# THE DIGEST

OF

# ONTARIO CASE LAW

BEING

## THE REPORTED CASES

DETERMINED IN THE COURTS OF THE NOW

## PROVINCE OF ONTARIO

FROM

THE COMMENCEMENT OF TRINITY TERM, 1823, TO THE END OF THE YEAR 1900,

TOGETHER WITH

CASES IN THE SUPREME AND EXCHEQUER COURTS OF CANADA AND CANADIAN CASES IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, CARTWRIGHT'S CASES ON THE B. N. A. ACT, AND A SELECTION OF CASES FROM THE LAW JOURNALS OF THE PROVINCE, WITH TABLES OF CASES CONTAINED IN THE DIGEST AND OF CASES AFFIRMED, REVERSED, FOLLOWED, OVER-RULED OR SPECIALLY CONSIDERED.

COMPILED BY ORDER OF
THE LAW SOCIETY OF UPPER CANADA

BY

J. F. SMITH, K.C., E. B. BROWN,
R. S. CASSELS, AND T. T. ROLPH,

BARRISTERS-AT-LAW.

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## VOL. IV.

CONTAINING THE TITLES

**UMPIRE TO YEAR,**

AND

TABLES OF CASES AFFIRMED, REVERSED, ETC., AND OF CASES CONTAINED IN THE DIGEST, ETC.

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*TORONTO:*
THE CARSWELL COMPANY, LIMITED
1904

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ENTERED according to the Act of the Parliament of Canada, in the year of our Lord one thousand nine hundred and four, by THE LAW SOCIETY OF UPPER CANADA in the office of the Minister of Agriculture.

TO THE MEMORY OF

BRITTON BATH OSLER, K.C.

DIED 5TH FEBRUARY, 1901.

THROUGH WHOSE EFFORTS, AS CHAIRMAN OF THE COMMITTEE ON REPORTING OF THE LAW SOCIETY OF UPPER CANADA, THIS WORK WAS UNDERTAKEN.

# TABLE OF ABBREVIATIONS

OF THE PRINCIPAL CANADIAN REFERENCES.

A. J. Act..... Administration of Justice Act (Ontario).
A. R..... Appeal Reports (Ontario).
B. C. .....British Columbia.
B. N. A. Act.....British North America Act.
(C.)..... Province of Canada.
Cart.....Cartwright's Cases on the British North America Act, 1867.
Cassels' Dig.....Cassels' Supreme Court of Canada Digest.
C. C. or C. C. L. C....Civil Code (Quebec).
C. C. P. or C. P. C....Code of Civil Procedure (Quebec).
C. L. P. Act.....Common Law Procedure Act.
C. L. J.....Upper Canada Law Journal, N. S., and Canada Law Journal.
C. L. T..... Canadian Law Times (Ontario).
C. L. T. Occ. N.....Canadian Law Times Occasional Notes (Ontario).
Ch. Ch..... Chancery Chamber Reports (Ontario).
Ch. D. .....Chancery Division.
Code.....Criminal Code of Canada, 1892.
C. L. Ch.....Common Law Chamber Reports (Ontario).
C. P.....Common Pleas Reports (Ontario).
C. P. D.....Common Pleas Division.
Con. Rule .....Consolidated Rules of Practice.
C. S. B. C..... Consolidated Statutes of British Columbia.
C. S. C..... Consolidated Statutes of Canada, 1859.
C. S. L. C..... Consolidated Statutes of Lower Canada.
C. S. N. B.....Consolidated Statutes of New Brunswick.
C. S. U. C. .....Consolidated Statutes of Upper Canada, 1859.
(D.)..... Dominion of Canada.
Dorion .....Decisions de la Cour D'Appel (Quebec), Queen's Bench Reports.
Dra..... Draper's Reports (Ontario).
E. & A. .....Upper Canada Error and Appeal Reports.
E. C. .....Election Cases (Ontario).
E. T. .....Easter Term.
Ex. C. R.....Exchequer Court of Canada Reports.
G. O. .....General Orders of the Court of Chancery (Ontario).
Gr. ..... Grant's Chancery Reports (Ontario).
Hannay .....Reports of Cases in the Supreme Court of New Brunswick (N. B. R. vols. 12, 13).
H. E. C. ..... Hodgins' Election Cases (Ontario).
H. T. ..... Hilary Term.

## TABLE OF ABBREVIATIONS.

(Imp.) ..... Imperial Statute.
L. C. Jur. ..... Lower Canada Jurist.
L. C. G. ..... Local Courts Gazette (Upper Canada Law Journal).
L. J. ..... Upper Canada Law Journal.
(M.) or Man. ..... Province of Manitoba.
Man. L. R. ..... Manitoba Law Reports.
(M. C.) ..... Municipal Code (Quebec).
M. T. ..... Michaelmas Term.
N. B. Rep. ..... New Brunswick Reports.
N. S. Rep. ..... Nova Scotia Reports.
N. W. T. Rep. ..... North-West Territories Reports.
(O.) ..... Province of Ontario.
O. J. Act ..... Ontario Judicature Act.
O. R. ..... Ontario Reports.
O. S. ..... Old Series of King's and Queen's Bench Reports (Ontario).
P. E. I. ..... Prince Edward Island.
Pr. ..... Practice Reports (Ontario).
Pugs. ..... Pugsley's Reports (New Brunswick, 14, 15, 16).
Pugs & Burb. ..... Pugsley & Burbidge Reports (New Brunswick, 17-20).
Q. B. D. ..... Queen's Bench Division.
Q. L. R. ..... Quebec Law Reports.
Q. R. Q. B. ..... Quebec Reports, Queen's Bench.
R. ..... The Reports (England), 1893-1895.
R. G. ..... Regulæ Generales (Ontario).
R. & H. Dig. ..... Robinson & Harrison's Digest (Ontario)
R. & J. Dig. ..... Robinson & Joseph's Digest (Ontario).
R. S. C. ..... Revised Statutes of Canada, 1886.
R. S. O. 1877 ..... Revised Statutes of Ontario, 1877.
R. S. O. 1887 ..... Revised Statutes of Ontario, 1887.
R. S. O. 1897 ..... Revised Statutes of Ontario, 1897.
R. S. Q. ..... Revised Statutes of Quebec.
R. S. N. S. 4th ser. .... Revised Statutes of Nova Scotia, 4th series.
R. S. N. S. 5th ser. .... Revised Statutes of Nova Scotia, 5th series.
Rev. Leg. ..... Revue Légale (Quebec).
Russ. Eq. Reps. ..... Russells' Equity Decisions (Nova Scotia).
Russ. & Ches. ..... Russell & Chesley's Reports (N. S. R. 10-12).
Russ. & Geld. ..... Russell & Geldert's Reports (N. S. R. 13 to 32).
S. C. R. ..... Supreme Court of Canada Reports.
Stephens' Dig. ..... Quebec Law Digest by Stephens.
Stevens' Dig. ..... Stevens' Digest, (New Brunswick).
Tay. ..... Taylor's Reports (Ontario).
T. T. ..... Trinity Term.
U. C. R. ..... Queen's Bench Reports (Ontario).
U. S. R. ..... United States Supreme Court Reports.

# The Digest

OF

# ONTARIO CASE LAW.

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## I. Application of the Statute of Frauds and Making of the Contract.

### 1. *In General.*

**Acceptance**—*Time for Payment.*]—Time may be of the essence of a contract even without any express stipulation if it appear that such was the intention. Defendant wrote his agent on 25th March: "If O. (plaintiff) still want that farm . . he can have it for $350 net, provided it can be arranged at once. Kindly advise me . . if he accepts, and when he will pay the money over." On 6th April, the agent telegraphed defendant "O. will take the farm, will pay the money in two weeks," and on 11th April the defendant telegraphed "your offer of 6th comes too late:"—Held, that an arrangement between defendant and his agent as to the latter's commission would not affect the net price as between plaintiff and defendant. Held, also, that the inquiry "when will he pay over the money" shewed an intention to give a reasonable time for such purpose, and that under the circumstances two weeks was not an unreasonable time. But, held, also, that the acceptance of defendant's offer was not in time. *Oldfield* v. *Dickson*, 18 O. R. 188.

**Agent Exceeding Authority.**]—Where the owner of lands was induced to authorize the acceptance of an offer made by a proposed purchaser of certain lots of land through an incorrect representation made to her and under the mistaken impression that the offer was for the purchase of certain swamp lots only whilst it actually included sixteen adjoining lots in addition thereto, a contract for the sale of the whole property made in consequence by her agent was held not binding upon her and was set aside by the court on the ground of error, as the parties were not ad idem as to the subject matter of the contract and there was no actual consent by the owner to the agreement so made for the sale of her lands. *Murray* v. *Jenkins*, 28 S. C. R. 565.

**Deed Evidencing Agreement.**]—B. sold to C. land mortgaged to a loan society. The consideration in the deed was $1,400 and the sum of $104 was paid to B. C. afterwards paid $1,081 and obtained a discharge of the mortgage. B. brought an action to recover the balance of the difference between the amount paid the society and said sum of $1,400, and on the trial he testified that he intended to sell the land for a fixed price; that he had been informed by W., father-in-law of C., that there would be about $300 coming to him; that he had demurred to the acceptance of the sum offered, $104, but was informed by C. and the lawyer's clerk, who drew the deed, that they had figured it out and that was all that would be due him after paying the mortgage; that he was incapable of figuring it himself and accepted it on this representation. C. claimed that the transaction was only a purchase by him of the equity of redemption, and that B. had accepted $104 in full for the same:—Held, that the weight of evidence was in favour of the claim made by B., that the transaction was an absolute sale of the land for $1,400; and independently of that, the deed itself would be sufficient evidence to support such claim in the absence of satisfactory proof of fraud or mistake. *Burgess* v. *Conway*, 14 S. C. R. 90.

**Evidence.**]—The evidence of a parol contract for the purchase of land considered,

analysed, and acted on. *Grant* v. *Brown*, 12 Gr. 53.

