200 into court, but did not obtain, upon notice to the claimant, an expression of the prothonotary's satisfaction with such security.

Held, 1. That the Referee had, after the expiration of the day named, jurisdiction to extend the time.

2. The withdrawal from possession by the sheriff after the day named constitutes no bar to an appeal by the plaintiffs from an order reversing the Referee's order extending the time. *Howe* v. *Martin*; *Dupas*, *Claimant*, 6 M.R. 477.

3. Form of bond — *Style of cause.*

On an application for the allowance of a bond for security for the costs of an appeal to the Supreme Court, the *onus* of satisfying the Court of the sufficiency of the security is upon the appellant.

Such a bond ought to be in favor of the respondent, and not of the Registrar of the Court. One surety may, under certain circumstances, be sufficient.

In an affidavit, one defendant was named "Hon. John C. Schultz." In all other proceedings it was "John Christian Schultz."

Held, that the affidavit could not be read.

Attorney-General v. *Fonseca*, 5 M.R. 300.

4. Sufficiency — *Onus as to — Power of Master on reference—Extension of time.*

An order was made directing security to be given, within a certain time, to the satisfaction of the Master.

Plaintiff brought in a bond with one surety who justified in $400 over his just debts, but said nothing about exemptions. The defendant filed an affidavit impeaching the surety's solvency. The Master disallowed the bond.

Held, 1. That the Master had acted properly.

2. That further time should not be given unless upon material sufficiently

explaining the delay, etc. *Osborne* v. *Inkster*, 4 M.R. 399.

II. Of Appeal.

1. To Court of Appeal—*Jurisdiction of Judge of the King's Bench to order—Order for security for costs already taxed and for which judgment entered.*

1. Neither a Judge of the King's Bench nor a Judge of the County Court has jurisdiction to order a non-resident plaintiff to give security to the defendant for the costs of an appeal to the Court of Appeal or to stay proceedings in the Court of Appeal after the action has got into that Court, but the Court of Appeal will itself in a proper case order security for the costs of the appeal on the application of the defendant.

Bentsen v. *Taylor*, [1892] 2 Q.B. 193, not followed.

2. When the plaintiff's action has been dismissed and the defendant has entered judgment for his taxed costs, no order will be made requiring the plaintiff prosecuting an appeal to give security for them, although he is a non-resident and the security he has already given under an order made by the court of first instance is insufficient to cover the taxed costs. *Kerfoot* v. *Yeo*, 19 M.R. 512.

2. To Supreme Court — *Retaining money in court paid in by successful party.*

A plaintiff who has obtained judgment in his favor, which has been affirmed on appeal to the Full Court, is entitled to have paid out to him the money he had paid into court as security for costs, notwithstanding an appeal by defendant to the Supreme Court of Canada.

Hamill v. *Lilley*, (1887) 56 L.T.N.S. 620, and *Marsh* v. *Webb*, (1892) 15 P.R. 64, followed.

The Agricultural Ins. Co. v. *Sargent*, (1895) 16 P.R. 397, distinguished. *Day* v. *Rutledge*, 12 M.R. 309.

III. Defence on Merits.

1. Where no defence on the merits.

Held, that a defendant has no right to security for costs, unless he has a defence on the merits. *Western Electric Light Co.* v. *McKenzie*, 2 M.R. 51.

2. No defence to action—*Proof of.*

Upon an application for security for costs the plaintiff cannot (other than in proof of defendant's admission) file affidavits in proof of his cause of action and oblige the defendant to show that he has some defence.

An action was brought upon a foreign judgment. Upon an application for security the plaintiff filed a certified copy or exemplification of the judgment. The existence of the judgment was admitted by the defendant and he did not allege payment of it.

Held, that as there might be some doubt upon the construction of the judgment as to whether it was of such a nature as to raise an implied promise to pay it, the defendant was not to be deprived of his right to security. *British Linen Co.* v. *McEwan*, 6 M.R. 29.

IV. Foreign Company Plaintiff.

1. Ownership of property in Province.

Held, 1. A company must be said to be resident at its head office.

2. If the head office of a plaintiff Company be out of the jurisdiction, *prima facie* the defendant is entitled to security.

3. The plaintiff Company, resident in England, was being wound up there under the statutes in force in England.

Held, that the defendant was entitled to security for costs, even although the Company had large assets in this Province.

4. A serious doubt as to there being an effective remedy if defendants obtain a judgment for their costs, warrants the making of an order for security.

5. Security ordered with stay of proceedings, although the plaintiff was upon the point of going to trial.

6. A winding up order is not of itself a stay of proceedings, and notice of trial given after such order will not on account of it be set aside. *North-West Timber Co.* v. *McMillan*, 3 M.R. 277.

2. Assets within Province — *Effect of license under Foreign Corporations Act—King's Bench Act, Rule 978—Practice.*

1. When a plaintiff company is described in the statement of claim as having its head office out of, and a branch office within, the jurisdiction, the defendant is *prima facie* entitled, under Rule 978 of The King's Bench Act, to a *præcipe* order for security for costs.

North-West Timber Co. v. *McMillan*, (1886) 3 M.R. 277, and *Ashland Co.* v. *Armstrong*, (1906) 11 O.L.R. 414, followed.

2. Such an order should not be set aside by reason of the Company having, within the jurisdiction, assets consisting only of some office furniture of small value and premiums of insurance from time to time paid into the branch office for transmission to the head office.

3. The obtaining of a license under the Foreign Corporations Act, R.S.M. 1902, c. 28, to carry on a company's business in the Province, has not the effect of making it a domestic corporation or giving it a local residence, so as to free it from the necessity of giving security for costs.

Ashland Co. v. *Armstrong*, *supra*, followed. *Canadian Railway Accident Co.* v. *Kelly*, 16 M.R. 608.

V. Further Security.

1. Application for—*What must be shown.*

Although an order for security for costs has been made and complied with, an order for further security can be granted upon a proper case being made.

On an application for further security defendants must show that they could not have foreseen that the cause was one in which security to a larger amount than that usually ordered would have been proper.

In this case the defendants failed to show that costs already incurred, and to which they were entitled, had exhausted the security already given.

Application refused.

Bell v. *Landon*, 9 P.R. 100, followed. *Charlebois* v. *Great North-West Central Ry. Co.*, 9 M.R. 60.

Distinguished : *Moore* v. *Scott*, 16 M.R. 428.

2. Application for — *Practice* — *King's Bench Act, Rule* 987.

Taking out a *præcipe* order for security of costs is not a bar to a subsequent application for an order for additional security where it could not be said that the defendant ought to have anticipated the necessity for further security when he first applied.

Standard Trading Co. v. *Seybold*, (1902) 5 O.L.R. 8, followed.

Charlebois v. *G.N.W. Central Ry. Co.*, (1893) 9 M.R. 60, distinguished. *Moore* v. *Scott*, 16 M.R. 428.

VI. Libel in Newspaper.

1. Action commenced before statute complied with—*Statutes.*

A statute provided that defendants in actions of libel might, under certain circumstances, obtain security for costs. Another clause provided that no person who had not complied with the provisions of this statute (as to registration, etc.,) should be entitled to the benefit of it.

Held, that compliance with the provisions of the statute after action brought did not entitle the defendant to the benefit of the Act. *Daly* v. *White*, 5 M.R. 55.

2. Dismissal of action—*Libel Act, R.S.M.*, 1902, c. 97, *s.* 10 — *King's Bench Act, Rules* 508, 978, 982.

1. Under section 10 of The Libel Act, R.S.M. 1902, c. 97, a corporation defendant may obtain an order for security for costs as well as an individual and Rule 508 of The King's Bench Act is applicable.

2. Rule 982 and following Rules of The King's Bench Act must be read along with section 10 of the Libel Act, so that a defendant sued for libel may obtain a second or other subsequent order for security under that section.

3. Rule 978 does not, however, apply in such a case, so that the order should not contain a provision for the dismissal of the action in case of non-compliance, but a substantive application for dismissal would have to be made after the lapse of the time limited. *Adcock* v. *Manitoba Free Press Co.*, 19 M.R. 160.

VII. Nominal Plaintiff.

1. Real plaintiff a third party.

This action was brought upon a cheque payable to bearer, which had been paid by defendant, but he had neglected to have it delivered up to him on payment, and the same came into other parties' hands.

After issue had been joined, a summons for security for costs was taken out, on the ground that the plaintiff was not interested and that a third party was the real plaintiff.

From the examination of the plaintiff it appeared that he was a clerk in the office of Turner, McKeand & Co. of Winnipeg, and had been asked to have the cheque sued in his name, he had no property, he knew nothing of the suit

until about a week before the examination on his declaration, which was after issue joined, and had never seen the cheque sued on until about that time, and, should the suit be a successful one against the defendant, it would not be he, but Turner, McKeand & Co., who would receive the benefit.

Held, that it was a case in which security should be directed, and that the order would be the usual order for security for costs, to cover all costs of suit incurred, or that might be incurred by the defendant. Costs of the application to be costs in the cause. *Martindale* v. *Conklin*, 1 M.R. 338.

2. Change of venue.

Held, 1. A Judge in chambers has power to change the venue, notwithstanding a prior change in Term.

2. A plaintiff having assigned his cause of action, the defendant is entitled, upon discovery of the fact, to security for costs, if he moves promptly, notwithstanding that he may, by delay, be disentitled upon other grounds. *Vivian* v. *Plaxton*, 2 M.R. 124.

3. Plaintiff suing for benefit of others.

Upon an application for security for costs, it appeared that the plaintiff had assigned the cause of action to three persons. After the application had been made, two of these persons re-assigned to the plaintiff.

Held, that no order for security should be made; although had one existed it would not, under such circumstances, have been discharged. *Evans* v. *Boyle*, 5 M.R. 152.

VIII. Ownership of Property Within Jurisdiction.

1. Plaintiff out of jurisdiction—*Real estate, ownership of, may be sufficient security for costs.*

The ownership of unincumbered real estate within the Province may be a sufficient answer to an application for security for costs, based on the plaintiff's non-residence. *Caston* v. *Scott*, 1 M.R., 117, not followed.

A Colonial Court should follow the decisions of the English Court of Appeal rather than those of another Colonial Court. *Trimble* v. *Hill*, 5 App. Cas. 352, and *Hollender* v. *Fjoulkes*, 26 O.R. 61, followed. *Wood* v. *Guillett*, 10 M.R. 570.

2. Evidence—*Affidavit—Q.B. Act*, 1895, *Rule* 500.

The plaintiff, who lived out of the jurisdiction, moved to set aside a *præcipe* 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 M.R. 620.

IX. Rescinding Order on Plaintiff Coming to Reside Permanently.

1. Discharging order for security for costs after security given.

When an order for security for costs has been made and security actually given under it, the order will not be discharged on the plaintiff returning to reside permanently in the Province.

Semble, it is otherwise if the security has not been given. *Brown* v. *Schantz*, 7 M.R. 42.

2. Evidence of intended residence.

A plaintiff coming to reside within the jurisdiction, after an order for security for costs has been made against him, cannot get the order rescinded without convincing the Court that his intended residence within the jurisdiction is to be of a more permanent character than for the temporary purpose of enforcing his claim by action.

Howard v. *Howard*, 30 L.R. Ir. 340; *Westenberg* v. *Mortimore*, 44 L.J.C.P. 289, L.R. 10 C.P. 438, followed. *Cordingly* v. *Johnson*, 11 M.R. 4.

X. Miscellaneous Cases.

1. Delay in applying for.

After defendant had obtained a postponement of the trial, and had applied for and been refused a further postpone-

ment, he applied for security for costs, alleging that he had only learned a few days before moving of the fact of the plaintiff's absence.

Held, that the application was not too late. *Carruthers* v. *Waterous*, 4 M.R. 402.

2. Evidence of plaintiff's residence abroad.

Although the rule is that, upon an application for security for costs upon the ground of the absence of the plaintiff, the absence must be positively sworn to, yet, where in the same action the plaintiff had filed an affidavit describing himself as of a place without the jurisdiction,

Held, that the absence was sufficiently proved. *Fair* v. *O'Brien*, 3 M.R. 680.

3. Insolvent plaintiff—*Assignment of claim sued on—Practice.*

A plaintiff or petitioner will not be ordered to give security for costs on the ground that he is insolvent and has assigned the claim, if the assignment was only given as security and he is still interested in the collection of the money. *Shields* v. *McLaren*, 9 M.R. 182.

4. Interlocutory costs—*Payment into court in lieu of a bond for security for costs.*

Money paid into court in lieu of giving a bond for security for costs will be ordered to be paid out in satisfaction of interlocutory costs. *Sutherland* v. *McKinnon*, 3 M.R. 608.

5. Interpleader proceedings.

Pending an interpleader summons, an order was made for the examination of the claimant upon an affidavit filed by her. Thereupon the claimant applied for and obtained an order staying proceedings until security for costs was given by the plaintiff, a foreign execution creditor. Upon appeal from the County Court,

Held, 1. That no order for security could be made until an issue was directed *Buchanan* v. *Campbell*, 6 M.R. 303.

6. Motion for summary judgment.—*Application to set aside præcipe order for—King's Bench Act, Rule* 988.

Rule 988 of the King's Bench Act, R.S.M. 1902, c. 40, does not prevent a non-resident plaintiff, against whom an order for security for costs has been taken out on *præcipe*, from moving to set aside such order upon any ground otherwise open to him, it merely provides a means whereby such a plaintiff, wishing to move for summary judgment, may, by paying $50 into court, proceed with such motion without fully complying with the *præcipe* order.

Walters v. *Duggan*, (1896) 17 P.R. 359, followed.

Payne v. *Newberry*, (1890) 13 P.R. 354, distinguished. *Copelin* v. *Cairns*, 19 M.R. 509.

7. Petition under Real Property Act.

When a petition is filed by a caveator under The Real Property Act and the petitioner resides out of the jurisdiction he must give security for costs.

If the respondent shews cause to the petition without asking for security, he thereby waives the right to it.

Semble, this may not waive the right to security in respect of an issue to try questions raised upon such a petition. *Ross* v. *Morgan*, 7 M.R. 593.

8. Stay of proceedings—*Enlargement of summons for.*

A summons for security for costs was returnable the day before the day for which the argument of a demurrer had been set down. It had been served late on the previous day.

An enlargement of the summons was granted and the Judge refused meanwhile to stay the argument of the demurrer. *Hooper* v. *McBean*, 3 M.R. 682.

9. Waiver of security by proceeding in the cause—*Præcipe order.*

A *præcipe* order for security for costs may be issued by the Clerk of Records and Writs.

The defendant obtained a *præcipe* order with a stay of proceedings. The plaintiff, treating that order as a nullity, noted the bill *pro confesso*. The defendant then applied to the Referee for another order for security. This order was granted. The plaintiff appealed upon the ground that the bill was *pro confesso*, and that the defendant had waived his right to security by having previously made an application to stay all proceedings until the costs of a prior suit had been paid.

Held, 1. That the *præcipe* order was valid.

2. That the Referee's order for security should be reversed.

3. That the defendant had not waived his right to security by moving to stay proceedings. *Baynes* v. *Metcalf*, 3 M.R. 438.

See APPEAL FROM COUNTY COURT, VIII.
— ELECTION PETITION, II, IX; X, 1, 2, 6.
— INTERPLEADER, VII.
— MARRIED WOMAN, 4.
— PRACTICE, XXVIII, 27.
— REAL PROPERTY ACT, II, 7, 8; III, 7.
— STAYING PROCEEDINGS, I, 2, 4.

SECURITY FOR MONEY.

See BILLS OF SALE, 3.

SEDUCTION.

1. What constitutes relation of master and servant.

The plaintiff sued the defendant for the seduction of her daughter, a girl fourteen years of age. At the time the seduction took place, the girl was living as a domestic servant at the defendant's house, under the following circumstances: The plaintiff made a contract with defendant, in the daughter's presence, that the daughter should enter his service for $8 a month. The wages were to be paid to the mother.

For the plaintiff it was contended that the defendant's contract was with the mother, that the daughter remained all the time in the service of the mother, and did her work as the servant of the mother under the mother's contract with defendant. The jury found a verdict for plaintiff. On a motion for a non-suit,

Held, that under such circumstances the only proper inference was, that the girl was to serve the defendant alone, as her master in the ordinary way, and there was not sufficient evidence to warrant the jury in finding that any but the ordinary relations of master and servant existed between the girl and the defendant, or that the girl remained the servant of the mother, and was to do her work in that capacity.

(*Per* KILLAM, J.). There may well be a case in which a master hires out a servant to do work for a third party, and in which there would be no contract at all between the third party and the servant, who would remain all the time in the original service, though bound to obey such commands of the third party as were implied by the nature of the employment or the terms of the agreement.

Carr v. *Clarke*, 2 Chitty, 260, commented on. *Hebb* v. *Lawrence*, 7 M.R. 222.

2. Of illegitimate child—*Act respecting the Action of Seduction, 55 Vic., c. 43, (M. 1892).*

Section 1 of the Act respecting the Action of Seduction, 55 Vic., c. 43, does not apply to the case of the seduction of an illegitimate female. *St. Germain* v. *Charette*, 13 M.R. 63.

SEED GRAIN MORTGAGE.

See CHATTEL MORTGAGE, II, 2, 3.

SEIZURE.

See COUNTY COURT, II, 4.
— FI. FA. GOODS, 4.
— FIXTURES, 1.
— SHERIFF, 6.

SELF DEFENCE.

See CRIMINAL LAW, XVII, 3.

SENTENCE.

See CRIMINAL LAW, XIII, 6.

SEPARATE DEFENCES.

See COSTS, VII.

SEPARATE ESTATE.

See MARRIED WOMAN, 1, 2, 5.
— REAL PROPERTY ACT, III, 2, 3.

SEPARATE PROPERTY OF WIFE.

See HUSBAND AND WIFE, II, 1, 2; III, 1; IV, 2.

SEPARATION DEED.

See ALIMONY.

SERVICE BY PUBLICATION.

See PRACTICE, XXIV, 2, 3.

SERVICE OF NOTICE.

See PRACTICE, VII, 1.

SERVICE OF PROCESS.

See COUNTY COURT, II, 7.
— JURISDICTION, 6, 7, 8, 9, 10.
— PRACTICE, IV, 3; XIX, 1, 3; XX, B, 3.

SERVICE ON SOLICITOR.

See PRACTICE, IV, 4.

SERVICE OUT OF JURISDICTION.

See LUNATIC, 2.
— PATENT OF INVENTION, 1.
— PRACTICE, XIX, 2; XX, C.
— PRIVATE INTERNATIONAL LAW.
— PROHIBITION, I, 3.

SET-OFF.

1. Of interlocutory costs—*Costs of application.*

Interlocutory costs may be set off against interlocutory costs.

If the right of set-off be contested the successful party may be entitled to the costs of the application. *Real Estate Loan Co.* v. *Molesworth*, 3 M.R. 176.

2. Counterclaim — *Assignments Act, R.S.M.* 1902, *c.* 8, *ss.* 6, 26—*Right of action for damages — Solicitor's lien for costs— King's Bench Act, s.* 39 (*e*), *Rule* 293.

Plaintiff sued for damages for deceit upon a sale by defendant to him of a business fraudulently represented to be of much greater value than it was. Defendant counterclaimed for the balance of the purchase money.

After the trial but before judgment plaintiff made an assignment for the benefit of his creditors under the Assignments Act, R.S.M. 1902, c. 8, and the assignee was added as a co-plaintiff.

In giving judgment the trial Judge awarded $750 damages to the plaintiff with the costs of the action, but he found also that the defendant was entitled to recover a much larger sum on his counterclaim which was not disputed. The Judge also ordered a set-off and that judgment be entered for defendant for the balance and refused to allow the plaintiff's solicitor any lien for costs.

Held, even if the plaintiff's claim had been validly transferred to the assignee, the defendant would be entitled to maintain his counterclaim and to have the plaintiff's damages paid by deducting them from it, as both claim and counterclaim arose out of the same transaction, and Rule 293 of The King's Bench Act expressly provides that the Judge may order such set-off to be made.

Shrapnel v. *Laing*, 20 Q.B.D. 334; *Lowe* v. *Holme*, 10 Q.B.D. 286, and *Newfoundland* v. *Newfoundland Ry. Co.*, 13 A.C. 199, followed.

(2) The discretion of the Judge in making such order should not be interfered with, although the effect was to deprive the plaintiff's solicitor of any lien for costs on the amount awarded to his client whether for damages or costs.

Westacott v. *Bevan*, [1891] 1 Q.B. 774; *Pringle* v. *Gloag*, 10 Ch.D. 680, and *McPherson* v. *Allsop*, (1839) 8 L.J. Ex. 262, followed. *McGregor* v. *Campbell*, 19 M.R. 38.

3. Principal and agent.

When the buyer of goods from an agent knows that the person he is dealing with is only an agent, he cannot set off a claim against the agent in an action by the principal for the price of the goods, although the ownership of the goods may have been transferred to another principal before he bought and without his knowledge. So far as the claim of set-off is concerned, it is im-

material whose agent the buyer thought him to be.

Boulton v. *Jones*, (1857) 2 H. & N. 564, distinguished *Wood* v. *John Arbuthnot Co.*, 10 M.R. 320.

4. Summons to sign judgment.

Anything which could have been pleaded by a defendant under the old statutes of set-off, can now be brought forward in answer to an application for leave to sign judgment under the statute and will prevent an order being made allowing judgment to be signed. *Manoque* v. *Mason*, 3 M.R. 603.

5. 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 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-off 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. 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 M.R. 653.

6. Unliquidated damages —*Unconnected transactions — King's Bench Act, R.S.M.* 1902, *c.* 40, *s.* 39 (*f*).

A defendant, sued for a balance due under an agreement of purchase of land assigned to the plaintiff, cannot set off against the debt a claim against the assignor for unliquidated damages arising out of transactions wholly unconnected with the purchase in question. Section 39 (f) of The King's Bench Act, R.S.M. 1902, c. 40, only permits, as against an assignee, a set-off of anything which would be recognised in a court of equity as a proper subject of set-off, and a counterclaim for unliquidated damages arising out of a cause of action in no way connected with the claim assigned is not a defence or set-off which would at any time have been recognised.

The Government of Newfoundland v. *The Newfoundland Ry. Co.*, (1888) 13 A.C. 199, distinguished. *McManus* v. *Wilson*, 17 M.R. 567.

See Banks and Banking, 5.
— Company, I, 3.
— Costs, VII, 3; XI, 2, 3.
— Negligence, VII, 7.
— Principal and Agent, IV, 2.

SET-OFF OF COSTS.

See Practice, XXVIII, 30.
— Solicitor's Lien for Costs, 7.

SET-OFF OF VERDICTS.

See Warranty, 5.

SETTING ASIDE CROWN PATENT.

See Crown Patent, 4, 6

SETTING ASIDE JUDGMENT.

See Attachment of Goods, 6.
— County Court, I, 6.
— Foreign Judgment, 10.
— Practice, XIX, 3; XX, B, 1, 3, 4, 5, 6, 7; XXVIII, 24.
— Prohibition, III, 4.

SETTING ASIDE ORDER.

See Capias, 4, 5.
— Conflict of Laws, 2.
— Costs, XIII, 23.
— Garnishment, I, 6; VI, 8.
— Practice, XX, C; XXIII, 4.

SETTING ASIDE PROCEEDINGS.

See ELECTION PETITION, III, 2.
— MORTGAGOR AND MORTGAGEE, V, 2.
— PRACTICE, XX.

SETTING ASIDE SALE.

See MORTGAGOR AND MORTGAGEE, IV, 4.

SETTLING MINUTES OF JUDGMENT.

See PRACTICE, X, 2.

SHAREHOLDER.

See SCIRE FACIAS.

SHERIFF.

1. Fees, poundage, etc.

A sheriff having made a seizure, and a claim having been made to the goods, an interpleader issue was directed. Security not having been given, the sheriff sold the goods. Before trial the plaintiffs abandoned and an order was made for payment by the plaintiffs to the claimant and the sheriff of "their costs occasioned by said interpleader order and interpleader issue." This order was amended and the plaintiffs were further directed to pay the sheriff's possession money and other expenses occasioned by the sale, and the costs of the sale.

Upon appeal from the settlement of the sheriff's account,

Held, 1. That the sheriff was not entitled to poundage.

2. That the sheriff was entitled to possession money and other expenses by the terms of the orders, which had not been appealed.

3. That under the circumstances the charge for possession money was not unreasonable ; nor was $2 a day too much to pay to a man for keeping possession.

4. A charge of $2.40 for taking a man out of possession was disallowed.

5. Adjournments of sale allowed at fifty cents each. *Manitoba & N.W. Loan Co.* v. *Routley*, 3 M.R. 521.

2. Landlord and tenant—*Execution creditor—Rent—8 Anne, c.* 14, *s.* 1.

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 M.R. 519.

3. Liability of sheriff for acts of his bailiff — *Satisfaction of judgment — Executions Act, R.S.M.* 1902, *c.* 58, *ss.* 21, 25—*Credit sale by sheriff—Sale of goods under fi. fa.*

1. Notwithstanding the provisions of section 21 of The Executions Act, R.S.M. 1902, c. 58, a sale of goods by a sheriff's bailiff under *fi. fa.* was, under the peculiar circumstances set forth in the judgment, held to have been good, although made immediately after seizure and without the notice required by that section.

2. A sheriff is responsible for all money realized by his bailiff by a sale under a *fi. fa.*, though the money be stolen from the bailiff as a result of his carelessness and never comes to the sheriff's hands.

3. A seizure by a sheriff of sufficient goods to satisfy a judgment in part will be a discharge to the debtor as to such part.

4. When the goods seized are subject to a chattel mortgage the sale of the goods themselves, instead of only the equity of redemption, will be good unless objected to by the mortgagee.

5. It is not an absolute rule that a sheriff's sale under execution must be for ready money ; but, if the sheriff does not comply with such rule, he will be responsible for the money if he fails to collect it.

6. The fact that the sheriff failed to comply with section 25 of The Executions Act, by advertising the amount realized and keeping the money to be distributed rateably, is no answer to the defendant's claim to have such amount credited upon the execution against him, when nearly three years have elapsed and there is no evidence that any other execution against the defendant has been placed in the sheriff's hands. *Massey-Harris Co.* v. *Mollond*, 15 M.R. 364.

4. Mandamus compelling sheriff to execute writ.

Mandamus is not the proper proceeding to compel a sheriff to execute a writ. A motion for a rule should be made. *Black* v. *Kennedy*, T.W. 144.

5. Action for money had and received by sheriff as such, for the use of plaintiff — *Money paid by debtor to be applied on second execution, leaving first unsatisfied — Priority of executions.*

A debtor, against whom there were several executions in the hands of a sheriff, paid him a sum of money expressly to be applied on the plaintiffs' writ, which was not entitled to priority. Afterwards, on the money being claimed both by the plaintiffs and the first execution creditor, the sheriff returned the money to the debtor.

Held, that the plaintiffs were entitled to recover the amount from the sheriff as money had and received for their use. *Coburn* v. *McRobbie*, 9 M.R. 375.

6. Negligence in not levying under execution — *Sheriff bound to levy on chattels though mortgaged — Sheriff bound to see whether chattel mortgage valid on its face—Duty of sheriff as to threshing grain seized in stack—Chattel mortgage—Affidavit of bona fides made by "accountant" of mortgagees.*

In an action against a sheriff for not levying under an execution, it appeared that he had abandoned the seizure and refused to do anything further on finding that there were three mortgages on the debtor's goods and chattels, prior to the execution ; being of opinion that the aggregate amount apparently secured by them would exceed what he could realize by sale of the chattels after payment of expenses.

One of the mortgages had, in fact, been satisfied and the sheriff could have ascertained this on inquiry. Another was not proved at the trial to be valid under The Bills of Sale Act ; it was in favor of the Canada North-West Land Company, and the affidavit of *bona fides* upon it was made by one Campbell, who only described himself as "Accountant of the mortgagees," and there was no other evidence that he was an agent of the Company authorized to take the same.

The debtor realized out of his grain, which might have been levied upon, more than sufficient to satisfy both the latter mortgage and the remaining valid and unsatisfied mortgage besides the plaintiffs' judgment.

Held, that the defendant was liable for the full amount of the plaintiffs' claim against the judgment debtor.

If for any reason of which the sheriff has notice, or by reasonable enquiries could discover, a chattel mortgage is not entitled to priority over a writ of execution in his hands, he cannot rely on it as a justification for not levying under the writ.

Per KILLAM and BAIN, JJ. (DUBUC, J. *dubitante*). The sheriff could not rely on the mortgage to the Canada North West Land Company, as it was plainly invalid unless Campbell was the agent of the Company, and there was no evidence that he was such agent.

Per DUBUC, J. The sheriff, having seized grain in stacks, is not bound to have it threshed and marketed, but may sell it in the stacks; but, as no evidence was given to show that such a sale would have realized less than the actual value, the Court cannot presume that it would, although such would probably be the case.

It is clearly the sheriff's duty, notwithstanding the use of the word "may" in the statute, to seize and sell the equity of redemption in mortgaged chattels when such equity is valuable. *Massey Mfg. Co.* v. *Clement*, 9 M.R. 359.

7. Wrongful seizure by—*No interference with goods — Damage — Instructions by attorney—Power of.*

Under an execution against B. the sheriff seized goods claimed by the plaintiff. The sheriff did not touch the goods or leave any one in possession, but merely took a list of them, told the plaintiff not to remove them, and took an undertaking from the plaintiff that he would not remove them. The sheriff interpleaded and the execution creditors abandoned. The sheriff then (three or four weeks after the seizure), gave notice of abandonment to the plaintiff.

Held, 1. That there was no trespass for which an action would lie.

2. An attorney has no implied authority to give instructions to a sheriff to seize any particular goods.

3. Taking part in interpleader proceedings is not a ratification by the execution creditor of the seizure.

Remarks upon the *bona fides* of a sale made to a hired man under suspicious circumstances. *Wallbridge* v. *Hall*; *Wallbridge* v. *Yeomans*, 4 M.R. 341.

See CHATTEL MORTGAGE, II, 2.
— CRIMINAL LAW, X, 3.
— FI. FA. GOODS.
— GARNISHMENT, VI, 9.
— INTERPLEADER, II; IV, 1; VIII; IX, 1, 4.
— MANDAMUS, 3, 6, 7.
— PRACTICE, III, 5.
— REPLEVIN, 4.
— SOLICITOR, 9.
— TRESPASS AND TROVER, 2.

SHERIFF'S BAILIFF.

See PUBLIC OFFICER.
— SHERIFF, 3.

SHOPBREAKING.

See CRIMINAL LAW, IX, 2.

SHORT FORMS.

See MORTGAGOR AND MORTGAGEE, III, 4.

SHORT NOTICE OF MOTION.

See PRACTICE, XIV, 2.

SHORTHAND—EVIDENCE IN.

See CRIMINAL LAW, XIII, 7; XVII, 18.
— EXTRADITION, 3, 4.

SIDEWALKS.

See NEGLIGENCE, IV, 3, 4.

SIGNATURE OF CONTRACT.

See VENDOR AND PURCHASER, VI, 5.

SIGNATURE OF PARTY CHARGED OR HIS AGENT.

See VENDOR AND PURCHASER, VII, 9.

SLANDER.

Words capable of two constructions — *Respective provinces of judge and jury.*

In an action for slander, if the words used by defendant are capable of being reasonably understood in a slanderous sense, it should be left to the jury to find whether or not they were so used, and the plaintiff should not be nonsuited on the ground that the words did not necessarily impute the commission of a crime.

Ritchie v. *Sexton*, (1881) 64 L.T. 210, and *Simmons* v. *Mitchell*, (1880) 6 A.C. 156, followed. *Cameron* v. *Overend*, 15 M.R. 408.

SLANDER OF REAL ESTATE.

Publication of statement that house haunted — *Damages — Statute of Westminster* II, 13 *Ed.* 1, *c.* 24.

The publication in a newspaper of a statement that the plaintiff's house is haunted is, under the Statute of Westminster II, 13 Ed. 1, c. 24 (Bac. Ab. vol. 1, 102), an actionable wrong if special damages result, though there be no actual malice or any intention to injure the plaintiff or to depreciate the value of the property.

Per RICHARDS, J. A. The members of the Court should, as educated men, assume that there are not such things as ghosts and, therefore, that the statement published by defendants was necessarily false. It should also be presumed that the reporter and the sub-editor who were responsible for the publication of the article, as educated men, knew that it was false and, therefore, had no reasonable justification or excuse for publishing it. They thus rendered their employers, the defendants, liable in damages for the natural results of such publication, though such results were not foreseen by them.

The evidence showed that the plaintiff lost a sale of the house in consequence of the publication and that the house, being vacant, was damaged by crowds

resorting to it on account of the report that it was haunted, and the plaintiff should be awarded $1,000 and costs.

Per PHIPPEN, J. A., concurring with RICHARDS, J. A. The case falls within the principle of *Riding* v. *Smith*, (1876) 1 Ex. D. 91, and *Bruce* v. *Smith*, 1 Fraser (Court of Sessions Cases, Scotland) 327, rather than within that other class of cases where, on the ground of public policy, or protection of property, or for other sufficient reason, the Courts have held honest statements to be lawful, although occasioning damage to the innocent.

Per PERDUE, J. A., dissenting. In such a case the plaintiff must prove that the statement is false, that it was published maliciously and that special damage resulted.

The statement can only be actionable if it was intended to be believed and was believed by some person who was influenced by it to the detriment of the plaintiff : *Langridge* v. *Levy*, (1837) 2 M. & W. at p. 531. But, if it was so repugnant to common sense and common knowledge that no proof of its untruth would be necessary, it is difficult to see how any one could have been deceived by it. The plaintiff failed to show that the statement complained of was wrongful and was made with the knowledge that it would cause, or was likely to cause, injury to the plaintiff, or that the defendants, in publishing it, intended or contemplated any injury to the plaintiff or her property, and without such evidence the plaintiff should not recover. Intention to injure must be established either directly or by reasonable inference to support such an action : *Quinn* v. *Leathem*, [1901] A.C. 495, at p. 524 ; *Read* v. *Friendly Society*, [1902] 2 K.B. 732, at p. 739. It is clear that the statement was only published as an item of news, with no intention to do any wrong to the plaintiff and without any idea that the publication would cause any damage to the plaintiff's property. The plaintiff also failed to prove that she sustained special damage resulting directly from the publication complained of. The finding of the trial Judge on this point and as to those parts of the evidence which should be believed or disbelieved should not be interfered with. It must be shown that an actual sale was prevented. Evidence of opinion to show a general depreciation of value caused by the statement is not sufficient in such a case when no lasting injury was shown to have been caused. *Nagy* v. *Manitoba Free Press Co.*, 16 M.R. 619.

Affirmed. 39 S.C.R. 340.

SMUGGLED GOODS.

See RAILWAYS, III, 6.

SOLICITOR.

1. Attachment for contempt.

The Court has jurisdiction to issue an attachment against an attorney for disobeying a rule of Court by which he is ordered to pay to his client the money of the client. *Re A. B., an Attorney*, 3 M.R. 316.

2. Criminal offence—*Rule to answer charges—Indictable offence.*

A rule will not be granted to compel an attorney to answer charges if they may be made the subject of an indictment. *Re R.A., an Attorney*, 6 M.R. 398.

See, however, *Re R.A., an Attorney*, 6 M.R. 601.

3. Duty of solicitor on purchase of mortgage — *Acknowledgment by mortgagor — Production of title deeds.*

S. claimed to be mortgagee of certain lands and agreed to sell the mortgage to the plaintiffs. The plaintiffs employed the defendant to examine the title of S. and prepare the necessary assignment. Defendant passed the title, and took an assignment of the mortgage, and upon his report the plaintiffs made the purchase. It afterwards transpired that the mortgage was a forgery.

In an action for negligence, it appeared that the defendant had not, before passing the title, obtained an acknowledgment from the mortgagor, of the amount due upon the mortgage ; and had not required the production of the title deeds of the property. The mortgage was dated but a short time before the assignment and was not due.

Held, 1. That acceptance of the title without the mortgagor's certificate did not constitute such negligence as to render the defendant liable.

2. That, notwithstanding the Registry Act, it is as much as ever the duty of a solicitor to inquire for the title deeds, and to insist upon their production

unless their non-production is satisfactorily accounted for; and that upon this ground the defendant was liable for the amount paid by the plaintiffs and interest. *Freehold Loan Co.* v. *McArthur*, 5 M.R. 207.

4. Misconduct of — *Delivering up of documents — Employment of attorney to purchase land scrip.*

S. employed T., an attorney, to purchase half-breed land scrip, and for that purpose gave him $30. T. purchased the scrip, and drew and got executed an assignment thereof to S. When the scrip became distributable, T. refused to disclose to S the name of the half-breed from whom he had bought the scrip, and also refused to produce the assignment. He further procured the half-breed to apply for and obtain the scrip, which he afterwards sold without accounting to S.

Held, that the transaction for which T. had been employed was one which required legal knowledge to complete it by drawing a conveyance; that, therefore, he had been employed in his professional capacity, and was liable to the summary jurisdiction of the Court for misconduct in the transaction.

Held, also, that if he had been in possession of the scrip at the time of the application, the Court would have ordered him to deliver it to S., but on this application he could only be ordered to refund the money originally entrusted to him, with interest, as the loss of the client on the land was unliquidated. *Re Thibeaudeau*, T.W. 149.

5. Striking off the Rolls — *Striking off the roll of barristers — Law Society Act, R.S.M.*, 1902, *c.* 95, *s.* 74.

An order was made that the attorney in this case should be struck off the roll of attorneys; but this action was taken in consequence of his conduct in the management of a case in which he had acted as an attorney and not as a barrister.

Held, that the Court could not strike his name off the barrister's roll. *Re J. B., an Attorney*, 6 M.R. 19, followed.

It seemed an anomaly that a man unworthy to remain on the one roll could be left on the other, but the opinion of the Court was that under the statute, as it was worded, it must be so. *Re R. A., an Attorney*, 11 C.L.T. Occ. N. 208.

6. Striking off the Rolls—*Delay—Civil action pending.*

A delay of six months is not a bar to a motion to strike off the rolls, where an unsuccessful motion for an order to compel the attorney to answer had meanwhile been made.

The pendency of civil proceedings upon a cause of action arising out of the same matters is not an answer to a motion to strike off.

Nor is the fact that the matter complained of involves a criminal charge. *Re R. A., an Attorney*, 6 M.R. 398, commented on.

The charges being denied, a reference to enquire and report was ordered. *Re R. A., an Attorney*, 6 M.R. 601.

7. Striking barrister and attorney off the Rolls — *Non-payment of money.*

An attorney will not be struck off the rolls for non-payment of money merely.

Whether the Court has jurisdiction to remove attorneys apart from the Provincial Statute. *Quære.*

A client left with an attorney a mortgage for collection, and also a discharge to be delivered over upon payment. The attorney received the money and paid to the client a portion of it, telling him from time to time that that sum was all that he had received. Discovery of the truth was not made until after the attorney had left the country the following year.

Held, that this was misconduct "in the discharge of his duties as an attorney."

The attorney had also received payment on behalf of mortgagees, for whom he was not entitled to act; the mortgagor believing that he was so entitled. The attorney paid over a portion of the money only.

Held, that he should be struck off the attorney's roll, but not off the barrister's as he had done nothing discreditable in the discharge of that office. *Re J. B., an Attorney*, 6 M.R. 19.

But see amendment to Law Society Act, R.S.M. 1902, c. 95, s. 74.

Distinguished. *Re P.E.H.*, 22 M.R. 746.

8. Undertaking of — *Breach — Order —Disobedience — Attachment — Summary jurisdiction of Court.*

An attorney, having undertaken to pay the clerk of the Court certain fees

for stamps furnished to him upon the undertaking and used by him in proceedings in the Court, and having failed in his undertaking, was ordered to pay the amount. On failure to obey the order, the Court directed an attachment to issue against him for contempt.

Where an attorney is employed in a matter wholly unconnected with his professional character, the Court will not entertain a summary application against him for breach of duty; but, where the presumption is that he was employed on account of his professional character, he is liable to the summary jurisdiction of the Court. *Re Osler*, T.W. 205.

9. Undertaking of — *Summary jurisdiction.*

An attorney having an execution in the sheriff's hands, and the sheriff requiring security before seizure, the attorney's partner wrote to the sheriff agreeing to indemnify him. The sheriff seized, was sued, and judgment went against him. Upon a summary application to enforce the undertaking,

Held, 1. That the undertaking was that of the writer personally.

2. That it was given in a professional capacity and might be summarily enforced.

3. But that, the sheriff having acted improperly in the seizure, and so incurred a greater liability than that against which he was indemnified, he should be left to his action. *Re McPhillips, an Attorney*, 6 M.R. 108.

See APPEAL FROM COUNTY COURT, V, 1.
— BREACH OF TRUST.
— COSTS, IX.
— MUNICIPALITY, VI.
— PRACTICE, XII, 1; XVI, 9; XX, A, 2; XXVIII, 8.
— SHERIFF, 7.

SOLICITOR AND CLIENT.

I. AGREEMENTS BETWEEN.

1. Agreement that attorney not to account for moneys received—*Business done before a magistrate.*

An attorney was employed to conduct the entire defence of a prisoner. He appeared upon the preliminary investigation before a police magistrate. He received money from the prisoner. Upon an application for the delivery of his bill he swore that it had been agreed that he was to use the money in procuring the prisoner's release, but was to keep no account of the money paid out. This the client denied.

Held, 1. That the attorney should deliver an ordinary bill of costs.

2. That such an agreement must be in writing. *Re A., an Attorney*, 6 M.R. 181.

2. Agreement respecting costs—*Misrepresentation of fact — Agreement procured through pressure—The Law Society Act, R.S.M., c. 83, s. 68 — Interest upon costs — Consideration.*

Section 68 of The Law Society Act, R.S.M., c. 83, making it legal for an attorney or solicitor to bargain for remuneration of his service as such for a client in any way that may be agreed on, instead of having his costs taxed in the usual way, does not preclude the Court from exercising the ordinary jurisdiction of a Court of equity to determine the validity of any such agreement upon equitable principles, although it contains no express provisions, as the corresponding Imperial and Ontario Statutes do, for enquiring into the fairness or reasonableness of such an agreement and for setting it aside if found unfair or unreasonable.

In the course of the negotiations between the solicitor and the client leading up to the making of the impeached agreement, the solicitor had in a letter made a statement that the amount of his disbursements in the litigation had been considerably in excess of the actual amount, and had also strongly intimated the probability that he would be compelled to dispose of a certain judgment, in which his clients were largely interested and which had been assigned to him, upon terms which might have left little or nothing for them unless they would provide him with funds to carry on the litigation.

Held, without imputing to the solicitor an intentional mis-statement of the amount of his disbursements for the purpose of procuring the arrangement or the intention to hold out the prospect of the loss of the claim as a threat for the purpose of securing an undue advantage, that the mis-statement and th

threats were such as to render the clients incapable of acting freely and independently and, therefore, that the agreement should be set aside.

Forbearance to sue may be a sufficient consideration for an agreement by a client to pay interest to his solicitor upon an amount agreed on as due for costs, although there is no legal liability for such interest, and although the client acted without independent advice. *Preston* v. *Nugent*, 13 M.R. 511.

3. Agreement to share in amount to be recovered by suit — *Law Society Act, R.S.M.*, 1902, *c.* 95, *s.* 65 — *Maintenance and champerty — What criminal laws of England introduced into Manitoba by section* 12 *of the Criminal Code.*

Maintenance and champerty had become obsolete as crimes in England in 1870, and section 12 of the Criminal Code declaring that the criminal law of England as it was on 15th July, 1870, *in so far as it is applicable to the province of Manitoba**** shall be the criminal law of the Province of Manitoba, did not introduce the law of maintenance and champerty considered as crimes into that Province; consequently section 65 of the Law Society Act, R.S.M. 1902, c. 95, allowing an attorney or solicitor to make an agreement with a client to be paid for his services by receiving a share of what might be recovered in an action, is not *ultra vires* of the Provincial Legislature as trenching upon or intended as a repeal of any provision of the criminal law. Such an agreement, therefore, may be enforced in our courts.

Mcloche v. *Deguire*, (1903) 34 S.C.R. 24; *Hopkins* v. *Smith*, (1901) 1 O.L.R. 659, and *Briggs* v. *Flentot*, (1904) 10 B.C.R. 309, held not applicable in Manitoba. *Thomson* v. *Wishart*, 19 M.R. 340.

4. Special agreement as to costs — *Stay of proceedings pending taxation — King's Bench Act, Rules* 965–967—6 & 7 *Vic.* (*Imp.*) *c.* 73, *s.* 37—*Taxation of costs.*

In an action against a firm of solicitors for the recovery of money collected by them for the plaintiff, the solicitors claimed the right to retain the money for extra costs between solicitor and client in proceedings which they had conducted for the plaintiff. Plaintiff, however, alleged that there had been a special agreement precluding any such claim.

Held, that an order for taxation of the defendants' bill of costs should not have contained a stay of proceedings in the plaintiff's action, as he was entitled to have the question of the existence of the alleged agreement determined by a trial in the ordinary way.

Held, also, that under Rules 965–967 of The King's Bench Act and 6 & 7 Vic. (Imp.) c. 73, s. 37, such order for taxation, obtained on the application of the defendants, should not have contained a clause directing the client to pay the amount, if any, found due.

Re Debenham and Walker, [1895] 2 Ch. 430, followed.

Quære, whether there should have been any order for taxation of defendants' bill before the other questions raised had been decided at the trial: *Re Beale*, (1849) 11 Beav. 600. *Myers* v. *Munroe*, 16 M.R. 112.

II. Taxation of Costs Between.

1. Review of Taxing master's report —*Discretion of Master—Solicitor acting on agency terms for solicitors in another Province—Solicitors' Act*, 6 & 7 *Vic.*, *c.* 73, (*Imp.*)

This was an appeal from the taxing master's certificate upon a taxation of a bill of costs between solicitor and client. The solicitor received his instructions from a firm of solicitors in Toronto acting for the client, a company whose head office was in Toronto.

The solicitor here sent to the solicitors in Toronto one-half the amount charged as fees on the basis of having attended to the business on agency terms for the Toronto solicitors.

Held, that, although the Toronto solicitors might not have been entitled as between themselves and the company to derive a profit from the transaction and such an allowance to them might be a breach of the Law Society Act, yet, since the Winnipeg solicitor had chosen to send them the money for themselves, he could not subsequently insist that it was received by them for the company.

More than one-sixth of the whole bill rendered was taxed off, and the Master allowed the costs of the reference to the company as against the solicitor.

Held, that this was right, as the Solicitors' Act, 6 & 7 Vic., c. 73, s. 37, was

in force in Manitoba, and had not been affected by Rules 926 and 958 of the Queen's Bench Act, 1895.

The taxing master had refused to give effect to the contention of the client as to certain items objected to on the ground that the costs were incurred through negligence and a mistake of law of the solicitor.

Held, that the finding and discretion of the taxing master should not be interfered with, unless it is clearly shown that he has erred in well established points of law or has been mistaken as to some material facts upon which he has based his finding.

Decision of DUBUC, J., in 1889, as varied by the Full Court.

In re H., a Solicitor, 19 C.L.T. Occ. N. 290, 20 C.L.T. Occ. N. 140.

2. When referred for taxation.

A solicitor rendered a bill containing charges for conveyancing and also a lump charge of $1,000, commission on a purchase. He afterwards divided the account by rendering two separate bills, one containing the conveyancing items and the other the charge for commission. He then brought this action to recover the amount of the two bills, claiming the commission under the common counts.

The defendant applied to have both bills referred for taxation.

Held, (reversing the decision of TAYLOR, C. J.)

1. When a solicitor's bill contains one taxable item the whole bill is taxable.

2. That the first bill was clearly taxable, and the statute can not be evaded by the device of dividing the one bill into two.

3. When there is no prescribed tariff the taxing officer must inform himself in the best way he can as to the proper amount to allow. *Howard* v. *Burrows*, 7 M.R. 181.

III. MISCELLANEOUS CASES.

1. Collusive settlement of suit with plaintiff without the knowledge of his solicitor—*Liability of defendant for costs of plaintiff's solicitor in such case.*

If the defendants make a collusive settlement of a suit with the plaintiff without the knowledge of the plaintiff's solicitor and with the object of depriving the latter of his costs, he is entitled, on application to a Judge in Chambers, to an order that the defendants should pay his costs.

Brunsdon v. *Allard*, (1859) 2 E. & E. 19; *Price* v. *Crouch*, (1891) 60 L.J.Q.B. 767, and *Re Margetson and Jones*, [1897] 2 Ch. 314, followed. *Stewart* v. *Hall*, 17 M.R. 653.

2. Multifariousness.

A bill by a client against solicitors for an account, and to set aside a conveyance of land made by the client, at the instance of the solicitors, to the wife of one of them, is multifarious. *Haffield* v. *Nugent*, 6 M.R. 547.

3. Parliamentary agent—*Proceedings before the Legislature—Taxation of costs—Practice.*

Held, that, where a solicitor has obtained from the Speaker of the Legislative Assembly authority to act in any matter as a parliamentary agent, he can recover the amount due him for services, without being obliged to observe all the requirements of the English Act. *Kennedy* v. *Austin*, 1 M.R. 362.

4. Privileged communications between solicitor and client.

Certain questions put to the defendant as to communications between himself and his attorneys with a view to shewing his responsibility for their action in issuing and enforcing a *fi. fa.* goods,

Held, to be privileged. *Dederick* v. *Ashdown*, 4 M.R. 174.

5. Right of solicitor trustee to costs as against the trust estate—*The Manitoba Trustee Act, R.S.M., c. 146, s. 40—Lien of solicitor under Imperial Act, 23 & 24 Vic., c. 127.*

Held, that, notwithstanding the provision in section 40 of The Manitoba Trustee Act, R.S.M., c. 146, the rule of English law that a sole trustee who is a solicitor cannot charge against the trust estate profit costs for acting as solicitor for the estate, still prevails to the extent that he is not entitled as of right to have such costs taxed to him as a solicitor.

Meighen v. *Buell*, (1897) 24 Gr. 503, followed.

Cradock v. *Piper*, (1850) 1 Mac. & G. 664, distinguished.

Held, also, that neither the Imperial Act, 23 & 24 Vic., c 127, nor the Ontario Rule 1129 founded upon it, gives a solicitor an absolute right to a lien for his costs upon property recovered or

preserved through litigation, but only a discretionary power in the Court to charge the property. *Turriff* v. *McDonald*, 13 M.R. 577.

6. Substitutional service of notice of motion to solicitor to refer his bill of costs to taxation—*Costs—Taxation—King's Bench Act, Rule* 368.

Under Rule 368 of The King's Bench Act, R.S.M. 1902, c. 40, an order may be made for service substitutionally on a solicitor, who has left the jurisdiction and cannot be found, of a notice of motion for an order to refer his bill of costs, rendered, to taxation. *Re Reid Estate*, 17 M.R. 652.

See CONSTRUCTIVE NOTICE.
— COSTS, XIII, 4.
— FRAUDULENT PREFERENCE, III, 6.
— MORTGAGOR AND MORTGAGEE, V, 3.
— PRACTICE, XXVIII, 28.
— SCANDALOUS MATTER.
— SOLICITOR'S LIEN FOR COSTS, 2.

SOLICITOR TRUSTEE.

See SOLICITOR AND CLIENT, III, 5.

SOLICITOR'S LIEN FOR COSTS.

1. Attachment of goods—*Charge on property recovered or preserved for costs of proceedings — 23 & 24 Vic. (Imp.) c. 127, s. 28 — Attachment — King's Bench Act, R.S.M. 1902, c. 40, Rule* 852.

Notwithstanding the wording of Rule 852 of The King's Bench Act, which provides that, in cases of attachment, "the proceeds of the property and effects attached in the sheriff's hands shall be rateably distributed among such plaintiffs as shall in due course obtain judgment and execution. . . . in proportion to the sums actually due upon such executions," an order may be made under section 28 of the Solicitors' Act, 23 & 24 Vic. (Imp.), c. 127, giving the solicitor for the plaintiff, in whose action the order for attachment was made, a charge upon the net proceeds of the attached property in the sheriff's hands for the amount of his taxed costs, charges and expenses in the action, including the cost of interpleader proceedings in which claims to the goods are successfully resisted, in priority to the claims of other execution creditors, when it appears that such proceeds have been "preserved" by the labor, time and money expended by the solicitor within the meaning of that section.

Darling v. *Smith*, (1884) 10 P.R. 360, followed.

RICHARDS, J., dissented.

It is quite immaterial that some of the parties for whose benefit the property has been recovered or preserved are not parties to the action.

Greer v. *Young*, (1883) 24 Ch. D. at p. 549; *Emden* v. *Carte*, (1882) 16 Ch. D. 311, and *Leacock* v. *McLaren*, (1894) 9 M.R. 599, followed. *Valentinuzzi* v. *Lenarduzzi*, 16 M.R. 121.

2. Jurisdiction of Judge in Chambers—*Charging order —Preservation of fund by solicitor — Attorneys' and Solicitors' Act., 23 & 24 Vic. (Imp.) c. 127, s.* 28.

A Judge in Chambers has no jurisdiction to make an order, under The Attorneys' and Solicitors' Act, 23 & 24 Vic. (Imp.), c. 127, s. 28, charging a fund for the benefit of a solicitor in respect of his costs for services in preserving it.

[Decided in 1893, before the passing of The Queen's Bench Act, 1895.]

Leacock v. *McLaren*, 14 C.L.T. Occ. N. 10.

3. Limitation of actions—*Charging order — Statute of Limitations — Defendant out of jurisdiction — Application by clients to tax solicitor's costs.*

Petition by a solicitor for a charging order on a fund in court for his costs for services rendered two years previously to the four parties entitled to the fund, who objected that the claim was barred by the Statute of Limitations.

Held, as to two of the parties, that they could not rely on the Statute because they had, four years before, taken out an order to tax the same costs, and, as to the other two, as they had never been residents of Manitoba, the Statute had never begun to run in their favor: *Banning on Limitations*, p. 86. *Shields* v. *McLaren*, 13 C.L.T. Occ. N. 418.

4. Practice — *Charging order for costs — Before what Judge to be heard — Death of Judge who heard cause—Affidavit —Alteration in jurat—Three styles of cause — Surplusage — Practice.*

A solicitor, having taxed his costs, presented a petition for a charging order in the original suit under 23 & 24 Vic., c. 127 (Imp.). Several preliminary objections to the petition were taken.

Held, that the statute contemplates that the Judge, before whom the cause in which the costs were earned was heard, should hear the petition; but, the Judge being dead, and the cause having been reheard before three Judges, of whom the Judge before whom the petition came on was one, under these peculiar circumstances, the objection of want of jurisdiction should not be sustained.

Held, also, that an objection that there was an alteration in the jurat of an affidavit filed in support of the petition should be overruled. The rule in equity on this point is not so strict as at common law. And, in any event, the Court would allow the affidavit to be re-sworn.

The petition was in the style of cause of the original suit, and also, "In the matter of T.S.K. a solicitor," and "In the matter of the Imperial Statute passed in the twenty-third and twenty-fourth years of the reign of Her Majesty Queen Victoria, and chaptered one hundred and twenty-seven."

Held, that, as the petition was in the proper style of cause of the original suit, the other two headings, even if unnecessary, might be considered as surplusage. And the petition should not be dismissed on that ground.

The petition shewing that other parties were interested, at the request of the petitioner, they were ordered to be served. *Leacock* v. *McLaren*, 8 M.R. 579.

5. Priority as against fund in court —*Lien on fund in court for costs of recovering or preserving the fund — Charging order.*

The lien of a solicitor for his costs of recovering or preserving a fund in court for his client will be given priority over a charging order on the fund obtained by a creditor of the client. *Coupez* v. *Lear*, 16 W.L.R. 401.

6. Property recovered or preserved— *Solicitors' Act, Imp. Stat.*, 23 & 24 *Vic.*, c. 127.

The petitioner had been retained by John Shields, one of the defendants in *Leacock* v. *McLaren*, which had been brought for the purpose of winding up the partnership composed of the plaintiff and defendants in that suit, and he had conducted it to the termination of an appeal to the Supreme Court of Canada, whose decision was in favor of his client, and resulted in establishing his rights as a partner in certain moneys in court and in certain other assets of the partnership. The other defendants then appealed to the Privy Council, but, pending that appeal, a settlement was arrived at between the parties without the knowledge of the petitioner (Shields having retained another solicitor in his place), by which the moneys in court were all applied in payment of the debts of the firm. Meantime, John Shields married, and made a settlement on his wife of all his interest in the partnership assets, and the trustee of the settlement, William Shields, the plaintiff in the suit of *Shields* v. *McLaren*, afterwards commenced that suit for the purpose of working out the settlement of the former suit. In this latter suit, the old partnership was wound up, the assets realized, and a considerable sum of money was paid into court.

Held, that the petitioner was entitled to a lien on this money for his unpaid costs of the first suit, as being property preserved within the meaning of the Solicitors' Act, Imp. Stat., 23 & 24 Vic., c. 127, but subject to the prior lien of the solicitor for William Shields, notwithstanding that the money was actually realized in another suit; and that the fact of his client having parted with his interest before the commencement of the second suit, was no objection to his claim.

Berrie v. *Howitt*, L.R. 9 Eq. 1, not followed.

Foxon v. *Gascoigne*, L.R. 9 Ch. 657, distinguished. *Leacock* v. *McLaren*; *Shields* v. *McLaren*, *Re Kennedy*, 9 M.R. 599.

7. Set-off of costs.

The plaintiffs, creditors of the defendant E. D., having brought suit in equity to set aside a judgment recovered against him by his wife, the co-defendant, as fraudulent and void, the bill was dismissed with costs. In settling the minutes of the decree, the plaintiffs asked to have their judgment, obtained after the filing of the bill, set off *pro tanto* against the costs payable by them to E. D., who had defended separately from his wife. This was opposed by his solicitor on the ground that his costs were unpaid.

Held, following *Webb* v. *McArthur*, 4 Ch. Ch. 63, and *Collett* v. *Preston*, 15 Beav. 458, that the solicitor's lien could not be interfered with in such a case and the application was refused.

Semble, however, that, when costs in a particular suit are payable to and by different parties to it, there may be a set-off and no question of the solicitor's lien will be entertained to prevent it. *Thompson* v. *Didion*, 10 M.R. 301.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 5.
— SET-OFF, 2.
— SOLICITOR AND CLIENT, III, 5.

SOUTH AFRICAN LAND WARRANTS.

Volunteer Bounty Act, 7 & 8 Edw. VII, c. 67 (D) — *County Courts Act, R.S.M.* 1902, c. 38—*Attachment.*

A warrant or certificate granted under 7 & 8 Edward VII, c. 67 (D), to a volunteer as a reward for services in the South African War and entitling him to select and obtain a grant of land from the Dominion Government, is in the nature of a document of title to land, and cannot, therefore, be seized under a writ of attachment from a county court. *Inter-Ocean Real Estate Co.* v. *White*, 20 M.R. 67.

SPECIAL DAMAGE.

See LIBEL, I, 7.
— PRACTICE, XVI, 10.

SPECIAL INDORSEMENT.

See PRACTICE, XI, 1.

SPECIAL JURY.

See JURY TRIAL, I, 11.
— PLEADING, XI, 19.
— VERDICT OF JURY, 3.

SPECIFIC OR PECUNIARY LEGACY.

See WILL, II, 1, 2.

SPECIFIC PERFORMANCE.

1. Damages — *Fusion of Law and Equity.*

The defendant agreed to sell to the plaintiff certain lands by a memorandum in writing which the plaintiff registered. Subsequently the defendant sold at an advanced price to H., who sold to another. On a bill filed for specific performance, or damages, after the defendant had sold to H.,

Held, that the Court could give relief by awarding damages to the plaintiff without compelling him to commence an action at law.

The Court of Queen's Bench possesses full power to give appropriate relief without regard to the form in which the action or suit is brought. *Boultbee* v. *Shore*, T.W., 376.

2. Decree for specific performance refused, but without prejudice to remedy at law.

Bill filed for foreclosure. Defendant set up a special agreement postponing time for maturity of mortgage, and a reduction of the amount of principal. This agreement was lost, and the only evidence of its existence was that of an alleged compared copy and the parol evidence of several witnesses. Defendant asked specific performance of this agreement. At the hearing TAYLOR, J., held that the agreement set up by defendant had never been executed.

On re-hearing, WALLBRIDGE, C. J., delivered the judgment of the Full Court, and held that the agreement set up by defendant had not been proved with that certainty and clearness which was required in a suit for specific performance, but remarked in his judgment that the defendant might sue at law for damages.

The minutes of the order on re-hearing affirming the decree of TAYLOR, J., as settled by the registrar contained a proviso that the defendant might pursue his remedy at law for damages.

The judgment of TAYLOR, J., in *Kelly* v. *McKenzie*, 2 M.R. 203, was cited, in which an application to vary the original decree was successfully made, some time after re-hearing, and to insert a similar condition to that asked for in this case.

WALLBRIDGE, C. J., held that the minutes should stand as settled by the registrar. *Tait* v. *Calloway*, 2 M.R. 312.

3. Evidence—*Certainty of proof.*

The certainty of proof in a suit for specific performance must be greater than in an action for damages. *Tait* v. *Calloway*, 2 M.R. 289.

See AGREEMENT FOR SALE OF LAND, 1.
— BANKS AND BANKING, 8.
— CONTRACT, I, 1; XIII, 1; XV, 14.
— INDEMNITY, 1.
— INFANT, 1.
— JURISDICTION, 2.
— MISREPRESENTATION, IV, 1.
— MISTAKE, 3.
— STATUTE OF FRAUDS, 1.
— VENDOR AND PURCHASER, II, 3, 7; IV, 1, 3, 5; V, 1; VI.

SPEEDY TRIAL.

See CRIMINAL LAW, XI.

SPUR TRACK FACILITIES.

See RAILWAYS, XI, 4.

SQUATTER.

See FIXTURES, 1.

STABLE KEEPER.

See NEGLIGENCE, VII, 6.

STATEMENT OF CLAIM.

See PRACTICE, XXVII, 1.

STATEMENT OF RESIDENCE.

See PRACTICE, XXVIII, 15.

STATUTE OF FRAUDS.

1. Agreement of sale of land — *Name of purchaser not stated in memorandum—Specific performance.*

1. A note or memorandum in writing containing an agreement for the sale of land must, to satisfy the Statute of Frauds, name both the contracting parties or describe them so that they can be ascertained without extrinsic parol evidence, and it is not sufficient that the agent of the intending purchaser is named.

Potter v. *Duffield*, (1874) L.R. 18 Eq. 4; *White* v. *Tomalin*, (1891) 19 O.R. 513, and *Williams* v. *Jordan* (1877) 6 Ch. D. 517, followed.

2. An intending purchaser of land, who has been guilty of laches, bad faith and default for a considerable time in payment of the cash stipulated for, disentitles himself to the exercise of the judicial discretion to grant specific performance in his favor: *Gough* v. *Bench*, (1884) 6 O.R. 699, *Coventry* v. *McLean*, (1893) 22 O.R. 1, and *Harris* v. *Robinson*, (1892) 21 S.C.R. 391, followed. *Maber* v. *Penskalski*, 15 M.R. 236.

2. Agreement of sale of land—*Memorandum in writing.*

A writing signed by defendant not under seal agreeing to sell a parcel of land for $2000 on terms stated and acknowledging the receipt of a cheque for $100 deposit on same, but not mentioning the name of any person as purchaser or containing anything to indicate who the purchaser is, is not a sufficient memorandum in writing to bind the defendant under the Statute of Frauds; and, if the person whose name is signed to the cheque is not acting as the agent of the purchaser in the transaction, the cheque and the agreement do not together constitute such sufficient memorandum.

Pearce v. *Gardner*, [1897] 1 Q.B. 688, distinguished. *Grant* v. *Reid*, 16 M.R. 527.

3. Description of land, sufficiency of —*Evidence.*

A written offer, signed by the defendant in Manitoba, to purchase from the plaintiff land described only as "N½ 23-4-3E," and accepted by the plaintiff, sufficiently describes the land to satisfy the Statute of Frauds.

Abell v. *McLaren*, (1901) 13 M.R. 463, followed.

The same writing contained an offer to convey land described as "6 lots in Winnipeg listed with J. P. Bucknam & Son."

Held, that parol evidence was admissible to ascertain the identity of these lots, and, that being proved, the Statute of Frauds was sufficiently complied with. *Shardlow* v. *Cotterell*, (1881) 20 Ch. D. 90, followed. *Caisley* v. *Stewart*, 21 M.R. 341.

4. Hiring and service — *Quantum meruit — Joint creditors.*

The plaintiffs, husband and wife, made a verbal contract with the defendant to serve him on his farm for a year for $400. The work was not to be commenced until the plaintiffs were sent for. This was done some days after the making of the agreement. They nearly completed their year of service, but the defendant dismissed them two days before the end of the year, without any justification.

Held, that, the agreement of hiring being within the Statute of Frauds, the plaintiffs could not sue upon it; but that they were entitled to recover the value of their services in this action as upon a *quantum meruit*, and that the verbal agreement might be given in evidence for the purpose of showing the terms of the engagement and the amount that defendant had agreed to pay.

In such a case a plaintiff does not recover upon the special contract, but upon the promise implied by law to remunerate him for what he has done at the defendant's request; and the Statute does not prevent the party who has furnished money, goods, lands or labor under such a contract, when repudiated by the other party, from rescinding it and recovering upon this implied obligation.

Held, also, that the contract of hiring to be implied from the services rendered, and from the terms of the hiring, should be considered as joint, and that the plaintiffs could sue jointly, and only jointly, for the value of their services. *Giles* v. *McEwan*, 11 M.R. 150.

5. Parol evidence — *Guarantee in writing — Sufficient memorandum — Ambiguity.*

The defendant by writing under seal agreed "to become responsible for the debt contracted by James Jones to The Waterous Engine Works Co.," but the writing did not state to whom he was to become responsible.

Held, (reversing the decision of KILLAM, J.)

1. That parol evidence of the surrounding circumstances was admissible to explain the ambiguity, and that, looking at the writing in relation to the circumstances, it was sufficiently shewn that it was the plaintiffs to whom defendant was to become responsible.

2. That the writing was a sufficient memorandum to satisfy the Statute of Frauds. *Waterous Engine Works Co.* v. *Jones*, 7 M.R. 73.

6. Parol trust — *Renewal of fi. fa. —Certificate of judgment— Informalities.*

C. owned lands subject to mortgages. For the purpose of securing O. against some accommodation endorsements she mortgaged the land to him, but in form the mortgage was to secure payment of $3,500. The first mortgagee took foreclosure proceedings. A verbal agreement was then made, (as the plaintiff alleged) that O. should prove upon his mortgage, should redeem the prior mortgagees, borrow upon a new mortgage sufficient to recompense him, and hold the equity of redemption in trust for C.

The plaintiff purchased a judgment against C. upon which *fi. fa.* lands and a certificate of judgment had been issued, and filed a bill upon them claiming that O. was a trustee for C., and asking for a sale. The evidence shewed that the plaintiff was simply the nominee of C.

Held, 1. That, the agreement being verbal, the Statute of Frauds was a valid defence.

2. The *fi fa.* had ceased to be in force, it having been tested 17th August, 1885, and renewed more than 30 days before its expiration.

3. That the certificate of judgment was invalid. The judgment was recovered by Thomas Houston and William S. Foster, trading as Houston, Foster & Co. for $1,278.60, whereas the certificate was of a judgment recovered by Thomas Hustin and William S. Fisher, trading as Hustin, Fisher & Co., for $1,188.70. *Waterous* v. *Orris*, 6 M.R. 177.

7. Parol evidence to establish express trust—*Appeal from findings of fact.*

Action for a declaration that certain lands standing in defendant's name were held by him in trust for plaintiff and for an order for a conveyance of the lands to the plaintiff. Plaintiff alleged that he had bought and paid for the lands and taken deeds in defendant's

name with his knowledge and consent. Defendant positively denied this and claimed that he had himself bought and paid for the lands.

The trial Judge held that the plaintiff had not satisfied the *onus* that lay on him to establish a clear case upon the evidence and gave judgment for defendant.

Held, on appeal to the Full Court,

1. In view of the letters written by defendant to plaintiff and of the undisputed facts and circumstances, as set out in the judgments, the plaintiff's case was clearly made out.

2. When the trial Judge's decision does not depend upon the credit to be given to conflicting testimony, but rather upon inferences drawn from the documentary evidence and the surrounding facts and circumstances, a Court of Appeal is free to reverse his decision upon questions of fact as well as law.

McKercher v. *Sanderson*, (1887) 15 S.C.R., at p. 301, and *Creighton* v. *Pacific Coast Lumber Co.*, (1899) 12 M.R. 546, followed.

3. Notwithstanding section 7 of the Statute of Frauds, an express verbal trust of land may be proved by oral testimony, wherever a strict reading of the Statute would enable the trustee to commit a fraud.

Re Duke of Marlborough, [1894] 2 Ch. 141, and *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, followed. *Gordon* v. *Handford*, 16 M.R. 292.

8. Sale of land—*Quantum meruit.*

The plaintiff's claim was for the balance of the purchase money of a piece of land which had been sold by the plaintiff to the defendant, and the plaintiff had procured a conveyance of the land to the defendant, who had accepted the same as made in performance of the plaintiff's agreement, but there was no agreement of sale to satisfy the Statute of Frauds.

Held, following *Giles* v. *McEwan*, 11 M.R. 150, that, notwithstanding the absence of an agreement in writing, the plaintiff was entitled to recover the value of the land conveyed, which *prima facie* was worth the amount the defendant had agreed to pay.

McMillan v. *Williams*, 9 M.R. 627, distinguished on the ground that plaintiff there had sued on the agreement. *Holmwood* v. *Gillespie*, 11 M.R. 186.

See AGREEMENT FOR SALE OF LAND, 1, 2.
— ASSIGNMENT OF CHOSE IN ACTION.
— BAILMENT, 6.
— CONTRACT, II, 1; XIII, 2; XV, 13.
— EQUITABLE ESTOPPEL.
— EQUITABLE MORTGAGE.
— EVIDENCE, 20.
— GUARANTY, 1.
— JURISDICTION, 2.
— MUNICIPALITY, I, 3.
— PRINCIPAL AND AGENT, V, 7.
— VENDOR AND PURCHASER, VI, 1, 6, 10, 14; VII, 9.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.
— REAL PROPERTY LIMITATION ACT.

STATUTE OF MORTMAIN.

See WILL, II, 3.

STATUTE PROCURED BY FRAUD.

See SUMMARY JUDGMENT, II, 3.

STATUTES, CONSTRUCTION OF.

1. Adjournment of trial—*"From day to day."*

In a statute regulating the procedure upon a contested election, it was provided that the Judge "shall adjourn from day to day, until he has pronounced his final judgment;" but there was no provision declaring the proceedings void if this provision was not observed.

Held, that the provision was directory only, and its non-observation did not vitiate the Judge's decision. *McMicken* v. *Fonseca*, 6 M.R. 370.

2. Change of name of company—*Parties—Crown choosing forum.*

After the S. & R. M. Railway Co. had incurred some liabilities, its name was, by statute, changed to the N.W.C. Ry. Co. The Act provided that "the existing liabilities of the company, for work done for the said company, shall be a first charge upon the undertaking."