**Offer in Form of Agreement.**]—Defendant wrote to the manager, who was orally authorized to sell certain lands belonging to a bank: "I hereby agree to purchase from the Dominion Bank all," &c., and paid on account of the purchase money $100. This memorandum was not submitted to the managing board of the bank, nor was it signed by any one acting on their behalf, and the solicitor for the bank refused to have it put into such a shape as to bind the bank:—Held, that the memorandum amounted to an offer to purchase only, and that before a formal acceptance thereof by the bank authorities defendant was at liberty to withdraw the same; and quære, whether in such a case authority for the purpose of selling the lands of the bank could be conferred by parol. *Dominion Bank* v. *Knowlton*, 25 Gr. 125.

——— *Withdrawal before Acceptance.*]—A parcel of land having been placed by the plaintiff in a land agent's hands for sale, the defendant offered to purchase it, and signed a form of agreement for sale and purchase, which was taken by the agent to the plaintiff and was signed by him, but before the defendant was notified thereof he gave notice to the agent withdrawing his offer:—Held, that the instrument, though in form an agreement, was in substance a mere offer, and as defendant had withdrawn before he was notified of its acceptance, there was no completed agreement. *Larkin* v. *Gardiner*, 27 O. R. 125.

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2. *In What Cases the Statute Applies.*

**Accepting Land in Satisfaction of Debt.**]—An attorney took a conveyance of property in trust for a client, but did not sign any writing acknowledging the trust. A parol agreement was subsequently entered into, that the attorney should accept the property in discharge of two notes he held against the client:—Held, that this agreement was binding on the attorney, though not in writing. *Fleming* v. *Duncan*, 17 Gr. 76.

**Account Stated.**]—An item in an account stated being a sum charged for the price of a lot of land, does not make it incumbent on a plaintiff to prove the agreement respecting such land to have been made in writing. *Dalton* v. *Botts*, Tay. 181.

A defendant casually observing to a third party, in the presence of the plaintiff, that he has paid the whole price for his land, except a certain sum, without any further explanation, is not satisfactory, if any, evidence of an account stated. Semble, that if it had been, the Statute of Frauds would not have applied, though the sum was due in respect of the sale of lands. *Curtis* v. *Flindall*, 3 U. C. R. 323.

Action on account stated, to recover $102, which defendant was to pay plaintiff for giving up his purchase of land from defendant. It was proved that defendant had acknowledged that he was to pay plaintiff this sum, but there was a nonsuit for want of an agreement in writing:—Held, that if the acknowledgment was made after the agreement had been cancelled and the land resold by defendant, the plaintiff might recover; and this not being clear on the evidence, a new trial was granted to ascertain the fact. *Gross* v. *Bricker*, 18 U. C. R. 410.

*See*, also, *Lloyd* v. *Clarke*, 12 C. P. 320.

**Agency**—*Work Done.*]—C., in his own name, bought the privilege of digging for gold on a certain lot, and subsequently formed a company by whom that lot was purchased:—Held, that the plaintiff, one of the working partners, was entitled to a share of all the profits and advantages made by C. in this transaction. There was no writing signed by C. acknowledging the agency and trust:—Held, that A. and B., two of the partners, having entered and worked on the lot, the statute did not apply. *Burn* v. *Strong*, 14 Gr. 651.

**Agent's Unauthorized Statement.**]—E., the agent of a testatrix, introduced into her will a clause declaring that she had sold to one S. two properties described, and directing the plaintiff (to whom she devised all her real and personal estate beneficially), to convey them to S. The testatrix had contracted with S. for the sale to him of only one lot; but E. alleged an oral bargain by the testatrix to sell the lot to him, E. There was no writing as to such bargain, and no part performance. After the death of testatrix, E. induced the plaintiff, who was not of age, to execute a conveyance to S. of the two lots:—Held, that the alleged bargain with E. was not binding on the plaintiff, and a release of the lot to her was directed, with costs to be paid by E. *Archer* v. *Scott*, 17 Gr. 247.

**Agreement to Give Mortgages.**]—Defendant held a note of one S. for $980, given to the plaintiff for land in relation to which a suit was pending in chancery by plaintiff against S. They met in order to settle. The plaintiff requiring first to be relieved from the note, which he had indorsed, S. agreed to give a mortgage to defendant on certain land for $600, and procure K. to mortgage to him other land for $380; and defendant agreed, as soon as these mortgages were registered, to give up the note to the plaintiff. The mortgages were made and registered, but there was a previous mortgage on the land, and defendant transferred the note to a third person, who recovered judgment against the plaintiff. The plaintiff then sued defendant for not giving up the note, alleging as the consideration for defendant's agreement that S., at the plaintiff's request, would give defendant the mortgages:—Held, that the contract was within the statute as relating to land, and that being oral only, the plaintiff could not recover. *Johnstone* v. *Cowan*, 25 U. C. R. 470.

**Clearing Land.**]—An agreement to enter upon and clear land, and take the wood after it is cut down in payment of the labour, is not for an interest in lands within the statute. *Hamilton* v. *McDonell*, 5 O. S. 720.

**Commission on Purchase.**]—Defendant agreed with the plaintiff, an attorney, to give him $1,000 for his trouble and commission, if he procured for him a certain hotel property for $15,000. The plaintiff took an agreement from the vendor to sell to himself, and afterwards, with the vendor's assent, substituted one O., who acted for the plaintiff, for himself as vendee. The defendant and the vendor, through the instrumentality of the plaintiff, then came together, and the price was reduced to $14,500. Deeds were made by

O. and the vendor to the defendant, who took possession, the plaintiff being employed by the vendor to prepare some of the papers, but he had not, as he swore, been employed by him to make the sale:—Held, that the plaintiff was entitled to recover; that the contract was not one within the statute; and that his acting for the vendor after the contract of sale had been made, notwithstanding the agreement for purchase in the first instance to himself, was not open to any legal objection. *White* v. *Curry*, 39 U. C. R. 569.

**Contingent Interest.**]—Semble, that the purchase of a devisee's contingent interest in real estate is within the statute. *McDiarmid* v. *McDiarmid*, 9 Gr. 144.

**Crops.**]—Quære, is the sale by a sheriff of a crop of wheat ready for the harvest, the sale of a mere chattel, not requiring a writing. *Haydon* v. *Crawford*, 3 O. S. 583.

**Defendant Resisting.**]—The position of a defendant resisting a claim, is more favourably considered than that of a plaintiff endeavouring to enforce an agreement, the terms of which may not have been defined so as to clearly satisfy the requirements of the statute. *Lawrence* v. *Errington*, 21 Gr. 261.

**Delivery of Deed.**]—In trover for a deed, it was held that an agreement that the plaintiff should deliver the deed to defendant to be returned on certain conditions, was not affected by the statute, at least when pleaded by defendant. *Dowling* v. *Miller*, 9 U. C. R. 227.

**Erecting Gates.**]—An agreement with a railway company to erect and see to gates on the plaintiff's farm, in place of fences, is not an agreement in relation to land within the statute. *Great Western R. W. Co.* v. *Vilaire*, 11 C. P. 509.

**Exchange of Lands**—*Promise by Third Person to Repay Consideration.*]—Where a father, intending in the distribution of his property to give his son 100 acres of land, was induced by the son to exchange it for the property of a stranger, the father paying £125 for such exchange, and the son promising to repay it, so that it might go in the distribution to the rest of the family, and the father then for a nominal consideration conveyed to the son the land received in exchange:—Held, that the executors of the father might maintain an action against the son for the £125, as money paid to his use; that they were not estopped by the consideration stated in the deed; and that it was not for an interest in lands within the statute. *McBride* v. *Parnell*, 4 O. S. 152.

**Lease** — *Collateral Right to Enter.*]—Declaration for breaking and entering the plaintiff's close and cutting and carrying away the grain. Plea, on equitable grounds, that the plaintiff held the land under an indenture of lease from defendant, on the negotiation for and execution of which it was orally agreed between them, and the true agreement was, that defendant should have the right to enter and harvest the crop then in the ground sowed by him: that when the lease was executed a reservation of such right in it was suggested, but omitted on the plaintiff's assurance that it was unnecessary, as the agreement between them was well understood, and defendant would be allowed to take the crop; and that the entry, &c., in pursuance of such agreement, is the trespass complained of:—Held, that the plea was good, for the independent oral agreement, made in consideration of defendant signing the lease, was good as an agreement, though defendant, by the fourth section of the Statute of Frauds, might be prevented from suing on it; and as equity in such a case would decree specific performance, there was ground for a perpetual injunction against this action. Quære, whether the plea was not also a justification at law, as under an agreement which was valid to protect the defendant, though he could not have enforced it by action. *McGinness* v. *Kennedy*, 29 U. C. R. 93.

**Lost Deed.**]—The father of the plaintiffs and the defendant were brothers, and defendant obtained a deed in his own name of 100 acres of land, in which it was alleged his brother was jointly interested. It was shewn distinctly that the defendant had at one time made a deed to his brother of some land, although the defendant, after his brother's death, denied having given any deed, but on the hearing he admitted giving a deed of an adjoining property for which no patent had issued, although the defendant's name had been entered in the books of the Crown lands department as an applicant for purchase. It was shewn that a box containing the deeds in reference to the property had been stolen, and the contents had never been seen since. The court, under the circumstances, notwithstanding the denial of the defendant, whose evidence was not consistent, held, that the plaintiffs were entitled to an account of the purchase money received by the defendant upon a sale of the property, and ordered the defendant to pay the costs to the hearing. *Curry* v. *Curry*, 26 Gr. 1, 4 A. R. 63. Affirmed by the supreme court, the Judges being equally divided, *Cassels' Dig.* 778.