A further Act provided that "the company shall remain liable for all debts due for the construction of the railway and, if such debts are due to contractors, shall cause all just claims for labor, etc., to be paid by such contractors."

Afterwards a charter was issued to the G.N.W.C. Ry. Co., in which that railway covenanted with Her Majesty to pay all debts due by the above-named railways, "and will cause all just claims for labor, &c., due by contractors, to be paid by such contractors."

Upon an information against the last named railway company, and certain contractors of the first named railway, to enforce the covenant,

Held, 1. That the railway was liable only to the extent to which the previous railway was liable to its own contractors, and not for sums due by such contractors to workmen beyond the amount of that liability.

2. If otherwise, the workmen ought to be parties to the bill.

Per TAYLOR, C. J. The Crown may, when proceeding in relation to property to which the Sovereign is entitled in right of the Crown, choose its own forum; but otherwise, where the Crown claims no beneficial interest. *Attorney-General* v. *MacDonald*, 6 M.R. 372.

3. "Majority in value of the creditors."

Held, that, in estimating a majority in value of the creditors under 50 Vic. (M), c. 8, s. 1, s-s. 5, the question of security held by any creditor should not be taken into account. Creditors must be taken to be such for the full amount of what the debtor owes them. *Fraser* v. *Darroch*, 6 M.R. 61.

4. Retrospective statute—*Costs.*

In an action on contract the plaintiff had a verdict for $101. When the action was commenced, the County Court had jurisdiction up to $250; but, when the amount claimable exceeded $100, the case could be brought in the Queen's Bench. In such case, if the verdict exceeded $200, full costs were given, but if less than $200, and more than $100, costs upon a lower scale were taxed.

Pending the action an Act provided that, "In case an action of the proper competence of the County Courts be brought in the Queen's Bench," County Court costs only should be allowed, and that subject to a set-off of Queen's Bench costs, unless the presiding Judge certified otherwise.

Held, that the statute, although passed after the case was commenced, governed the question of costs. *Todd* v. *Union Bank of Canada*, 6 M.R. 457.

5. Retrospective statute — *King's Bench Act, Rules* 803, 804—60 *Vic.*, c. 4, *County Court judgment—Judicial sale of land.*

Rule 807 (*a*), added to The King's Bench Act by 60 Vic., c. 4, is retrospective and was intended to apply not only to orders which had been previously made and which had not been attacked, but also to the proceedings which had been taken under them, so as to validate judicial sales of land that had been made under orders to realize County Court judgments without the bringing of a separate action, which it had been held in *Proctor* v. *Parker*, (1897) 11 M.R. 485, there was no jurisdiction, before 60 Vic., c. 4, to make. *Ritz* v. *Schmidt*, 13 M.R. 419.

Reversed, 31 S.C.R. 602. (See next case.)

Until 1897 it was the practice in Manitoba for the Court of Queen's Bench to grant orders for the sale of lands on judgments of the County Court under Rules 803 *et seq.* of The Queen's Bench Act, 1895. In that year the Court of Queen's Bench decided that this practice was irregular, and in the following year the Legislature passed an Act providing that, "in the case of a County Court judgment, an application may be made under Rule 803 or Rule 804, as the case may be. This amendment shall apply to orders and judgments heretofore made or entered, except in cases where such orders or judgments have been attacked before the passing of this amendment."

Held, SEDGEWICK, J., dissenting, that the words "orders and judgments" in said clause refer only to orders and judgments of the Queen's Bench for sale of lands on County Court judgments, and not to orders and judgments of the County Court.

Held, further, reversing the judgment of the Queen's Bench, 13 M.R. 419, DAVIES, J., dissenting, that the clause had retro-active operation only to the

extent that orders for sale by the Queen's Bench on County Court judgments made previously were valid from the date on which the clause came into force, but not from the date on which they were made.

Per SEDGEWICK, J., The clause had no retro-active operation at all. *Ritz* v. *Schmidt*, 31 S.C.R. 602.

7. Sale of land for taxes—*Tax deed —Interest upon taxes.*

A statute provided that no "sale" of land for taxes should be impeached because of the addition of interest to the taxes. A bill was filed to prevent the execution of a tax deed in pursuance of a sale on the ground that such an addition had been made.

Held, that the statute was not confined in its operation to a sale completed by conveyance, but made valid the sale itself. *Schultz* v. *City of Winnipeg*, 6 M.R. 269.

See ALIMONY, 4.
— ATTACHMENT OF GOODS.
— C.P.R. LANDS, 1.
— CAPIAS, 3.
— COMPANY, IV, 7.
— CONSTITUTIONAL LAW, 5.
— CONTRACT, XV, 5.
— CORPORATION, 6.
— COSTS, XI, 4.
— CROWN LANDS, 2.
— CROWN PATENT, 2.
— ELECTION OF REMEDY.
— ELECTION PETITION, X, 6.
— EXEMPTIONS, 6.
— FIRE INSURANCE, 3.
— FRAUDULENT PREFERENCE, VI, 2.
— HALF BREED LANDS, 1.
— HOMESTEAD, 6.
— ILLEGALITY, 2.
— INJUNCTION, I, 2.
— LAW STAMPS.
— LIQUOR LICENSE ACT, 3.
— MECHANIC'S LIEN, III, 1.
— MUNICIPALITY, I, 2, 5; IV, 4, 5.
— PRACTICE, XXVIII, 29.
— PUBLIC PARKS Act.
— PUBLIC SCHOOLS ACT, 2.
— RAILWAYS, VI, B, 1, 2.
— RETROSPECTIVE STATUTES.
— SALE OF LAND FOR TAXES, IV, 1; VI; VII, 1; IX, 1, 3.
— SHERIFF, 6.
— STREET RAILWAY.
— WINDING-UP, I, 2; III, 1.

STATUTORY DECLARATION.

See AFFIDAVIT.

STAYING PROCEEDINGS.

I. APPEAL PENDING.
II. IN SECOND ACTION.
III. MISCELLANEOUS CASES.

I. APPEAL PENDING.

1. In action on foreign judgment—*Terms on which proceedings stayed—Practice.*

The plaintiff was proceeding to enforce in the Courts of this Province two judgments obtained in Ontario against defendants for a large amount, one of which judgments had been entered by consent; and the company was at the same time going on with proceedings in the Ontario Court for the purpose of setting aside the judgment on the ground that the consent had been given in fraud of the company, and that there had been collusion between the plaintiff and the president of the company, and that there was a good defence to plaintiff's claim on the merits. It appeared that the company was acting in good faith in their proceedings, that the expenses connected with the same would be very great and would have to be duplicated here if the action in this Court proceeded.

The defendants then applied for a stay of proceedings in this action until the determination of the litigation in Ontario.

Held, that the proceedings should be stayed upon terms securing as far as possible the plaintiff's claim and upon defendants agreeing to abide by the result of their litigation in Ontario. *Charlebois* v. *G.N.W.C.R. Co.*, 9 M.R. 286.

2. In mechanic's lien action.

The bill was filed to enforce a mechanic's lien, and was dismissed at the hearing with costs, 1 M.R. 39.

After taxation, plaintiff having served notice of intention to re-hear, moved to stay proceedings under the decree, pending the re-hearing, offering to give security for costs.

TAYLOR, J., *Held*, (reversing the decision of the Referee who had followed the English authorities, and dismissed the motion with costs,) that the Court here had decided not to follow the Eng-

lish practice, but to act on the practice laid down in the Supreme Court Act, and made an order that the proceedings be stayed, upon plaintiffs giving security, to the satisfaction of the Referee, for the costs of the defendants, including the costs of re-hearing *Chadwick* v. *Hunter*, 1 M.R. 109.

3. From order to strike out defence.

The strict legal right to appeal from an order does not necessarily entitle the aggrieved party to a stay of proceedings. It is a matter of discretion, and may be refused when a stay would defeat the ends of justice, or where one of the parties would be materially prejudiced by it, while the inconvenience to the other party would be of a much less character. *Miller* v. *Henry*, 3 M.R. 454.

4. To Privy Council — *Stay of execution—Security.*

Where, after judgment on appeal to the Supreme Court of Canada, the losing party proposes to appeal to the Judicial Committee of the Privy Council, the Court will order proceedings on such judgment in the Court of original jurisdiction to be stayed on satisfactory security being given for the debt, interest and costs. *Union Investment Co.* v. *Wells*, 41 S.C.R. 244.

5. Recovery of costs.

Proceedings to recover costs, under the order appealed from, will be stayed upon payment of the amount into court. *Abell* v. *Allan*, 3 M.R. 479.

6. Sale of land in mechanic's lien action —*Appeal pending in action for redemption of same land — Identity of parties.*

Pending proceedings for the sale of the land in question to realize the amount found due to the plaintiffs and other lien holders under The Mechanics and Wage Earners Lien Act, R.S.M. 1902, c. 110, the president of the plaintiff company, as trustee for the company, acquired a mortgage on the land given by the owner and sold it under the power of sale for default in payment to an officer of the company. The owner afterwards got judgment in this Court in an action against the president of the plaintiff company for redemption of the mortgage, but the latter appealed therefrom to the Supreme Court of Canada, which appeal was still pending.

Held, that, as the plaintiff company was in effect a party to both actions, proceedings to carry out the sale in the first action should, on the application of the owner of the land, be stayed until after the decision of the Supreme Court in the second action should be given, provided that the applicant would within one month pay into court the amounts found due by the Master's report to lien holders other than the plaintiff, as against whom there should be no stay of proceedings, and that, in default of such payment, the application should be dismissed with costs. *Black* v. *Wiebe*, 4 W.L.R. 218.

II. In Second Action.

1. Until payment of costs of former suit.

Plaintiff had filed a bill to set aside, on the ground of fraud, a purchase of lands made by him from the defendant. The bill was dismissed because the plaintiff, after his discovery of the fraud, had affirmed the contract.

In the present action for damages, for the deceit, the defendant applied to stay all proceedings until payment of his costs of the previous suit.

Held, that, as the causes of action were not the same, or substantially the same, and the plaintiff's conduct was not vexatious, the action should not be stayed. *Stewart* v. *Jackson*, 3 M.R. 568.

2. Until payment of costs of former suit.

Where a suit is instituted seeking relief substantially the same as that sought in a previous suit, the proceedings will be stayed until the costs of the former suit have been paid.

The fact that the first suit was not determined upon its merits is not necessarily an answer to the application.

The fact that the Judge who heard the application exercised a discretion and dismissed the application is no bar to an appeal.

Per Killam, J. It was not a case for the exercise of discretion.

The fact that in the first suit a married woman was suing alone and, in the second, that she sued by a next friend is no ground for refusing the application. *Hinl* v. *Whitmore*, 2 K. & J. 458, considered.

Per TAYLOR, C. J. (1) The test of the identity of the suits is whether the bill in the second suit could have been produced by a fair amendment of the first. But the proceedings will sometimes be stayed although the relief sought in the second suit could not have been obtained in the first.

(2) That there is new matter in the second suit; that the relief sought is not exactly the same, or that the parties are not identical in both suits, is no ground for refusing to stay proceedings. *McMicken* v. *Ontario Bank*, 6 M.R. 155.

3. Practice—*Second action—Formal objection.*

An application to stay proceedings in a second action for the same cause, cannot be made before appearance.

But such an objection is a "formal" one, and may be cured by enlargement of the application, and the entry of appearance. *McNaughton* v. *Dobson*, 5 M.R. 315.

III. MISCELLANEOUS CASES.

1. Action brought without authority.

An action was commenced and carried to trial without the authority of the plaintiff. During or immediately preceding the trial the plaintiff first learned of its existence, and then told the defendant that he (the plaintiff) had nothing to do with it. The plaintiff took no steps to stay the action, and, the defendant having had a verdict, a motion for a new trial was made on the plaintiff's behalf, which was refused. After judgment and execution the plaintiff moved to stay all proceedings.

Held, that the plaintiff was entitled to the rule as asked.

Semble, a defendant at common law may call upon the plaintiff's attorney to produce his authority for instituting the action. It is not so in equity. *Carey* v. *Wood*, 2 M.R. 290.

2. Garnishment — *Interpleader.*

Where a garnishing order is made in an action for a disputed claim before judgment and the garnishee, admitting his debt, pays the money into court with notice that it is claimed by another party, and then applies for an interpleader issue to be tried between plaintiff and such other party as claimant, it is proper to stay the trial of the interpleader issue until it be seen whether the plaintiff will recover judgment against the original defendant.

The interpleader issue to be tried being one which involved the title to lands, the question was raised as to whether it would be proper to send the issue to the County Court for trial, although the amount garnished was under $250.

Held, following *Guardians of Hertford Union* v. *Kimpton*, 11 Ex. 295, that the issue might be sent to the County Court as it was a remedy provided by special statute directing the trial in a County Court. *Hough* v. *Doll*; *Howard, Garnishee*, 10 M.R. 679.

3. Issue of execution pending trial of counterclaim — *Practice — Summary judgment — Counterclaim*

Although the plaintiff has obtained leave to sign judgment for rent due, a stay of execution should be granted until after the trial of the defendant's counterclaim for damages to the goods on the premises alleged to have been caused by non-repair, if the counterclaim is so far plausible that it is not unreasonably possible for it to succeed if brought to trial, unless some reason is shown to believe that the plaintiff will be put in peril of losing the amount of his judgment by the delay.

Sheppards v. *Wilkinson*, (1889) 6 Times L.R. 13, followed. *Wells* v. *Knott*, 20 M.R. 146.

4. Meaning of expression "usual stay."

When, at the close of the trial, counsel for the losing party asks the Judge to grant the "usual stay" and the Judge says "Yes" and nothing more is said, the meaning is that the successful party may sign judgment, but may neither issue an execution nor register a certificate of judgment until after the lapse of the time allowed for appealing from the decision. *Johnston* v. *Henry*, 21 M.R. 700.

See APPEAL FROM ORDER, 6.
— ARBITRATION AND AWARD, 1.
— COSTS, III, 1, 2.
— EJECTMENT, 4.
— ELECTION OF REMEDY.
— ELECTION PETITION, V, 1.
— INFANT, 11.
— INJUNCTION, IV, 6.
— PARTIES TO ACTION, 4.

See PRACTICE, III, 5; IV, 1; XXVIII, 30, 32.
— REAL PROPERTY ACT, III, 8.
— SECURITY FOR COSTS, IV, 1; X, 8
— SOLICITOR AND CLIENT, I, 4.
— WINDING-UP, IV, 9.

STIPULATION FOR FORMAL CONTRACT.

See VENDOR AND PURCHASER, I, 2.

STOCK GAMBLING TRANSACTION.

See EVIDENCE, 27.

STOLEN CHEQUE.

See BILLS AND NOTES, VI, 4.

STOP ORDER.

See PRACTICE, XXVIII, 30.

STOPPAGE IN TRANSITU.

Termination of transit by sheriff—*Insolvency of consignee—Proof.*

Goods while in transit were seized by a sheriff under an execution against the assignee, and removed from the custody of the carrier.

Held, that the consignor could not, after such removal, stop in transitu.

Semble, 1. By insolvency, in such cases, is meant a general inability to pay debts, of which the failure to pay one just and admitted debt would probably be sufficient evidence.

2. A vendor, who, in good faith and in ignorance of the embarrassed circumstances of a customer, sold goods to him, may, on discovery of the customer's insolvency, exercise the right of stoppage in transitu. *Couture* v. *McKay. Hudson's Bay Co., Claimants*, 6 M.R. 273.

See RAILWAYS, III, 3.

STREET RAILWAYS.

Exclusive right to use of street for tramway purposes — *Powers of Municipal Councils* — "*Portion of street.*"

Municipalities in Manitoba are the creatures of the Legislature and have only such powers as are expressly conferred upon them by the Legislature, or implied as incident thereto, or necessary to be exercised in order to carry into effect the powers expressly given; and, therefore, without express legislative sanction, such a municipality has no power to confer upon any person or corporation an exclusive right to operate street railways on any of its streets or highways.

The City of Winnipeg, by by-law passed in 1882, assumed to grant to the plaintiffs, for twenty years, "the exclusive right to such portion of any street or streets as shall be occupied by said railway," and the plaintiffs claimed an injunction to prevent the defendants from operating a competing line of street cars on tracks parallel to them on the same streets.

The Charter of Incorporation of the City, c. 36 of the statutes of Manitoba passed in 1882, gave it no express power to grant any exclusive rights or monopoly of the use of the streets, but provided that the Council might pass by-laws "for authorizing the construction of any street railway or tramway upon any of the streets or highways within the City," and the plaintiffs' Act of Incorporation, c. 37, of the statutes passed in the same year, gave them "full power and authority to use and occupy any and such parts of any of the streets or highways of the City as may be required for the purposes of their railway track, the laying of the rails and the running of their cars," subject to the terms of any agreement between the plaintiffs and the City relating to the same.

Held, that there was nothing in either statute enabling the City to grant the exclusive rights claimed by the plaintiffs; and, also, that, even if the City had such power, it had failed to confer such rights upon the plaintiffs by the by-law above referred to, the exclusion intended having no application laterally across the whole width of the streets in question, but only longitudinally as far as the plaintiffs' tracks extended. *Winnipeg St. Ry. Co.* v. *Winnipeg Electric St. Ry. Co. & City of Winnipeg*, 9 M.R. 219.

Affirmed, [1894] A.C. 615.

See NEGLIGENCE, VI.
— TREES ON HIGHWAY.

STRIKES.

See INJUNCTION, I, 6.
— TRADE UNIONS.

STRIKING OFF THE ROLLS.

See SOLICITOR.

STRIKING OUT APPEAL.

See PRACTICE, III, 3.

STRIKING OUT PLEADINGS.

See EVIDENCE, 12.
— FOREIGN JUDGMENT, 2, 3, 6, 7.
— LIBEL, 4.
— PARTIES TO ACTION, 8.
— PLEADING, II, 1; VII, 1, 2; X; XI, 6.
— PRACTICE, XXII, 3; XXIII; XXVIII, 21.
— PRODUCTION OF DOCUMENTS, 12.
— TIME, 1.
— TRADE UNIONS, 1.

STYLE OF CAUSE.

See INTERPLEADER, VII, 1.
— SECURITY FOR COSTS, I, 3.
— SOLICITOR'S LIEN FOR COSTS, 4.

SUB-CONTRACTOR.

See MECHANIC'S LIEN, III, 2; VII.

SUB-PURCHASER AND MORTGAGEE.

See VENDOR AND PURCHASER, III, 1.

SUB-PURCHASER AND VENDOR.

See VENDOR AND PURCHASER, IV, 5; VI, 3, 13; VII, 12.

SUBROGATION.

See MECHANIC'S LIEN, VI, 2.

SUBSEQUENT INCUMBRANCER.

See MERGER.
— MORTGAGOR AND MORTGAGEE, VI, 1.

SUBSEQUENT PURCHASER FOR VALUE.

See FRAUDULENT CONVEYANCE, 22.

SUBSTITUTION OF GOODS.

See WAREHOUSE RECEIPT.

SUBSTITUTIONAL SERVICE.

See COUNTY COURT, I, 4.
— JURISDICTION, 9.
— PRACTICE, XI., XXIV.
— SOLICITOR AND CLIENT, III, 6.

SUBWAY UNDER RAILWAY.

See INJUNCTION, I, 3.

SUCCESSION DUTY ACT.

Property situate in the Province—*Shares in corporations whose head offices are not in the Province—Deceased a resident of the Province.*

Under The Succession Duty Act of 1893, the Province cannot collect a tax or duty upon shares of stock in corporations whose head offices are not in the Province or upon money on deposit outside of the Province, as such property cannot be said to be "situate in the Province," although the deceased was a resident and died there. *Re Campbell's estate*, 14 C.L.T. Occ. N. 433.

SUCCESSIVE CONVICTIONS.

See LIQUOR LICENSE ACT, 6.

SUMMARY CONVICTION.

1. Corporation — *Certiorari to quash —Recognizance preliminary to certiorari— The Manitoba Summary Convictions Act, R.S.M. 1902, c. 163, s. 4—Deposit in lieu of recognizance.*

1. Where a corporation cannot enter into a recognizance, it can only comply with sec. 4 of the Manitoba Summary Convictions Act, R.S.M. 1902, c. 163, (requiring the entering into of a recognizance or making a deposit with the justice of the peace or magistrate as a necessary preliminary to the application for a *certiorari* to quash a conviction,), by making such deposit.

2. A recognizance under that section is defective if it is conditioned for the due prosecution of "a writ of certiorari issued" etc., instead of a writ *to be issued*.

3. Following *Ex parte Tomlinson*, (1869) 20 L.T. 324, and *Regina* v. *Robinet*, (1894) 16 P.R. 49, the defendant company should have leave to make the necessary deposit with the convicting magistrate within fourteen days, and then to renew the motion. *Re Western Co-operative Construction Co. and Brodsky*, 15 M.R. 681.

2. Jurisdiction of magistrate — *Certiorari—Criminal Code*, 1892, *s.* 887—*Appeal from summary conviction.*

1. The jurisdiction of an inferior court must appear on the face of the proceedings or it will be presumed to have acted without jurisdiction. Therefore a summary conviction under The Liquor License Act which does not state where the offence was committed, or even that it was committed in Manitoba, should be quashed.

2. Notwithstanding section 887 of The Criminal Code, 1892, *certiorari* proceedings may be maintained, although there has been an appeal from the conviction, upon any ground which impeaches the jurisdiction of the magistrate. *Reg.* v. *Starkey*, (1890) 7 M.R. 43, followed. *Johnston* v. *O'Reilly*, 16 M.R. 405.

See CRIMINAL LAW, X, 2; XV, 4.

SUMMARY JUDGMENT.

I. LEAVE TO DEFEND.

1. Allegations of fraud — *Costs, refusal of—King's Bench Act, Rule* 593.

When a defendant intends to rely on a defence of fraud, he should set it up definitely in his statement of defence and, in meeting a motion for leave to sign judgment under Rule 593 of The King's Bench Act, he should file an affidavit in answer showing such definite facts pointing to the alleged fraud as to satisfy the Judge that it would be reasonable that he should be allowed to raise such defence.

In this case the only evidence in support of the allegation of fraud consisted of some general statements of defendants in their examinations on their affidavits filed in answer to the plaintiff's motion, and it was held on appeal from the Referee that his order allowing plaintiff to sign judgment was right.

Wallingford v. *Mutual Society*, (1880) 5 A.C. 685, followed.

Costs of appeal refused partly on account of the great mass of material heaped up, including diffuse examinations on affidavits. *Canadian Moline Plow Co.* v. *Cook*, 13 M.R. 439.

2. Payment into court.

On an application for leave to sign final judgment, the Referee made an order giving defendant leave to defend on condition that he should pay into court $613.80 within a week, and that in default of such payment the plaintiff should have leave to sign final judgment for the full amount of his claim. The defendant had been examined on his affidavit and showed no defence as to that sum, and no clear defence at all to any portion of the plaintiff's claim. He desired, however, to defend for the whole, and had filed an affidavit that he had a good defence to the action on the merits.

Held, that the Referee had jurisdiction to make the leave to defend conditional upon payment into court of the part of the plaintiff's claim practically admitted as security, and that his discretion should not be interfered with in this case.

Rotheram v. *Priest*, 49 L.J.N.S. 104, and *Oriental Bank* v. *Fitzgerald*, W.N. [1880] 119, followed. *Law* v. *Neary*, 10 M.R. 592.

3. Promissory note — *Delivery of note in fraud of maker—Holder in due course—Application to sign judgment.*

On application to sign final judgment in an action on a promissory note by the indorsee against the maker, defendant filed an affidavit stating that the note had been handed by him to one L. to hold in escrow until the settlement of certain accounts between him and the payee, and that it had been delivered over to the payee without his consent.

Held, that, under The Bills of Exchange Act, 1890, s. 30, s-s. 2, defendant was entitled to defend without showing that plaintiff was not a holder in due course.

Fuller v. *Alexander*, (1882) 52 L.J.Q.B. 103, and *Millard* v. *Baddeley*, W.N. (1884) 96, followed. *Flour City Bank* v. *Connery*, 12 M.R. 305.

II. Special Indorsement.

1. Alleging liability under covenants in mortgage—*Practice.*

In indorsing a claim on a covenant in a mortgage for the payment of principal and interest, it is necessary to allege clearly and distinctly that the claim is made upon a covenant to *pay* the money secured by the mortgage, or leave will not be given to sign final judgment in the action, under section 26 of the Administration of Justice Act. Where the claim is only stated to be one for "money due upon covenants contained in a mortgage," it will not be assumed that these are covenants to pay a liquidated and ascertained amount, and it must clearly appear that the claim is not in any way in the nature of damages or such leave will not be given.

Satchwell v. *Clarke*, 8 T.L.R. 592, not followed. Dictum of the Master in *Munro* v. *Pike*, 15 P.R. 164, dissented from. *Manitoba and N.W. Loan Co.* v. *McPherson*, 9 M.R. 210.

2. Alleging performance of conditions precedent—*Practice.*

In a special indorsement of a writ of summons under The Common Law Procedure Act, for the purpose of an application for leave to sign final judgment after appearance entered, it is unnecessary to allege performance of conditions precedent, although such seems to be required under the Judicature Acts in England. *Wyld* v. *Livingstone*, 9 M.R. 109, overruled in that respect.

It is also unnecessary to show by the indorsement that a claim for interest arises under a contract express or implied, and it will be left to the defendant to show, if he can, that such claim does not so arise.

The special indorsement on the writ in this case showed a claim for an amount due under a covenant contained in a mortgage made by the defendant to the plaintiffs, dated 22nd July, 1892, whereby the defendant covenanted to pay to the plaintiffs $3,150.00, with interest at 8 per cent. per annum, and went on to give the dates when the principal and interest should be payable, and contained the following paragraphs :—

"To interest on $3,150 at 8 per cent. per annum from 22nd July, 1892, to 3rd October, 1893, due under covenant in said mortgage—the covenant is to pay interest yearly ; - - - - $249.30

To amount paid by the plaintiffs to insure the buildings on the said land in accordance with a covenant contained in the said mortgage, which insurance money the defendant by the said mortgage covenanted to repay to the plaintiffs with interest thereon at 8 per cent. per annum until paid ; - - - $45.00

And the plaintiffs claim interest on $3,444.30, the amount due as aforesaid from 3rd October, 1893, until judgment, at 8 per cent. per annum."

Held, that, taking the indorsement as a whole, it sufficiently appeared that the interest was claimed under the covenant for payment of interest, and that the indorsement in that respect was sufficient.

Held, also, that, under the rule laid down in *London and Canadian L. & A. Co.* v. *Morris*, 7 M.R. 128, the description of the claim for insurance premiums was sufficient.

Rodway v. *Lucas*, 24 L.J. Ex. 155, followed. *Canada Settlers' Loan Co.* v. *Fullerton*, 9 M.R. 327.

3. Municipality — *Questioning Act of Parliament — Municipal by-law.*

The defendant Municipality issued, in October, 1882, debentures payable to bearer, in aid of a railway company. These debentures were issued under a by-law passed in September, 1882. In

the following year this by-law was legalized and confirmed by statute. The boundaries of the Municipality were afterwards changed, and the name changed from the Municipality of Morris to The Rural Municipality of Morris. Twelve of these debentures, with interest coupons attached, came into the possession of the plaintiffs, who brought an action thereon and moved for final judgment by summary procedure under section 34 of The Queen's Bench Act. Amongst other defences the defendant set up that it was not the same Municipality that had issued the debentures, and that the by-law was procured to be passed by fraud, and that the passage of the Act confirming same through the Legislature was obtained by fraud and without the knowledge of the members.

Held, 1. That the Municipality was liable, because the Acts changing the boundaries preserved rights already acquired.

2. That, even if the by-law could be questioned after the lapse of eight years, the defendant was barred by the statute confirming it.

3. That, if an Act has passed the Legislature and received the assent of the Lieutenant-Governor, a court of justice cannot enquire into the mode in which it was passed or the means by which its passage was procured.

The special indorsement set out so many debentures, bearing certain numbers and of certain date, issued under a certain by-law, so much being claimed in respect of them. Interest was claimed upon these debentures, and in each case the numbers of them were given.

Held, a sufficient special indorsement. *Walter* v. *Hicks*, 3 Q.B.D. 8, followed. *Stewart* v. *Richard*, 3 M.R. 610, distinguished.

Held, (*Per* TAYLOR, C. J.) That interest might be recovered on the coupons.

The statute (sec. 34, Queen's Bench Act, 1885) requires that the application for final judgment shall be supported by an affidavit made by the plaintiff "himself, or by any other person who can swear positively to the debt or cause of action."

Held, that, when the affidavit is not made by the plaintiff himself, sufficient must appear on the affidavit to satisfy the Judge that the deponent is a person who can swear positively to the debt or cause of action, but those precise words need not be used. *London and Canadian Loan and Agency Co.* v. *Rural Municipality of Morris*, 7 M.R. 128.

Appeal quashed, 19 S.C.R. 434.

4. Sufficiency of — *Cheque dishonored — Notice of — Amendment of indorsement after summons for judgment taken out—Writ of summons.*

In an action on a dishonored cheque final judgment will not be ordered, unless the indorsement on the writ contains either an allegation that notice of dishonor was given to the drawer, or a statement of the facts excusing the giving of such notice.

The indorsement on a writ cannot be amended by striking out objectionable particulars, after a summons for final judgment has been taken out, in order to support the summons. *Wyld* v. *Livingstone*, 9 M.R. 109.

III. Other Cases.

1. Action on foreign judgment — *Appeal pending against same when application made here — Finality of judgment — Railway Company — Power to assign judgment — Power of attorney — Judgment is a security for money.*

The plaintiffs sued as assignees of judgments for costs recovered against the defendants in actions brought by a Railway Company and one Delap in the High Court of Justice for Ontario. The defendant having entered an appearance, the plaintiffs applied to strike it out and sign judgment on the usual affidavit. Defendant opposed this application, claiming that he was appealing against the Ontario judgments, also that the power of attorney under which the assignment by Delap was executed did not authorize such an instrument. The power gave authority to sell and dispose of, among other things, "bonds, mortgages and other securities for money."

Held, (1) That the pendency of an appeal against a foreign judgment would be no defence to an action upon it here, although the Court might stay execution on proper terms.

(2) That there is nothing to prevent a railway company from assigning a judgment recovered by it.

(3) That a judgment is a security for money, and that the assignment executed by Delap's attorney, under the power above referred to, was sufficient. *Howland* v. *Codd*, 9 M.R. 435.

2. Affidavit — *Person who can swear positively to the debt or cause of action—Practice.*

On an application to sign final judgment under section 34 of The Queen's Bench Act, 1885, if the affidavit be not made by the plaintiff, it must shew such facts as will satisfy the Judge that the deponent is a person who can properly make the affidavit, but it need not state in express terms that he "can swear positively to the debt or cause of action."

If the affidavit be made by the plaintiff himself, all that he need swear to, in proof of his claim, is that "in his belief there is no defence to the action."

London & Canadian L. & A. Co. v. *Morris*, 7 M.R. 128, followed.

The corresponding English order distinguished. *Central Electric Co.* v. *Simpson*, 8 M.R. 94.

See APPEAL TO SUPREME COURT, 4.
— EVIDENCE, 22.
— EXAMINATION FOR DISCOVERY, 2.
— EXAMINATION ON AFFIDAVIT, 4.
— NEW TRIAL, 3.
— PRACTICE, XI, 5; XXII, 1, 2.
— SET-OFF, 4.

SUMMARY JURISDICTION OF THE COURT.

See SOLICITOR, 2, 4, 8, 9.

SUMMARY TRIAL OF INDICTABLE OFFENCE.

See CRIMINAL LAW, II, 2; XIII; XVII, 8.

SUMMING UP OF VOTES.

See LOCAL OPTION BY-LAW, II, 1, 2.

SUNDAY.

See CRIMINAL LAW, XVII, 16.

SUPERIOR TITLE.

See CROWN PATENT, 6.

SURCHARGE.

See MORTGAGOR AND MORTGAGEE, VI, 1.

SURPLUS FROM TAX SALE.

See SALE OF LAND FOR TAXES, VII.

SURPRISE.

See EVIDENCE, 10.
— NEW TRIAL, 5.

SURRENDER OF LEASE.

See LANDLORD AND TENANT V, 3.

SURROGATE COURT.

Surrogate Courts Act, R.S.M. 1902, c. 41, s. 63 — *Transfer of contentious matter to King's Bench—Notice of application to parties concerned—Practice—Appeal to Full Court.*

1. There is no jurisdiction in a Judge of the Court of King's Bench to order the removal, under section 63 of the Surrogate Courts Act, R.S.M. 1902, c 41, of a contested petition from the Surrogate Court to the Court of King's Bench unless reasonable notice of the application for removal has been given to the other parties concerned; and a son of the deceased, and also of the administratrix of the estate of the deceased, to whom letters had been granted as his widow, is a party concerned in a petition by the sister of the deceased to revoke the letters of administration on the alleged ground that the administratrix was not the lawful widow of the deceased.

2. Under section 58 of The King's Bench Act, an appeal lies to the Court in *banc* from an order of a Judge of this Court for the removal of a contentious matter to this Court under the Surrogate Courts Act.

Doll v. *Howard*, (1896) 11 M.R. 21, distinguished. *Re Estate of B——— Deceased*, 16 M.R. 269.

See PRACTICE, XXVII, 2.

SURVEY OF LAND.

New survey — *Errors in survey.*

1. When, upon a new survey of a block of lots giving only the outlines, it is determined that there is a small excess in the length of the block over the dimensions shown in the original sub-division survey, t ere is no principle of law requiring that such excess should in all cases be distributed over the whole length of the block so as to increase the width and change the true boundaries of every lot; but, if the case requires that such excess should be distributed or located at all, it may, according to circumstances, be located or allotted at one or the other end of the block.

2. It is only when it is shown that, after careful and exhaustive search, none of the original posts or monuments of the sub-division survey nor any vestiges of them can be found, that the Court will resort to the expedient of an equal proportional distribution of the excess among the several lots.

3 In default of such evidence, therefore, a plaintiff, whose claim depends upon his establishing strictly the boundary between his and the defendant's lot and rests solely upon the theory of such an equal distribution, must fail.

Barry v. *Desrosiers*, (1908) 14 B.C.R. 126, doubted. *Thordarson* v. *Akin*, 21 M.R. 157.

See BOUNDARY LINES.

SURVIVING TRUSTEE.

See PARTIES TO ACTION, 9.

TAKING POSSESSION.

See VENDOR AND PURCHASER, VII, 8.

TAX SALE.

See MORTGAGOR AND MORTGAGEE, VI, 10.

TAX SALE DEED.

See REAL PROPERTY ACT, II, 9.
— SALE OF LAND FOR TAXES, III, 2; IV, 3; VI, 1, 3; VIII; IX, 3.

TAXATION.

1. Business tax — *Charge on goods in premises for business tax imposed — Distress for taxes — Winding up — Liquidator — Assessment, when taken to be made — Taxes, when due — Mistake in name of party assessed—Winnipeg Charter, 1 & 2 Edward VII, c. 77, ss. 228 B., 313, 369, 378, 382.*

1. A liquidator appointed to wind up a company, under chapter 144 of the R.S.C. 1906, is not an assignee for the benefit of creditors within the meaning of section 382 of the Winnipeg Charter, 1 & 2 Edward VII, c. 77, so that there is no priority under that section in favor of the City for the business tax imposed upon the Company as against other debts.

2. Notwithstanding section 378 of the Charter, taxes imposed by the City are not due and payable so as to entitle the City to sue for them until after the preparation of the tax roll.

Chamberlain v. *Turner*, (1881) 31 U.C.C.P. 460, followed.

3. The assessment for the business tax can be deemed to be made only after notice thereof has been given: *Devanney* v. *Dorr*, (1883) 4 O.R. 206; and, if, at that time, the Company assessed is no longer in possession of the premises and the goods, though still on the premises, are in the hands of a purchaser from the liquidator, there is nothing in the Charter which preserves to the City the lien on the goods for the taxes created by section 313, for that section only gives the City a first charge *during the occupancy* on all goods in the premises for which the occupant has been assessed.

4. The statutory right given to the City by section 369 to distrain for such taxes upon any goods and chattels found on the premises in respect of which the taxes have been levied, although such goods and chattels may be the property, and in the possession, of any other occupant of the premises, is not equivalent to a lien or charge on the goods for such taxes; and, when the liquidator of a company assessed for business tax had, prior to the assessment, given up the occupancy of the premises and sold the goods therein, it was held that the City had no right to be paid the taxes in full out of the funds in the hands of the liquidator, but had the right to rank with other creditors of the company for the

same under section 228 B added to the Charter by the Act of 1907.

5. Taxes imposed before the winding up of a company has commenced can only rank as ordinary debts in the absence of a statutory lien or charge, but taxes imposed after the commencement of the winding up must be paid in full, as part of the expenses of the winding up, if the liquidator has remained in possession and such possession has been "a beneficial occupation:" *In re National Arms Co.*, (1885) 28 Ch. D. 474.

6. The assessment of the Company under the name "Ideal Furniture Company," instead of "Ideal House Furnishers, Limited," was sufficient under the circumstances.

Booth v. *Raymond*, (1901) 61 N.E.R. 129, followed. *Re Ideal House Furnishers and City of Winnipeg*, 18 M.R. 650.

2. Corporations Taxation Act, R.S.M. 1902, c. 164, s. 3, s-s. (m), as re-enacted by s. 7 of c. 37 of 5 & 6 Edward VII, and s. 18—*Municipality—Business tax levied under 63 & 64 Vic., c. 35, s. 2.*

The tax provided for by section 2 of chapter 35 of 63 & 64 Vic. to be levied by the City of Brandon upon occupants of business premises based upon the rental value of such premises, though called a business tax in the Act, might more properly be called an "occupation tax" or a "rental tax," and, at all events, it is not a tax similar to that imposed by the Legislature upon express and other companies for purposes of Provincial revenue by section 3 of The Corporations Taxation Act, R.S.M. 1902, c. 164, although the latter tax is based, in the case of an express company, partly on the number of its branch offices in the Province. Consequently section 18 of the last mentioned Act does not exempt an express company from payment of the tax levied under the first mentioned Act. *Dominion Express Co.* v. *City of Brandon*, 20 M.R. 304.

3. Exemption from — *Municipality—Ultra vires—56 Vic., c. 25, s. 9 (M.)*

In this suit the plaintiffs sought to obtain a declaration that the defendants were liable to pay taxes upon certain lands belonging to them, which were made part of the plaintiffs' municipality in April, 1891. The lands in question had formerly belonged to the municipality of St. Boniface, which, in 1882, entered into an agreement with the defendants by which the former acquired certain property from the latter for the use of the municipality, and in consideration thereof agreed that certain other property belonging to the defendants, including the lands in question, should be exempt from taxation, until the year 1901.

The plaintiffs contended that this agreement was *ultra vires*, because a municipality created by the Legislature has no power to exempt from taxation except in accordance with the provisions of law, and such exemptions as were claimed were not provided for by any statute.

Held, that the plaintiffs must fail on the following grounds:

First, the agreement providing for the exemption claimed by the defendants was more in the nature of a purchase and sale, the result of which was that the defendants practically paid their taxes on the land in question in advance for twenty years by conveying certain other property to the municipality.

Second, the agreement in question had been declared valid and binding upon the municipality of St. Boniface by the statute 46 & 47 Vic., c. 79, and the statute 56 Vic., c. 25, s. 9, specially provided that, in the case of the transfer from one municipality to another of property affected by any valid by-law, deed, or agreement, it should continue to be subject thereto, and it did not matter whether the by-law, deed, or agreement was valid at the time of its being made, if it had been confirmed by legislation before the passing of the last mentioned statute. *Rural Municipality of Springfield* v. *La Corporation Archiepiscopale Catholique Romaine de St. Boniface*, 10 M.R. 615.

4. Unpatented land — *Assessment Act, R.S.M. 1902, c. 117, ss. 7, 146, 159, 166 — Sale of land after issue of patent for taxes imposed before issue — Dominion Lands Act, 7 & 8 Edward VII, c. 20, s. 29.*

Under section 159 of The Assessment Act, R.S.M. 1902, c. 117, having regard to the special provisions of the Act and more particularly to sections 7 and 166, there may be a sale, after the issue of the Crown patent, for arrears of taxes assessed against the interest of the occupant, being the homesteader, prior to the issue of the patent, and the municipality is not, in such a case, limited

to the special method of collection provided by section 146.

In any event the sale will not be set aside when some of the taxes for which the lands were sold were assessed after the issue of the patent.

The provision in section 29 of 7 & 8 Edward VII, c. 20 (The Dominion Lands Act), that "No charge of any nature may be created upon a homestead, a purchased homestead or a pre-emption," refers only to charges created by the homesteader or pre-emptor and was not intended to interfere with the Province's right of direct taxation of the interest of such person in the land. *Hannesdottir* v. *Rural Municipality of Bifrost*, 21 M.R. 433.

See CONSTITUTIONAL LAW, 5, 6, 17.
— COSTS.
— LAW STAMPS.
— PUBLIC SCHOOLS ACT, 2.
— SALE OF LAND FOR TAXES.

TAXATION OF COSTS.

See COSTS, I, 1, 5; XI, 6; XIII, 19.
— PRACTICE, XXVIII, 5.
— RAILWAYS, I, 2.
— SOLICITOR AND CLIENT, I, 4; II; III, 6.

TAXES.

Distress for taxes — *Demand* — *Pleading.*

The defendant's treasurer served a demand for payment of taxes, upon the plaintiff, in the form set out in the judgment. A portion of the total amount demanded was not properly chargeable; but one of the items, viz., the taxes for 1884, was legally due, and appeared separately and clearly specified.

Held, 1. That there was no sufficient demand, even for the 1884 taxes.

2. If the demand could have been sustained, a seizure and sale for the whole amount would have given the plaintiff an action for excessive seizure and sale only.

3. Justification for trespass, in such a case, must be pleaded. *Foote* v. *Municipality of Blanchard*, 4 M.R. 460.

See GARNISHMENT, V, 6, 8.
— INJUNCTION, I, 7.
— PROHIBITION, I, 8.
— SALE OF LAND FOR TAXES, II; X, 7.
— TAXATION.

TEACHER AND SCHOOL TRUSTEES.

See PLEADING, XI, 17.

TECHNICALITY.

See PRACTICE, VII, 1.
— STAYING PROCEEDINGS, II, 3.

TENANT AT SUFFERANCE.

See VENDOR AND PURCHASER, IV, 6.

TENANT FOR LIFE.

See ADMINISTRATION, 1.

TENDER.

See ACCIDENT INSURANCE, 2.
— PRACTICE, XXVIII, 31.

TENDER OF CONVEYANCE.

See VENDOR AND PURCHASER, VII, 9.

THEFT.

See CRIMINAL LAW, VI, 5, 6; XVII, 17.
— LIVERY STABLE KEEPER, 2.
— SHERIFF, 3.

THIRD PARTY.

See PLEADING, II, 2.
— PRACTICE, XXVI.

THRESHERS' LIEN.

Threshers' Lien Act, 57 Vic., c. 36— *Lien on grain for price of threshing other grain — Seizure of excessive quantity — Notice of claim of lien.*

A thresher cannot, under The Threshers' Lien Act, 57 Vic., c. 36, maintain a

lien on grain, for the threshing of which he had been paid, to recover the price of a subsequent unpaid threshing.

The plaintiff, by his notice put up on the granary, asserted his claim to a lien upon all the grain contained in it which was worth about $86; but the Court found that the amount of the claim for threshing for which he could, under the Act, at the time of the posting of the notice, enforce a lien on such grain, if the proper steps were taken, was only about $26.

Held, that the quantity of grain which the plaintiff attempted to retain was unreasonably large for the amount owing, and that, under section 2 of the Act, he had forfeited his right of retention of any of it. *Simpson* v. *Oakes*, 14 M.R. 262.

THRESHING GRAIN.

See WEIGHTS AND MEASURES ACT.

THRESHING OPERATIONS.

See NEGLIGENCE, III, 2.

TICKET OF LEAVE ACT.

R.S.C. 1906, c. 150, ss. 7 and 8 — *Forfeiture of license to be at large by subsequent conviction — Place where prisoner must serve balance of term of first sentence —Prisoner arrested in Province other than that in which first sentence imposed.*

Under sections 7 and 8 of The Ticket of Leave Act, R.S.C. 1906, c. 150, when a prisoner, who has obtained a license to be at large after undergoing part of a gaol sentence in one Province and who has afterwards been confined in a penitentiary in another Province for a subsequent offence, thus forfeiting his license, is arrested upon the expiration of such later sentence for the purpose of his completing the term of his first sentence, he should, notwithstanding sub-section 3 of section 8, be confined in a gaol in such other Province and not in the penitentiary where he was last confined. *Rex* v. *McColl*, 21 M.R. 552.

TIME.

1. Computation of time — *Last day Sunday — Pleas — Application to strike out—Demurrer—Appeal from Referee.*

G. O. 97 provides that "Appeals from the order or judgment of the Referee in Chambers shall be made by summons, such summons to be taken out within four days after the order or judgment has been pronounced," &c.

Held, that, where the last day happens to fall on a Sunday, the time should be reckoned exclusively of that day.

Where pleas are clearly bad they should be struck out, and the plaintiff not put to the expense of a demurrer. *Bank of British North America* v. *Munro*, 9 M.R. 151.

2. Computation of time.

Records which require to be entered "at least four days before" the trial must be entered not later than Thursday for the following Tuesday. *Calder* v. *Dancey*, 2 M.R. 383.

3. Holidays — *Time for pleading — Christmas and three following days.*

The plaintiff signed judgment in default of pleas on the twenty-seventh day of December, 1883, the last day to plead falling on Christmas day.

The defendant moved to set aside judgment on the ground that Christmas day does not count, nor the three following days, in a notice to plead, and that the judgment was signed before the time to plead had expired.

Held, that Christmas day and the three following days could not be reckoned in any rules, notices or other proceedings; that Rule 175, Hilary Term, 1853, was then in force in this Province, and that the judgment should be set aside. *Fortier* v. *Gregory*, 1 M.R. 25.

4. Service of notice of intention to appeal.

An order of TAYLOR, J., on appeal from the Master's Report, was dated 10th December, 1883, but the minutes of it were not settled till 14th December. Notice of intention to appeal from the order was served on the plaintiff's solicitor on 19th December.

Plaintiff moved before the Referee in Chambers to set aside the notice of appeal on the ground that it was given too late.

Held, affirming the order of the Referee, that the time for the service of the notice must be reckoned from the date of the order and not from the date of settling it, and that the notice of appeal was given too late.

Leave was, however, given to proceed with the rehearing, notwithstanding the lapse of time, there having been a *bona fide* intention to appeal. *Glass* v. *McDonald*, 1 M.R. 29.

5. Sunday last day for notice—*Interpretation Act, R.S.M., c. 78, s. 8, clause (s).*

Where the last day for serving a notice of appeal under section 79 of The Assessment Act, R.S.M., c. 101, falls on a Sunday, it must be served not later than the Saturday preceding or it will be too late. Clause (s) of s. 8 of The Interpretation Act, R.S.M., c. 78, which reads, "When anything required to be done by any Act of the Legislature of Manitoba falls on a holiday, it shall be done on the next day not a holiday," does not apply in such a case. *Re Scott and City of Brandon*, 10 M.R. 494.

See Appeal from County Court, III, 4.
— Appeal from Order, 4.
— Arbitration and Award, I, 9, 13.
— Election Petition, VII, 1; VIII.
— Liquor License Act, 12.
— Local Option By-Law, V, 3;
— Mechanic's Lien, III, 1, 3; VII, 2; VIII.
— Municipal Elections, 5.
— Municipality, VIII, 2.
— Practice, XIX, 1; XXVIII, 16.
— Vendor and Purchaser, II, 1, 4, 7; IV, 2, 3, 6, 8; VI, 15; VII, 5, 10.

TITLE BY POSSESSION.

See Ejectment, 5.

TITLE BY USER.

See Pleading, VII, 1.

TITLE DEEDS.

See Solicitor, 3.

TITLE TO LAND.

1. Cloud upon title — *Parties* — *Costs.*

S. conveyed land to the plaintiff, who registered his conveyance. S. afterwards conveyed the same land to Fr., who conveyed to Fo., who conveyed to the defendant.

Held, that, although the registry showed a good title in plaintiff, the defendant's conveyances should be declared to be clouds, and be removed.

Held, that Fo. and Fr. were not necessary parties.

Held, that defendant must pay the costs. *Blair* v. *Smith*, 1 M.R. 5.

2. In Manitoba before the Transfer —*Sale of land by married woman prior to 1870—Effect of Crown Patent for land not vested in the Crown at the time—Husband and wife—Statute of Limitations—Amendment of bill by alleging conveyance from true owner obtained after suit commenced—Parties.*

The plaintiffs claimed title to the land in question under an alleged sale from the defendant, a married woman, made verbally in 1863 to their mother, E. T.

E. T. was married in 1861, and her husband, A. T., then went to live with her on the land. They continued to reside on and occupy it up to 1882 when E. T. died intestate, after which A. T. and the plaintiffs remained in possession up to the filing of the bill.

The Judge found as a fact that some time prior to 1866 the defendant had agreed to sell the land to E. T., and that E. T. and A. T. thereafter continued to occupy it under the belief that it belonged to E. T., but

Held, that, according to the Common Law of England, in force down to 1870, which was then the law of this country, such a sale by a married woman of land which was in no way separate estate, was wholly void and incapable of being enforced against her, although a verbal sale by a person *sui juris* might at that date have been good, according to the decision in *Sinclair* v. *Mulligan*, 5 M.R. 17.

The plaintiffs also claimed title by length of possession held by their mother under said sale since 1863, and by themselves since 1880, but their father, A. T., had lived on the land all that time, and farmed and occupied it in the same way as any other head of a family would.

Held, that, on the evidence, A. T. was the person who had acquired the title by possession under the Statute of Limitations, and as he had not conveyed his title to the plaintiffs, and was not a party to the suit, the bill must be dismissed.

The defendant had obtained a patent from the Crown for the land in 1891, but it appeared that the land was not then vested in the Crown, having been granted by the Hudson's Bay Company in fee simple many years before to the defendant's father.

Held, that the existence of such patent would not have prevented relief being granted if A. T. had brought the suit, and that the defendant might have been ordered to convey to him.

An objection for want of parties was taken by defendant's counsel, who claimed that defendant's husband should have been a party to the suit.

Held, that, as the husband had not, prior to the coming into force of the Married Woman's Property Act, taken possession of the land, it then became her separate property, and she might be sued in respect of it as a *femme sole*.

The Judge at first inclined to the opinion that it would be proper to allow the plaintiffs to obtain a conveyance from their father and then to amend the bill by alleging the conveyance, and upon proof thereof to make a decree in their favor; but, after hearing further argument,

Held, that such amendment could not be allowed, and that the bill must be dismissed, but without costs. *Templeton* v. *Stewart*, 9 M.R. 487

3. Proof of Patent — *Patent as evidence of title—Cloud upon title.*

Held, 1. That the copy of a patent filed in the registry office and produced by the registrar is not evidence of the patent.

2. Where the bill alleged a patent and asked that certain deeds to the defendant should be set aside as clouds upon title, and the answer prayed, by way of cross relief, that the patent referred to in the bill might be set aside as a cloud upon the defendant's title, no proof of the patent was necessary.

4. That a patent from the Crown is *prima facie* evidence of title. If it be desired to set up title through a purchaser from the Hudson's Bay Company as against a patent, evidence must be given to bring the case within The Rupert's Land Act, 1868. (Imp.) *Pritchard* v. *Hanover.*, 1 M.R. 72.

4. Proof of will—*Production of original will — Age — Certificate of baptism.*

Held, to prove title to land the original will must be produced and execution proved—probate is not sufficient.

Held, that a certificate of baptism, signed by the proper official under Con. Stat., c. 16, ss. 1 and 16, was admissible in evidence. *Sutherland* v. *Young*, 1 M.R. 38.

See APPEAL FROM COUNTY COURT, IV.
— COSTS, XI, 9.
— COUNTY COURT, I, 4.
— CROWN LANDS, 2.
— EVIDENCE, 26.
— JURISDICTION, 2.
— PROHIBITION, I, 8.
— SOUTH AFRICAN LAND WARRANT.
— STAYING PROCEEDINGS, III. 2.
— VENDOR AND PURCHASER, IV, 9, 11; VI, 1, 6, 14; VII, 2, 4, 8, 11.

TORT.

See ATTACHMENT OF GOODS, 7.
— JURISDICTION, 10.
— NEGLIGENCE, VII, 2.
— PARTNERSHIP, 5.
— PRACTICE, XXVI, 1.

TRADE FIXTURES.

See FIXTURES, 8.

TRADE NAME.

Imitation—*Defendant using his own name—Injunction—Delay in moving for injunction.*

Action for injunction to prevent defendant from advertising shoes for sale in such a manner as to infringe upon the plaintiff's trade mark, "The Slater Shoe." The defendant was the agent in Winnipeg for the sale of goods manufactured by George A. Slater of Montreal, who was not connected with the plaintiff company. George A. Slater advertised and sold his goods extensively in Canada under the names "The George A. Slater Shoe" and the "Invictus Shoe." The

defendant's advertising agent, in an advertisement published in a Winnipeg newspaper, described the shoes defendant was selling as "the celebrated George A. Slater Invictus Shoes for men." The words "George A." and "Invictus" were in considerably smaller type than the words "Slater" and "Shoes," but still were quite prominent and easily seen. The defendant discontinued the advertisement as soon as the form of it came to his notice and before plaintiff took exception to it.

On appeal from the decision of MATHERS, J., refusing an injunction,

Held, that the advertisement objected to, in the form in which it appeared, would, if persisted in, have constituted an infringement of the plaintiffs' trade name; but that the discretion exercised by the Judge appealed from in refusing an injunction should not be interfered with, and that the appeal should be dismissed without costs, for the following reasons:—

(*a*) Defendant was not personally responsible for the form in which the advertisement had appeared and had voluntarily withdrawn it as soon as it came to his knowledge and before any complaint was made.

(*b*) The action had not been commenced until after the lapse of sixteen days from the withdrawal of the advertisement.

Semble, it is not necessary in such an action for the plaintiff to prove fraud or an intention to deceive on the defendant's part. It would be sufficient if the advertisement were likely to deceive. *Slater* v. *Ryan*, 17 M.R. 89.

See PLEADING, VII, 1.

TRADE UNIONS.

1. Strikes — *Combined action — Conspiracy to injure plaintiff — Picketting and besetting — Injunction — Damages — Evidence — Striking out defences of persons represented because of default of defendants representing them.*

Whilst workmen, members of a trade union, have a right to strike and to combine for that purpose in order to improve their own position, provided the means resorted to be not in themselves unlawful, yet they have no right to induce other workmen, who are not members of the union and who desire to continue working, to leave their employment, or to endeavor to prevent the employers from getting other men to work for them and for that purpose to watch and beset the places where the men happen to be, or to induce the employers' workmen to break their contracts, as these are actionable wrongs and picketting and besetting are expressly made unlawful by section 501 of the Criminal Code.

Quinn v. *Leathem*, [1901] A.C. 511; *Read* v. *The Friendly Society, &c.*, [1902] 2 K.B. 732; *South Wales Miners' Federation* v. *Glamorgan Coal Co.*, [1905] A.C. 239; *Lyons* v. *Wilkins*, [1899] 1 Ch. 255, and *Charnock* v. *Court*, [1899] 2 Ch. 35, followed.

Held, also, that all the defendants who had participated in, or counselled or procured, the acts condemned were each individually liable for the whole amount of the damages suffered by the several plaintiffs in consequence of those acts, but not for any damage caused by themselves quitting work.

Krug Furniture Co. v. *Berlin Union*, (1903) 5 O.L.R. at p. 469, followed.

Damages were assessed against all the defendants found guilty at $2,000 divided amongst the several plaintiffs in proportions fixed by the judgment.

Held, also, that the property and assets of the Union were liable for the amount of the judgment and costs and that an interim injunction granted should be made perpetual restraining the defendants from persuading, procuring or inducing workmen to leave the employ of the plaintiffs and from conspiring or combining to induce workmen not to enter the plaintiffs' employ, also from besetting or watching places where the plaintiffs or any of their workmen or those seeking to enter their employ reside or carry on business or happen to be with a view to compel the plaintiffs or said workmen to abstain from doing anything they or any of them have a lawful right to do, and from persistently following them or any of them.

Defences enuring, under an order of the Court, for the benefit of absent interested persons, represented for the purposes of the action by one or more of the actual defendants, should not be struck out by reason of a contempt or default committed by such defendants in refusing to produce documents, and any interlocutory judgment entered in

consequence of such defences being struck out is a nullity.

The destruction, during the progress of this suit, of a book kept by an officer of the Union at its headquarters in which were recorded minutes relating to the strike and the non-production of a strike register kept and of the reports handed in from day to day by members of the Union actively engaged in picketting and officially appointed for that purpose were circumstances that justified the Court in presuming that they contained entries unfavorable or damaging to the defence and in being satisfied with less convincing evidence than might otherwise be required, that the wrongful acts of certain members were the authorized acts of the Union: *Taylor on Evidence*, 10th ed. 117. *Cotter* v. *Osborne*, 18 M.R. 471.

2. Strikes — *Combined action — Conspiracy to injure employers — Picketting and besetting — Damages — Injunction — Principal and agent—Criminal Code, s.* 523.

1. Besetting and watching the premises of an employer by members of a trades union, if done in concert with a view to compel the employer to change the mode of conducting his business and to comply with their demands for better pay by persuading men not to work for him or to seek employment from him, especially when accompanied by some attempts at intimidation by threats of violence, amounts to a common law nuisance punishable in damages.

Lyons v. *Wilkins*, [1899] 1 Ch. 255, and *Cotter* v. *Osborne*, (1909) 18 M.R. 471, followed.

2. Such besetting and watching may be wrongful under section 523 of the Criminal Code, although done merely to obtain or communicate information.

3. When a body of men unite to perform an act or to accomplish a purpose, leaving it entirely to the discretion of those they employ as to the means they shall make use of, all must be responsible for the acts of each individual thus employed, and they cannot evade responsibility by saying that what was done was without instructions, so that, where a number of the defendant lodges appointed a strike committee and afterwards recognized such committee and its transactions, the lodges were held liable as well as the individuals for the illegal acts committed by the pickets acting under the instructions of the strike committee, although there was no proof of any resolutions or formal acts of the lodges authorizing such conduct.

Giblan v. *National Amalgamated*, [1903] 2 K.B. 624, followed.

4. Neither the receipt of strike pay by a lodge from its grand lodge and the subsequent payment of same to its men taking part in the strike, nor the payment by the lodge of its share of the rent of the premises used as headquarters for the strike, nor the giving of monetary assistance to its members, nor the censure by the lodge of two of its striking members who had returned to work for the plaintiffs, made the lodge liable as a lodge for past illegal acts committed by its members without authority.

Denaby v. *Yorkshire*, [1906] A.C. 384, followed.

Smithies v. *National Ass. of Plasterers*, (1908) 25 Times L.R. 205, distinguished.

5. Damages should be awarded against the defendants found guilty, for inducing the boiler makers' union to employ its coercive machinery and power to compel a number of its members to withdraw from their employment with the plaintiffs, for the loss caused to the plaintiffs in not being able to secure workmen through the illegal conduct of the defendants and for the loss of the services of men who would otherwise have remained in their employment, but not in respect of individual members peaceably persuading employees to quit work or because one of the lodges censured two of its members who returned to work, nor for losses sustained by the strike independently of the illegal acts proved.

6. Injunction made perpetual restraining the parties found guilty from besetting and watching the place where the plaintiffs carried on business or any other places in which any person or persons employed or about to be employed by the plaintiffs resided, with a view to compel such other person or persons to abstain from working for the plaintiffs, etc., or for any other illegal purpose, and from intimidating by threats of violence such person or persons and from persistently following such person or persons about from place to place. *Vulcan Iron Works* v. *Winnipeg Lodge No.* 174, 21 M.R. 473.

See EQUITABLE EXECUTION.
— INJUNCTION, I, 6.
— PLEADING, X, 9.

TRADING COMPANY.

See COMPANY, IV, 2, 15.
— WINDING-UP, I, 3.

TRANSCRIPT OF JUDGMENT.

See COSTS, 1, 4.
— LIMITATION OF ACTIONS, 5.
— PROHIBITION, III, 4.

TRANSFER FROM COUNTY COURT TO KING'S BENCH.

See APPEAL FROM COUNTY COURT, VII, 2.
— PRACTICE, IV, 1; XXVII.

TRANSFER FROM SURROGATE COURT TO KING'S BENCH.

See PRACTICE, XXVII, 2.
— SURROGATE COURT.

TRANSFER OF INTEREST.

See EJECTMENT, 6.
— EVIDENCE, 9.
— PARTIES TO ACTION, 10.

TRANSFER OF TITLE TO LAND.

See CONSTITUTIONAL LAW, 9.

TRANSFER UNDER REAL PROPERTY ACT.

See VENDOR AND PURCHASER, III, 2.
— WILL, I, 4.

TRANSITORY ACTIONS.

See JURISDICTION, 6, 7, 8.

TRAVERSE

See PLEADING, X, 9.

TREASON.

See CRIMINAL LAW, XVII, 18.

TREATING.

See ELECTION PETITION, IV, 5.

TREES ON HIGHWAY.

Street railway — *Rights of owner of adjoining land — Injunction — Municipal Act, R.S.M.* 1902, *c.* 116, *s.* 688.

The right of property in shade trees on highways and to fence them in conferred upon the owners of the lands adjacent to the highways by section 688 of The Municipal Act, R.S.M. 1902, c. 116, is not taken away by an Act incorporating a railway company with power to construct a line of railway along the public highway with the consent of the municipality and according to plans to be approved by the council of the municipality, even although such consent has been given and such plans approved.

Douglas v. *Fox*, (1880) 31 U.C.C.P. 140, and *Re Cuno*, (1888) 43 Ch. D. 12, followed.

The defendants' Act of Incorporation provided that the several clauses of the Manitoba Railway Act, R.S.M. 1902, c. 145, should be incorporated with and deemed part of it. And the Railway Act provides that the several clauses of The Manitoba Expropriation Act, R.S.M. 1902, c. 61, with respect to the expropriation of land and the compensation to be paid therefor, shall be deemed to be incorporated *mutatis mutandis* with the Railway Act.

Held, that the defendants had no right to cut down the trees on the highway or to lower the grade in front of the plaintiffs' land, although such action was necessary in carrying out the approved plans without taking the proper steps, under the Railway Act and the Expropriation Act, either to ascertain and pay the damages suffered by the plaintiffs to their land injuriously affected by the intended construction, or to procure an order from a Judge, under section 25 of the Railway Act, giving them the right to take possession upon giving security for payment of the compensation

to be awarded; and that the interim injunction secured by the plaintiffs should be continued until the trial unless the defendants should furnish security that they would proceed forthwith to settle the amount of such compensation.

Parkdale v. *West*, (1887) 12 A.C. 602; *North Shore Ry. Co.* v. *Pion*, (1889) 14 A.C. 612, and *Hendrie* v. *Toronto H. & B. Ry.*, (1896) 27 O.R. 46, followed. *Bannatyne* v. *Suburban Rapid Transit Co.*, 15 M.R. 7.

TRESPASS.

Forcible entry—*Possession.*

If A. peaceably gains entrance to a house in the actual possession of B. and then, under a claim of right to possession, forcibly removes the doors and windows with the assistance of a number of men brought with him, he will be liable in an action of trespass at the suit of B., although B. had no more right to possession than A.; but, if B. had been wrongfully holding possession against A., then the same conduct on the part of A. would constitute a forcible entry for which he could be prosecuted criminally, but for which B. would have no redress in a civil action. *Lewis* v. *McInnes*, 17 W.L.R. 309.

See Crown Lands, 1.
— Fences.
— Forcible Entry.
— Injunction, I, 9, 10.
— Jury Trial, I, 5.
— Landlord and Tenant, I, 2.
— Public Parks Act.
— Public Schools Act.
— Sheriff, 7.
— Taxes.

TRESPASS AND TROVER.

1. Exemplary damages — *Audita Querela — Certificate for costs — Court ascertaining damages.*

Plaintiff and the defendant Babington both claimed the ownership of a crop of wheat, the plaintiff as being tenant of Babington, and Babington on the ground that the lease had expired. The question was whether the oral agreement between the parties was for one or five years. The defendant had cut and stacked eight stacks but had not interfered with the rest of the wheat which was cut and put up by the plaintiff in six stacks. The plaintiff had a verdict for $650.

Upon a motion for a new trial,

Held, 1. That the charge was not erroneous because the Judge refused to tell the jury that it was for the plaintiff to make out every part of the agreement, and not merely that part of it which he required for this case.

2. That the Judge was correct in telling the jury that if they found a verdict for the plaintiff they were not limited in estimating damages to the actual pecuniary loss, but could allow exemplary damages in addition; that it was not necessary, under the circumstances, to point out the distinction between a *bona fide* assertion of right and a wanton trespass.

3. That it was not necessary for the Judge to tell the jury that if the verdict was in trespass the damage would be calculated with reference to the whole crop, while, if in trover, it would be limited to the part converted. The jury could not well have erred upon that point.

4. Some damage had occurred because of the occurrence of a hail storm, while a portion of the wheat was uncut. For this the defendants were not liable, and the damages were reduced by $200, the amount estimated by the Court as attributable to that cause.

Just previous to the hour fixed for rendering judgment in Term affidavits were read by defendant's counsel shewing that, since verdict, the plaintiff had threshed seven of the stacks for his own use.

Held, that such a matter could be dealt with by the Court.

Affidavits having been filed and a further argument having taken place,

Held, 1. That under the charge the jury might well have given damages in trover for the whole crop, instead only for that part converted; and that the Judge's charge was therefore erroneous. (Dubuc, J., diss.)

2. The verdict was, therefore, further reduced to $225, being the value of the stacks converted by the defendants, less the value of one of them re-taken by the plaintiff; the plaintiff to have a certificate for full costs. (Dubuc, J., diss.) Upon the objection being taken that no certificate could be granted, the Court, without deciding the point, ordered the

verdict to be entered for $260, the plaintiff to give credit thereon for $35, the value of the stack re-taken by him. *Monkman* v. *Follis*, 5 M.R. 317.

2. Plaintiff's right to sue for goods in custodia legis.

The sheriff, having an execution against A. & B., seized their stock in trade and made an inventory. Nothing was removed and no one was left in charge; but, with a notification to the debtors not to remove anything, the sheriff left them in possession, their business proceeded and they made payments to the sheriff from time to time. Afterwards A. & B. executed to the plaintiffs a chattel mortgage upon their stock. Subsequently the defendant placed an execution in the sheriff's hands against A. & B., and at a sale by the sheriff become the purchaser.

Held, in an action for trespass and trover, that the goods were at the date of the mortgage under seizure, and that the plaintiff could not succeed. Nor could he recover for goods sold or money received to his use. *Munaker* v. *Bower*, 2 M.R. 265.

TRESPASSER.

See Assault.
— Railways, VIII, 2.

TRIAL.

Contract — *Evidence* — *Right to reply* — *New trial*—*Practice.*

This was an action tried before a Judge and jury in which the plaintiff claimed damages on a sale of a number of car loads of oats by sample on the ground that the oats were not equal to sample.

The contract having been simply that the oats should be equal to the sample produced,

Held, that the certificates of the grain inspector at Fort William were not evidence as to the quality of the oats delivered.

The defendant having adduced evidence, although only by way of putting in certain documents on the cross-examination of one of plaintiff's witnesses,

Held, (1) following *Best on the Right to Begin*, s. 132, and *Rymer* v. *Cook*, (1865) Moo. & M. 86 *n*, that plaintiff's counsel had the right to reply.

(2) That the error of the Judge in refusing to allow the reply could only entitle the party to a new trial if it appeared that the course of justice had been thereby interfered with and some substantial injury done to the party complaining.

Doe d. Bather v. *Brayne*, (1854) 5 C.B. 655; *Geach* v. *Ingall*, (1868) 14 M. & W. 95, followed.

(3) That in the present case the plaintiff could suffer nothing from the order in which the jury were addressed, as his evidence was weak and the defendants were entitled to the verdict, and that a new trial should not be granted. *Quintal* v. *Chalmers*, 12 M.R. 231.

See Amendment, 5, 7.
— Evidence, 3, 23, 24.
— Evidence on Commission, 10, 11.
— Jury Trial, I, 9.
— Practice, IX, 1; XV, 2.
— Sale of Goods, II, 1.
— Verdict of Jury, 3.

TRIAL BY JURY.

See Jury Trial.
— Workmen's Compensation for Injuries Act, 2.

TROVER.

See Practice, XXVIII, 32.
— Trespass and Trover.

TRUST BY PAROL.

See Statute of Frauds, 6, 7.

TRUST FUNDS.

See Garnishment, III, 3; IV, 3, 4; V, 4, 7.

TRUST PROPERTY.

See Mechanic's Lien, VII, 1.

TRUSTEE AND CESTUI QUE TRUST.

1. Purchase by trustee from cestui que trust—*Under value—Family arrangements.*

The defendant's brother having died unmarried and without issue, the plaintiff, his father, became sole heir at law; but, as he lived in Ontario, he consented to the defendant taking out letters of administration and disposing of the estate which consisted solely of a quarter section of land. The defendant represented to the plaintiff that the land in question was worth only about $600, and the plaintiff was induced by such representation to sell and convey the land to defendant at that price. He afterwards filed a bill to set aside the sale on the ground that, as he alleged, the defendant had been guilty of false and fraudulent representations as to the real value of the land. The learned Judge at the hearing came to the conclusion upon the evidence "that the market, or saleable, value of the land did not exceed between $650 and $750, or perhaps $800."

Held, that this difference between the market value and the amount which defendant had represented to be the value, was too inconsiderable to be a ground for setting aside the sale, and the plaintiff's bill was dismissed with costs. *Bonney* v. *Bonney*, 9 M.R. 280.

2. Remuneration of trustee—*Costs—Appeal as to costs.*

This was an action against defendant for a reconveyance to the plaintiff of certain lands which she had, for her own purposes and by the advice of her solicitor, conveyed to defendant to hold in trust for her, and asking an account of certain money which defendant had received by mortgaging the property. The statement of claim also charged misconduct in various ways, but none was proved. The statement of defence offered to reconvey the property and account for all moneys received, but defendant claimed a sum of $100 which plaintiff had agreed to allow him for his services as trustee.

In ordering the reconveyance and taking of accounts, the trial Judge directed that no remuneration be allowed to the defendant and declined to make any order for costs.

Held, (1) That defendant should be allowed the $100 remuneration agreed on.

(2) Following *Hill on Trustees*, 566, and cases there cited, no misconduct having been proved, that defendant was entitled to his costs as between solicitor and client.

(3) That an appeal as to costs may be heard and decided where, as here, the appellant succeeds on another substantial ground of appeal: *Harpham* v. *Shacklock*, 19 Ch. D. at p. 215.