**Mortgage without Covenant** — *Oral Promise to Pay.*] — Defendant having purchased land from the plaintiff for $6,000, paid $600 down, and gave a mortgage for the balance of $5,400, $400 of which was to be paid on an event specified, $1,000 within three months, and the remaining $4,000 in three equal payments, in six, nine, and twelve months from the date of the mortgage; but the mortgage contained no covenant to pay. The first payment of $400 was made, and afterwards, in consideration of the plaintiff forbearing to take any proceedings on the mortgage for two months, defendant promised to pay the $1,000 then overdue. The plaintiff, having waited accordingly, and left defendant in possession for that time, sued upon this promise:—Held, that he could not recover, for that the promise, which was oral, was a contract for an interest in land, within s. 4 of the statute; and that if it amounted to a lease it was not one within s. 2, so as to be good without writing. *Jackson* v. *Yeomans*, 39 U. C. R. 280.

**Option to Purchase.**]—A. being lessee of land with a right to purchase within a certain period, at a certain price, assigned his interest to B., who agreed to take the deed in his own name and convey to plaintiff on repayment of the money paid by him with interest at 20 per cent. B. neglected the matter, and the owner of the land (the time having expired), refused to sell except at a much higher price. Upon action by A. against B. for damages:—Held, that it being a contract

relating to land not in writing, he could not recover. *Foy* v. *Weir*, 9 C. P. 487.

**Partition**—*Agreement to Hold Share in Trust.*]—A testator having devised his real property to such of the persons named as should be living at the death of his widow, the parties interested came to an agreement for partition during the widow's lifetime. There were several questions between the parties. The plaintiff, who was one of the devisees, was induced to consent to the partition upon a distinct understanding with another of the devisees, that the latter should, after partition, hold a portion of her share in trust for the plaintiff. This agreement was not known to the other devisees; the partition deed was executed by all the parties, and the partition would not have been agreed to by the plaintiff but for the promise stated:—Held, that the promise was not binding, both because there was no writing within the statute, and because the party making it was a married woman. *Morley* v. *Davison*, 20 Gr. 96.

**Pleading.**]—In an action for lands bargained and sold, a plea of the Statute of Frauds is bad upon special demurrer, as amounting to the general issue. *Birdsall* v. *Darling*, 2 U. C. R. 401.

Where a part of the consideration for the deed sought to be set aside, was a promise on the part of the grantee to make a lease for life of certain lands to the grantor, the bill prayed a specific performance thereof, and the defendant, without making discovery of the circumstances, pleaded to so much of the bill generally, that there was no contract:—Held, that a plea in that form, intended as a plea of the statute, was insufficient. *Wright* v. *Henderson*, 1 O. S. 304.

Quære, whether, in order to exclude parol evidence of a contract, it is necessary for a defendant, who denies the contract, to claim the benefit of the statute. *Butler* v. *Church*, 18 Gr. 190.

A party is entitled to set up the statute as a defence to a suit to enforce a parol agreement respecting an interest in land, although the statute has not been specially pleaded. *Wilde* v. *Wilde*, 20 Gr. 521.

*See Keefer* v. *Roaf*, 8 O. R. 69.

**Proceeds of Sale of Mine.**]—A contract for a share in the proceeds of a mine when it should be sold is not a contract for the sale of an interest in land within the Statute of Frauds. *Stuart* v. *Mott*, 23 S. C. R. 384.

**Promise to Devise**—*Execution of Will.*]—C. C., the plaintiff, alleged that A. C., his father, being the owner of certain land, induced him to abstain from enforcing a certain claim, and also to work on the land, by representing that he would devise the land to him, which he afterwards represented that he had done; and A. C. being dead, C. C. now claimed the land as against one to whom A. C. had devised it by a later will, revoking the former one. The execution of the former will was proved as alleged:—Held, that this was not such part performance as to take the case out of the Statute of Frauds, for the execution of the former will was the act of the person whose estate it was sought to charge, and not of the person seeking to enforce the contract, and, moreover, did not import a contract, but only indicated a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature:—Quære, whether if it had been proved, which it had not, that A. C. had, by his representations that he had devised the land to C. C., induced him to forego his claim, and to work on the land as alleged, this would have entitled C. C. to succeed. *Campbell* v. *McKerricher*, 6 O. R. 85.

**Promise to Devise.**]—B., a resident of British Columbia, wrote to his sister, in England, that he would like one of her children to come out to him, and in a second letter he said, "I want to get some relation here, for what property I have, in case of sudden death, would be eat up by outsiders and my relations would get nothing." On hearing the contents of these letters T., a son of B.'s sister, and a coal miner in England, came to British Columbia and lived with B. for six years. All that time he worked on B.'s farm and received a share of the profits. After that he went to work in a coal mine in Idaho. While there he received a letter from B. containing the following: "I want you to come at once as I am very bad. I really do not know if I shall get over it or not, and you had better hurry up and come to me at once, for I want you and I dare say you will guess the reason why. If anything should happen to me you are the person who should be here." On receipt of this letter T. immediately started for the farm, but B. had died and was buried before he reached it. After his return he received the following telegram which had not reached him before he left for home: "Come at once if you wish to see me alive, property is yours, answer immediately. (Sgd.) B." Under these circumstances T. claimed the farm and stock of B. and brought suit for specific performance of an alleged agreement by B. that the same should belong to him at B.'s death:—Held, that as there was no agreement in writing for the transfer of the property to T., and the facts shewn were not sufficient to constitute a part performance of such agreement, the fourth section of the Statute of Frauds was not complied with, and no performance of the contract could be decreed. *Turner* v. *Prevost*, 17 S. C. R. 283.

**Promise to Give Mortgage.**] — The plaintiff, as administrator, sued upon defendant's alleged promise to execute a mortgage to the testator on certain land, in consideration that the testator would discharge a mortgage which he then held thereon, so as to enable defendant to give a first mortgage on the land to one L.:—Held, that the alleged promise required to be in writing, as relating to an interest in land. *Stoddart* v. *Stoddart*, 39 U. C. R. 203.

**Purchase in Trust.**]—A deed was taken in the name of two, as grantees of the property conveyed. One of them afterwards, claiming to be solely interested in the property as purchaser, filed a bill to have his cograntee declared a trustee of one moiety of the property for him. The evidence adduced shewed that the deed was intentionally drawn as it was; receipts for instalments of the purchase money were taken in the name of the two, and the mortgage for securing the balance of purchase money due was executed by both:—Held, that if even the whole amount of purchase money was advanced by the one,

it was not sufficient to shew that the purchase was made solely for his benefit. *Hutchinson* v. *Hutchinson*, 6 Gr. 117.

Where it was shewn by evidence that the defendant had orally agreed to attend and buy in a property, offered for sale by auction, as the agent of the plaintiff and for his benefit:—Held, affirming 21 Gr. 391, notwithstanding the statute had been set up as a defence and there was not any writing evidencing the agreement, that the plaintiff was entitled to a decree to carry out the agreement. *Ross* v. *Scott*, 22 Gr. 29.

**Recovery Back of Consideration.**]—If a party pays money on an oral agreement for the sale of lands, he cannot, without shewing any thing more, maintain an action to recover it back, on the ground that the agreement is void by statute. *Barber* v. *Armstrong*, 6 O. S. 543.

**Right to Cross Railway.**]—A right to cross the land on which a railway is constructed will not pass by a parol agreement. *Mills* v. *Hopkins*, 6 C. P. 138.

**Right to Redeem Mortgage.**] — The plaintiff, who was mortgagee of certain lands, alleged that L., the present holder of the mortgage, purchased it from C. with knowledge of the fact that C. had purchased it from the original mortgagee as trustee for the plaintiff, who was to be allowed to redeem on paying whatever C. should pay for the mortgage, and a certain additional sum for C.'s services; and sought to redeem on payment of what was due under the said agreement with C.:—Held, that the above agreement fell within the Statute of Frauds, and should be evidenced in writing. Held, also, that even if this were not so, L. could not be affected by such agreement, having purchased without notice of it. *Wright* v. *Leys*, 8 O. R. 88.

**Sale at Price per Acre**—*Agreement to Pay Excess.*]—It was orally agreed to sell the land at a certain price per acre, the purchaser paying the amount computed on fifty acres. The vendor agreed to refund the excess should the property be shewn to contain less than the fifty acres, and the purchaser at the same time agreed to pay for any excess above that number at the agreed rate:—Held, that the statute did not prevent the vendor shewing these facts by parol and recovering for any excess of acres, although a conveyance of the land had been executed to the purchaser. *Kitchen* v. *Boon*, 24 Gr. 195.

**Sale of Mortgage.**] — Plaintiff having bought land from defendant, agreed to pay him $1,000 on a certain day, and to give a mortgage on the lot for the balance of the purchase money, defendant agreeing to accept in part payment of the latter an assignment of a mortgage held by plaintiff for $1,600, bearing six per cent. interest, which was to be sold to defendant at such a reduction as would pay him eight per cent:—Held, that the agreement for the sale of the mortgage was not an agreement relating to the sale of land requiring to be in writing. *Carscaden* v. *Shore*, 17 C. P. 493.

**Sale of Wood.**]—The plaintiff had agreed to purchase from F. certain land, one condition being that he (the plaintiff) should take possession and begin his improvements at once, but should cut no wood for the purpose of sale, but only as required for his own use, or for the purpose of clearing. The plaintiff afterwards agreed with defendant to sell him 500 cords of wood at 3s. 9d. a cord. M. had agreed to cut this wood for the plaintiff at 2s. 6d. a cord, and defendant was to pay M. the 2s. 6d., and the plaintiff 1s. 3d. as owner of the trees. In an action for breach of this latter agreement:—Held, that the plaintiff's agreement with F. did not restrain him from selling wood off the land cleared by him, and that a payment on account by the defendant to M. took the agreement sued upon out of the Statute of Frauds, being a payment on the contract as much as if made to the plaintiff. *Brady* v. *Harraby*, 21 U. C. R. 340.

**Sheriff's Sale.**]—A sheriff sold property under an execution, but a settlement was effected and the execution creditor desired the sheriff not to convey. The purchaser filed a bill against the sheriff to compel specific performance, but no memorandum had been made or signed by the sheriff:—Held, that the contract must be in writing under the statute. *Witham* v. *Smith*, 5 Gr. 203.