Semble, that an appeal as to costs may sometimes be entertained though there be no other question raised on the appeal, as where the giving or withholding of costs is not wholly discretionary, as in the case of a trustee guilty of no misconduct: *Taylor* v. *Dowlen*, L.R. 4 Ch. 697; *Re Hoskins*, 6 Ch. D. 281; *Farrow* v. *Austin*, 18 Ch. D. 58; *Re Knight's Will*, 26 Ch. D. 82; or when the appellant raises some other ground of appeal not merely colorable, although he does not succeed in it: *Att. Gen.* v. *Butcher*, 4 Russ. 180; *Fitzgibbon* v. *Scanlan*, 1 Dow, 261. *Scarry* v. *Wilson*, 12 M.R. 216.

See BANKS AND BANKING, 8.
— GARNISHMENT, IV, 1.
— INDEMNITY, 1.
— INTERPLEADER, IX, 4.
— MONEY HAD AND RECEIVED.
— PLEADING, VI, 1.
— PRACTICE, II, 4; XXVIII, 22.
— RECTIFICATION OF DEED, 1.
— SET-OFF, 5.

TRUSTEE FOR SALE—POWERS OF.

See RECTIFICATION OF DEED, 1.

TRUSTEES.

1. Moneys admitted to be in his hands — *Order for payment of same into court.*

This was a suit in equity brought by the creditors of one Pritchard to enforce the trusts of an assignment made by Pritchard to the defendant for the benefit of his creditors.

A decree having been made referring it to the Master to take an account of the property, effects and credits come to the hands of the defendant under the assignment, the taking of the accounts was proceeded with in the Master's office until the long vacation commenced.

It then appeared that there was a balance of about $722.00 admitted to be in the hands of the defendant, and an affidavit was filed showing that he had admitted that he could not prove a further item, amounting to $283.70, of his charges against the estate. The reference having to stand over until after vacation, the plaintiff moved for an order to compel the defendant forthwith to pay into court $1,000.00.

Held, that the order should be made as defendant had practically admitted that he was indebted to the trust estate in that amount.

The trustee might, notwithstanding the admissions, meet the application by showing that the existence of the balance claimed was doubtful and a matter yet to be investigated, or by showing that he had a clear and distinct interest in such balance which should induce the Court to refuse the order as to the whole or some part of the fund. But the *onus* is upon him to show such a state of facts, and the defendant in the present case had shown nothing beyond a suggestion that he might be one of the creditors entitled to share in the balance. *Bole* v. *Mahon*, 10 M.R. 150.

2. Bill to remove trustee under an assignment—*Parties to action.*

The defendant Charles Bradford, becoming insolvent, made an assignment to his father, the defendant Henry Bradford, in trust for his creditors, and the plaintiffs, attaching creditors, filed this bill for the removal of the trustee and the appointment of a receiver.

The objection was taken that Charles Bradford was not a proper party and that as to him the bill should be dismissed.

Held, that as the bill sought to remove a trustee, and Charles Bradford was one of the *cestuis que trustent* interested, being entitled to any surplus after payment of the creditors, he was a proper party, and that, although the plaintiffs might not be entitled to recover costs against him as prayed, he could not, if he were otherwise a proper party, call for the bill being dismissed against him. *Stobart* v. *Bradford*, 11 C.L.T. Occ. N. 207.

3. Remuneration — *Commission on amount handled.*

Where there has been nothing special in the management or winding up of an estate, a percentage on the gross amount come to the hands of the executors or trustees will generally be allowed to them as remuneration.

In this case the value of the estate realized by the executors was $39,348, of which they had properly paid out and disbursed $21,814, leaving $17,534 still in their hands which could not all be paid out before nine years. On the application of the executors for interim remuneration, the Court allowed them 4 per cent. on the $21,814, and 2 per cent. on the $17,534 not yet paid out, in addition to the sum charged for the services of a book-keeper, giving them leave to apply for a further allowance at the final winding up of the estate. *Re Cursitor*, 9 M.R. 433.

See Executors and Administrators, 4.
— Lunatic, 1.
— Will, III, 1.

TRUSTS.

See Real Property Act, IV.
— Registered Judgment, 8.

TRUSTS IN WILLS.

See Will, I, 2, 3.

ULTRA VIRES.

See Company, IV, 7, 10.
— Constitutional Law.
— Corporation, 6.
— Criminal Law, XIV, 4.
— Election Petition, VII, 1.
— Municipality, I, 2, 7; V, 2; VII, 3, 4, 5, 7, 9; VIII, 4.
— Nuisance, 1.
— Prohibition of Sale of Liquor.
— Street Railway.
— Taxation, 3.

UNCERTAINTY.

See Municipality, I, 5; VII, 4.
— Vendor and Purchaser, VI, 14.
— Will, II, 3.

UNDERTAKING OF SOLICITOR.

See SOLICITOR, 9.

UNDERTAKING TO PAY DAMAGES.

See RATIFICATION.

UNDISCLOSED PRINCIPAL.

See PRINCIPAL AND AGENT, V, 10.

UNDUE INFLUENCE.

Father and son—*Fraudulent misrepresentations.*

The defendant was induced to sign the promissory note for $500 sued on, as security for his father. He was only 22 years old and his account of what took place when he signed the note was that the plaintiffs' manager represented to him that a third party, who was liable for the debt along with the father, had offered to pay $200 or $250, and that with that and what they had in the warehouse there would not be very much for him to pay. The defendant's father was also present at the interview and importuned the son to come to his relief by signing the note, which he did very reluctantly and after refusing at first. The plaintiffs' manager and their solicitor, who was also present, denied these statements at the trial in the court appealed from, but the Judge entered a verdict for the defendant thereby accepting his version of the facts.

No evidence was given as to whether or not the third party referred to had actually made any such offer, nor was anything said as to the amount or value of what was in the warehouse as being applicable in reduction of the debt.

Held, that the defendant was not liable on the note as there was undue influence brought to bear upon him and misrepresentation as to the amount of the liability he was incurring, and a want of independent advice to one so young, all of which brought the case within the principles laid down in *Bank of Montreal* v. *Stuart*, [1911] A.C. 120.

Per CAMERON, J. A., dissenting. The alleged representation as to the offer that had been made by the third party was not proved to have been false and therefore that ground failed. As to the statement that "there was furniture in the warehouse," this was not of itself so material to the transaction that the falsity of it would vitiate the note, and there was not sufficient in the facts relied on to warrant a finding that any "undue influence," within the meaning of that term as used in the decided cases, had been brought to bear upon the defendant as he was able to take care of himself and fully understood the nature of the transaction. *Lewis Furniture Co.* v. *Campbell*, 21 M.R. 390.

See ALIMONY, 6.
— DURESS, 2.
— FRAUD, 2.
— SOLICITOR AND CLIENT, I, 2.
— WILL, III, 4, 7.

UNINCORPORATED ASSOCIATION.

See BILLS AND NOTES, VIII, 7.

UNITED STATES.

See EXTRADITION, 8.

UNLIQUIDATED DAMAGES.

See GARNISHMENT, II, 1.
— NEGLIGENCE, VII, 7.
— SET OFF, 6.

UNPATENTED LANDS.

See HOMESTEAD, 6.
— PROHIBITION, I, 8.
— REAL PROPERTY ACT, V, 8.
— TAXATION, 4.

UNREASONABLENESS.

See MUNICIPALITY, I, 6.

UNREGISTERED PRIOR CHARGE.

See REGISTRY ACT, 3.

UNSETTLED ACCOUNT.

See COUNTY COURT, I, 11, 12.
— PROHIBITION, I, 2.

USE OF STREETS BY COMPANY.

See COMPANY, IV, 14.
— MUNICIPALITY, VIII, 7.

USURY.

See MONEY LENDER'S ACT, 2.

VACANT LAND.

See MORTGAGOR AND MORTGAGEE, IV, 1, 2.

VAGRANCY.

See CRIMINAL LAW, XV, 1, 4.

VAGUENESS AND UNCERTAINTY.

See DEED OF SETTLEMENT.
— RAILWAY COMMISSIONERS FOR CANADA, BOARD OF

VALUATION.

See EXPROPRIATION OF LAND, 1.
— VENDOR AND PURCHASER, VI, 2.

VARIANCE.

See BILLS AND NOTES, III, 1.
— ELECTION PETITION, III, 3.
— INJUNCTION, III, 4.

VARIATION OF AGREEMENT.

See VENDOR AND PURCHASER, VI, 5, 15.

VENDOR AND PURCHASER.

I. AGREEMENT OF SALE.
II. CANCELLATION OF THE CONTRACT.
III. INCUMBRANCES.
IV. RESCISSION OF THE SALE.
V. RETURN OF MONEY PAID.
VI. SPECIFIC PERFORMANCE.
VII. MISCELLANEOUS CASES.

I. AGREEMENT OF SALE.

1. Bond to secure payment of purchase money with additional stipulation for payment even although obligees should be unable to make title to the land.

Defendants with others had entered into an agreement with the plaintiffs that they would respectively purchase certain lands at a price agreed on, $2 per acre of which was to be paid on 1st November, 1905. Defendants afterwards executed the bond sued on in this action.

This bond stated that it was given expressly to secure the said payment of $2 per acre, but it contained an additional stipulation for payment to the plaintiffs of $2500, part of the instalment of $2 per acre, to and for their own use and benefit as liquidated damages for their services rendered and to be rendered in using every possible endeavor to have the lands surveyed and located as soon as possible, and that such services should be a sufficient performance of the agreement on their part.

In the opinion of the Court, the plaintiffs failed to show at the hearing that they had ever acquired title to the lands or any legal or enforceable right to purchase them.

Held, that, as the plaintiffs could not recover under the agreement, neither could they on the bond, which should be construed as one merely given, as it said, to secure the instalment of purchase money, disregarding the stipulation above referred to as being fraudulent as against the defendants. *Colwell* v. *Neufeld*, 19 M.R. 517.

Affirmed in Supreme Court, 1 W.W.R. 779.

2. Stipulation for formal contract —*Waiver—Contract.*

Action to recover payment of an instalment of purchase money under an agreement of sale of land in the form of a written option signed by the plaintiffs and accepted in writing by the defendant. The option contained all necessary terms of the proposed purchase including a provision that, should the defendant sell any portion of the lands, the plaintiffs would execute a transfer or conveyance of the lands sold provided that the amounts had been agreed upon between the plaintiffs and defendant and, in the event of their being unable to agree, then provided the selling price was at a fair valuation to be determined by named arbitrators. It contained also a clause providing that upon the exercise of the said option a formal agreement of sale should be entered into between the parties containing such terms and conditions as were suitable and usually contained in the form of an agreement of sale in common use by the firm of Tupper, Phippen & Co. The letter of acceptance also contained the defendant's statement: "I shall be pleased to have you arrange for the preparation of the formal agreement of sale."

No formal agreement was ever prepared or executed, but the defendant, before the due date of the instalment sued for, entered into an agreement for the sale of a considerable portion of the property and applied for and obtained a conveyance of such portion from the plaintiffs upon payment of an amount agreed upon between the parties.

Held, (1) That there was a completed contract between the parties enforceable by the plaintiffs notwithstanding the absence of the more formal agreement contemplated.

The principles laid down by Lord Westbury in *Chinnock* v. *Marchioness of Ely*, (1865) 4 De G. J. & S., 638, and *Rossiter* v. *Miller*, (1878) 3 A.C. 1124, adopted.

(2) That, if it had been otherwise, the defendant had waived his right to have a formal agreement executed by making the sale referred to. *Munroe* v. *Heubach*, 18 M.R. 470.

II. Cancellation of the Contract.

1. Construction of contract—*Agreement for sale of land — Proviso for cancellation by giving twenty days' notice.*

An agreement of sale of land contained a proviso that, in default of payment of any of the instalments payable under it, the vendor should be at liberty to determine and put an end to the agreement and to retain any money paid, "in the following method, that is to say,—by mailing***a notice****intimating an intention to determine this agreement, addressed to the purchaser," and that, at the end of twenty days from the time of mailing the same, the purchaser should deliver up quiet possession of the land to the vendor or his agent, immediately at the expiration of said twenty days.

Held, that the agreement could not be construed as providing that it could be cancelled immediately on default in payment of the money on the day fixed by the mailing of the notice provided for, but that the purchaser was entitled to the time specified to make good his default. *Paget* v. *Bennetto*, 17 M.R. 356.

2. For default of purchaser — *Different modes of cancellation provided in agreement — Equitable relief against forfeiture.*

The agreement of purchase by plaintiff from defendant of the land in question provided in one paragraph that, in case the purchaser should at any time be in default the vendor should be at liberty at any time after such default, with or without notice to the purchaser, to cancel the contract and declare the same void and forfeit any payments that might have been made on account thereof and retain all improvements, &c., and that the vendor should be entitled, immediately upon any default as aforesaid, without giving any notice or making any demand, to consider and treat the purchaser as his tenant holding over without permission or any color of right, and might take immediate possession of the premises and remove the purchaser therefrom.

Further on in the agreement, and separated from the above provision by other covenants, there were provisions for two other modes of cancellation in case of default, one by service of a notice personally on the purchaser of intention to exercise the power of cancellation after one month, to be followed at the end of the month by a notice similarly served declaring the cancellation to be complete and effective, and the other by notice, after the default had continued for three months, declaring the contract null and void, "addressed to the pur-

chaser directed to the Post Office at * * * * and deposited in the Post Office at * * * *."

Held, that, upon plaintiff making default, the defendant had a right to select any one of the three modes of cancellation provided for, and that a notice pursuant to that first above quoted, personally served upon the defendant, was valid and effectual as a cancellation of the agreement, subject to the power of the Court to give equitable relief if the circumstances should warrant it.

Canadian Fairbanks v. *Johnston*, (1909) 18 M.R. at 601, referred to.

The defendant having, in his statement of defence, submitted to redemption by the plaintiff upon payment of the arrears and certain expenses, judgment was given accordingly, allowing the plaintiff two months after the Master's report to pay the amount found due by him and costs, and in default that the agreement should be cancelled. *Perks* v. *Scott*, 21 M.R. 570.

3. Equitable relief — *Agreement for sale of land — Rescission pursuant to power in agreement for default in payment of instalment of purchase money — Specific performance—Laches.*

Pursuant to a provision in the agreement of sale by the defendants to the plaintiff of certain lands, the defendants on 29th April, 1909, gave written notice to the plaintiff that, by reason of his default in payment of the two annual instalments of the purchase money due 7th September, 1907, and 7th September, 1908, respectively, they thereby cancelled the said agreement and declared the same void and forfeited the payment on account already made by the plaintiff. Time was in the agreement declared to be of the essence of it.

The plaintiff made a tender to defendants on 16th June, 1909, of the amount in arrears for principal and interest, but defendants refused to accept it, whereupon this action for specific performance was commenced. Defendants did not set up, as a defence, either laches or abandonment of the contract on the plaintiff's part and, on the argument of the appeal, defendants' counsel stated that they did not rely on any such defence.

Held, that the contract was not rescinded by such notice, as the plaintiff was not thereby given an opportunity of making good his default, and that, even if the notice had in effect cancelled and annulled the contract, the Court could, and in this case should, laches not having been set up as a defence, grant relief against the forfeiture and decree specific performance at the suit of the plaintiff.

In re Dagenham Dock Co., (1873) L.R. 8 Ch. 1022; *Wallis* v. *Smith*, (1882) 21 Ch. D. 273; *Public Works Commr.* v. *Hills*, [1906] A.C. 368; *Cornwall* v. *Henson*, [1900] 2 Ch. 298, and *Canadian Fairbanks* v. *Johnston*, (1909) 18 M.R. 589, followed.

Steele v. *McCarthy*, (1908) 7 W.L.R. 902, not followed.

Per HOWELL, C. J. A., dissenting. The plaintiff had been guilty of such laches and unexplained delay that he was not entitled to any relief. *Whitla* v. *Riverview Realty Co.*, 19 M.R. 746.

Distinguished, *Dalziel* v. *Homeseekers' Land Co.*, 20 M.R. 736.

4. Notice of — *Agreement of sale of land — Rescission of contract by notice pursuant to conditions thereof — Forfeiture —Time.*

The defendant held possession of the land in question under an agreement of purchase which provided that, in default of payment of any instalment of the purchase money, the vendor should be at liberty to determine and put an end to the agreement * * * *, and to retain any sum or sums paid thereunder as and by way of liquidated damages, by serving a notice *intimating an intention to determine the agreement*, and that, at the end of thirty days from the mailing or delivery of such notice, if such default should not be remedied in the meantime, the purchaser should deliver up quiet and peaceable possession of the land to the vendor or his agent, and the agreement should become void and be at an end and all rights and interests thereby created or then existing in favor of the purchaser or derived under the agreement should thereupon cease and determine and the premises should revert to and revest in the vendor without any further declaration of forfeiture or notice or act of re-entry and without any other act by the vendor to be performed and without any suit or legal proceedings to be brought or taken and without any right on the part of the purchaser to any compensation for moneys paid under the agreement. The agreement also contained the clause—"Time shall be in every respect of the essence of this agreement"

Held, that a notice served upon the defendant by the vendors' assignee, after default in payment, that "the said agreement is *hereby determined and put an end to* and unless such default shall be remedied by you within thirty days * * * * you shall *then* be required to deliver up quiet and peaceful possession of the said lands and premises and said agreement shall be absolutely null and void and all rights," &c., (following the wording of the clause quoted) was not in accordance with the terms of the power and was therefore ineffectual to put an end to or determine the agreement or to entitle the vendor's assignee to an order of the Court for possession of the land.

Such powers of rescission must be strictly followed and their exercise subjected to rigorous scrutiny in a court of equity just as in cases of notices under powers of sale in mortgages.

Held, further, that, even if the notice had been worded in strict accord with the power in the agreement, the latter should be treated as in the nature of a penalty against which the Courts will relieve.

In re Dagenham Dock Co., (1873) L.R. 8 Ch. 1022, and *Cornwall* v. *Henson*, [1900] 2 Ch. 298, followed.

Semble, the plaintiff's remedy would be to commence an action in the nature of specific performance to have the contract cancelled by decree of the Court upon default after a time to be fixed by the Court: *Per* KILLAM, J., in *Hudson's Bay Co.* v. *Macdonald*, (1887) 4 M.R. 327, and Jessel, M.R., in *Lysaght* v. *Edwards*, (1876) 2 Ch. D. 506. *Canadian Fairbanks Co.* v. *Johnston*, 18 M.R. 589.

5. One month's notice — *Notice of cancellation for default in payment of purchase money — Actual notice giving thirty days only.*

A proviso in the agreement of sale between the plaintiff (purchaser) and the defendant (vendor) authorized the defendant to cancel it after two months default by giving one month's notice in writing.

Defendant, on 26th March, gave plaintiff notice allowing plaintiff only 30 days to make payment.

Held, that the notice was not sufficient to effect a cancellation of the agreement. *Le Neveu* v. *McQuarrie*, 21 M.R. 399.

6. Recovery by purchaser of money paid on account — *Counterclaim.*

In an action by the vendor of land against the purchaser for specific performance of the agreement to purchase or in the alternative for cancellation of the agreement for default in subsequent payments, if the purchaser has acquiesced in the cancellation after notice thereof served on him by the vendor, he cannot recover back by counterclaim the money which he had originally paid on account of the purchase. *Miller* v. *Sutton*, 20 M.R. 269.

7. Repayment of moneys paid on account — *Equitable relief — Specific performance.*

The plaintiff agreed to purchase from the defendants certain lands for the sum of $500, payable as follows: $60 cash and $20 per month thereafter till the full amount should be paid. The agreement provided that time should be of the essence of the contract and contained the usual proviso for cancellation by notice in case of default fully set out in the judgment. Plaintiff having made default in payment of six monthly instalments, defendants gave notice of cancellation pursuant to the agreement and afterwards sold and conveyed the land to a third party.

About two and a half years after the last payment by plaintiff, he brought this action for specific performance, or, in the alternative, for a return of the money he had paid.

Held, that the effect of the default, the giving of the notice and the continued default was, at common law, to cancel the contract and, unless equity would relieve, to enable the vendor to retain both the land and the money paid, and that the plaintiff, having deliberately refrained from continuing his monthly payments for over two years and a half because the land had diminished in value and he was in doubt whether it "would do him any good" to pay any more instalments, was not entitled to any equitable relief, either by way of specific performance or against the forfeiture provided for by the contract, and therefore could not recover the amount he had paid.

Whitla v. *Riverview*, (1910) 19 M.R. 746, distinguished, as in that case, because of the pleadings and the refusal of counsel to raise the point, the question of the pu chaser's laches was, in the view

of the majority of the Court, not before it for decision. *Dalziel* v. *Homeseekers' Land & Colonization Co.*, 20 M.R. 736.

III. Incumbrances.

1. Liability of purchaser to indemnify vendor against incumbrances— *Assignment of right to indemnity to the holder of the incumbrance—Right of action by incumbrancer against purchaser direct—Real Property Act, R.S.M.* 1902, *c.* 148, *s.* 89.

The defendant took a transfer of land, absolute in fact as well as in form, from one Williams and agreed to assume a mortgage on the property held by the plaintiff.

Held, that the plaintiff, who had obtained an assignment from Williams of her right of indemnity against the defendant under the transfer, had a good cause of action to recover the amount of his mortgage from the defendant direct.

Short v. *Graham*, (1908) 7 W.L.R. 787, distinguished. *Morice* v. *Kernighan*, 18 M.R. 360.

2. Right of purchaser to recover after conveyance in respect of incumbrances then discovered — *Transfer under Real Property Act — Mistake as to amount of incumbrances—Caveat emptor —Misdescription in particulars of sale—Merger of agreement in subsequent deed.*

The plaintiff agreed to purchase from the defendant certain Winnipeg City property for $11,200, "assuming the sum of $5,500" on it and to pay for it by conveying to the defendant two farm properties valued at $10,500 subject to an incumbrance of $200, the difference $4,000, to be adjusted by the defendant giving two mortgages on the farms. The plaintiff then accepted transfers of the City property under The Real Property Act, and conveyed one of the farms to the defendant who gave a mortgage for $2,000 upon it, the proceeds of which were paid to the plaintiff.

The plaintiff then discovered that the total incumbrances on the City properties exceeded the amount assumed by $950. He then postponed the conveyance of the other farm to the defendant and brought this action to recover the $950 and for other relief.

Held, that, as the agreement between the parties had only been partially carried out, it could not be said to have become merged in the transfer accepted by the plaintiff, and this took the case out of the principles laid down in *Joliffe* v. *Baker*, (1883) 11 Q.B.D. 255; *Palmer* v. *Johnson*, (1884) 13 Q.B.D. 351, and *Clayton* v. *Leech*, (1889) 41 Ch. D. 103, and that the plaintiff was entitled to a vendor's lien on the lands conveyed and to be conveyed by him for the amounts mentioned in the agreement with the addition of the $950 in question. *Foster* v. *Stiffler*, 19 M.R. 533.

IV. Rescission of the Sale.

1. For default in payment of an instalment — *Specific performance or rescission — Demurrer — Chose in action.*

There is a distinction between a bill for specific performance, and a bill asking that a time may be fixed for payment and, in default, rescission.

The principle upon which the Court acts in decreeing cancellation of an agreement for the sale of land, is practically the same as that on which foreclosure of a mortgage is decreed.

Consequently, a bill for rescission may be filed for default in payment of an instalment, although the whole purchase money may not be due.

An agreement for the sale of land provided that upon default the vendor might re-enter or re-sell.

Held, that, without exercising these powers, the vendor might file a bill for rescission.

It is not necessary to allege that an assignment from a vendor of his interest in the property was in writing. When it is stated generally in a pleading that there is an agreement, or assignment or other contract, and it does not appear on the face of the pleading that it is invalid, the Court will assume that it is valid. Assignments of *choses* in action may in equity be by parol. *West* v. *Lynch*, 5 M.R. 167.

2. Limiting time for payment by notice—"*Prowling assignee.*"

Three of the defendants agreed to purchase certain lots from the H. B. Co., one-fifth to be paid in cash and the balance in instalments; time to be of the essence of the contract. These three defendants sold to Mrs. C., their co-defendant, who afterwards filed a bill to rescind the sale on the ground of fraud, and for a lien upon the land for her purchase money. Pending the litigation the plaintiff paid off the H. B. Co. and took a conveyance

subject to the agreement. Shortly afterwards he filed a bill in the name of the Co. against the same defendants for a rescission of the contract. This was dismissed because the Co. had parted with its interest.

The plaintiff then gave the defendants notice to pay in three weeks, and in default that he would rescind. Payment not having been made upon the date fixed, this bill was filed to declare the contract rescinded and that the various documents might be declared to be clouds upon the plaintiff's title.

Held, 1. That the time given for redemption was reasonable, and that the defendant Mrs. C. was not now entitled to redeem.

2. Upon the evidence that the plaintiff was not disentitled to relief as being a "prowling assignee." *Wickson* v. *Pearson*, 3 M.R. 457.

3. Necessity of formal notice of— *Specific performance — Landlord and tenant — Waiver — Laches.*

The plaintiff became tenant of a farm under a lease from C. for seven years at an annual rental of $450, payable on the 15th of October in each year. Contemporaneously with the lease an agreement of purchase of the property was entered into between the plaintiff and C., by which the latter agreed to accept as part payment of the purchase money all sums of money which should be paid by the plaintiff as rent under the lease, and the plaintiff covenanted, at the expiration of eight years from the date of the instrument, to pay the balance of the purchase money with interest. There was also the covenant of C. to convey upon payment, an option to the plaintiff to pay off the full amount and receive a conveyance at any time, and finally the following proviso: "It is expressly understood and agreed that time is to be considered the essence of this agreement, and unless the payments are punctually made the said party of the first part shall at his option declare this agreement null and void, all payments made thereunder shall be forfeited, and the said party of the first part shall be at liberty to resell the said land, the said party of the second part hereby agreeing to convey to the said party of the first part his interest in the same when and as soon as such default occurs."

The lease contained a proviso for re-entry, in the statutory short form, for non-payment of rent. C. afterwards conveyed the land in fee to the defendant Palmatier subject to the lease and agreement.

Default having occurred in payment of the rent due on 15th October, 1897, the defendant Palmatier leased the property to the defendant Mills with an option of purchase before the end of the first year of the term, and Mills at once entered into possession.

Held, (1) That the lease and agreement between C. and the plaintiff should not be considered as independent contracts, and that C. or his assignee might rescind the agreement of sale for default in payment of any rent called for by the lease.

(2) That a formal notice or declaration of rescission of the contract was not necessary as the plaintiff was aware of the lease to Mills, his taking possession under it, and of Palmatier's intention to rescind.

(3) The plaintiff, having made default as regards an essential term of the agreement, was not entitled to the exercise of the discretion of this Court to order specific performance in his favor after the position of the parties had been entirely changed.

Held, also, *per* RICHARDS, J., that the laches of the plaintiff barred her from the remedy of specific performance against the defendant Mills, who had made valuable improvements without notice that the plaintiff intended to claim specific performance. *Moir* v. *Palmatier*, 13 M.R. 34.

4. By one of several joint purchasers.

Property having been sold to five persons who purchased jointly,

Held, that one of the purchasers, establishing a misrepresentation, could not rescind the contract so far as he was alone concerned, and recover his share of the purchase money. *Braun* v. *Hughes*, 3 M.R. 177.

5. Parties — *Pleading — Waiver — Fixtures — Specific performance or for rescission.*

Distinction between a specific performance suit and one to rescind a contract in case of failure to perform by a specified time.

The plaintiffs agreed to sell to B. certain lands upon certain terms. B. paid a portion of the purchase money

and afterwards conveyed to the defendant. Afterwards the plaintiffs removed certain buildings from the lands. The buildings were large and built upon stone foundations, a portion of which, either originally or by pressure, were beneath the level of the ground. Upon a bill against the defendant alone for payment or rescission, the defendant claimed repayment of the money paid to the plaintiffs.

Held, 1. That *prima facie* the buildings were fixtures.

2. That the purchaser would have been entitled under such circumstances to sue for the return of the purchase money.

3. That the present defendant could not recover the money in the absence of B.

4. That no decree for rescission could be made in the absence of B., the defendant having in no way been substituted for B. as purchaser.

5. To obtain a decree for specific performance by vendor with an abatement from the purchase money by reason of the removal of the buildings, the bill must be so framed.

6. Waiver must be specially pleaded. *Hudson's Bay Co.* v. *MacDonald*, 4 M.R. 237.

6. Penalty—*Ejectment after default.*

A bill by a vendor alleged that by the contract time for the deferred payments should be of the essence of the agreement, and that upon default the vendor should be at liberty to re-enter upon or re-sell the lands, all payments on account being forfeited; that certain payments on account had been made, (not shewing whether before or after the day fixed for the last instalment); that there had been dealings between the parties and an extension of time given "for payment of some of the instalments," not saying which of them. The prayer was for a declaration that the contract was at an end and void and that it should be delivered up to be cancelled; and for possession.

A demurrer was allowed upon the grounds:—

1. That it was nowhere alleged that the plaintiffs had rescinded the agreement, but, on the contrary, they seemed to have continued to deal with, and receive payments from, the purchaser.

2. That the right reserved was in the nature of a penalty, and the plaintiffs would not be entitled to rescission without limiting a time for payment.

3. That, as to the prayer for possession, the purchaser in possession after default would be a tenant at sufferance and not entitled to a demand of possession, but the bill did not clearly shew that the extension of the time given for payment had elapsed. *Hudson's Bay Co.* v. *MacDonald*, 4 M.R. 480.

7. By sale to third party.

The plaintiff's claim was for payment of an instalment of the purchase money overdue on an agreement of sale of a hotel property to defendant which provided that, upon default in payment, the plaintiff might determine the contract by notice in writing.

After the due date of the instalment defendant notified plaintiff that she would not carry out her contract, and about twelve days later plaintiff, without giving defendant any notice, entered into a binding agreement of sale of the property to a third party. He then brought this action.

Held, following *Sawyer* v. *Pringle*, (1891) 18 A.R. 218; *Sawyer* v. *Baskerville*, (1891) 10 M.R. 652, and *McCord* v. *Harper*, (1876) 26 U.C.C.P., per HAGARTY, C. J., at p. 104, that the plaintiff had practically rescinded the contract of sale to defendant and could not thereafter sue upon it. *Parent* v. *Bourbonnière*, 13 M.R. 172.

8. Time of the essence—*Notice to complete—Reasonable notice.*

Where time is of the essence of the contract the condition may be waived by the purchaser by paying a portion of the money on the day named for completion and consenting to wait for production of title.

The 1st July, 1882, was fixed for completion. At this time the title was vested in the C.P. Ry. Co., but the vendor had a right of purchase under a contract covering other lands, in which other persons had a similar interest. The vendor had, at the time for completion, paid to the Co. the purchase money for his lands, but, others not having paid, the Co. would not convey. On several occasions between the 1st July, 1882, and the 12th January, 1883, the purchaser asked the vendor to complete the title, but did not press him to do so or threaten to rescind if it was not done. On the 12th January, 1883, the purchaser served

the vendor with a notice, requiring him to complete the title by the 1st of February, otherwise he would declare the sale off. After receiving this notice the vendor used reasonable diligence to procure the title, but, inasmuch as six weeks was the shortest time within which a deed could be procured from the Railway Co., it was not obtained by the day named.

Held, that the notice was too short, and the purchaser was not entitled to recover his deposit. *Fortier* v. *Shirley*, 2 M.R. 269.

9. Title—*Reasonable time.*

By agreement in writing defendants agreed to sell to the plaintiffs and the plaintiffs agreed to purchase lots 26, 28, 30 and 32 at a certain price, payable one half in one week and the balance on the defendants removing from off the lands, not earlier than the 1st May, and not later than the 12th July. The defendants covenanted that, upon payment of the purchase money, they would convey. Time to be of the essence of the contract.

Afterwards it was verbally agreed that the defendants should remain in possession until after the time limited.

In the fall the defendants demanded payment, and it was then verbally agreed that two weeks' notice should be given. The notice was given, and it was again agreed to extend the time to a particular Monday.

At that time the defendants had a conveyance from the Hudson's Bay Co. for lots 26 and 28, a patent for lot 30, and a receipt from the Crown for payment in full of the purchase money of lot 32.

On the Monday the plaintiffs tendered their purchase money, but refused to accept the title, and rescinded the contract.

In an action for return of the portion of the purchase money paid,

Held, 1. That the defendants were entitled to a reasonable time to make title after the last payment had been made, and that the plaintiffs were not in a position to rescind the contract. *Guthrie* v. *Clark*, 3 M.R. 318.

10. For want of title—*Waiver of rescission.*

After a contract had been made for the purchase of 73 3-10 acres the purchaser discovered that the vendor had no title to 5 acres of the land. He then gave notice of rescission and demanded a return of his deposit.

Held, that he was entitled to repayment. Afterwards the vendor agreed that a portion of the deposit should be returned and the purchaser promised to repay it on the vendor "furnishing satisfactory title" to the property. 29 days afterwards the purchaser commenced this action for the return of the deposit. Meanwhile the vendor had used due diligence to perfect his title and succeeded in doing so 7 days after the issue of the writ.

Held, that purchaser had waived his rescission; that there was a new agreement engrafted on the old one by which the purchaser agreed to wait a reasonable time for the perfecting of the title. *Clark* v. *Everett*, 1 M.R. 229.

11. For want of title—*Pleading—Removal of objection to title after action begun for rescission—Agreement of sale of land.*

Held, per HOWELL, C.J.A. and PHIPPEN, J. A.

(1) In an action by the purchaser for rescission of the agreement of sale on the ground of fraud and misrepresentations, it is too late for the plaintiff, at the hearing of the appeal, for the first time to take the position that he is entitled to rescind because the defendants' title is not good.

(2) The title of the defendants to the lands in question, although it was only under an agreement of purchase from the Q. Company which in turn only held under an agreement of sale from the Canadian Northern Railway Co., was a sufficient equitable title with a right to get in the absolute title before they should be called upon to convey, and the plaintiff could not rescind, although the defendants purported to agree to sell and convey the fee simple in the lands.

Shaw v. *Foster*, (1872) L. R. 5 H. L. 350; *Egmont* v. *Smith*, (1877) 6 Ch. D. 476; *Re Head's Trustees*, (1890) 45 Ch. D. 310; *Want* v. *Stallibrass*, (1873) L. R. 8 Ex. 175, and *Re Bryant*, (1890) 44 Ch. D. 219, followed.

(3) The purchaser, not having demanded an abstract of title or called on the vendor to make the title good, had no right to rescind the contract, and, as certain reservations in the agreement under which the defendants held had been released by the Companies inter-

ested before the trial, the Court would not now rescind the contract.

(4) The reservation not released, viz., that in the agreement from the Canadian Northern Railway Co., reserving any land that might be required for right of way and station grounds of the Grand Trunk Pacific Railway, should not be held fatal to the title, as no evidence was given to show that any of the lands bought by the plaintiff were or would be affected by it.

The plaintiffs' appeal from the nonsuit entered at the trial should be dismissed.

Per RICHARDS and PERDUE, JJ. A.

(1) The Court will not force a purchaser to take an equitable estate except where the vendor has the *whole* equity in the land and controls the legal estate in such a way that he can readily procure it, and the defendants had not, either at the time the contract was made or at the trial, such a title as the plaintiff was compellable to accept: *Craddock* v. *Piper*, (1844) 14 Sim. 310; *Estaile* v. *Stephenson*, (1822) 6 Mad. 366; *Maddey* v. *Baith*, (1848) 2 De G. & Sm. 718; *Fry on Specific Performance*, 4th ed. p. 586.

(2) The defendants were too late in procuring the release of the reservations after the commencement of the suit, though it might be otherwise in an action for specific performance: *Dart*, 1005. The reservation in favor of the G. T. P. Ry. Co. was a fatal objection to the title as it had not been, and could not be, removed.

(3) The position taken by the defendants in their statement of defence, setting up the various contracts under which they held, was a repudiation of their contract to furnish a title in fee simple, and an attempt to set up that the plaintiff had only bought the equitable interest they had in the land, which entitled the purchaser at once to treat the contract as rescinded; *Wrayton* v. *Naylor*, (1895) 24 S. C. R. 295.

(4) The bringing of the suit for the return of the money paid, alleging that the vendor had not a good title, was a sufficient repudiation of the contract on the part of the plaintiff, and it was not necessary for him to give notice of rescission or demand the repayment of the money before commencing suit: *Want* v. *Stallibrass*, (1873) L. R. 8 Ex. 175. Neither was it necessary for the plaintiff to demand an abstract of title, as the defendants' agent showed the plaintiff the nature of the Company's title before the action.

(5) Although in Ontario the Court may allow money to be paid into court to secure the purchaser against an outstanding incumbrance, as in *Cameron* v. *Carter*, (1885) 9 O.R. 426, that course is permissible under the Act respecting the Law and Transfer of Property, R.S.O. 1897, c. 119, s. 15, and there is no similar statutory provision in Manitoba.

(6) So far as the question of pleading was concerned, the statement of claim was quite sufficient, for the plaintiff was entitled to join two grounds of relief as he had done and to rely upon either or both of them.

The appeal should be allowed and relief given to the plaintiff as claimed.

The Court being equally divided, the appeal was dismissed without costs. *Hartt* v. *Wishard Langan Co., Ltd.*, 18 M.R. 376.

V. RETURN OF MONEY PAID.

1. Specific performance—*Rescission.*

Held, that where a contract for the purchase of real estate is rescinded, owing to the default of the purchaser, he cannot recover back his deposit. *Robertson* v. *Dumble*, 1 M.R. 321.

2. Vendor unable to make title—*Payment in shares which afterwards become worthless—Right of vendor to return the shares instead of the amount at which they had been valued in the exchange—Estoppel by recovery of judgment.*

The defendants sold 18 parcels of land to the plaintiff, at an average price of $1040 each, and accepted shares in a company of the par value of $6400 in lieu of the first payments to be made under the agreements. Plaintiff paid in cash by way of second instalment $794.56. Defendant recovered judgment against plaintiff for the third instalments due on twelve of the agreements, and plaintiff paid the judgment. He afterwards discovered that defendant was unable to make title under thirteen of the agreements and brought this action. Shortly after defendant acquired the shares the company failed and the shares became worthless.

Held, (1) Plaintiff was entitled to recover back the cash he had paid on the lands for which defendant could not make title, including the amount paid to satisfy

the judgment referred to, though not the costs of that action.

(2) The said judgment was not under the circumstances an estoppel against the plaintiff, as he was ignorant of his rights when he failed to defend the action. *Jackson* v. *Scott*, (1901) 1 O.L.R. 488, followed.

(3) (RICHARDS, J.A., dissenting). In respect of his first payments defendant should only be ordered to transfer back the shares he had received from the plaintiff and was not liable for the amount in cash at which he had taken them over. *Adam* v. *Newbigging*, 13 A.C. at p. 323, followed.

Snider v. *Webster*, (1911) 20 M.R. 562, distinguished.

Per RICHARDS, J.A. The defendant should be ordered to pay in cash what the shares were worth at the time he received them, and there should be a reference to ascertain that value. *Johnson* v *Henry*, 21 M.R. 347.

VI. SPECIFIC PERFORMANCE.

1. Collateral verbal provisions—*Contract—Evidence to vary written contract—Terms intentionally omitted from the writing but verbally agreed on—Statute of Frauds.*

When two parties enter into a formal written agreement for the sale and purchase of land containing all the particulars necessary to make it binding under the Statute of Frauds and all the terms they intended to embody in it, and there is no suggestion of accident, fraud or mistake in the preparation or execution of it, specific performance of it may be decreed notwithstanding that the parties at the same time verbally agreed upon a number of collateral agreements or subsidiary conditions for conveniently carrying out the written agreement and notwithstanding the Statute of Frauds.

The following variations of or additions to the written contract made in that way in this case were held not to stand in the way of specific performance being decreed, the plaintiff being willing to carry out the agreement as thereby modified.

1. The vendor was to allow a deduction of $30 per acre from the price mentioned for any deficiency in the estimated acreage that might be found in actual measurement.

2. The purchaser agreed to accept possession at a date two weeks later than the time fixed by the agreement for taking possession.

3. Taxes, interest on a mortgage and insurance premiums were to be adjusted as of the date of the agreement, which was silent on these points.

4. It was understood that, although the plaintiff had a certificate of title under The Real Property Act, the defendant's solicitor was to examine the title and see if it was all right, whilst the written contract declared that the purchaser accepted the vendor's title and should not be entitled to call for an abstract or evidence of title or any deeds, papers or documents other than those in the possession of the vendor.

Byers v. *McMillan*, (1887) 15 S.C.R. 194, and *Martin* v. *Pycroft*, (1852) 2 De G. M. & G. 785, followed.

Green v. *Stevenson*, (1905) 9 O.L.R. 671, distinguished.

Held, also, *per* HOWELL, C.J.A., that evidence should not have been allowed in to prove such variations and additions in the absence of anything in the defendant's pleading setting them up.

Per PERDUE, J.A. The evidence should not have been admitted at all.

Per PHIPPEN, J.A. The evidence of the variations and additions in this case was properly received. *Anderson* v. *Douglas*, 18 M.R. 254.

2. Damages—*Date of assessing damages.*

In an action by a purchaser, for specific performance of a contract respecting lands, intended to be held by him for sale, where damages have been decreed, instead of specific performance, on account of the sale by the vendor of the lands to a third party, the date of the breach of the contract is the period at which the value of the land in question is to be estimated for the purpose of assessing the damages. *Boultbee* v. *Shore*, 1 M.R. 22.

3. Deficiency in land — *Part taken by railway—Sub-purchasers—Parties.*

On 30th January, 1882, plaintiff agreed to sell lot 33, described as 128 acres, to defendant L. Shortly afterwards, defendant L. agreed to sell the same land, described as 111 acres, to another defendant, who agreed to sell it to other defendants. There were, in reality, about 112½ acres in the lot, and of this 1½ acres

were owned by a railway company and used for their track.

The agreements were made during a period of great excitement in real estate. After its abatement neither party took any steps to carry out the agreement, beyond the rendering of an account by the plaintiff to the defendant and a letter threatening proceedings in 1885, and beyond an enquiry by the defendant L. as to the state of the title in 1883.

Held, 1. That, under the circumstances, specific performance ought not to be decreed against L.

2. That the proper decree against the sub-purchasers (who had not answered) was to direct a reference to the Master to enquire as to title; in the event of his finding a good title, to take an account of the amount due for purchase money and to fix a day for payment; on payment, plaintiff to convey; on default, rescission; if title good at time of filing bill, plaintiffs' costs to be added to purchase money. *Nixon* v. *Logie*, 4 M.R. 366.

4. Estoppel by signing lease—*New trial—Pleading.*

1. A person is not estopped by entering into a lease of land, which has expired before the commencement of the action, from bringing an action for specific performance of an agreement for the sale of the land to him by the lessor, alleged to have been made before the signing of the lease.

2. A plea that the plaintiff had never been in possession of the land, except only as tenant to the defendant under a lease in writing made between the parties, does not amount to a plea of estoppel. *Poliquin* v. *St. Boniface*, 17 M.R. 693.

5. Illiterate vendor — *Signature of agreement of sale by person not understanding English — Enforcement of agreement with variation — Plaintiff not prepared to carry out agreement exactly.*

1. When a vendor of land who does not understand English is induced by the purchaser, who understands both English and the language of the vendor, to execute an agreement of sale, in English, the purchaser himself being the only interpreter, there is a heavy *onus* upon the purchaser seeking to enforce the agreement to satisfy the Court that the agreement was freely executed by the vendor after its effect was fully and clearly explained to him—an *onus* that is not satisfied by the evidence of the purchaser alone.

2. When the evidence shows that the plaintiffs, seeking specific performance of the defendant's agreement to sell, sought to have him carry it out on terms less advantageous to him than those to which he had agreed and, therefore, were not prepared to carry out the agreement on their part, they must fail.

Quære, whether the rule as to the enforcement of agreements with a variation should be applied under the circumstances of this case. *Weidman* v. *Pelakise*, 2 W.L.R. 308.

6. Incumbrances — *Statute of Frauds.*

Action for specific performance of an agreement in writing by the defendant to purchase the property in question for $40,000, "payable as follows: $10,000 cash, and six equal notes with interest at seven per cent. for balance to be handed over for such time payments."

There were incumbrances on the property aggregating over $8,000, part of which was overdue, but the greater part was to mature at various dates within four years and some of the holders were unwilling to accept prepayment. The agreement did not state for what time the notes were to run, but the parties understood that they were to be for six equal yearly payments, the first in one year and the last in six years, also that a transfer and bill of sale were to be given at once and a mortgage taken for the deferred payments, although the document was silent on these points.

The defence raised the Statute of Frauds because the agreement did not state when the instalments of purchase money should fall due.

Held, without determining this point, that the purchase was intended to be completed at once and the title was not one which could be forced on an unwilling purchaser because there were incumbrances which the vendor was not in a position to pay off at once.

In re Weston & Thomas's Contract, [1907] 1 Ch. 244, followed. *Brandon Steam Laundry Co.* v. *Hanna*, 19 M.R. 8.

7. Misrepresentation by purchaser as to a material fact affecting value of land.

The plaintiff, knowing of the definite announcement of the location of certain railway shops near the defendant's land, a fact affecting its value of which the

defendant was ignorant, in order to induce the defendant to give him an option to purchase the land, not only concealed that fact, but represented to the defendant that the shops were to be located elsewhere.

Held, following *Walters* v. *Morgan*, 8 De G.F. & J., at p. 723, and *Turner* v. *Green*, [1895] 2 Ch. 205, that specific performance of the contract should be refused. *Irish* v. *McKenzie*, 6 W.L.R. 209.

8 Misrepresentations by purchaser inducing sale—*Materiality of.*

A decree for specific performance of an agreement of sale will not be refused because of any misrepresentations by the purchaser, unless they are material, that is, relate to some part of the contract or its subject matter. Misrepresenting the seller's chance of sale or the probability of his getting a better price for his property than the buyer offers is not a material misrepresentation.

Archer v. *Stone*, (1898) 78 L.T. 34, and *Vernon* v. *Keys*, (1810) 12 East, 632, 4 Taunt. 488, followed.

Applying this principle, statements made by the plaintiff to the defendants, during negotiations for the purchase of the property in question, that there was nothing in a rumor (said to be current) of a big concern having bought, or being about to buy a large parcel of land on the opposite side of the street, of part of which the plaintiff was one of the owners, with the intention of erecting extensive improvements thereon; that he, the plaintiff, had never been approached by any one with a view to purchasing his interest in such property and that part of that property could then be bought at a price per foot frontage very much lower than the defendants were asking for the property in question, were held not to be material to the contract.

A misrepresentation as to who the real purchaser was might, under some circumstances, be so material to the contract as to vitiate it, but in this case the defendants, although they had been told by the plaintiff that he was buying for another named person, could only say that, if they had known that the plaintiff was buying for himself, they would have been suspicious that he was concealing facts which would have made the property more valuable and would not have sold to him at the price actually fixed, and they actually made out and signed the contract of sale in the plaintiff's own name.

Held, that the alleged misrepresentation as to the identity of the proposed purchaser was not, under the circumstances, material to the contract. *Dart* v. *Rogers*, 21 M.R. 721.

9. Notice of prior unregistered sale—*Fraud.*

Under sections 71 and 91 of The Real Property Act, R.S.M. 1902, c. 148, the title of the holder of a certificate of title, as against the claimant under a prior unregistered sale, can only be impeached for fraud, and fraud cannot be found merely because the purchaser had been told of the prior sale by the solicitor of the prior purchaser, when it appeared that he had afterwards been informed by the vendor himself that he had not sold the property and by one Watson, a real estate agent, that the property had not been sold but had been placed by the vendor in his hands for sale, also that due search had been made in the Land Titles Office.

Stark v. *Stephenson*, (1891) 7 M.R. 381, followed. *Shaw* v. *Bailey*, 17 M.R. 97.

10. Part performance—*Delivery of deed in escrow—Statute of Frauds.*

As part of the consideration for the sale of a house and lot to the plaintiff, the defendant verbally agreed to take an assignment of the plaintiff's interest in certain farming lands under an agreement of purchase from one Empey provided that one Bishop would take a lease of the lands.

A deed of the house and lot and an assignment of the agreement of sale were prepared and executed and left with the defendant's solicitors in escrow.

Held, 1. The plaintiff's failure to secure Bishop as a tenant barred his right to specific performance, as did also the fact that the plaintiff had, pending the action, lost his interest in the farm lands through cancellation by Empey of the agreement.

2. The receipt by the plaintiff of a payment of rent from the tenant of the house, without the consent or acquiescence of the defendant, was not such a part performance of the contract as would take the case out of the Statute of Frauds.

Semble, the documents left in escrow could not be used as evidence of the verbal agreement sufficient to take it out of the statute: *McLaughlin* v. *Mayhew*, (1903)

6 O.L.R., per *Osler*, J.A., at p. 177 *Vanderwoort* v. *Hall*, 18 M.R. 682.

11. Pleading—*Refund of money paid on purchase of land—Prayer for further and other relief.*

The plaintiff's statement of claim set forth a case for specific performance of an agreement of sale of land to the plaintiff's assignor and the payment of two instalments of the purchase money. The relief claimed was specific performance of the contract and "such further and other relief as the nature of the case might require." No amendment of the pleadings was asked for or made.

Held, that, on the failure of the case for specific performance, the trial Judge could not, under the prayer for general relief, properly make an order for payment by the defendant of the money he had received on account of his sale, and that the action should be dismissed with costs, without prejudice, however, to the right of the plaintiff to claim such payment in another action.

Cargill v. *Bower*, (1879) 10 Ch., D. 502, followed.

Labelle v. *O'Connor*, (1908) 15 O.L.R. 519, distinguished. *Hamilton* v. *Macdonell*, 19 M.R. 385.

12. Purchaser for value without notice — *Contract — Cancellation —Service of notice of cancellation — Costs —Further relief—Amendment.*

The plaintiff made an agreement in writing for the purchase of the land in question from the defendant Hough, paid $200 on account, went into possession and erected a good house on the lot. The title to it was under The Real Property Act. The plaintiff did not register his agreement.

Some time afterwards, the defendant Robinson procured an assignment from Hough to himself of the agreement, and also a transfer of the title to the lot. The trial Judge found that these transfers were obtained by fraudulent promises on the part of Robinson or his solicitor to protect the plaintiff's interests. Robinson afterwards transferred the lot for value to the defendant Parker, who was not proved to have any notice or knowledge of the plaintiff's rights or that he was in possession of the property.

Held, that the plaintiff could not have specific performance of the agreement as against Parker, but should be allowed to remove the house from the lot if he desired.

In his statement of claim, the plaintiff had asked only for specific performance of the agreement, but, under the power conferred on the Court by sub-section (*k*) of section 38 of The King's Bench Act, and rules 344 and 346 as to amendment of the pleadings if found necessary, the Court, having found the defendant Robinson guilty of fraud, granted the plaintiff further relief against him by ordering him to pay the plaintiff, by way of damages, what he had paid to Hough on the lot with interest.

Action dismissed as against the defendants Hough and Parker.

Held, as to costs, that the defendant Robinson should be ordered to pay not only the plaintiff's costs, but also those of his co-defendants directly to them: *Daniel's Ch. Pr.*, 7th ed., p. 980.

Rudow v. *Great Britain Mutual Life Assurance Society*, (1881) 17 Ch. D. 600, followed.

There were two clauses in the agreement providing for cancellation in case of default; the first saying that, after such default, the vendor might cancel with or without notice, the second providing for the manner of giving the notice of default.

Held, that the vendor might elect to adopt one or other of such modes of cancellation; that, if he elected to cancel without giving notice, he could not do so by a mere operation of his mind, but must do something by which he gives the purchaser clearly to understand that he decides to avoid the contract, and that the relation of vendor and purchaser no longer exists between them, or do some act directly affecting the vendee in his position or interest, as, for example, a sale to another: *McCord* v. *Harper*, (1876) 26 U.C.C.P. 104; and on the other hand, if he adopts the mode of cancellation by notice, he must conform strictly to the mode prescribed. *Czuack* v. *Parker*, 15 M.R. 456.

13. Action by sub-purchaser against original vendor — *Privity of contract.*

A purchaser of land from A., whose only title to the land is under an agreement of purchase from B. the owner, may, after default of A. in carrying out his contract with B., on notifying B. of his interest and tendering the full amount owing to him by A., if it be refused,

maintain an action against both A. and B. for specific performance and for an order that B. convey to him on payment of the amount due under his agreement with A.

Smith v. *Hughes*, (1903) 5 O.L.R. 245; *Dyer* v. *Pulteney*, (1740) Barn. (Ch.) 160, and *Fenwick* v. *Bulman*, (1869) L.R. 9 Eq. 165, followed.

Dictum of PERDUE, J. A., in *Hartt* v. *Wishard Langan Co.*, (1908) 18 M.R. at p. 387, not followed. *Sveinsson* v. *Jenkins*, 21 M.R. 746.

14. Statute of Frauds—*Possession.*

The land which the defendant agreed to purchase from the plaintiff for the sum of $5000 was subject to mortgages and registered judgments for amounts exceeding in the aggregate the sale price, and the plaintiff had no means of paying them off except out of the purchase money and he undertook to negotiate with the judgment creditors to get releases for less than the sums due to them respectively, but he had not, up to the commencement of the action, been able to get his arrangements for these releases definitely concluded. By the agreement the defendant was to pay the purchase money "as soon as a loan can be arranged and title found satisfactory." The agreement was silent as to when the purchaser was to have possession of the property and the plaintiff remained in possession during the negotiations for completion, which lasted about nine months.

Held, that specific performance of the agreement should be refused on the following grounds:

(1) The plaintiff had failed to show a clear title or his ability to give such a title.

(2) Such failure caused such delay in the defendant getting possession that it would be a great hardship on him to enforce the contract, as specific performance is purely a discretionary remedy available according to the equities of each case: *Fry on Specific Performance*, 183, *et seq.*

(3) The provision in the agreement that the purchase money was to be paid "as soon as a loan can be arranged" was so indefinite, obscure and uncertain as to render the contract incapable of being the subject of an action for specific performance: *Am. & Eng. Ency.*, vol. xxvi., 137. *Major* v. *Shepherd*, 18 M.R. 504.

15. Stipulation that time is to be of the essence of the contract—*Possession as excuse for delaying suit—Damages in lieu of specific performance—Laches.*

1. The variation of an agreement for the sale of a lot of land, by a subsequent conveyance of a part of the lot to the purchaser in fee simple, will not of itself operate as a rescission of the agreement as to the remainder.

2. A stipulation in an agreement of sale of land that time shall be considered to be of the essence of the contract will be treated, in circumstances such as are set out in the judgments, and when everything goes to show that it was not the real intention of the vendor to insist on its being strictly carried out, as only in the nature of a penalty which a Court of Equity should relieve against.

In re Dagenham Dock Co., (1873) L.R. 8 Ch. 1022; *Lowther* v. *Heaver*, (1889) 41 Ch. D. 248, and *Hipwell* v. *Knight*, (1835) 1 Y. & C. 401, followed.

3. A purchaser of land under an agreement of sale who takes and retains possession will not be barred from taking proceedings for specific performance, although he delays them for more than six years.

4. When specific performance for any reason cannot be granted, a plaintiff may now be awarded damages in lieu thereof as at Common Law, and no delay in seeking his remedy, short of that imposed by the Statute of Limitations, would afford a sufficient defence. *Barlow* v. *Williams*, 16 M.R. 164.

16. Title, transfer of—*Contract—Sale of land—Parties to action—Costs.*

Defendant held two half sections of land from the C. P. R. Co. under interim receipts signed on behalf of the Company, acknowledging payment of $160 on each, stating the price and expressed to be given "subject to the conditions of the Company, and pending completion of agreement for the purchase of said land." Plaintiff afterwards agreed to buy defendant's interest in the land for $1440 and to assume the debt still due to the Company. He paid $720 cash and was to pay the other $720 in thirty days on receiving assignments from the defendant of the agreements of sale to be given by the Company. When the thirty days expired, defendant had not yet procured the agreements from the Company, but offered to assign

them to the plaintiff and hand over interim receipts on payment of the money.

Held, that plaintiff was not bound to accept such offer, but was entitled to withhold the money until defendant should procure the agreements from the Company and hand them over with assignments. After the receipt of the Company agreements defendant refused to carry out the sale to the plaintiff and entered into an agreement to sell one of the parcels to a Mr. Work who was aware of the plaintiff's claim.

Held, that plaintiff was entitled to specific performance by defendant of the contract of sale between them, and that defendant could not rely on his objection that Work had not been made a party to the action because he had not raised such question by his pleadings. One fourth part of the counsel fees that would ordinarily have been allowed for the trial was ordered to be struck off because plaintiff's counsel had unnecessarily prolonged the trial by neglecting to go through the documents relating to the case before the trial and select those they wished to use. *Brown* v. *Hoare*, 16 M.R. 314.

17. Contract for sale of land and chattels—*Misrepresentation by purchaser—Failure of proof—Immateriality—Assignment of contract to business rival of vendor—Alteration of agreement—Memorandum made before execution—Signature.*

The plaintiff and defendant were rival ice-dealers in a city. W., who was agent for the plaintiff, made an agreement with the defendant for the sale by the defendant to W. of the defendant ice-dealer's plant, consisting of land, buildings, a stock of ice, and certain chattels used in the business. The agreement was reduced to writing and executed by W. and the defendant. W. assigned all his interest under the agreement to the plaintiffs, who sued for specific performance. The defendant alleged that W. represented to him that he was acting on behalf of a company which was being formed for the purpose of taking over all the ice businesses in the city where the plaintiff and defendant carried on business, and, when asked by the defendant if he was acting for the plaintiff, replied that he was acting on behalf of a new joint stock company:

Held, upon the evidence, that it was not established that the alleged representation was made; but, even if it were, it would not be material; the defendant agreed to sell to W. without imposing any restrictions on his right to assign the benefit of the agreement to any person he chose; and the defendant would have been in no way injured by an assignment to the plaintiff, even if the representation had been made.

Nicholson v. *Peterson*, 18 M. R. 106, followed.

Held, upon the evidence, that the organization of a company to which both plants would be conveyed was the project which both W. and the plaintiff had in view when the negotiations were being conducted, and that it had to be abandoned because of the defendant's refusal to complete the sale.

The defendant also alleged that the agreement was materially altered by a memorandum written by the defendant in a private book of his, and alleged to have been signed by the defendant, just before the execution of the agreement.

Held, upon the evidence, that the signature to the memorandum was not that of W.; and the principal document correctly expressed the agreement of the parties.

Held, also, that, where there is an entire agreement by which a party agrees to sell real estate and certain chattels to be enjoyed with it, the Court will compel specific performance, where the enjoyment of the chattels is requisite to the enjoyment of the real estate.

Specific performance and other relief decreed. *Lane* v. *Rice*, 18 W.L.R. 557.

VII. Miscellaneous Cases.

1. Assignee of purchaser —*Liability for costs — Registration of cloud on title.*

The plaintiffs agreed to sell real estate to defendant R. who registered his contract. Afterwards R. executed a mortgage upon the land to the defendants the O. Bank. The bill was for payment and in default rescission. Prior to the suit the Bank offered to execute a release of their mortgage upon it being tendered by the plaintiffs.

Held, that the Bank should pay the costs of the suit, the plaintiffs being under no obligation to tender a release for execution. *Hudson's Bay Co.* v. *Ruttan*, 1 M.R. 330.

2. Constructive notice — *Provision that purchaser shall accept vendor's title—Land subject to lease—Cancellation of*

agreement to purchase—Damages recoverable by purchaser.

A clause of the agreement under which the plaintiff purchased the land in question provided that the purchaser should accept the vendor's title and the land was in fact under lease to a third party which could not be determined in the fall of 1906. The defendant's agent, however, in the receipts given for the first payment, inserted the words "possession according to the existing lease in the fall of 1906."

Held, that this latter statement absolved the plaintiff from further inquiry as to the actual terms of the lease under the authority of *Cox* v. *Coventon*, 31 Beav. 378, and constructive notice of those terms should not be imputed to him.

The plaintiff bought a number of horses for the purpose of working the farm, which he subsequently had to sell at a loss, as he could not get possession at the time stipulated for. He also bought a quantity of implements for the same purpose. It did not appear, however, that the defendant knew that these preparations were being made, or of the necessity for them, or that such purchases were contemplated by the parties at the time of the contract.

Held, following *Godwin* v. *Francis*, L.R. 5 C.P. 295, that the purchaser, on getting the agreement cancelled, could not recover damages for loss caused by such purchases. *Cairns* v. *Dunkin*, 6 W.L.R. 256.

3. Conveyance, preparation of — *Duty of vendor to prepare and execute conveyance at his own expense.*

In this Province, on a sale of land, unless it is otherwise provided in the agreement, it is the duty of the vendor to prepare and execute the conveyance at his own expense, and a purchaser may maintain his action for breach of the contract without tendering a conveyance to the vendor for execution.

Sweeney v. *Godard*, 4 Allen (N.B.) 300, followed. *Dysart* v. *Drummond*, 7 M.R. 68.

4. Damages for breach of covenant to convey land—*Vendor's lien.*

Where a vendor of land has received the amount of the purchase price agreed on and covenanted to convey with a clear title within a time limited, the purchaser may in case of failure to make title recover the purchase price paid.

Dart on Vendors and Purchasers, 801, and *Mayne on Damages*, 250, 251, followed.

That the consideration mentioned in the deed and acknowledged by the defendant to have been received was not actually cash, but only lands received in exchange at a valuation agreed on, makes no difference if such lands have actually been conveyed by the plaintiff to the defendant, and the plaintiff is in such a case entitled to a lien on the lands so conveyed for the amount at which they were taken in the proposed exchange. *Snider* v. *Webster*, 20 M.R. 562.

Affirmed, 45 S.C.R. 296.

5. Option to purchase —*Time made of essence of contract —Addition of clause giving vendor power to cancel if payment not made within time fixed.*

An offer, though made for valuable consideration, to sell and convey land on payment of $500 to be made on or before a fixed date only gives an option to purchase which cannot be exercised as of right after the time limited, and the addition of a clause providing that, if the payment is not then made, the vendor shall be at liberty to cancel the agreement confers no additional right upon the proposed purchaser, so that the vendor may refuse a tender of the money subsequently made, although he has given no notice and has done no positive act of cancellation. *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348; *Weston* v. *Collins*, [1865] 11 Jur. N.S. 190; *Waterman* v. *Banks*, (1891) 144 U.S.R. 394, and *Dickinson* v. *Dodds*, (1876) 2 Ch. D., 463, followed.

RICHARDS, J. A., dissented, holding that the added clause meant that the option was to remain open to acceptance for a certain term, and thereafter until cancelled in some way by the proposed vendor. *Paterson* v. *Houghton*, 19 M.R. 168.

6. Redemption—*Relief against acceleration clause in agreement of sale of land—Verbal agreement varying written contract.*

By agreement dated June 7, 1906, the plaintiff sold to the defendant 625 acres of land for $17,500, $1,000 being payable on the execution of the agreement and the balance in yearly instal-

ments with interest. It was provided that on default in payment of any instalment the whole of the purchase money and interest should at once become due and payable. Owing to some difficulty over the title to the property the agreement was not completed until November 8, 1907, when each party got a duplicate signed by the other and the defendant paid $957.60 of the $1,000 payable on the execution of the agreement. On that date there was also past due the second instalment of the purchase money and some taxes which the defendant had covenanted to pay. It was admitted that, prior to the completion of the agreement by delivery, a verbal agreement was arrived at extending the time for payment of the second instalment, but the parties differed as to the terms of this verbal agreement and, as it would contradict the writing, the trial Judge held that it should not be given effect to and that the plaintiff was not bound by it. The plaintiff demanded payment of the full amount of the purchase money, claiming that it was due by virtue of the accceleration clause above quoted. The defendant asked that, upon payment of all arrears, he might be relieved from the effect of the accceleration clause.

Held, 1. Such a provision in a contract is not in the nature of a penalty against which equity will relieve.

Wallingford v. *Mutual Society*, (1880), 5 A.C. 705, followed.

2. The plaintiff, by completing the agreement, waived his right to call in the full balance of the purchase price, because at that date the agreement was, so far as the past due payments were concerned, impossible of performance.

3. For that reason, and also because the plaintiff had made default in carrying out a term of the agreement by which he was to place a mortgage of $10,000 on the property for a five years' term, the defendant was entitled to the relief prayed for. *Vosper* v. *Aubert*, 18 M.R. 17.

7. Right to recover money paid under cancelled agreement—*Rescission of contract—Cancellation under provisions of agreement.*

After making some payments to the defendant on account of the purchase of land under an agreement, the plaintiff discovered that he had made a bad bargain and repudiated and abandoned the contract, which the defendant then cancelled under the provisions thereof.

Held, that the plaintiff, having failed in his claim for damages in deceit founded on alleged misrepresentations of the defendant in making the sale, could not recover as an alternative the moneys he had paid on account of the purchase. *Kerfoot* v. *Yeo*, 20 M.R. 129.

8. Sale under order of Court—*Possession—Effect of taking—Ex parte order.*

This was an application, under Rules 685 and 691 of The Queen's Bench Act, 1895, for an order to issue execution against David Milne, who had, in September, 1896, made a written offer for the purchase of the property in question in this action at $2,700 cash—after an abortive sale by auction. The offer contained a stipulation for a clear deed. Milne went into possession pending the completion of the title and made some alterations in the buildings. Great delays occurred in completing the title, and the purchaser, after having several times requested the vendor to make the title good, finally, on the 30th August, 1897, notified the vendor's solicitors that, unless title was made to him within two weeks from that date, the offer should be considered as withdrawn, and that he would have nothing more to do in the matter. Two weeks afterwards the purchaser accordingly gave up possession of the property and returned the key. The vendor's solicitors, however, procured a report from the Master, dated 18th September, 1897, approving of the sale to Milne, and on 29th September, an order *ex parte* from the Chief Justice dispensing with payment into court of the purchase money, and that the payment be made to the Imperial Loan and Investment Company, mortgagees, within ten days after service of a copy of the order, and upon the purchaser receiving a conveyance of the property. No conveyance had been tendered to the purchaser before this application; but it appeared that, on being served with a copy of the order, he stated that he had withdrawn his offer and given up possession of the property, and would have nothing more to do with the matter.

Held, that, while the order of the Chief Justice remained in force, it must be obeyed, although, if all the circumstances had been made known to him, he might

have refused it; and that the purchaser must pay the purchase money into court within two weeks, and, in default, that the order for execution should go.

Held, also, that the purchaser had not lost his right to call for a good title by going into possession, and that there should be a reference to the Master as to the title.

No costs of the application were allowed. *Currie* v. *Rapid City Farmers' Elevator Co.*, 12 M.R. 105.

9. Statute of Frauds—*Memorandum of agreement—Signature of party charged or his agent—Tender of conveyance.*

1. An agent to purchase or sell land need not be authorized in writing in order to bind his principal. It is sufficient, under the Statute of Frauds, if the agent, though authorized only by parol, has signed an agreement in writing so as to satisfy the statute.

2. The writing of the purchaser's name near the beginning of a written agreement of sale, prepared by a solicitor under the instructions of the purchaser's duly authorized agent, may be a sufficient signature by the defendant's agent within the meaning of the statute, although the agreement is signed by the vendor only.

McMillan v. *Bentley*, (1869) 16 Gr. 387; *Evans* v. *Hoare*, (1892) 1 Q. B. 593, and *Schneider* v. *Norris*, (1814) 2 M. & S. 286, followed.

3. When the purchaser has formally refused to carry out the purchase, it is not necessary for the vendor to tender a conveyance of the land before commencing an action to recover the purchase money.

Illustration of correspondence and documents together constituting a memorandum in writing sufficient to satisfy the Statute of Frauds in a case of a sale of land. *McIlwride* v. *Mills*, 16 M.R 276.

10. Time, whether of the essence of the contract—*Agreement to purchase on fixed date at option of vendor.*

In consideration of the plaintiff purchasing an interest in certain lands and paying $500 on account, the defendant signed an agreement that he would purchase the plaintiff's interest for the sum of $600, if the latter desired to dispose of it on the first day of December, 1907. That day was on a Sunday and the plaintiff was away from home until the 4th day of December, when he at once notified the defendant that he wanted the agreement carried out. The defendant did not then repudiate the agreement, but asked the plaintiff to call again, saying that he had not the money just then. He afterwards refused to carry out the agreement and claimed that the plaintiff was bound to come on the very day fixed by the contract.

Held, that the circumstances showed that it was never intended that time was to be of the essence of the contract, that the plaintiff had made his demand within a reasonable time, and that he was entitled to a verdict for the $600 and costs. *Hill* v. *Rowe*, 19 M.R. 702.

11. Vendors unable to make title—*Bona fides—Pleading—Amendment—Damages*

Where a vendor of land has sold in good faith, but cannot make title, he is liable only for a return of the money paid to him on the purchase and for the purchaser's costs of investigating the title.

Flureau v. *Thornhill*, 2 W. Bl. 1078, and *Bain* v. *Fothergill*, L.R. 7 H. L. 158, followed.

Such defence should, however, be pleaded to a claim for damages for the breach of contract to sell, though, in a proper case, the defendant may, at the trial, be allowed to introduce it by way of amendment to his pleading. *Moody* v. *McDonald*, 4 W.L.R. 303.

12. Warranty of title—*Sale and assignment of the right and interest of a purchaser under an agreement of sale from the owner—Damages.*

The plaintiff sold and conveyed a property to the defendant and accepted from the latter, as payment of $450 of the purchase money, an assignment of all the right and interest of the defendant in certain lots which he held under an agreement of sale to him from A. A.'s title to the lots was only under another agreement of sale from the owner who, in fact, had cancelled the sale to A. before the defendant assigned to this plaintiff, but the defendant was not aware of this.

Held, that the defendant had impliedly represented that he had an equity or interest in the said lots, whereas in fact he had none at the time of the assignment, though he honestly believed he had, and that he was liable to the plain-

tiff in damages for the $450. *Graham* v. *Dremen*, 9 W.L.R. 641.

See AGREEMENT FOR SALE OF LAND, 2.
— CHURCH LANDS ACT, 1.
— CONTRACT, XV, 1, 6.
— COVENANT, 2.
— EQUITABLE ASSIGNMENT, 2.
— JURISDICTION, 4.
— MECHANIC'S LIEN, IV, 2.
— MISREPRESENTATION, III, 3; V, 1.
— OWNERSHIP OF CROPS.
— PRINCIPAL AND AGENT, I, 5.
— REGISTERED JUDGMENT, 5.
— STATUTE OF FRAUDS.

VENDOR'S LIEN.

See FRAUDULENT CONVEYANCE, 20.
— INDIANS, 1.
— MECHANIC'S LIEN, IV, 1; VI, 2.
— VENDOR AND PURCHASER, III, 2; VII, 4.

VENUE.

See COUNTY COURT, II, 2.

VENUE, CHANGE OF

See SECURITY FOR COSTS, VII, 2.

VERBAL AGREEMENT.

See STATUTE OF FRAUDS, 4.

VERBAL AGREEMENT TO VARY WRITTEN CONTRACT.

See VENDOR AND PURCHASER, VII, 6.

VERDICT OF JURY.

1. Costs—*New trial.*

The jury at the trial of an action has nothing to do with costs and, if they bring in a verdict clearly stated to be for damages and costs, which is accepted and acted upon by the Judge, the judgment should be set aside and a new trial ordered.