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3. *Memorandum to Satisfy the Statute.*

**Acceptance of Offer before Signature.**] — An acceptance in writing by the owner of land of a written offer therefor addressed to him but unsigned by any purchaser, and without any purchaser being named or in any way described therein, is not a sufficient memorandum to satisfy the statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer. *McIntosh* v. *Moynihan*, 18 A. R. 237.

**Agent's Bond for Deed.**]—A., by power of attorney, authorized his wife to sell and convey certain lands, and immediately afterwards left the Province and died abroad. The wife employed B. to find a purchaser, who accordingly agreed with the plaintiff for a sale at a certain price, payable by instalments, with interest: upon payment whereof he was to receive a conveyance, and B. gave his own bond for a deed, in which were contained the terms and conditions of sale. The wife subsequently ratified the bargain, and B., with her consent, let the purchaser into possession of the property. Upon a bill for specific performance of the contract:—Held, that this was not a contract in writing, within the meaning of the statute; but that sufficient appeared to authorize the court to decree a specific performance of a parol contract upon the terms of the bond as being partly performed and within the terms of the authority. *Farquharson* v. *Williamson*, 1 Gr. 93.

**Agent's Letter to Principal.**] — The owner of land gave parol authority to an agent to sell, and the agent accordingly entered into a parol contract for sale, and communicated the fact and the particulars of the contract to his principal by letter:—Held, sufficient to satisfy the statute. *McMillan* v. *Bentley*, 16 Gr. 387. See, also, *Jennings* v. *Robertson*, 3 Gr. 573.

**Agent's Recognition of Contract.**]—An agent's subsequent written recognition of

an oral contract, where such recognition was made in the performance of his duty in the carrying out of the contract: — Held, binding on the principal for the purpose of taking the case out of the statute. *Ward* v. *Hayes*, 19 Gr. 239.

**Assignment for Creditors**—*Sheriff.*]—A sheriff, selling lands as an assignee for creditors, under R. S. O. 1887 c. 124, cannot, as when selling under an execution, sign a memorandum which will bind a purchaser under the Statute of Frauds, for he is not, as in the latter case, agent for both vendor and purchaser. *McIntyre* v. *Faubert*, 26 O. R. 427.

**Clerk of Vendor's Agent.**]—The clerk of a vendor's agent, by his direction wrote to T., an intending purchaser, "Mr. H. D. won't take less than $30 a foot for ground on Beverley street:" terms, &c., (setting them forth). T. answered this: "Your memorandum offering me three hundred and odd feet of land on Beverley street, by a depth of one hundred and fifty feet, at the price of $30 per foot frontage, duly received. I will take the land at that price, and now offer terms, viz., one-fifth cash, and the balance in four yearly payments, with interest at eight per cent. I should like the right of getting any one-sixth part of the land released from the operation of the mortgage, by paying one-sixth of the mortgage money, and the interest accrued thereon." This was answered by the clerk of the agent, by his directions: "Your acceptance of my offer of three hundred and odd feet on Beverley street, by a depth of one hundred and fifty feet, for thirty dollars ($30) per foot, to hand. Will accept your terms, namely" (repeating them), "on the following conditions" (as to investigation of title, production of deeds, &c.):—Held, that these letters did not form such a memorandum in writing as took the case out of the statute. *Hope* v. *Dixon*, 22 Gr. 439.

The agent of the vendor asked permission to remove a building off the premises, the subject of the alleged contract; and his solicitors asked for papers from the vendee's solicitor, in order to prepare answers to certain questions of the plaintiff as to title, &c.:—Held, not such acts as would ratify an agreement not otherwise binding on the vendor. *Ib.*

**Connected Documents.**]—Several documents may be construed together as evidence of an agreement or note in writing, under the statute. *Rochleau* v. *Bidwell*, Dra. 345.

A conveyance in fee from the plaintiff to the defendant, with absolute covenants for title, but not for further assurance; a bond to defendant for further assurance at a fixed period, on receiving additional sum of money and interest, with a subsequent written offer from defendant to plaintiff to purchase another property, on paying part of the purchase money at once and the residue at a future day, receiving a bond from the plaintiff, like the former bond for a deed of confirmation, as in the former bond:—Held, sufficient to constitute an agreement, or note or memorandum thereof, within the statute, on defendant's part to pay the sum specified in the bond and interest, on plaintiff tendering a confirmation and demanding the same. *Ib.*

Semble, that when to pleas of no agreement or note in writing, and also an agreement not to be performed within a year, to the same count of the declaration, an agreement is replied to the first plea, and a note or memorandum replied to the second, and sufficient evidence of a note or memorandum is given, the plaintiff is entitled to judgment on the whole record, though such evidence might not amount to substantive proof of an agreement. *Ib.*

The declaration stated that by agreement between the plaintiff and J. and H., two of the defendants, the plaintiff was entitled, on delivering to them certain goods, to a conveyance in fee, free from incumbrances, of two lots mentioned, then subject to a mortgage to one S.; and in consideration that the plaintiff would accept a conveyance and deliver up the goods, defendants in writing promised to pay the plaintiff $500 in six weeks, if in the meantime the lots should not be released from the mortgage. Averment, that the conveyance was so accepted and the goods delivered; that the mortgage had not been discharged; and that the defendants had not paid the $500. The first agreement, under seal, dated 1st June, 1865, set out the sale of the goods by the plaintiff to the defendants J. and H., for which they agreed to pay $1,400, $200 on receiving possession, $500 by a conveyance in fee of the two lots to be taken as cash for that sum, and the remaining $700 by instalments as stated in the agreement. The second, dated 10th June, was as follows, "Six weeks after date, we, or either of us, promise to pay to Thomas Gibbs Greenham $500, value received, if in the mean time park lots 7 and 8 in the Garvan survey be not released from the subsisting mortgage thereon to A. S., deceased." Signed by all the defendants:—Held, assuming the promise sued upon to be within the Statute of Frauds, either as a contract by the third defendant to indemnify against the default of the others, or as respecting an interest in lands—that the two agreements (the connection between which was established by their contents), construed with the surrounding circumstances to be gathered therefrom, together with the averments in the declaration, sufficiently shewed the consideration for defendants' promise. Semble, however, that there need have been no writing to bind the third defendant, for the consideration was executed by the plaintiff delivering the goods without getting a conveyance free from encumbrances. Held, also, that under the first agreement the defendants were not entitled to possession of the goods until payment of the $200 and execution of the conveyance. *Greenham* v. *Watt*, 25 U. C. R. 365.

**Deed and Mortgage.**]—In pursuance of an oral agreement for sale, the purchase money to be secured by mortgage on the premises and on other lands, a deed and mortgage were executed by the vendor and mortgagor respectively, neither instrument referring to the other, and the deed expressing that the purchase money had been paid. They took away the respective instruments so signed, for the purpose, as alleged, of procuring the execution thereof by their respective wives. The vendor subsequently refused to perfect the transaction, and on a bill filed by the purchaser for specific performance:—Held, that the conveyance so executed by the vendor was a sufficient contract of sale within the statute; that the presumption from such instrument was that the purchase money had been paid, which being admitted by the plaintiff to be incorrect, the purchaser was entitled to a decree for specific performance.

paying the price in hand. *Gillatley* v. *White*, 18 Gr. 1.

**Description of Property.**]—A., whose wife owned a certain freehold property on St. George street, wrote to B. the owner of a certain leasehold property on King street, with reference to the said properties as follows: "If you will assume my mortgage, and pay me in cash $3,700, I will assume your mortgage of $5,000 on the leasehold;" and B. replied. "Your offer of this date, for the exchange of my property on King street for your property on St. George street, I will accept on your terms;"—Held, affirming 2 O. R. 609, not a sufficient memorandum of the contract to satisfy the Statute of Frauds. *McClung* v. *McCracken*, 3 O. R. 596.

**Description**—*Implied Terms—Pleading.*]—At a tax sale of land, J. R. R. and T. A. K., finding there would be a contest between them for lots 1118 and 1119, signed an agreement, with their initials in the margin at the bottom of the page of the Gazette, containing the list of lands to be sold as follows:

Mr. J.R.R. ½ } We buy on joint acc't { J. R. R.
} of 1118, and 1119. {
Mr. T.A.K. ½ } sheriff's Nos. above. { T. A. K.

The sheriff's numbers had not been printed in the Gazette, but T. A. K. had prefixed them in ink to most of the parcels on that page of the Gazette, including Nos. 1118 and 1119. It was not stated anywhere in that list that these numbers were sheriff's numbers. J. R. R. having bid for the lots, and afterwards caused them to be conveyed to B., T. A. K. now brought this action against J. R. R. and B., claiming specific performance of the above agreement, and a declaration that J. R. R. and B. were trustees for him of an undivided moiety of the lands:—Held, that the above constituted a sufficient memorandum of the agreement within the Statute of Frauds. The manner of paying the amount of taxes, or by whom payment was to be made, was not one of the essentials of the contract as between the parties. The implication of law would be that whoever paid so as to complete the sale should have contribution of a moiety from the other. Held, further, that the defendant appealing not having pleaded the defence of the statute, could not claim the benefit of it. Held, also, that the above agreement was not illegal, nor did it make any difference that it was a tax sale. *Keefer* v. *Roaf*, 8 O. R. 69.

Held, that the agreements were void under the Statute of Frauds, as when they were made the plaintiffs had no lands, and there was nothing in the agreements to shew what lands the defendant was entitled to, or the plaintiffs were bound to convey. *Temperance Colonization Co.* v. *Fairfield*, 16 O. R. 544. See, also, *S. C.* in appeal, 17 A. R. 205.