Poole v. *Whitcomb*, (1862) 12 C.B. N.S. 770, and *Kelly* v. *Sherlock*, (1866) L.R. 1 Q.B. 691, followed.

Costs are now entirely in the discretion of the trial Judge, no matter what is the amount of the verdict for the plaintiff.

Shillinglaw v. *Whillier*, (1909) 19 M.R. 149, followed. *Davis* v. *Wright*, 21 M.R. 716.

2. Motion to set aside—*Questions of fact.*

Held, the Court will not interfere with the finding of a jury, and reverse it, unless the verdict is perverse, or clearly and evidently against the weight of evidence, or when the jury has been misdirected by the Judge. *Maddill* v. *Kelly*, 1 M.R. 280.

3. Special jury—*Verdict of nine or more.*

Held, that section 29 of chapter 31, Con. Stat. Man., applied both to special and common juries, and that the verdict of nine or more jurors is, in either case, sufficient. *Robertson* v. *McMeans*, 1 M.R. 348.

See BANKS AND BANKING, 6.
— DAMAGES, 2, 3.
— LORD CAMPBELL'S ACT, 3.
— MALICIOUS PROSECUTION, 2.

VETERINARY SURGEON.

See CONVICTION, 5.

VOID CONTRACT.

See WEIGHTS AND MEASURES ACT, 2.

VOID OR VOIDABLE ACTS.

See INFANT, 1.

VOID PROCEEDINGS.

See PRACTICE, XX, A, 2.
— REPLEVIN, 4.
— SALE OF LAND FOR TAXES, III, 2, 3; VI, 4; IX, 2, 3.
— SETTING ASIDE PROCEEDINGS.

VOLUNTARY CONVEYANCE.

Husband and wife — *Fraudulent conveyance — Resulting trust.*

The plaintiff caused the land in question to be conveyed to his wife, the defendant, and registered the deed without her knowledge. His motive was to avoid payment of an anticipated claim against him.

Held, that he could not succeed in an action to compel her to re-convey the land to him.

Curtis v. *Price*, (1806) 12 Ves. 103, and *Roberts* v. *Roberts*, (1819) 2 B. & Ald. 367, followed.

Childers v. *Childers*, (1819) 1 De G. & J. 481, and *Haigh* v. *Kaye*, (1872) L.R. 7 Ch. 469, distinguished. *McAuley* v. *McAuley*, 18 M.R. 544.

See FRAUDULENT CONVEYANCE, 15.

VOLUNTARY PAYMENT.

See ADMINISTRATION, 7.
— CHOSE IN ACTION, 1.
— WEIGHTS AND MEASURES ACT, 1.

VOLUNTARY SETTLEMENT.

See FRAUDULENT CONVEYANCE, 22.

VOTERS' LIST.

See CRIMINAL LAW, XVII, 12.
— PROHIBITION, III, 3.

WAGES.

1. Act respecting Assignments of Wages or Salaries to be earned in the Future, 9 Edw. VII, c. 2—*Earnings of man employed to work with his own team at a rate per day, whether wages or not—Meaning of word.*

Wages are the personal earnings of laborers and artisans, and it is an essential ingredient in wages that the personal services of the laborer or artisan must not only be rendered but must have been contemplated as such in the contract. Where, therefore, the defendant, owning two teams of horses, was employed to haul gravel at a rate per team per day and hired another man to drive one of the teams for him, the earnings of the defendant for the work were held not to be *wages*, within the meaning of the Act respecting Assignments of Wages or Salaries to be earned in the Future, 9 Edw. VII, c. 2, and an assignment by the defendant to the claimant of such earnings, although part had not yet been earned, did not come within the said Act and was held to be valid as against a garnishing order subsequently served by the plaintiff.

Ingram v. *Barnes*, (1854) 26 L.J.Q.B. 319, followed. *Coupez* v. *Lear. Hubbard, Claimant*; *Winnipeg Electric Ry. Co., Garnishees*. 20 M.R. 238.

2. Builders' and Workmen's Act, R.S.M. 1902, c. 14, ss. 2, 3, 4—*Priority of wages over garnishing and other orders.*

Section 4 of The Builders' and Workmen's Act, R.S.M. 1902, c. 14, making a proprietor directly liable for payment of the wages of workmen employed by a contractor doing any work for him, effects what may be termed a statutory assignment to the workmen, to the amount of their unpaid wages, of the moneys payable by the proprietor to the contractor, so that the workmen are entitled to priority over the claims of creditors holding garnishing or other orders against the proprietor in respect of such moneys, and such creditors are entitled to be paid out of any balance in the order in which notices of their several claims were given to the proprietor.

In such case it makes no difference that the proprietor has made a payment to the contractor which diminishes the amount available for such other creditors. *Bryson* v. *Municipality of Rosser*, 18 M.R. 658.

See COMPANY, IV, 8.
— CONTRACT, XV, 2.
— MASTER AND SERVANT, III.
— MUNICIPALITY, VII, 9.
— WINDING-UP, IV, 3.

WAGES, PRIORITY OF

See BUILDERS' AND WORKMEN'S ACT.

WAIVER.

See ACCIDENT INSURANCE, 2.
— ARBITRATION AND AWARD, 9.
— BILLS AND NOTES, II; VIII, 13; X, 4.
— BUILDING CONTRACT, 6.
— CERTIORARI, 3.
— COMPANY, IV, 10, 14.
— CONSTITUTIONAL LAW, 14.
— CONTRACT, XIV, 1, 2.
— COUNTY COURT, I, 13.
— DURESS, 1.
— EVIDENCE ON COMMISSION, 1, 9.
— EXPROPRIATION OF LAND, 3.
— FIRE INSURANCE, 6.
— FOREIGN JUDGMENT, 11.
— GARNISHMENT, IV, 1.
— LANDLORD AND TENANT, V, 2.
— LIQUOR LICENSE ACT, 8.
— MECHANIC'S LIEN, IX.
— MISREPRESENTATION, IV, 2.
— PRACTICE, II, 1; III, 4; V, 1; VII, 2; XXII, 1; XXIII, 2; XXVIII, 27.
— PRINCIPAL AND SURETY, 3.
— PROHIBITION, I, 3, 5.
— SECURITY FOR COSTS, X, 7, 9.
— STAYING PROCEEDINGS, II, 3.
— VENDOR AND PURCHASER, I, 2; IV, 3, 5, 8, 10; VII, 6.

WANT OF EQUITY.

See PLEADING, VI, 1.

WANT OF MERITS.

See PRACTICE, XX, B, 3, 7.

WAREHOUSEMAN.

See COMPANY, II, 1.
— SALE OF GOODS, II, 3.
— RAILWAYS, II, 2, 3; III, 3.

WAREHOUSE RECEIPT

Bank Act, ss. 64, 68, 74, 75—*Assignment of goods under form in Schedule C to the Bank Act—Substitution of other goods for those described—Purchase for value without notice.*

One A., a wholesale purchaser and shipper of dead stock and the products thereof, obtained several advances of money from the defendants on the security of assignments of certain hog products in the form in Schedule C to the Bank Act; and agreed with the manager of the Bank to ticket the goods so as to identify them, and not to sell the goods. He then set apart certain of the goods as belonging to the defendants, and placed tickets over them to indicate this, but afterwards he sold all these goods in the ordinary course of business and substituted other goods of a like character in their place, placing the same tickets upon them. Subsequently, the plaintiffs, as security for a then pre-existing debt due them from A., obtained an assignment of the same kind as the defendants had taken, covering *inter alia* 10,000 lbs. of bacon, but no appropriation of any particular bacon as hypothecated to the plaintiffs was made until about seven weeks later, when, at the instance of an officer of the plaintiffs, A. set apart 10,000 lbs. of bacon out of the pile which had been appropriated to the defendants in the manner above described, and this quantity was ticketed with the name of the plaintiff Bank, the defendants' tickets being removed. Shortly afterwards A. absconded, and the defendants took possession of this 10,000 lbs. of bacon under their securities.

Held, that they were entitled to hold it against the plaintiffs.

Held, also, that, notwithstanding the language of s. 75 of the Bank Act, a Bank may take securities of the kind provided for by s. 74, even for pre-existing debts, as the general provisions of s. 68 should not be held to be restricted by the language of s. 75 so as to prevent it. *La Banque d'Hochelaga* v. *Merchants' Bank*, 10 M.R. 361

WARRANT OF COMMITMENT.

See CRIMINAL LAW, XIII, 5; XVI.
— EXTRADITION, 8.

WARRANT OF DISTRESS.

See PUBLIC OFFICER.

WARRANTY.

1. Action on, previous to payment of purchase price—*Measure of damages—Misjoinder of plaintiff.*

Action upon a warranty given on sale of second hand machinery "good for twelve months with proper care." The action was brought in the name of two persons, to one only of whom the warranty had been given.

Held, 1. That, no objection to the frame of the suit having been taken at the trial, the Court in Term had power to give judgment for the proper plaintiff.

2. That damages could be recovered for a breach of the warranty, notwithstanding that the purchase money had not been paid, promissory notes having been given for the amount. *Church* v. *Abell*, 1 S. C. R. 442, distinguished.

3 The measure of damages was the sum which, at the time of the sale, it would have been necessary to expend in order to remove any defect which constituted a breach of the warranty. *Cook* v. *Thomas*, 6 M.R. 286.

2. Conditional Sale of Goods—*Sale of goods — Agreement for — Action for breach of—Property passing—Damages—Measure of—Bailment.*

Plaintiff sued in a County Court upon a promissory note given to him by defendant upon an agreement for the sale of a horse.

A condition of the agreement was that the property was not to pass to defendant until payment. Defendant filed a counter claim for breach of an alleged warranty that the horse was sound. The horse was delivered to defendant and used by him for some time, but died before maturity of the note from a cause not connected with the unsoundness complained of. At the trial, the Jury found that there was a warranty, that the horse was unsound, and that the difference in value between the horse as it was, when delivered, and it would have been if sound, was $90, for which amount a verdict was entered for defendant on the counter claim.

The plaintiff appealed to the Court of Queen's Bench.

Held, 1. That the consideration for the note was in part the bailment, and in part the promise of the vendor to sell.

2. That an action lay for the breach of warranty, and that the purchaser should recover as general damages, for the period of the bailment and for the proposed sale together, the same amount as if there were an immediate sale.

3. That the right of action for the breach of warranty arose at once, just as in the case of an absolute sale of a specific chattel.

Frye v. *Milligan*, 10 O. R. 599 and *Tomlinson* v. *Morris*, 12 O. R. 311, not followed. *Copeland* v. *Hamilton*, 9 M.R. 143.

3. Damages—*Measure of damages—Evidence to prove liability for commission—Breach of warranty.*

Action to recover the price of a threshing outfit, consisting of a new separator and a second-hand engine, sold to the defendant. The engine had been warranted to be in first-class repair and in good running order. The trial Judge found as a fact that it was not in first-class repair when delivered to the defendant, but that he nevertheless accepted it.

The chief question to be decided, therefore, was the amount of damages to be allowed for the breach of warranty. The defendant discovered nearly all of the defects complained of before he started using the machine and the others almost at once after starting; but, instead of proceeding at once to have the missing parts supplied, he continued to operate the machine in its defective condition without complaining to the plaintiff of anything but the friction.

Held, following *Crompton* v. *Hoffman*, (1903) 5 O.L.R. 554, that there could be no recovery for damage which might have been prevented by reasonable efforts on the defendant's part. The defendant was bound, as soon as he discovered the defects complained of, to take the necessary steps to remedy them, and could not recover anything for damages beyond what he would have sustained had he pursued that course.

The measure of the defendant's damage is the amount that it would have cost to put the engine in the condition it was warranted to be in, plus his loss of profits or from delays during the time that would necessarily elapse before these repairs could be made had he acted promptly after discovering them.

On defendant's default in payment the plaintiff had repossessed and resold the outfit and sought to deduct from the proceeds of the sale the sum of $250, which he said he had had to pay by way

of commission on the resale. There was no evidence that the sale had been made through an agent, or, if it was, what the proper commission should be.

Held, that the plaintiff had not sufficiently established his right to charge such commission against the defendant and that it should not be allowed to him. *Mawhinney* v. *Porteous*, 17 M.R. 184.

4. Description of goods—*Sale of goods —Contract for work and materials.*

The plaintiffs submitted a written proposal to defendant to supply and erect in operating order in the basement of defendant's theatre, on foundations supplied by defendant, an engine, generator and switchboard for a sum mentioned. The proposal embodied specifications for the engine describing an "Ideal" engine in language evidently that of the manufacturers as follows: "The Ideal engine is particularly adapted to direct connected work on account of its perfect balance, quiet running." The proposal was accepted by defendant who had previously selected the kind of engine he wanted from a number of different kinds mentioned in the preliminary discussions. The plaintiffs performed the contract, but the engine could not be made to run quietly enough to satisfy the defendant as the noise was heard in the auditorium above.

Held, that the bargain was not a sale of goods but a contract for work and materials and that there was no warranty that the engine would be "quiet running" but only a recommendation of the type of engine chosen for the work required.

The clause was general in its terms and had not in view any particular use of the engine.

Chalmers v. *Harding*, (1868) 17 L. T. 571, followed. *Allis, Chalmers, Bullock* v. *Walker*, 21 M.R. 770.

5. Fraudulent representations — *Promissory note—Counterclaim—Principal and surety — Damages for breach of warranty—Consolidation of cross actions—Set-off of verdicts.*

1. It is no defence to an action on a promissory note that it was given for the price of an article sold by the payee to the maker with a warranty which has been broken, unless the vendor was guilty of a fraudulent or reckless misrepresentation in making the sale; the maker's proper remedy being either to counterclaim or bring a cross action for damages for the breach of warranty.

2 A party who has signed such a note as surety for the maker may, if sued along with the maker, set off against the plaintiff any damages which the maker would be entitled to recover against him for the breach of warranty.

Becherraise v. *Lewis*, (1872) L.R. 7 C.P. 372, followed.

When the maker of the note brought a cross action for the breach of warranty, instead of counterclaiming in the action brought against him, and recovered a verdict for damages exceeding the amount due on the note, the two actions, having been tried together, were consolidated, one verdict was set off against the other, and final judgment ordered to be entered in the consolidated action in favor of the maker of the note for the difference only. Illustration of the proper assessment of damages for breach of a warranty that a stallion sold was a sixty per cent. foal getter. *La Fleche* v. *Bernardin, Bernardin* v. *La Fleche*, 21 M.R. 315.

Appealed.

See CONTRACT, III, 1; XII, 1; XIV, 2.
— MISREPRESENTATION, IV, 4.
— PRINCIPAL AND AGENT, I, 6, 7.
— SALE OF GOODS, IV, 1; V; VI, 1.

WARRANTY OF AUTHORITY.

See PARTIES TO ACTION, 5.
— PRINCIPAL AND AGENT, V, 6.

WARRANTY OF TITLE.

See COVENANT, 1.
— EVIDENCE, 15, 17.
— SALE OF LAND FOR TAXES, I, 2.
— VENDOR AND PURCHASER, VII, 12.

WARRANTY OF TITLE TO GOODS.

See BANKS AND BANKING, 7.
— HAY.

WASTE.

See MORTGAGOR AND MORTGAGEE, VI, 10.

WATERCOURSE.

Drainage—*Right to obstruct flow of water.*

A watercourse consists of bed, banks and water and, while the flow of the water need not be continuous or constant, the bed and banks must be defined and distinct enough to form a channel or course that can be seen as a permanent landmark on the ground.

The plaintiff's claim was that a watercourse ran through her land into and across the defendant's land, and that for some years past the defendant had obstructed the flow of water in this watercourse by building a dyke or embankment across it on his own land, the effect of which had been to throw the water back upon and overflow the plaintiff's land.

According to the evidence, what the plaintiff claimed to be a watercourse was merely a depression in the surface of the country extending through the plaintiff's land, crossing into the defendant's land and continuing through it until it reached a slough or gully which finally emptied into Long Lake. There was no continuous flow of water through this depression, but every spring the rain and melted snow from the lands south and west of the plaintiff's land and from the higher parts of her own land flow or drain into it and, covering it to a depth of six inches or more according to the season, gradually pass off, in the absence of obstruction, across the defendant's land into the slough. In the high water there is a perceptible northerly current for a few days, and the height of the water on the slope of the depression and the general course of its flow are defined by the rubbish deposited along the edge of the current, but the position of this line of rubbish varies from year to year, according to the height of the water. Apart from this, there was no evidence of the existence of any banks or edges of a channel through which the water flowed, and in some years the plaintiff had cultivated portions of this depression right up to her western line.

Held, that there was no watercourse which plaintiff had any right to have kept free and clear of obstruction for the benefit of her land, and that her action must be dismissed with costs.

An occupant or owner of land has no right to drain into his neighbor's land the surface water from his own land not flowing in a defined channel, and the rule of the Civil law, that the lower of two adjoining estates owes a servitude to the upper to receive the natural drainage, does not apply in this Province.

Williams v. *Richards*, (1893) 23 O.R. 651, and *Ostrom* v. *Sills*, (1897) 24 A. R. 526, followed. *Wilton* v. *Murray*, 12 M.R. 35.

WAY OF NECESSITY.

Right of way—*Parol grant of right of way—Easement by prescription—Constructive notice.*

The plaintiff's claim was for damages for trespass and an injunction to prevent defendant from exercising an alleged right to cross the plaintiff's land in going from his farm to the travelled road. The two parcels of land were separated by at least half a mile, but evidence was given to show that in the year 1875 the plaintiff's predecessor in title had, as part of an agreement for an exchange of the two parcels with the defendant, promised verbally to allow the latter the right to cross the parcel in question and that the defendant had exercised this right for four or five years. His user of the way, however, ceased after that for six or seven years until, about 1886 or 1887, he commenced to use the trail over the plaintiff's land at times for heavy loads; but in 1892 the defendant himself built a fence without any gate right across the very trail which he claimed the right to use and between the plaintiff's land and a parcel on the east of it which the defendant had in the meantime acquired. There was no evidence to show that the plaintiff when he acquired the land had any notice of the alleged agreement for a right of way.

Held, (1) That the intermittent use by the defendant of a convenient old trail was not sufficient to affect the plaintiff with constructive notice of the alleged agreement.

(2) That defendant was not entitled to use the trail as a way of necessity notwithstanding that there were natural obstacles to his reaching the travelled highway by any other road.

(3) That there was no such continuous enjoyment of the way as is necessary to establish an easement by prescription under 2 & 3 Wm. 4, c. 71, s. 2.

Carr v. *Foster*, (1842) 3 Q.B. 581, and *Hollins* v. *Verney*, (1884) 13 Q.B.D. 308, followed.

(4) That the evidence was not sufficient to establish a definite agreement for a perpetual right of way or to warrant the interference of a Court of equity by way of specific performance, as the agreement was made when the country was sparsely settled and the road allowances were not expected to be speedily made passable, and the passage across the intervening land not owned by either party might have been shut off at any time. *Huddlestone* v. *Love*, 13 M.R. 432.

WEDDING PRESENTS.

See ALIMONY, 5.

WEIGHT OF EVIDENCE.

See LIBEL, 5.
— NEW TRIAL, 2, 6.

WEIGHTS AND MEASURES ACT.

1. Burden of proof of illegality—*Voluntary payment of price of threshing ascertained in violation of Weights and Measures Act—Appropriation of payments.*

Appeal from a County Court.

The chief part of the plaintiff's claim was for the price of threshing oats and wheat for defendant and the defence was that the quantities were ascertained in a manner prohibited by the Weights and Measures Act, R.S.C. 1886, c. 104, and that therefore the plaintiff could not recover.

It appeared from the evidence that the oats threshed had been measured by the bag, but it also appeared from a statement rendered to plaintiff by defendant that he had credited plaintiff with the amount of his account for threshing the oats and charged plaintiff with certain items dated prior to any other credit to plaintiff and amounting to about the same as the price of threshing the oats.

Held, following the rule in *Clayton's Case*, (1816) 1 Mer. 610, that defendant had appropriated the amount of his said charges in settlement of the price of threshing the oats, and, following *Hughes* v. *Chambers*, 14 M.R. 163, that he could not now set off such amount against the price of threshing the wheat.

As to the threshing of the wheat, the bargain was that defendant was to pay by car measurement if it was clean, if not, then by bag measurement, neither of which modes would be legal under the statute; but defendant in the statement rendered to plaintiff had credited him with the threshing of 4,597.20 bushels of wheat at 5¼ cents. per bushel. The defendant gave no evidence, and there was no express testimony, that the wheat had been measured by the bag, but the trial Judge held that the proper inference was that the measurement had been by the bag, and he dismissed the plaintiff's claim.

Held, following *Hanbury* v. *Chambers*, 10 M.R. 167, that the trial Judge was not bound to draw such inference in a case where it would enable defendant to evade payment of an honest claim; that, as there was no conflict of testimony, the appellate Judge was free to follow his own views as to the conclusions to be drawn from the evidence, that the defence raised should not prevail without strict proof of a violation of the Act, and that there was no such proof in this case. *Fox* v. *Allen*, 14 M.R. 358.

2. Measuring grain in bags—*Void contract.*

The plaintiff contracted with the defendant to thresh his grain at a price per bushel. At the threshing the threshed grain was run into bags, each supposed to contain two bushels, and the quantity was estimated by the number of bags. It was not ascertained either by measuring with a Dominion Standard Measure or by weighing. Section 21 of The Weights and Measures Act, c. 104, R.S.C. 1886, provides that "Every contract bargain . . . . . or dealing made or had in Canada in respect of any work . . . which has been or is to be done . . . . . or agreed for by weight or measure, shall be deemed to be made and had according to one of the Dominion weights or measures ascertained by this Act . . . . . and if not so made or had shall be void, except when made according to the metric system."

Held, that under this enactment the plaintiff could not recover anything for the work he had done.

Manitoba Electric & Gas Light Co. v. *Gerrie*, 4 M.R. 210, followed. *Macdonald* v. *Corrigal*, 9 M.R. 284.

Distinguished, *Ferris* v. *C.N.R.* 15 M.R. 134.

See CHOSE IN ACTION, 1.
— PLEADING, I, 2.

WHEN PROPERTY PASSES.

See COUNTY COURT, II, 4.
— FI. FA. GOODS, 4.
— SALE OF GOODS, IV, 4.

WILL.

I. CONSTRUCTION OF.
II. LEGACY.
III. MISCELLANEOUS CASES.

I. CONSTRUCTION OF.

1. Charge on estate—*Application of rents upon mortgage—Improvements under mistake of title.*

A testator appointed executors "directing my said executors to pay all my just debts and funeral expenses and the legacies hereinafter given out of my estate." In a subsequent part of the will it was provided that, 'after paying off my said debts and funeral expenses, I give and bequeath to my daughter M. the sum of $5000 to be paid to her at the age of 21 years by my executors and I give to my wife all my real estate whatsoever and wheresoever and all my chattels and household furniture with the exception of the above named legacy." "And also my executors to educate and provide all necessaries for said child (M.) from my estate until she is 21 years of age over and above the $5000 above mentioned."

The plaintiffs had a mortgage upon part of the real estate of the testator. After his death they loaned the widow a further sum for the purpose of erecting buildings upon it. After default they took possession under the first mortgage and appropriated the rents to its payment. Upon a bill to foreclose the second mortgage,

Held, 1. That the legacy and provision for maintenance and education were a charge upon the real estate.

2. That the plaintiffs were not entitled to priority over these charges either upon the ground of mistake in title, or because the Court would have sanctioned the loan on behalf of the infant if applied to at the time.

3. The plaintiffs could not be permitted to change the application of the rents to the reduction of the second mortgage. *Confederation Life Ass.* v. *Moore*, 6 M.R. 162.

2. Gift of residue to executors, whether absolute or in trust.

A testator devised and bequeathed all his property to two executors and trustees "in trust" to pay debts and certain legacies, and invest the residue and pay the net annual income to his widow during her life. He then gave certain legacies and disposed of the residue as follows: "subject to the foregoing trusts in favor of my said wife and the payment of my funeral and testamentary expenses, debts and legacies and directions as aforesaid, I give all my lands, chattels real, real and personal estate unto my trustees to be applied and disposed of as to them, in their uncontrolled and absolute discretion, shall seem fit."

Held, that under the above clause the trustees had no absolute disposing power over the residuary estate, but held it in trust. *Re Magnus Brown*, 8 M.R. 391.

3. Precatory trust—*Proceeds of sale of right to subscribe for new shares in corporation, whether capital or income.*

Application by the executors of the will of William Walton for advice and directions under section 42 of The Manitoba Trustee Act, R.S.M. 1902, c. 170. The deceased owned 52 shares of the common stock of the Canadian Pacific Railway Company and, after his death, his executors were given the right to subscribe for a certain number of shares of new stock issued by the Company at 125. They sold this right for the sum of $511.42.

The will contained the following request:

"I bequeath to each of my sons William, Thomas and Percy one third of my stock or shares in the Canadian Pacific Railway Company, the share of each to be transferred in the books of the Company to each of my said legatees. My wish and desire, however, is that, though each of my said three sons shall have had such shares so transferred to them as aforesaid, they shall not dispose of them but only the income derived therefrom shall be expended by them respectively, and that, upon the death of each of them, his share shall be disposed of and the proceeds thereof divided equally amongst all my grandchildren and, in the event of my son Percy dying and not leaving lawful issue, his share shall be sold and apportioned amongst my grandchildren as aforesaid."

Held, (1) That the will should be construed as creating a precatory trust of the shares in favor of the grandchildren, allowing the legatees only the income during their lives, and that the executors would not be justified in transferring the shares absolutely to the three sons.

In re Hamilton, [1895] 2 Ch. 370; *In re Williams*, [1897] 2 Ch. 12, and *In re Oldfield*, [1904] 1 Ch. 549, distinguished.

(2) The proceeds of the sale of the right should be treated as an addition to the capital and not as income, and the legatees were only entitled to the income to be derived therefrom. *Re Walton Estate*, 20 M.R. 686.

4. Words of absolute gift to A. followed by direction that after death of A, on the happening of a certain event, the property be equally divided between B. and C.—*Transfer under Real Property Act.*

Appeal from the refusal of the District Registrar to register a transfer of land under The Real Property Act from the testator's widow in her capacity of executrix to herself individually in fee simple.

Testator by his will, after using words which imported an absolute gift of all his property to his widow, proceeded to direct that, upon the happening of a certain contingency, after the death of his widow, the property be divided equally between two named classes of persons. That contingency might still happen.

Held, that the District Registrar was justified in refusing to register the transfer. *Re Simon*, 19 M.R. 450.

II. Legacy.

1. Specific or pecuniary legacy—*Conversion—Interest—Capital or income.*

In a will there was the following bequest:—"I bequeath to my dear wife Sarah the interest on £1,000, out of the moneys invested by me in the Montreal Bank in Canada, to be annually paid to her by my executors hereinafter mentioned, and for her sole use and benefit during her life, and at her death the above £1,000 to be equally divided among all my children surviving, share and share alike."

At his death the testator was possessed of a considerable number of shares in the capital stock of the bank, the dividends upon which were payable half yearly.

After the death, for the purpose of carrying into effect the bequest, the executors transferred to one of their number twenty-two shares of the stock, and he executed a declaration of trust, by which he declared that he held the same in trust for the widow and her children, upon the terms that he was annually to pay to the widow, in satisfaction of the interest appointed to be annually paid to her, all such dividends or interest on the twenty-two shares as should accrue to him, and in the event of the death of the widow he was to surrender the shares for the purpose for which the sum of £1,000 was bequeathed.

Afterwards the capital stock of the bank was increased, and four shares of the new issue were in effect added by the process to the twenty-two old shares.

Held, 1. The bequest was pecuniary and not specific. The general rule is that a legacy of stock out of stock is specific, but of money out of stock, pecuniary.

2. The assignment of stock and declaration of trust did not amount to a conversion and investment, or an appropriation amounting to payment. Nothing short of a conversion of the stock and the investment of sufficient of the proceeds in an authorized security to answer the particular legacy could be such an appropriation. Bank stock is not a security authorized by the Court.

3. The twenty-two shares and the four shares always remained part of the estate.

4. The widow was entitled to interest at six per cent. from the expiration of one year after the testator's death.

Semble.—1. Any loss accruing to the estate through the non-conversion of the stock within a year from the death would fall upon the general estate.

2. An express direction by a testator for the conversion and investment of his property, from time to time, as the trustees may think fit, will not prevent the operation of the general rule that where personal property is given in a series of limitations it shall be invested in such securities as are approved by a Court of Equity, for the benefit of parties interested in remainder after the death of the tenant for life. If no such conversion has actually taken place the rule is that, between legatees for life and in remainder, a conversion will be deemed to have taken place at the expiration of

one year from the death. *Re Logan Trusts*, 3 M.R. 49.

See next case.

2. Specific or pecuniary legacy—*Conversion—Interest—Capital or income.*

An appeal from the judgment of KILLAM J., 3 M.R. 49, *ante*.

Held, 1. The bequest was demonstrative and not specific.

2. The assignment of stock and declaration of trust did not amount to a conversion and investment, or an appropriation amounting to payment.

3. The twenty-two shares and the four shares always remained part of the estate.

4. The widow was entitled to interest at 6 per cent. from the expiration of one year after the testator's death.

Form of order for payment out of court of money paid in under the Trustee Acts. *Re Logan Trusts*, 4 M.R. 19.

3. Revocation of legacy—*Statute of Mortmain—Bequest to "the three oldest and poorest people" in a municipality.*

The testator in his will gave $2,000 to his son William McMurray and no other person named William was mentioned in it. In the codicil to the will he said: "I am sorry my dear William to make this alteration. I cut you off my will and leave you $200. I leave $500 to Acton School * * * * and $300 to the three oldest and poorest people in Rosedale municipality * * * * *"

Held, (1) That the bequest of $2,000 to the son was revoked and one of $200 substituted for it.

(2) That the Statute of Mortmain, 9 Geo. 2, c. 36, is in force in Manitoba and the bequest to the School District of Acton, so far as it was directed to be paid out of land or the proceeds of land, was void, but that such proportion of the amount as the pure personalty of the estate bore to the whole estate should be paid subject to abatement *pro rata* with other legacies if the estate should not be sufficient to pay all.

Re Staebler, (1894) 21 A. R. 266, and *Theobald on Wills*, 5th ed. p. 342, followed.

Brook v. *Badley*, (1868) L. R. 3 Ch. 672, and *Re Watts*, (1885) 29 Ch. D. 947, distinguished.

(3) That the gift of $300 to the three oldest and poorest people in the municipality was valid, being sufficiently certain to be carried out. *Law* v. *Acton*, 14 M.R. 246.

III. MISCELLANEOUS CASES.

1, Annuity—*Corpus or income—Allowance for past maintenance of infant's—Powers of trustees to mortgage.*

A testator devised and bequeathed all his real and personal estate to trustees upon trust, to convert the same into money and, after payment of debts, to invest the proceeds and stand possessed thereof upon the following trusts: "In trust out of the income thereof to pay to my said wife during her life, if she shall remain my widow, an annuity of $2,000 . . . and in trust as to the residue of said income, to apply the same, or such portion thereof, if, or as my trustees or the majority of them shall in their discretion think fit, in or towards the support, maintenance and education of my present and future born children until the eldest surviving of them shall attain the age of twenty-one years, and in trust, if my said wife be then living and shall have continued unmarried, then to set apart such portion of the residuary trust funds as in the opinion of my trustees shall be sufficient to realize the said annuity given to my said wife," and then followed a gift over of the residue to the children in equal shares. The income of the estate proved insufficient to pay the annuity to the widow, who remained unmarried, and the trustees were compelled to advance a portion of the capital of the estate for the maintenance and education of the children.

The widow claimed that she was entitled to her annuity without abatement, and that if the income was insufficient it should be paid out of the *corpus*, and that when the eldest surviving child should attain the age of twenty-one she would then in any event be entitled to her annuity of $2,000 a year out of the estate so long as she remained unmarried. She also claimed repayment by the trustees of moneys which she had expended in the past support and education of the children.

The trustees filed a bill to have the will interpreted.

Held, 1. That the payment of the annuity could be made only out of the income, and that neither before nor after the eldest child should attain twenty-one years of age was the *corpus* of the estate liable to make up any deficiency of income.

2. That the testator's intention was to charge the payment of the annuity upon each year's income, and that a

deficiency of one year could not be made up from the surplus of another.

3. That no allowance could be made to the widow out of the infants' shares for past maintenance.

4. That the trustees had no power to mortgage the estate.

Baker v. *Baker*, 6 H. L. 616, and *Stelfox* v. *Sugden*, Johns. 234, considered and followed. *Machray* v. *Higgins*, 8 M.R. 29.

2. Attestation by witnesses—*Affidavit of execution substituted for ordinary attestation clause—Wills Act, R.S.M. 1902, c. 174, s. 5.*

At the execution of the last will of the deceased in Portland, Oregon, instead of the usual attestation clause, the attorney substituted a formal affidavit of execution commencing just below the signature of the testatrix and extending over part of another page. This affidavit was then signed by the witnesses in the presence of the testatrix and sworn to by them. Their evidence showed that they intended to and did witness the will and also intended to subscribe it as witnesses.

Held, that section 5 of The Wills Act, R.S.M. 1902, c. 174, had been sufficiently complied with and that the will had been validly executed.

Griffiths v. *Griffiths*, (1871) L.R. 2 P. & D. 300, followed. *Re Harvie*, 17 M.R. 259.

3. Disputed handwriting—*Forgery—Handwriting—Evidence of experts—Action for revocation of probate and to establish later will.*

Discussion of value of testimony of experts in a case of disputed handwriting and of the various circumstances which led to the conclusion that the document propounded by the plaintiff was a forgery. *Foulds* v. *Bowler*, 8 W.L.R. 189.

4. Mental capacity of testator—*Undue influence—Evidence—Onus of proof—Demurrer — Multifariousness—Jurisdiction of Court of Queen's Bench over wills.*

A bill is not necessarily multifarious because it seeks to set aside a deed as against one defendant and a will executed by the same person in favor of another defendant, when the latter relief is merely incidental to the former, and the defendants had set up the will as a bar to the plaintiff's claim.

The Court of Queen's Bench on its equity side has jurisdiction to try the validity of a will, or to pronounce it void for fraud or undue influence. R.S.M., c. 36, s. 11.

Where the evidence as to the mental capacity of the testator or grantor is conflicting, and the execution of the instrument was procured by parties who were in a position to exert an undue influence over him, and who take a benefit under it, the *onus* is thrown upon them of proving that the transaction was a righteous one and that there was no undue influence exerted. *Baker* v. *Batt*, 2 Moo. P. C. 321; *Barry* v. *Butlin*, 2 Moo. P. C. 482; *Fulton* v. *Andrew*, L.R. 7 H. L. 448.

In the present case the evidence as to the condition in which the deceased was on the day the deed and will were executed, though favorable to the defendants' contention, came entirely from those interested in supporting the instruments; whilst the evidence of disinterested outsiders, who had seen him shortly before, was distinctly unfavorable, and tended to show that he was childish, unable to speak intelligibly, and could not understand what was said to him.

Held, upon the evidence, which is fully set out in the judgment, and applying the principle above stated, that the deceased had not at the time he executed the deed and will in question, mental capacity sufficient for the transaction of any business, and that both instruments should be declared void and set aside. *Wright* v. *Jewell*, 9 M.R. 607.

5. Power of executors to sell real estate when no debts—*Postponement of division of residuary estate specifically devised — Annuities charged upon whole estate.*

Under a will making provision for the wife and sister of the testator to be secured on the estate and giving the residue both real and personal to his three children in equal shares, the executors have no power to sell the real estate without the consent of the residuary legatees, there being no express power to sell conferred and no debts necessitating a sale.