**Letters Referring to Contract.**]—A. contracted with B. for the purchase of land, and both parties signed the contract. Some delay occurred in delivering an abstract, and A.'s solicitor wrote to B.'s solicitor, declining to complete the contract unless the abstract was delivered by a certain day. Subsequently negotiations were entered into for a variation of the terms of payment, and two propositions in writing, but unsigned, were made by A. for B.'s acceptance. B. accepted one, and so informed A. or his solicitor; but after a little time, on the advice of his (A.'s) solicitor, A. declined to carry out the contract as varied, relying upon the former letters. Upon a bill filed by B.:—Held, (1) that defendant could not rely upon the letters fixing a time for the delivery of the abstract, as by his subsequent dealing with the plaintiff he had waived his right to withdraw from the contract. (2) That parol evidence could be admitted to connect the unsigned memorandum with the signed contract. (3) That there was sufficient evidence to shew that the proposition of the defendant had been accepted by the plaintiff. *Martin* v. *Reid*, 8 L. J. 186.

The agent of a person resident abroad sold by parol half a lot of land of the principal, and afterwards wrote and sent to him a letter detailing the terms of the contract, but mentioned the whole instead of the half of the lot, and the mistake was clearly proved. Quære, whether this would be a sufficient note in writing. *Jennings* v. *Robertson*, 3 Gr. 513.

Defendants were in partnership as solicitors, H. residing and carrying on the business at Lindsay, and D. at Peterborough. On the 18th September, 1870, H. wrote out the following agreement: "I, John Campbell, agree to purchase from Messrs. D. & H. lot S, 2nd concession, Verulam, for the sum of $350, payable," &c. This was signed at the foot by plaintiff, but not by defendants. On the same day H. wrote to D. that he had sold the lot to the plaintiff:—Held, taking the memorandum and letter together, that there was a sufficient contract within the statute, for the property and terms of sale were specified; and the names of the defendants in the body of the instrument, written by one of them, coupled with H.'s letter, was a sufficient signature by the defendants. *Campbell* v. *Dennistoun*, 23 C. P. 339.

Where property was sold by auction, the particulars and conditions of sale not disclosing the vendor's name, and the contract was duly signed by the purchaser, but was not by the vendor or the auctioneer acting in the matter of sale, and subsequently, in consequence of delays on the part of the purchaser, the attorneys for the vendor (one of whom was the vendor himself) wrote, "Re S.'s purchase, we would like to close this." And referring to certain representations made in the advertisements of the sale: "They were not made part of the contract of sale. . . . Have the goodness to let us know whether the vendee will pay cash or give mortgage. If the latter we will prepare it at once and send you draft for approval;" and on a subsequent occasion: "Re S.'s purchase. Herewith please receive deed for approval." And on another occasion the vendor himself wrote, "I shall take immediate steps to enforce the contract;"—Held, affirming 28 Gr. 207, 8 A. R. 161, that the conditions of sale together with the correspondence were sufficient to constitute a complete and perfect contract between the vendor and purchaser within the Statute of Frauds. *O'Donohoe* v. *Stammers*, 11 S. C. R. 358.

**Offer and Acceptance.**] — An offer in writing to purchase lands, stating terms, and an acceptance of that offer also in writing, is a sufficient contract under the statute. *Kerby* v. *Lawrence*, 1 U. C. R. 184.

Upon an action for breach of an agreement in not conveying land, the following letter from defendant to plaintiff was proved: "I have concluded to let you have the south half of the north half of lot No. 2 in the 1st con-

cession of Scarborough, say 50 acres more or less, for $3,000; $1,000 down, $1,000 on the 1st of June next (1860), and $1,000 on the 1st day of June (1861), the same bearing interest at six per cent., &c. Let me know the Christian name of your wife, if you are married, and the day you will be up, when the deed shall be ready:"—Held, that this letter contained evidence to shew that an offer had been made, to which it was a reply and an agreement to sell, and was sufficient, with the proof of the mailing of a reply, to sustain the action. The reply, which was produced in term, after the trial, without objection, stated when plaintiff would be in Toronto, and gave the name of his wife:—Semble, that if defendant's letter was a proposal only, this was an acceptance of it. *Pierce* v. *Small*, 10 C. P. 161.

**Offer in Agents' Book.**] — An offer to purchase land was written and signed by the defendant in an offer book kept by a firm of land agents who were authorized by the plaintiff to sell the land, and was orally accepted by the agents. The offer was not addressed to any one, but the book was marked on the back with the initials of the agents. Previous to this offer letters had been written between the defendant and the agents, in which an offer at a lower price was made and refused for the same land. After the second offer was accepted, the defendant's solicitors corresponded with the agents of the plaintiff about the title, referring in their first letter to the land which the defendant had purchased from the agents:—Held, that the initials on the book might be read into the offer to supply the name of the vendor, and that these, with the correspondence, constituted a sufficient agreement within the Statute of Frauds to bind the defendant. *Kennedy* v. *Oldham*, 15 O. R. 433.

**Price.**]—Where a writing provided for the conveyance of land on payment of the balance of the principal, not naming any amount, under a penalty of $100, and there had been no part performance:—Held, that it was insufficient for not naming price, and that it could not be made binding on the vendor by the subsequent consent of the vendee's heirs to treat the penalty as the price. *Kelly* v. *Sweeten*, 17 Gr. 372.

**Receipt.**]—A paper containing a receipt for part of the purchase money, which clearly ascertains the land to be sold and the price, but omits to state when the balance is payable, although it provides that such portion should be secured by mortgage, is sufficient. *Devine* v. *Griffin*, 4 Gr. 603.

**References to Other Papers** — *Ineffectual Conveyance.*]—C. orally agreed with an agent of W. at Toronto to buy land in Manitoba, paying the agent ten per cent. of the purchase money, and taking his receipt therefor. C. signed the receipt as a witness, made an affidavit of execution, and registered it, in order, as he swore, to bind the bargain. The vendor's name did not appear in the receipt, but there was a reference in it to a telegram sent to the vendor, which was produced and shewn to be addressed to W. The plaintiff was the owner of the land, W. being merely his agent, but W. subsequently executed in his own name a deed of it to C., who also signed the deed:—Held, that the affidavit made by C., the receipt, and the telegram, could be read together, and when so read constituted evidence of a contract sufficient to satisfy the Statute of Frauds; and that the receipt could not be objected to as evidence because of a mistake in it as to the price, which was subsequently corrected in the deed. Held, also, affirming 8 O. R. 316, that the deed executed by W. was sufficient to satisfy the statute, although ineffectual as a conveyance. *McCarthy* v. *Cooper*, 12 A. R. 284.

**Settlement** — *Third Person's Letter.*]—Quære, whether a letter written by a third person, and signed by him, addressed to the intended wife, and delivered to her by the intended husband, with a knowledge on his part of its contents, evidencing an agreement for a settlement by him, would be a sufficient writing signed by the agent of the party to be charged. *Gillespie* v. *Grover*, 3 Gr. 558.

**Signature by one Party.**]—Evidence of a bond signed by A. and delivered to B., conditioned to procure a patent to B. for certain lands, and deliver it to B. on payment of a sum named, together with proof that the patent had issued:—Held, sufficient to take the case out of the statute, although nothing was signed by B.; and A. was held entitled to recover the money. *Kilborn* v. *Forester*, Dra. 392.

**Vendor not Identified.**]—The name of the seller or his agent must appear in a contract of purchase by a municipal corporation. Where the municipal corporation contracted for the purchase of some land for a market site, and afterwards a by-law was passed with the sanction of the ratepayers, which recited the purchase, but did not name the seller, and there was no other evidence under the corporate seal, and possession had not been taken:—Held, that the contract could not be enforced by the vendor against the corporation. *Houck* v. *Town of Whitby*, 14 Gr. 671.

A written agreement to purchase, in order to satisfy the Statute of Frauds, must specify by name or description who is the vendor. *Cameron* v. *Spiking*, 25 Gr. 116.

Where a written agreement for the sale of land contained the following condition of sale, "The vendor shall have the option of a reserved bid which is now placed in the hands of the auctioneer," and the reserve bid was worded as follows, "Re sale of Allan Wilmot's farm, reserved bid, $105 per acre:"—Held, that the above words, even though read together as they should be, did not so identify the vendor as to satisfy the Statute of Frauds. "Vendor" is not a sufficient description of the party selling to satisfy the requirements of the statute. *Wilmot* v. *Stalker*, 2 O. R. 78.

Although extrinsic parol evidence may be given to identify one of the parties, it cannot be given to supply information as to the person to whom an offer in a memorandum required to be in writing by the Statute of Frauds was made or for whom it was intended. And where an offer, signed by the defendant, to exchange a stock of goods for land did not in any way designate the person to whom it was supposed to be made or for whom it was intended, and such person could not be ascertained without extrinsic parol evidence adding to the memorandum:—Held, not to be an agreement in writing within the statute so as to entitle the plaintiff to specific performance. Held, also, that an acceptance of the offer beneath the defendant's signature, signed

by the plaintiff's assignor, did not cure the defect. *White* v. *Tomalin*, 19 O. R. 513.

*See*, also, *McIntosh* v. *Moynihan*, 18 A. R. 237.

**Will Containing Terms of Agreement.**]—It being proved that the former will in this case was made pursuant to an alleged agreement, it was held that that will might be considered as evidence of the agreement, and was evidence in writing sufficient to satisfy the Statute of Frauds. *Campbell* v. *McKerricher*, 6 O. R. 85.

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*4. Part Performance.*

**General Rule.**]—To take a case of alleged contract concerning land out of the Statute of Frauds the acts of part performance must be done by the party seeking to enforce the contract, and must be such as to manifest from their nature that there is some contract between the parties touching the land in question, and the proper order of marshalling the evidence in such cases is first to prove the part performance, and so let in parol evidence of the agreement sought to be enforced. Maddison v. Alderson, 8 App. Cas. 467, followed. *Campbell* v. *McKerricher*, 6 O. R. 85.

**Character of Possession Changed.**]—Where a person came into possession of real estate as tenant, and it was shewn unequivocally, viz., by part payment of the purchase money evidenced by the receipt in terms therefor, that his tenancy was afterwards relinquished, and that his possession, being changed in character by parol contract to purchase, was continued as that of a vendee:—Held, that the possession thus changed was such part performance as took the contract for sale out of the Statute of Frauds. *McGee* v. *Kane*, 9 O. R. 475.

**Cutting Timber.**]—On a sale of timber, the land on which the same was situate was not mentioned in the memorandum evidencing the agreement, but the purchaser entered upon the land intended, and with the knowledge and acquiescence of the owner continued to cut thereon for over a year:—Held, that this was sufficient, within the statute, to prevent the vendor afterwards disputing the right of the purchaser to cut the timber within the time limited for his so doing. *Lawrence* v. *Errington*, 21 Gr. 261.

**Entire Contract.**]—Defendant wrote to plaintiff's solicitor that he would give $3,100 for plaintiff's house and lots, and a few days after he signed the following memorandum: "I will give $3,500, together with the choice of one horse, waggon, and teaming harness or buggy," to which was added "accepted," with plaintiff's signature. The plaintiff conveyed the land to defendant, who paid the sum required down, and gave a mortgage for the balance, but defendant would not give the horse, &c., for which the plaintiff sued:—Held, that he could not recover; that the contract was within the statute, and being entire, the part performance could not enable the plaintiff to sue for the part unperformed without proof of a written agreement; and that such proof failed, for that parol evidence, which was inadmissible, was required to connect the memorandum with the previous letter, so as to shew the consideration. *Taylor* v. *Knowles*, 30 U. C. R. 200.

**Making Improvements.**]—Where a person already in possession of property contracts with the agent of the proprietor for the purchase of it, and it was the interest of both parties that the purchaser should go on making improvements, and he did so, with the knowledge of the agent, without objection on his part, the improvements are such an acting on the contract as will take the case out of the statute. *Jennings* v. *Robertson*, 3 Gr. 513.

**Payment.**]—Payment of the whole purchase money, in pursuance of a parol contract for sale, will not operate as part performance to take the case out of the statute, any more than payment of a portion. *Johnson* v. *Canada Co.*, 5 Gr. 558.

**Possession in Changed Character.**]—Continued possession by a tenant, coupled with acts inconsistent with his previous tenancy, is sufficient part performance to let in parol evidence of a contract of sale. *Butler* v. *Church*, 18 Gr. 190.

**Possession.**]—The plaintiffs agreed to sell certain premises to the defendants, who signed a written contract agreeing to purchase. The writing omitted any mention of the names of the vendors. Possession of the property was taken by defendants through their agent, who carried on business therein for two days in their names:—Held, a sufficient part performance to let in parol evidence as to who were the vendors. *Cameron* v. *Spiking*, 25 Gr. 116.

**Settlement of Action** — *Procuring Releases.*]—A. brought an action against B. for the rents and profits of certain lands, which had belonged to their father who had died intestate, which lands B. had taken and held possession of for several years. On the action being entered for trial an agreement of settlement was arrived at, by which the action was to be stayed upon B.'s granting and releasing to A. his interest in the land, and on B. undertaking to obtain certain releases, &c. B.'s counsel appeared in court when the case was called for trial, and stated that it was settled, and an entry was made in the court minute book, that the case was settled out of court. Subsequently B. required A. to procure certain releases, and although these had not formed part of the settlement, A. agreed to do so, and at great trouble and expense procured the execution of the same ready to be delivered to B. Certain of the releases to be procured by B. were to be executed by married women and infants, which he was unable to procure. In an action to compel B. to carry out the settlement, B. set up as a defence the Statute of Frauds; and his inability to obtain the releases:—Held, that the staying of the action was a sufficient part performance to take the case out of the Statute of Frauds. An option was given to A. to take a judgment for specific performance, with a reference as to compensation, if B. was unable to procure all the grants and releases he agreed to procure; or a judgment for an account of the rents and profits, the subject of the former action. *Coates* v. *Coates*, 14 O. R. 195.

**Supporting Family.**]—C. the owner of real estate promised his brother A. that, if he would abandon his intention of leaving this Province and remain and support their mother and sister, he (C.) would convey him a portion of the land on which A. was then residing and assisting in their support. In consequence of such request and promise A. did remain and

assumed the whole charge of the support of his mother and sister:—Held, a sufficient part performance to take the case out of the statute. *McDonald* v. *McKinnon*, 26 Gr. 12.

*See* CONTRACT, II., 4—SPECIFIC PERFORMANCE, V., 18.

## II. CONSTRUCTION OF CONTRACTS OF SALE.

### 1. *In General.*

**Attempted Alteration.**]—A., by agreement, disposed of all his real estate to B., his son-in-law, who agreed to pay to A. an annuity for life, and after A.'s death to pay the purchase money in equal annual instalments to A.'s daughters. A. by his will, made some years afterwards, assumed to grant a legacy to his wife out of the real estate, directing the same to be deducted from the payments to be made to his daughters:—Held, that the agreement was complete, and the proceeds of the realty could not therefore be charged. *Honsberger* v. *Martin*, 8 Gr. 361.

**Bond to Convey.**] — Declaration on a bond, reciting that defendant had agreed to transfer to plaintiff land to which he was entitled as a private in the militia, as soon as a patent should be obtained from the Crown, and conditioned to keep such agreement. Breach, that defendant was not entitled to the land, by reason whereof no patent could be obtained:—Held, bad on demurrer, for there could be no breach of the condition till a patent had issued, though the plaintiff might have another remedy. *Crysler* v. *Eligh*, 1 U. C. R. 227.

In debt by executors on a bond to their testator, his heirs and assigns, the condition of the bond was, that when the parties concerned should see cause to survey and divide lot A., defendant should execute a deed of the north-east half of the lot to the testator. Pleas: (1) that the testator did not see cause to survey in his lifetime; (2) that before the defendant or testator saw cause to survey, the testator died; (3) that one of the plaintiffs was heir-at-law of the testator, and that he did not see cause to survey; (4) that neither the defendant nor the testator in his lifetime, nor the defendant nor the plaintiffs, as executors, since testator's death, saw cause to survey, &c. The plaintiffs, in their several replications in answer, alleged that the testator in his lifetime, &c., was ready and willing to survey the lot, and requested defendant to survey and execute a deed according to the bond, but defendant refused:—Held, that the pleas were bad; that survey and division were not conditions precedent to the execution of the deed; that the executors could sue though not named in the bond; and that the testator, under the bond, was entitled to a conveyance in fee, and not merely for life. *Ruttan* v. *Ruttan*, T. T. 3 & 4 Vict.

Debt on bond, conditioned to make a good and sufficient deed, free and clear, &c., but omitting the name of the obligee, and not stating for what term or time the deed was to be made. On demurrer for these causes:—Held, (1) that it must be intended that the land was to be conveyed to the obligee. (2) That defendant's meaning would be taken to be that he would give an absolute title. *Cæsar* v. *Norton*, 8 U. C. R. 587.

**Estate Taken.**]—By an instrument under seal between plaintiff and defendant H., H. agreed to allow the plaintiff the use of his grist and saw mills for five years, on condition that each party should pay half the repairs upon the mills for the term names; the saw mills and books to be under the control of H., and the grist mill chiefly under the control of plaintiff. The agreement then stated that H. allowed plaintiff the use of the dwelling house and barn near the mill, &c., and each party was to pay half the taxes "on the property above named during the term of five years;"—Held, that the plaintiff took a legal estate under the instrument in the whole of the property for five years, subject to the rights to be exercised over it by H. as well as the other conditions of the agreement; and that the plaintiff could therefore maintain trespass against two other of the defendants, who entered under H. and expelled plaintiff from the dwelling house. *Kellington* v. *Herring*, 17 C. P. 639.

**Interest** — *Mortgage.*]—In an agreement for the exchange of land it was stated that the property "was subject to a mortgage incumbrance of $750, bearing interest at the rate of seven per cent. per annum." The property was one of four houses and lots, mortgaged for $3,000, with interest at ten per cent., payable half-yearly, to be reduced, if punctually paid, to seven per cent., with an agreement to release each house on payment of $750;—Held, that the agreement did not convey an accurate statement as to the nature of the incumbrance. *Re Booth and McLean*, 21 O. R. 452.

**Misrepresentation by Vendor**—*Estoppel.*]—A vendor of land who wilfully misstates the position of the boundary line and thereby leads the purchaser to believe that he is acquiring a strip not included in the deed, is estopped from afterwards claiming such strip as his own property. *Zwicker* v. *Feindel*, 29 S. C. R. 516.

**Option to Purchase.**]—A lease contained an agreement that "the said lessor hereby agrees to give to the said lessee the first privilege of purchasing the said premises at any time within four years from the date hereof, at the price of $1,000, payable in five yearly instalments:"—Held, an absolute agreement to sell which the lessee had a right to enforce at any time within the period named; and not a qualified agreement to sell on the terms mentioned, only in case the lessor desired to sell. *Casey* v. *Hanlon*, 22 Gr. 445.

**Payment of Purchase Money.**] — An agreement for the purchase of certain land, after providing for the payment of a certain portion of the purchase money, continued as follows: "The remaining $1,900 (after deducting the amount due to the Crown), payable in instalments of $100 each, without interest, on 1st April in each year, during nineteen years," and the purchaser to secure by mortgage "the residue or sum of $1,900 (less the amount due to the Crown) payable as aforesaid." It was not then known exactly how much was due to the Crown, but it was soon afterwards ascertained to be $364:—Held, the true meaning of the above agreement was that the amount due to the Crown was to be subtracted from the $1,900, and the balance paid in instalments of $100 each on 1st April in each year until the whole of such balance should be paid. *Wolffe* v. *Hughes*, 1 O. R. 322.