Such power in the executors should not be inferred from a direction in the will that "no division of the said residue *or payment of their respective shares* to my said children shall be made by my executors until five years after the date of my death," or from the further direction that the executors should have power to delay and postpone the *payment* of the

share or shares of the children until such time as in their judgment and opinion it would be advisable to *pay* such share or shares, as these directions must be read in connection with the clause in the will requiring the executors, during the said five years, to "annually pay to my said children their respective shares of the income arising from the said residue of my estate," and the further clause providing that "if, during the said five years, my executors should have on hand any surplus funds from the residue of my estate, such surplus shall be invested in safe and legal securities," and it should be held that the "payment" mentioned in those directions referred merely to such surplus funds. The intention of the testator can be further arrived at by his direction that the annuities provided for his wife and sister are to be a charge upon his entire estate and, in the event of the period of division arriving before their deaths, the executors are directed to set aside from such division sufficient of his estate to secure such annuities. If it was his intention to confer a power of sale upon his executors, he would have made a provision for the security of such annuities in the event of a sale and, had he done so, the power of sale would be readily implied. *Carruthers* v. *Carruthers*, 21 M.R. 781.

6. Sale of devised land by testator subsequent to will—*Bequest of "cash, negotiable notes and mortgages"—Wills Act, R.S.M.* 1902, *c.* 174, s. 21—*Compensation to executors—Lapse.*

1. Notwithstanding section 21 of The Wills Act, R.S.M. 1902, c. 174, a devise of land specifically described fails when the testator has, after making the will, entered into an agreement to sell the land, although no part of the purchase money has been received during his life-time, and the devisee takes no interest in either the land or the purchase money.

Ross v. *Ross*, (1873) 20 Gr. 203, followed; *Jarman on Wills*, 129.

2. Unpaid purchase money of land sold by the testator in his life-time will not pass under a bequest of "all cash, negotiable notes and mortgages" if there were, at the time of his death, mortgages which would answer the description in the will.

3. A legacy lapses if the legatee dies before the testator unless it can be regarded as a legacy to a class: *Theobald on Wills*, 780.

4. The executors in this case should be allowed as compensation the following commissions: One half of one per cent. on cash in the bank, three per cent. on collections of all other sums, and one per cent. on all payments out. *Re Ferguson Estate*, 18 M.R. 532.

7. Undue influence.

The testator during his last illness made his will leaving all his property to the defendant who was not his wife, but had lived with him as such for many years, thus cutting off his only child, the plaintiff, with whom he was on friendly terms.

It sufficiently appeared that he was of sound mind at the time, and the evidence showed the probability of his having been influenced to make the will as he had by the action recently taken by his wife for alimony against him and by a notion that the plaintiff had been assisting her mother in such action. The defendant was present in the room when the instructions for the will were taken by the solicitor; but, beyond the fact that she had untruly stated to the deceased during his last illness that the plaintiff did not want to visit him, there was no direct evidence of any improper influence brought to bear upon him by the defendant and the plaintiff was compelled to rely on the general suspicions to be drawn from the surrounding circumstances.

Held, that the evidence was insufficient to warrant a finding that the will had been obtained by the exercise of undue influence.

It is not sufficient for that purpose to show that the circumstances attending the execution of the will are consistent with the hypothesis of undue influence, but it must be clearly shown that they are inconsistent with a contrary hypothesis; and it was impossible in this case to say that the circumstances surrounding the making of the will were consistent only with the hypothesis of undue influence.

Boyse v. *Rossborough*, (1855) 6 H. L. Cas. 49; *Waterhouse* v. *Lee*, (1863) 10 Gr. 190, and *Baudains* v. *Richardson*, [1906] A.C. 185, followed.

The facts in this case did not bring it within the principle laid down by the Court of Appeal in England in *Tyrrell* v.

Painton, [1894] P. 151. *Tellier* v. *Schilemans*, 17 M.R. 262.

See CONTRACT, XV, 13.
— LIFE INSURANCE, I, 2, 5.
— TITLE TO LAND, 4.

WINDING UP.

I. INSOLVENCY OF COMPANY.

1. Allegation of—*When company insolvent within the meaning of The Winding-Up Act—Pleading assignment of a chose in action—Petition for winding-up order.*

In a petition for an order against a company under The Winding-Up Act, R.S.C. 1886, c. 129, the petitioner alleged that the company "is insolvent and utterly unable to pay your petitioner's said debts and its other debts."

Held, that this was not equivalent to stating that the company was "unable to pay its debts as they became due," and was not a sufficient allegation of the company's insolvency within the meaning of section 5, subsection *a*, of the Act, and that the petition must be dismissed with costs.

The petitioner's claim was based on a judgment alleged to have been recovered by another person, and acquired by the petitioner, of which he "is now the *bona fide* holder and owner."

Held, a sufficient statement of the claim of the petitioner, without an allegation that the judgment had been assigned by an instrument in writing. *Re Rapid City Farmers' Elevator Co.*, 9 M.R. 571.

2. Allegations of—*Proof—Power to order winding-up.*

By The Winding-Up Act, R.S.C. 1886, c. 129, s. 5, a company is deemed insolvent, "(*b*) If it permits any execution issued against it * * * to remain unsatisfied till within four days of the time fixed by the sheriff, or proper officer, for the sale thereof, or for fifteen days after such seizure."

The petition for the winding up in this case alleged among other things that by virtue of a certain execution and seizure the sheriff had entered upon the premises of the company and proceeded to sell and dispose of the goods of the company, and that he had already sold under such execution the greater portion of the goods and intended to proceed under the execution and sell and dispose of, and was then from day to day selling and disposing of, the remainder thereof.

There was no allegation bringing the case under any other provision of The Winding-Up Act than the one above quoted.

Held, that an order for the winding up of the company could not be made on the material before the Court. *Re Manitoba Milling & Brewing Co.*, 11 C.L.T., Occ. N. 313.

3. Evidence of—*Computation of time—Trading company—Rights of creditors.*

Creditors may shew cause against the making of a winding-up order.

A subsequent execution creditor may file a petition for a winding-up order.

The provisions of 52 Vic., c. 32 (D. 1889), which are not made applicable to proceedings under The Winding-Up Act, do not, in consequence of section 3, apply to cases in which it is sought to wind-up a company incorporated in Manitoba.

It is within the legislative authority of the Legislature of Manitoba to incorporate a company for the purposes of "doing the business of lake and river transportation of passengers and goods within the Province of Manitoba by steamer or other vessels, the employment of tugs and barges for all purposes of their ordinary use, and the buying and selling of ships, vessels, and materials, the cutting of logs, wood, and timber manufacture, and dressing of lumber, lath, shingles and other forest products, the sale and transportation of same, the working of timber limits in connection therewith, the catching, curing, transportation and dealing in fish and fish products and supplies for fishing business, dealing and trading in general merchandise."

Such a company may be incorporated by the Lieutenant-Governor under Con. Stat. Man., c. 9, s. 226, and is within the meaning of "trading company," as defined by sec. 2, sub-sec. (c), of The Winding-Up Act.

Sec. 5, sub-sec. (c), of The Winding-Up Act is *intra vires* of the Parliament of Canada.

The non-appearance of a company to oppose a petition for a winding-up order is not an acknowledgment of insolvency sufficient to bring it within sec. 5, sub-sec. (d), of The Winding-Up Act.

The petitioner, who was president of the company, as well as a large creditor, stated in his affidavit that from his knowledge of said company's affairs he knew it to be unable to pay its debts in full, but gave no comparative statement of its assets and liabilities.

Held, not sufficient evidence of insolvency.

Sec. 5, sub-sec. (h), of The Winding-Up Act provides that a company shall be deemed insolvent "if it permits any execution issued against it, under which any of its goods, chattels, land or property are seized, levied upon or taken in execution, to remain unsatisfied till within four days of the time fixed by the sheriff or proper officer for the sale thereof, or for fifteen days after such seizure."

Held, that, in computing time under above sub-section, the day fixed for the sale is exclusive, and therefore, where an unsatisfied writ was in the sheriff's hands on the 30th of December, and the sale was fixed for the 3rd of January, it was a writ remaining "unsatisfied till within four days of the time fixed for the sale," and the company was insolvent within the meaning of the Act.

Ex parte Fallon, 5 T.R. 283, and *Williams* v. *Burgess*, 12 A. & E. 635, followed. *Re Lake Winnipeg Transportation, Lumber and Trading Co.*, 7 M.R. 255.

4. When company deemed to be insolvent — *Proof of insolvency under The Winding-Up Act.*

In supporting a petition for an order against a company under The Winding-Up Act, R.S.C. 1886, c. 129, it is not sufficient to show that several demands of payment have been made by the creditor without success, unless a demand in writing has been served on the company in the manner in which process may legally be served on it, under section 6 of the Act; nor can the company be deemed to be insolvent within the meaning of the Act, because an execution has been returned *nulla bona* by a County Court bailiff.

The provisions of sections 5 and 6 of the Act are exclusive, and a petitioner for a winding-up order must strictly prove the existence of one or more of the circumstances there set forth, or his petition will be dismissed.

Re Qu'Appelle Valley Farming Co., 5 M.R. 160, followed.

In re Flagstaff Mining Co., L.R. 20 Eq. 268, and *In re Globe New Patent Iron Co.*, L.R. 20 Eq. 337, distinguished. *Re Rapid City Farmers' Elevator Co.*, 9 M.R. 574.

II. LIQUIDATOR.

1. Appointment of liquidators of insolvent bank — *Choice between several nominees — Canvassing for votes — Nominee indebted to bank — Chief liquidator should be a banker — Costs — Remuneration of liquidators.*

Under the provisions of The Winding Up Act, R.S.C. 1886, c. 129, s. 101, as amended by the Act, 52 Vic., c. 32, s. 17, whilst the Court is confined to a selection between the persons nominated at the meetings of creditors and shareholders, for the office of liquidator, it is not bound to adopt the choice of the majority, but must exercise its own discretion.

The Merchants Bank of Canada, the petitioning creditor, its claim being amply secured, held not entitled as of right to have its nominee appointed.

If the creditors nominate one person and the shareholders another, the Court will, *ceteris paribus*, have particular regard to the wishes of the latter if the company is solvent, and of the former if it is not.

But, when it is not absolutely clear that the bank is solvent, the interests of creditors in the liquidation are entitled to greater consideration than those of the shareholders.

It is important that the chief liquidator should be a man of experience in banking, and well acquainted with the methods of bank book-keeping.

The candidate who received the largest vote as chief liquidator amongst the unsecured creditors, and by far the largest vote amongst the shareholders, was indebted to the bank in a considerable amount, and, although it was claimed that this debt was fully secured on real estate, yet the Court, deeming the securities uncertain and unsatisfactory,

Held, that, on this ground amongst others, it was not desirable to appoint him.

It is objectionable for a candidate to canvass in any way for the appointment or to send out proxies to secure votes, or to vote for himself on proxies sent to him, or to advocate his own claims before the meeting; and it is especially objectionable for a provisional liquidator seeking appointment as permanent liquidator to send out letters signed by him as such liquidator, asking managers of branches of the bank employed under him, as well as other parties, to pay attention to the correspondence of his solicitors as to proxies; and the Court intimated that in future such practices would be regarded in a more serious light.

The remuneration to be allowed to the liquidators cannot be fixed at the time of their appointment, as notice of an application for that purpose seems to be required, and it would in any case be difficult to decide such a matter in advance; but the Court adopted the suggestion of the meetings as to the proportions in which the several liquidators should share the remuneration to be allowed.

As to the costs of the contest the learned Judge, following the rule laid down in *Re London and Northern Insurance Co.*, 19 L.T.N.S. 144,

Held, that one set of costs should be allowed to the shareholders and one to the creditors appearing on the petition, not including, however, any costs occasioned by the contest, and that costs must also be allowed to the bank and to the petitioning creditor, those of the latter to include all reasonable disbursements connected with the holding of the meetings. *Re Commercial Bank of Manitoba*, 9 M.R. 342.

2. Directions of Court to —*Proceedings against former directors for fraud—Manitoba Winding Up Act, R.S.M.* 1902, c. 175, *ss.* 19, 23.

The company being in process of voluntary winding-up under The Manitoba Winding Up Act, R.S.M. 1902, c. 175, the liquidator applied, under section 23 of the Act, for a direction as to whether or not he should take proceedings against a number of former directors of the company to cancel certain shares in the stock which they had issued to themselves as fully paid up, but without payment of any kind, and to recover the dividends which, to the extent of over $62,000, they had afterwards paid to themselves on said shares.

Held, that this was not "a question arising in the matter of the winding-up" for the determination of which an application may be made to the Court under section 23, and that no order could be made, as the liquidator in such a proceeding is not an officer of the Court or under its control, except to the extent stated in sub-section (f) of section 19 of the Act.

The Judge, however, expressed the opinion that it was the liquidator's duty under the circumstances to take the suggested proceedings and that, if he refused, the Court would have jurisdiction, under sub-section (*f*) of section 19, to compel him to do so. *Re Great Prairie Investment Co.*, 17 M.R. 554.

3. Removal of.

An application to remove a liquidator and appoint others was granted upon the grounds, (1) that creditors to the amount of $29,123.23 out of a total of $29,451.39 requested the change, (2) that the proposed liquidators would act without remuneration, and (3) that the business connection of one of the proposed liquidators would be of value to the company. *Re Assiniboine Valley Stock Co.*, 6 M.R. 105.

4. Remuneration of — *Reference to Master.*

The Court has no power to refer to the Master the consideration of the amount to be allowed to the liquidator.

The scale of remuneration of liquidators fixed in England will be followed here, not as absolutely binding, but as a guide.

Amount of remuneration under certain circumstances discussed. *Re Saskatchewan Coal Mining Co.*, 6 M.R. 593.

5. Remuneration of.

An application by a liquidator to fix his remuneration should be supported by an affidavit shewing the number of hours devoted by him and his clerks to the business of the liquidation.

No charge can be made for time spent in procuring his own appointment or opposing his discharge.

Scale of remuneration, and business for which it is allowed, discussed. *Re Assiniboine Valley Stock Co.*, 6 M.R. 184.

III. Preferential Claims.

1. Lien under writ of execution placed in sheriff's hands after commencement of the winding up—*Company — Winding-Up Act, R.S.C.* 1906, *c.* 144, *s.* 84, *R.S.C.* 1886, *c.* 129, *s.* 66.

Sub-section 1 of section 84 of The Winding Up Act, R.S.C. 1906, c. 144, so far as applicable to the rights of an execution creditor under a writ of execution against the goods of a company placed in the sheriff's hands after the commencement of the winding up, is not different in effect from section 66 of The Winding-Up Act as it stood in the former Revised Statutes of 1886, and the execution creditor cannot proceed to realize his judgment out of the goods of the Company.

Quære, what would be the result in a case where the sheriff had sold the goods and had the proceeds of the sale in his hands when notice of the petition was served?

Under the Act as it stood before the last revision, the money would have gone to the liquidator; but, to obtain that result under the present Act, sub-section 2 of section 84 would have to be read into sub-section 1. *Re Ideal Furnishing Co. Stewart McDonald Co. Case*, 17 M.R. 576.

2. Mechanics' lien.

A mechanics' lien is a preferential claim under The Winding Up Act. *Re Empire Brewing & Malting Co. Rourke & Cass' Claim*, 8 M.R. 424.

IV. Miscellaneous Cases.

1. Contract to take shares—*Company—Contributory—Evidence.*

To constitute the relationship of shareholder there must be a contract between the company and the individual. But this contract need not be sanctioned by by-law.

An application for 50 shares was made by H. before incorporation. After incorporation he was entered in the books of the company as the holder of 50 shares, acted as a director for two years (which he could not have done unless he held at least five shares), and paid calls (upon what number of shares did not clearly appear).

Held, that these circumstances were evidence of the existence of a contract to take shares, and that H. was not entitled to have his name struck from the list of contributories. *Re Bishop Engraving and Printing Co. Ex parte Howard*, 4 M.R. 429.

2. Examination on affidavit filed in opposition to petition — *Compelling attendance of affiant—Manitoba Winding-Up Act, R.S.M.* 1902, *c.* 175, *s.* 43. (b).

A deponent who makes an affidavit in connection with proceedings under The Manitoba Winding Up Act is subject to cross-examination thereon and may be compelled to attend and submit to such cross-examination and also to examination for the purpose of his depositions being used on the hearing of a petition for a winding-up order and to produce upon such examination all books and documents in his possession as an officer of the company.

The effect of sub-section (b) of section 43 of the Act is that the practice in force under the Act, in matters with respect to which no provision is made either in the Act or in the Rules made under it, and in so far as such practice is not inconsistent with either, is the Chancery practice as it existed in England on 15th July, 1870, so that a subpœna and appointment should be issued in accordance with that practice.

The King's Bench Act and Rules do not apply to such proceedings. *Re Manitoba Commission Company*, 21 M.R. 795.

3. Leave to sue for wages —*Liability of directors — Company.*

A company incorporated under The Manitoba Joint Stock Companies Incorporation Act was in process of being wound up. P., a servant of the company, applied for leave under section 16 of The Winding-Up Act to bring an action against the company for arrears of wages, so that he might on the execution being returned unsatisfied proceed to sue the directors pursuant to section 276 of The Manitoba Joint Stock Companies Incorporation Act.

Held, that the case was one in which leave ought to be given. *Re Lake Winnipeg Transportation, Lumber and Trading Co. Paulson's Claim*, 7 M.R. 602.

4. Leave to withdraw claim and file another—*Maritime lien.*

B. was master of a ship owned by a joint stock company, and navigating inland waters, viz., Lake Winnipeg. The

company became insolvent, and winding-up proceedings were taken. B. without the advice of counsel, filed a claim for wages under the winding-up proceedings. In this claim he did not mention any security. He afterwards applied for leave to withdraw this claim and file another claiming a maritime lien upon the ship for the wages, and also for leave to proceed *in rem* in the Exchequer Court to enforce the lien.

Held, that leave should be granted.

Held, also, that the costs of the application should be reserved until the suit in the Exchequer Court was disposed of. *Re Lake Winnipeg Transportation Co. Bergman's Claim*, 8 M.R. 463.

5. Money in court made by sheriff before winding-up order, awaiting interpleader—*Estoppel.*

Under various executions against the defendant company certain goods were seized.

Upon adverse claims being made the sheriff sold the goods and paid the money into court under the terms of an interpleader order to abide the result of an issue.

Before the determination of the issue the company was ordered to be wound up.

The execution creditors, having succeeded in the issue, moved for payment to them of the money in court, and were opposed by the liquidator.

Held, 1. That the execution creditors were entitled to the money.

2. That they were not estopped from setting up such claim because they had filed claims before the liquidator. *Galt* v. *Saskatchewan Coal Co.*, 4 M.R. 304.

6. Notice of application — *Insolvency.*

Notice of an application for a winding-up order need not be served upon creditors, contributories or shareholders of the company. They should be served with notice of the application to appoint a liquidator.

Service by a creditor of a demand for payment, in order to establish insolvency, upon directors of the company is not sufficient.

A company does not "acknowledge" insolvency by allowing a judgment against it to remain unpaid.

Insolvency held to have arisen from the inability of the company to meet its liabilities in full, and a conveyance of the main part of its assets to another company without the consent of the creditors, and without satisfying their claims. *Re Qu'Appelle Valley Farming Co.*, 5 M.R. 160.

7. Petitioning creditor — *Assignee of judgment must show date of assignment.*

In supporting a petition under The Winding-Up Act against a company by a person claiming to be a creditor and relying upon a service of demand, under section 6 of The Winding-Up Act, it is necessary to show that the petitioner was a creditor of the company at the date of service of the demand, and it will not be sufficient to prove that the judgment was recovered before the date of the service, without showing also that the petitioning creditor had acquired the judgment before such date. *Re Rapid City Farmers' Elevator Co.*, 10 M.R. 681.

8. Second petition—*Costs*—*Company.*

A creditor presenting a winding-up petition, with notice of a former one, does so at his own risk as to costs, and can recover costs subsequently incurred, only if he can show that the first petition was presented *mala fide* or collusively. *Re Manitoba Milling &c., Co.*, 8 M.R. 426.

9. Application to stay proceedings in action by liquida or against contributory — *Who may make* — *Winding-Up Act, R.S.C.* 1906, *c.* 144, *s.* 131—*Contributories.*

1. Under section 131 of The Winding-Up Act, R.S.C., 1906, c. 144, further proceedings on an issue ordered to be tried between the liquidator of a company being wound up under that Act and a person placed by him on the list of contributories, as to the liability of the latter, should be stayed when it is shown that an overwhelming proportion of both the shareholders and creditors of the company and the liquidator himself desire that the claim against the contributory should be abandoned because of their belief that the proceeding would not be of benefit to them. The order for such stay, however, should contain a provision that any shareholder or creditor who is opposed to it may use the name of the liquidator or the company in bringing the issue to trial, on giving within a time limited a satisfactory indemnity to the liquidator against costs, in default of which only the issue to be dismissed.

2. To ascertain the wishes of the shareholders and creditors, it is not necessary that there should be a meeting; their consent may be sufficiently expressed by counsel.

Re West Hartlepool, (1875) L.R. 10 Ch. 618, followed.

3. The application for the stay may be made by a shareholder or a creditor independently of the liquidator.

Re Sarnia Oil Co., (1891) 14 P.R. 335, followed. *Re London Fence, Limited.* (No. 1.) *Re Brown. Re Merchant's Bank*, 21 M.R. 91.

10. Withdrawal by bank president of customer's deposit — *Insolvent bank.*

The claimant having $1,200 on deposit in the bank, and being about to go on a journey, left a cheque for that amount with the president, payable to his order, with instructions to invest it for him in a mortgage, as soon as a suitable security could be found. On the last day before the suspension of the bank, no investment having yet been found for the money, the president, in order to protect the claimant, indorsed the cheque, drew the amount in notes from the teller, placed the notes in an envelope, which was then sealed up and addressed to Dr. Robertson, with the words "twelve hundred dollars" written on it, and placed in the vault of the bank. The package was found there when the liquidators came into possession on the commencement of the winding-up proceedings a few days afterwards. The claimant contended that he was entitled to the notes.

Held, that, the cheque having been indorsed and the bank notes drawn without the authority of the claimant, they were still the property of the bank, and that the claimant must rank only as an ordinary creditor for the $1,200. *Re Commercial Bank of Manitoba. Rev. Dr. Robertson's Claim*, 10 M.R. 61.

See BANKS AND BANKING, 9.
— COMPANY, I, 3, 4; IV, 5.
— COSTS, XIII, 25.
— EXAMINATION OF JUDGMENT DEBTOR, 3.
— SECURITY FOR COSTS, IV, 1.
— TAXATION, 1.

WITHDRAWAL OF RECORD.

See COSTS, XIII, 8.

WITNESS.

See CONTEMPT OF COURT, 4.
— CRIMINAL LAW, II, 1; VI, 5; XVII, 5, 15.
— ELECTION PETITION, V, 2.
— EVIDENCE, 3, 27.
— EVIDENCE ON COMMISSION, 12.
— EXAMINATION FOR DISCOVERY, 16.
— EXAMINATION OF JUDGMENT DEBTOR, 5.
— FOREIGN COURT, 2.
— MANITOBA EVIDENCE ACT.
— PRACTICE, XII, 1.

WITNESS FEES.

See COSTS, I, 4; XII, 2; XIII, 4.
— ELECTION PETITION, IV, 3.
— PRACTICE, IV, 4; V, 2.
— MASTER'S OFFICE, 1.

WORDS.

"Amount in question."

See APPEAL FROM COUNTY COURT, II, 1, 2, 3.
— APPEAL FROM N. W. T.
— APPEAL TO PRIVY COUNCIL.

"Artificial Inland water.'

See Rex v. *Braun*, 8 Can. Cr. Cas. 397.

"As soon as possible."

See LOCAL OPTION BY-LAW, IV.

"At least——days."

See TIME, 2.

"Beyond the seas."

See LIMITATION OF ACTIONS, 6.

"By" a certain date.

See LANDLORD AND TENANT, V, 2.

"By reason of the railway."

See RAILWAYS, III, 6.

"By the day."

See BUILDERS' AND WORKMENS' ACT.

"Cause of action."

See COUNTY COURT, I, 8.

"Claim."

See MECHANIC'S LIEN, X, 5.

"Clean farm."
See MISREPRESENTATION, II, 2.

"Completion of the sale."
See PRINCIPAL AND AGENT, II, D.

"Court or Tribunal."
See FOREIGN COURT, 2.

"Crown side."
See QUO WARRANTO, 2.

"Current money of Canada."
See ELECTION PETITION, X, 1, 2.

"Deemed to be."
See CONTRACT, V, 4.

"Due notice."
See BILLS AND NOTES, VI, 2.

"Equitable Execution."
See—GARNISHMENT, V, 1.

"Feloniously did make an assault."
See CRIMINAL LAW, IV, 1.

"For at least one month."
See LOCAL OPTION BY-LAW, II, 1.

"Gambling house."
See CONSTITUTIONAL LAW, 3.

"Goods."
See HAY.

"Grant from the Crown."
See C. P. R. LANDS, 1.

"Happening of the alleged negligence."
See MUNICIPALITY, IV, 2.

"Immediately."
See ELECTION PETITION, II.

"Instrument in writing."
See LIFE INSURANCE, 5.

"Judicial proceeding."
See APPEAL TO SUPREME COURT, 6.

"Legal tender money."
See CONFLICT OF LAWS, 2.

"Liabilities."
See RECTIFICATION OF DEED, 2.

"Liquor."
See LIQUOR LICENSE ACT, 6.

"Manufacturer."
See ATTACHMENT OF GOODS, 1.

"Matter."
See APPEAL TO SUPREME COURT, 6.

"May."
See SHERIFF, 6.

"Money or other property."
See CONTRACT, V, 5.

"Municipal" taxes.
See MUNICIPALITY, VIII, 6.

"Notes of mine."
See BILLS AND NOTES, VIII, 13.

"Not transferable."
See NEGOTIABLE INSTRUMENT.

"Now."
See REFEREE IN CHAMBERS, JURISDICTION OF, 2.

"Officer."
See EXTRADITION, 5.

"One month's notice."
See VENDOR AND PURCHASER, II, 5.

"Operation."
See COMPANY, IV, 14.

"Opposite Party."
See RAILWAYS, V, 3.

"Party adverse in point of interest."
See EXAMINATION FOR DISCOVERY, 3.

"Passage of the by-law."
See MUNICIPALITY, I, 5.

"Personal baggage."
See RAILWAYS, II, 1.

"Portion of street."
See STREET RAILWAY.

"Produce a purchaser."
See CONTRACT, V, 3.

Promise to "fix it up all right."
See LIMITATION OF ACTIONS, 2.

"Province."
See CROWN PATENT, 2.

"Prowling assignee."
See VENDOR AND PURCHASER, IV, 2.

"Railway."
See RAILWAYS, XI, 2, 4.

"Raising money."
See RAILWAYS, IX, 2.

"Running at large."
See ANIMALS RUNNING AT LARGE.

"Sales clerk."
See WORKMEN'S COMPENSATION FOR INJURIES ACT, 2.

"Satisfactory answers."
See EXAMINATION OF JUDGMENT DEBTOR, 14.

"Security."
See COVENANTS, 1.

"Security for money."
See SUMMARY JUDGMENT, III, 1.

"Shall."
See CRIMINAL PROCEDURE, 1.

"Shareholder."
See COMPANY, IV, 13.

"Shipment."
See CONTRACT, XII, 3.
— ILLEGALITY, 4.

"Sold or occupied."
See C. P. R. LANDS, 3.

"Stored or kept."
See FIRE INSURANCE, 5.

"Sufficient securities."
See ELECTION PETITION, V, 2.

"Sworn."
See CHATTEL MORTGAGE, I, 3.

"Taxation by the Dominion."
See C. P. R. LANDS, 1.

"To" a certain date.
See AMBIGUITY.

"Trader."
See ATTACHMENT OF GOODS, 1.

"Trading Company"
See WINDING UP, I, 3.

"Trial Judge."
See COSTS, X, 2.

"Unduly."
See CONSPIRACY IN RESTRAINT OF TRADE, 3.

"Up to."
See PRACTICE, XXVIII, 29.

"Usual expenses."
See COMPANY, III, 3.

"Usual stay."
See STAYING PROCEEDINGS, III, 4.

"Violent death."
See ACCIDENT INSURANCE, 1.

"Volenti non fit Injuria."
See NEGLIGENCE, I, 4.

"Vote."
See LOCAL OPTION BY-LAW, III.

"Wages."
See WAGES.

"Without any notice."
See MORTGAGOR AND MORTGAGEE, III, 5.

"Working expenditure."
See RAILWAYS, X, 2.

"Workman."
See WORKMEN'S COMPENSATION FOR INJURIES ACT, 2.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

1. Retrospective legislation — *Limitation of actions — Notice of injury — 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 the passing of chapter 48 of the Statutes of 1895 the plaintiff's right of action for the injury under The Workmen's Compensation for Injuries Act, 56 Vic., 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 was 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 Elec. St. Ry. Co.*, 11 M.R. 528.

2. Salesclerk not a workman — *Trial by jury — King's Bench Act, R.S.M. 1902, c. 40, s. 59—Workman, meaning of.*

A salesclerk in a shop is not a workman within the meaning of that term as used in The Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, so that an action by a salesclerk against his employer for damages for injury alleged to have been sustained through the employer's negligence is not one which, under section 59 of The King's Bench Act, R.S.M., 1902, c. 40, must be tried by a jury.

To entitle a workman to the benefit of the Act, the labor performed must be manual.

Bound v. *Lawrence*, [1892] 1 Q.B. 226, followed. *Hewitt* v. *Hudson's Bay Co.*, 20 M.R. 126.

3. Who may sue under — *Lord Campbell's Act — Death by accident — Negligence — R.S.M. 1892, c. 26.*

The Act respecting Compensation to Families of persons killed by accident, R.S.M. 1892, c. 26, supersedes Lord Campbell's Act in this Province, and must be read along with The Workmen's Compensation for Injuries Act, 1893, and any action under it must be brought by the executor or administrator of the deceased person.

The plaintiff's claim was for the recovery of damages for the death of her husband, alleged to have been caused by negligence of the defendants or their servants. Letters of administration had been taken out by a brother of the deceased, but he had refused to sue.

Held, that the defendants' demurrer to the statement of claim should be allowed. *Pearson* v. *C.P.R.* 12 M.R. 112.

4. Who may sue under — *Lord Campbell's Act — R.S.M. 1902, c. 31 — Claim of father for death of boy resulting from negligence — Who may sue — Loss of prospective benefit from continuance of life — Pleading — Demurrer — King's Bench Act, Rules* 306, 453.

The plaintiff's claim was for damages for the death of his son, an infant, alleged to have been occasioned by the negligence of the defendants, on one of whose freight trains he was working as a brakeman at the time of the accident which resulted in his death. The alleged negligence consisted of the absence of air brakes and bell signal cord from the equipment of the train.

The statement of claim was demurred to on various grounds and the following points were decided:

1. No person can sue under The Workmen's Compensation for Injuries Act, R.S.M. 1902, c. 178, for damages for the death of a deceased relative, who could not sue under chapter 31, R.S.M. 1902, and the statement of claim must show, either that the plaintiff is the executor or administrator of the deceased, or that there is no executor or administrator, or, if there be one, that no action has been commenced within six months after the death of the deceased by or in the name of the executor or administrator; and it was not sufficient for plaintiff to state simply that he was the father and sole heir at law of the deceased.

Lampman v. *Gainsborough*, (1888) 17 O.R 191, and *Mummery* v. *G.T.R.*; (1900) 1 O.L.R. 622, followed.

2. It is necessary that the statement of claim should show that the plaintiff had a reasonable prospect of future pecuniary benefit from the continuance of the life of the deceased.

Davidson v. *Stuart*, (1902) 14 M.R. 74, followed.

Chapman v. *Rothwell*, (1858) 27 L.J Q.B 315, not followed.

When the failure to prove a fact will cause the action to fail, that fact is a material one upon which the plaintiff relies, and, under Rule 306 of The King's Bench Act, R.S.M. 1902, c. 40, should be set out in the statement of claim.

3. Under the circumstances appearing in this case it was not necessary that the action should be shown to be brought for the benefit of all persons entitled to claim damages.

4. Although the Railway Act in force at the time of the accident required only passenger trains to be equipped with bell signal cord and air brakes, it is still a question of evidence whether the absence of those appliances on freight trains is negligence for the purposes of such an action, that is whether they may be reasonably required or could be reasonably furnished for the protection of the train hands, and the statement of claim was not demurrable because it relied on that absence as constituting negligence.

5. The statement of claim should allege that the defendants were aware of the defects relied on as constituting negligence or should have known of them.

Griffiths v. *London & St. Katharine Docks Co.*, (1883) 13 Q.B.D. 259, followed on this point (PERDUE, J., dissenting).

6. It is not necessary to allege that the deceased was ignorant of the alleged defects.

Smith v. *Baker*, [1891] A.C. 325, and *Williams* v. *Birmingham* [1899] 2 Q.B. 338, followed.

7. The requirements of section 9 of The Workmen's Compensation for Injuries Act are directory rather than imperative and the omission to give the name and description of the person in defendants' service by whose negligence the accident occurred is a matter to be dealt with by an application for particulars and not by demurrer.

8. The refusal or neglect of defendants to provide medical or surgical attendance for the injured employee gives no cause of action: *Wennall* v. *Adney*, (1802) 3 B. & P. 247. Therefore the allegations in the statement of claim that the deceased came to his death as a result of the injuries received and of the alleged neglect to provide medical or surgical care are demurrable.

9. Plaintiff in such an action has no right to claim for funeral expenses.

10. That the time allowed by the statute for the commencement of the action had expired when the demurrer was argued was no objection to the allowance of amendments to the statement of claim which did not seek to introduce any new parties or different causes of action: *Weldon* v. *Neal*, (1887) 19 Q.B.D. 394, distinguished.

11. Under Rule 453 of The King's Bench Act, it is only in respect of some question of law which is fundamental or goes to the root of the cause of action or defence set up that there should be a separate argument before the trial. As to all other matters in the pleadings which may be objectionable, an application in Chambers under Rule 326, to strike them out is the proper remedy. *Makarsky* v. *C.P.R.*, 15 M.R. 53.

WRIT OF ERROR.

See CRIMINAL LAW, XIV, 4; XVII, 1.

WRIT OF EXECUTION.

See FI. FA. GOODS.

WRITS.

See CAPIAS, 2.

WRIT VALID ON ITS FACE.

See REPLEVIN, 4.

WRONGFUL DISMISSAL.

See PLEADING, XI, 17.

WRONGFUL SEIZURE.

See SHERIFF, 7.

CASES NOT DIGESTED.

The following decisions in the earlier reports have been overruled or are now obsolete and are not, therefore, included in this digest:—

Archibald *v.* Goldstein, 1 M.R. 8.

Bank of Nova Scotia *v.* Brown, 2 M.R. 224.
Bank of Nova Scotia *v.* Lynch, 1 M.R. 180.
Bank of Nova Scotia *v.* McKeand, 1 M.R. 175.
Baynes *v.* Metcalfe, 4 M.R. 85.
Bose *v.* Morris, T.W. 368.
Brown *v.* Hooper, 3 M.R. 88.
Brown *v* Hooper, 3 M.R. 89.

Cameron *v.* McIlroy, 1 M.R. 198.
Canadian Bank of Commerce *v.* Adamson, 1 M.R. 3.
Canadian Bank of Commerce *v.* Northwood, 5 M.R. 224.
Caston *v.* Scott, 1 M.R. 117.
Charlebois *v.* Great North West Central Ry. Co., 9 M.R. 448.

Elliott *v.* Armstrong, 6 M.R. 255.

Galt *v.* Gore, 2 M.R. 147.
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