**Representations.**]—The owner of a mill property wrote to an intending purchaser, "I will sell the mill as it now stands, at Glenmorris, with all rights and privileges belonging to it as sold me, and I will guarantee to give a head of five feet by laying out about £50; but as it is, there is four feet, and there is water enough to run ten run of stones if necessary:"—Held, that these representations amounted to express guarantees, upon the several points embraced in them. *Gale* v. *Hubert*, 6 Gr. 312.

**Right of Selection.**]—R. gave a bond to B., to convey to B. a water privilege on lot 17, and to convey also so much land as he might require for the purpose of making a raceway or for erecting buildings on the said lot, at the rate of £10 per acre:—Held, that the selection of such land must be made during the lifetime of both obligor and obligee. *Burnham* v. *Ramsay*, 32 U. C. R. 491.

**Sale of Business**—*Implied Obligation not to Compete.*]—The defendant sold to the plaintiff the goodwill of the business of an innkeeper which he was carrying on in London, in this Province, under the name of "Mason's Hotel" or "Western Hotel:"—Held, that the sale of the goodwill implied an obligation enforceable in equity that the defendant would not thereafter resume or carry on the business of an innkeeper in London, under the name of "Mason's Hotel," or "Western Hotel:" and would not resume or carry on the business of an innkeeper, under any name or in any manner, in the premises in question; and would not hold out in any way that he was carrying on the business formerly carried on by him under the said names, or either of them. Held, also, that the plaintiff's removal to other premises, fifteen months before the expiration of the term, in consequence of the burning down of the stabling, did not relieve the defendant from his obligation. *Mossop* v. *Mason*, 18 Gr. 453.

**Sale or Lease.**] — Defendant signed the following memorandum: "I agree to pay S. M. Fairbairn," (the plaintiff) "£50 currency for his right to the house I live in, the farm at present occupied by me, known as the Morrison farm, and the stables now used by me, for six months from the 1st April next:"—Held, evidence of a letting by plaintiff to defendant, not of a sale. If the memorandum had shewn a sale, so that the plaintiff would have been bound to tender a conveyance semble, that such tender must have been alleged in the declaration, and would not be included in the general averment that "all things happened," &c., for such averment covers only conditions precedent to be performed by plaintiff under the agreement. *Fairbairn* v. *Hilliard*, 27 U. C. R. 111.

**Special Wording.**]—The ancestor of defendant agreed under seal with plaintiff, as follows: "Now the condition of this agreement is such, the said John Phelan (defendant's ancestor) doth hereby for himself, his heirs, &c., give up unto the said James Phelan (plaintiff) all his right, title, and interest in and to lot 45 in the 1st concession of North Easthope, and to give him a clear deed of the same, and also one waggon, one fanning mill," &c. The plaintiff on his part did, for himself, his heirs, &c., in consideration of the above deed and articles mentioned, promise to pay unto the said John Phelan, his heirs or assigns, £250, by instalments, and also to allow the said John Phelan the use of the dwelling house in which he then resided, and four acres of land during his lifetime:—Held, that the words, "the same" in the agreement referred to lot 45 as their antecedent, and not to the right, title, and interest of defendant's ancestor therein. *Phelan* v. *Phelan*, 1 C. P. 275.

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*2. Description of Property.*

**Ascertainment of Location of Land.**]—It having been ascertained that a railway company intended to have a station on defendant's land, he contracted to sell to the plaintiff a quarter of an acre next to the station as soon as laid out. The company having afterwards located the station ground, but not the position thereon of the intended station house:—Held, that the plaintiff's parcel could not be ascertained until the locality of the station house was determined, and that until then a bill to enforce specific performance was premature. *Carroll* v. *Casemore*, 20 Gr. 16.

**Construction.**]—Defendant gave a bond to plaintiff in $1,000, reciting that he had that day purchased certain land known as the mill property in the village of P., and fully described in a deed made by one J., and conditioned to convey to the plaintiff all the land in said deed over two and a-half acres, being a strip on the western portion of the property, as soon as said land could be surveyed. The deed to J. included over four acres, part of which, at the eastern end, was covered with water:—Held, that defendant clearly was not entitled to retain two and a-half acres of dry land, in addition to that covered with water, but only two and a-half acres of the whole. *Greer* v. *Johnston*, 32 U. C. R. 77.

**Plan.**]—The city of Toronto offered land for sale, according to a plan shewing one block consisting of five lots each, about 200 feet in length running from east to west, bounded north and south by a lane of the same length, and east by a lane running along the whole depth of the block, and connecting the other two lanes. South of this block was a similar block of smaller lots, ten in number, running north and south, 120 feet each. The lane at the east of the first block was a continuation, after crossing the long lane between the blocks, of lot No. 10 in the second block. The advertisement of sale stated that "lanes run in rear of the several lots." M. became the purchaser of the first block and C. of lot 10 in the second. Before registry of the plan M. applied to the city council to have the lane at the east of the block closed and included in his lease, which was granted. C. then objected to taking a lease of his lot with the lane closed, but afterwards accepted a lease which described the land as leased according to plan 380 (the plan exhibited at the sale) and plan 352 (which shewed the lane closed); and he brought an action against the city and M. to have the lane reopened:—Held, affirming 11 A. R. 416, which reversed 7 O. R. 194, that C. having accepted a lease after the lane was closed, in which reference was made to said plan 352, was bound by its terms and had no claim to a right of way over land thereby shewn to be included in the lease to M. Held, also, that under the contract evidenced by the advertisement and public sale C. acquired no right to the use of the lane afterwards closed. *Carey* v. *City of Toronto*, 14 S. C. R. 172.

**Possession.**]—The plaintiff owned part of lot 7, and agreed orally in 1859, to buy from one M. two acres more adjoining on the north, of which he went into possession. In 1860 M. gave to defendant a bond to convey to him thirty acres of the lot, more or less, describing it as "all that part of the said lot lying north of the land owned by D.," the plaintiff, "and south of the road through the said lot to Cramahe Hill." He afterwards conveyed the two acres to the plaintiff, who then brought ejectment. M. swore upon the trial that these two acres were not intended to be included in the bond to defendant, but were looked upon as part of the plaintiff's land referred to in it, and that defendant had without them his full thirty acres:—Held, that the plaintiff must recover, for (1) the bond, under the circumstances, should be construed as referring to all the land in the plaintiff's visible possession as owner, thus excluding the two acres; and (2) the deed at all events vested the legal title in plaintiff, and defendant's equitable right under the bond could afford no defence. *Dusenbury* v. *Palmatier*, 21 U. C. R. 462.

**Removal of Buildings**—*Obstruction of Lane.*]—Where the covenants in a deed are silent as to the removal of buildings or obstructions on property conveyed thereby, the fact that in an advertisement for the sale of the property it was stated they would be removed, and that representations to that effect were made by the vendors at the sale, does not entitle the purchaser to a decree for their removal; for any relief he may be entitled to in this respect he must rely on his deed. But where a conveyance describes lands conveyed as abutting on a lane, and the plan by which the lands are sold shews such lane, notwithstanding which the vendors allow obstructions in the shape of buildings to continue thereon, the court will grant relief by directing a removal of such obstructions. *O'Sullivan* v. *Claxton*, 26 Gr. 612.

**Uncertainty.**]—Held, that the description of the land in this case, though too vague to shew on the face of the instrument where the land must lie, was yet sufficient to enable it to be ascertained on the ground, or by a jury. *Casar* v. *Norton*, 8 U. C. R. 587.

Quære, as to the effect of the uncertainty in the agreement for sale in this case, with regard to the description of the premises. *Snyder* v. *Proudfoot*, 15 U. C. R. 532.

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3. *Time for Performance.*

**Computation of Time.**]—By an agreement dated 20th September, money was to be paid within one month, and on the 21st October the money was tendered:—Held, sufficient, the day of the execution of the instrument being excluded in the computation of the time. *Barnes* v. *Boomer*, 10 Gr. 532.

**English Doctrines.**]—Semble, that the peculiar condition of real property here, and the peculiar practice which has grown up in relation to sales, may require a modification of English cases as to the doctrine of laches. *O'Keefe* v. *Taylor*, 2 Gr. 95.

**Excuse.**]—Where the agreement was that the defendant should advance money on the purchase of the land, and that the plaintiff should have the right to repurchase the same by a certain day, upon repayment of the amount so advanced, and interest, together with what was paid by the defendant for improvements and insurance, and it was expressly stipulated that time should be of the essence of the contract:—Held, that although the court, as a general rule, will hold a party to perform such a contract within the time limited, yet it is not ousted of its jurisdiction, but will admit him to shew a good and valid reason for its non-performance within such time, and in that case may order specific performance. *McSweeney* v. *Kay*, 15 Gr. 432.

**Extension of Time.**]—Plaintiff, on the 20th January, 1866, agreed under seal with defendants to sell them certain land for $5,000, $2,500 to be paid on the 1st April, 1866, and $2,500 on the 1st May, 1866, with interest; and to convey on these payments being made. Defendants covenanted to pay, and that if they made default the agreement should be void and of no effect, and all moneys paid thereunder up to the time of such default should be forfeited to the plaintiff, and that time should be of the essence of the contract. At the trial it appeared that the whole purchase money was $6,000, of which $1,000 was paid down and $1,000 more on the 7th April, 1866, when, by an indorsement under seal on the agreement, the plaintiff extended the time for payment of the balance to the 20th May, 1866:—Held, that the indorsement extending the time for payment did not do away with the provision for forfeiture, but incorporated the extended time in the agreement, as if originally there. *Marcus* v. *Smith*, 17 C. P. 416.

**Fluctuating Value.**]—Where lands which have a fluctuating value are the subject of a contract, time is, from the nature of the case, of the essence of the contract. *Saunderson* v. *Burdett*, 16 Gr. 119.

**Notice.**]—Semble, that when one party to a contract, in which time is not of the essence, desires to put an end to the contract, in consequence of the laches of the other party, the proper mode is to give notice that unless completed within a named period, the contract will be considered at an end. *O'Keefe* v. *Taylor*, 2 Gr. 95.

**Option to Purchase.**]—Where there is a contract between the owner of lands and another person, whether lessee or not, that if such other person shall do a certain specified act he shall be at liberty to buy the property, time is of the essence of the contract, and until the performance of the act which has been so stipulated for, the relation of vendor and purchaser does not exist. Therefore, where the defendants granted the plaintiff a lease of certain lands, whereby, amongst other things, they agreed that if the lessee duly paid certain rents and taxes, and should not cut or sell, or suffer or permit to be cut or sold any timber or other trees growing on the lands, except for the purposes of clearing and the use of the premises, he should be at liberty to purchase the same at a certain named price; and it was admitted that default had been made as well in regard to the payment of rent and taxes as to the cutting of timber:—Held, that the right to insist upon a sale was forfeited, notwithstanding the lessee's offer to make good the rent and taxes, and pay the amount of purchase money agreed upon. *Ball* v. *Canada Company*, 24 Gr. 281.

**Provision for Termination.**]—On the 7th December, 1874, T. G., by a promise of sale, agreed to sell a farm to D. M., then a minor, for $1,200—of which $500 was to be paid at the time, balance payable in seven yearly instalments of $100 each, with interest at seven per cent. D. M. was to have immediate possession and to ratify the deed on becoming of age, and to be entitled to a deed of sale if instalments were paid as they became due, "but if, on the contrary, D. M. fails, neglects, or refuses to make such payments when they come due, then said D. M. will forfeit all right he has by these presents to obtain a deed of sale of said herein mentioned farm, and he will moreover forfeit all moneys already paid, and which hereafter may be paid, which said moneys will be considered as rent of said farm, and these presents will then be considered as null and void, and the parties will be considered as lessor and lessee." After D. M. became of age he left the country without ratifying the promise of sale, he paid none of the instalments which became due, and in 1879 T. G. regained possession of the farm. In October, 1880, D. M. returned and tendered the balance of the price, and claimed the farm:—Held, that the condition precedent on which the promise of sale was made not having been complied with within the time specified in the contract, the contract and the law placed the plaintiff en demeure, and there was no necessity for any demand, the necessity for a demand being inconsistent with the terms of the contract, which immediately, on the failure of the performance of the condition, ipso facto changed the relation of the parties from vendor and vendee to lessor and lessee. *Grange* v. *McLennan*, 9 S. C. R. 385.

**Waiver.**]—In a contract for sale, the vendor covenanted for quiet enjoyment until default in payment of the purchase money and interest. It was also stipulated that time was to be considered the essence of the agreement, and unless the payments were punctually made, the vendor was to be at liberty to resell. On ejectment for non-payment of a half-year's interest:—Held, that the receipt of the interest by the vendor's attorney after action, without costs, amounted to a waiver. *Barber* v. *Allen*, 6 C. P. 329.

By a contract for the sale of land belonging to infants, it was a condition that, if in seventeen months the approval of the court of chancery had not been obtained to the sale then made, the contract should be at an end, thus rendering time of the essence of the contract. The sale was not completed by the time specified, and some months afterwards the purchaser acquiesced in the proceedings then taken to perfect the title:—Held, that he had waived the condition. *McDonald* v. *Garrett*, 7 Gr. 606.

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## III. Making Title.

### 1. *In General.*

**Abstract** — *Title by Possession.*]—B. agreed to sell certain land to W., and in the agreement it was provided that "the examination of title to be at the expense of the purchaser who is to call for only those deeds and papers in my possession or under my control." W. demanded a solicitor's abstract which B. declined to furnish; and on the examination of the title it was discovered that a deed was missing which had not been registered, so that a clear paper title could not be made out. B. then offered evidence of a title by possession by declarations under 37 Vict. c. 37 (D.), which W. declined to accept:—Held, on an application under the Vendors and Purchasers Act, R. S. O. 1877 c. 109, s. 3, that B. was bound to furnish an abstract, and that W. was not bound to accept declaration evidence of the title by possession, and the vendor was directed to obtain affidavits from the declarants, when the purchaser could cross-examine the deponents, and if not satisfied with that, although he might be thought unreasonable, the purchaser was entitled to have the evidence taken vivâ voce, and have his title sanctioned by a decree, in which case, and for that purpose leave was given to him to institute a suit for specific performance, all costs of which were reserved until the hearing. *Re Boustead and Warwick*, 12 O. R. 488.

**Attorney.**]—A prior deed, through which the title comes to the vendor, having been executed by the attorney of the grantor, does not render the title invalid, or such as a purchaser will not be bound to accept. *Farrell* v. *Moore*, 1 Ch. Ch. 139.

**Certificate of Official.**]—Held, that the certificate of the municipal treasurer that the land was not redeemed from sale for taxes is sufficient, and that an affidavit cannot be required from a public officer as to the proper discharge of his duty. More evidence may be required as between a vendor and purchaser than in a suit where the owner or those claiming under him are parties. *Re Morton and County of York*, 7 O. R. 59.

**Certified Copy**—*Possessory Title.*]—The abstract of title set out a registered conveyance from L. G. et al. to S. G.:—Held, that the purchaser was entitled at the vendor's expense to the production of the conveyance with the usual registrar's certificate of registration of the duplicate indorsed upon it or to the production of a registrar's certified copy. Re Charles, 4 Ch. Ch. 19, commented upon. If the vendor relies upon a possessory title the purchaser is entitled to cross-examine persons making affidavits in support of it, for the reasons given in Re Boustead and Warwick, 12 O. R. at p. 491. *McIntosh* v. *Rogers*, 12 P. R. 389.

Upon a petition under the Vendors and Purchasers Act: — Held, that the purchasers were entitled to certified copies of registered deeds or memorials of deeds in the chain of title which the vendors were unable to produce. McIntosh v. Rogers, 12 P. R. 389, followed; Cooper v. Emery, 1 Phil. 390, distinguished. *Re Bobier and Ontario Investment Association*, 16 O. R. 259.

**Certificates of Lis Pendens**—*Power of Attorney.*]—Upon a petition under the Vendors and Purchasers Act:—Held, that the purchasers were entitled to have removed from the registry as clouds upon the title: (a) A certain certificate of lis pendens in an action upon a mortgage which appeared by the registry to be discharged; because it could not be ascertained from the registry itself that the action was in respect of the discharged mortgage; (b) a second certificate of lis pendens in an action to set aside as fraudulent a deed in the chain of title under which the vendors claimed, the vendors not being parties to it, because the vendors, and, if the title passed, the purchasers, might be added as parties;

(c) a power of attorney to sell the lands in question, although registered after the mortgage under which the vendors were selling; because the vendors might be affected with notice of the interest claimed by the donor of the power, such interest having accrued, if at all before the vendors obtained title. *Re Bobier and Ontario Investment Association*, 16 O. R. 259.

**Clerical Error**—*Reformation.*]—In one of the conveyances in the chain of title the grant was to the party of the third part, whereas there were only two parties to the conveyance, and the party of the second part did not execute it:—Held, that this was a valid objection, though the instrument would be at once corrected or reformed as against the grantors; or could be cured by another conveyance drawn with proper certainty. *Re Clarke and Chamberlain*, 18 O. R. 270.

**Condition as to Production.**]—A clause in the conditions of sale that the vendors shall only produce certain title deeds and an abstract of the registrar, and that the purchaser shall not be entitled to call for any other proof of title, does not exempt the vendors from shewing otherwise a good title. *Canada Permanent Building Society* v. *Wallis*, 8 Gr. 368.

**Conditions** — *Evidences of Title.*]—By written agreement for the purchase of land it was provided that "no title deeds, abstracts, or evidences of title to be required other than those in the vendor's possession, nor shall the vendor be required to give a covenant for the production of the same:"—Held, that under this condition the vendor was relieved from the absolute obligation of making a good title to the land; while if the evidence of title coupled with the abstract and it may be the public register did not disclose and prove a good title, the purchaser was not bound to complete, but in that event the vendor would not be liable for damages because of the above condition. *McIntosh* v. *Rogers*, 14 O. R. 97.

——— *Objection to Title.*]—In an action for specific performance of a contract for the sale of land it was contended by the plaintiff that the title could not now be objected to by the defendant, as by the terms of the contract all objections to the title were to be notified by the 26th December, 1887, and the objection in question was not taken until a week later:—Held, following Ward v. Stallibrass, L. R. 8 Ex. 175, that such a condition did not apply to the case of the vendor being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title; and the objection here might go to the root of the plaintiff's title. *Brown* v. *Pears*, 12 P. R. 396.

——— *Objection to Title—Waiver—Lapse of Time—Defeasible Title.*]—An agreement for the sale and purchase of land contained the provision that the vendee should examine the title at his own expense and have ten days from the date of the agreement for that purpose, and should be "deemed to have waived all objections to title not raised within that time." Upon the investigation of the title by the purchaser it appeared that the vendors derived title through one P., a purchaser from one B. S., a devisee under a will by which the land in question was devised by the testatrix to her daughter, the said B. S., and certain other land to another daughter; the will contained the direction that "if either daughter should die without lawful issue the part and portion of the deceased shall revert to the surviving daughter," and a gift over in case both daughters should die without issue. At the time of the agreement B. S. was alive and had children. An objection was taken to the title but not within the ten days from the date of the agreement. The purchasers brought a suit for specific performance of the contract:—Held, reversing 22 O. R. 542, 21 A. R. 183, that although B. S. took an estate in fee simple subject to the executory devise over in case she should die without issue living at her death, inasmuch as the purchaser would get a present holding title accompanied by possession, the objection taken did not go to the root of the title and was one to which effect could not be given, not having been taken within the time limited by the agreement. *Armstrong* v. *Nason*, *Armstrong* v. *Wright*, *Armstrong* v. *McClelland*, 25 S. C. R. 263.

**Conveyance or Title.**]—On a sale by a person whose title is derived under a chancery purchase, a question as to whether the legal estate was effectually conveyed to him under such purchase is, on a subsequent sale of the property, a question of conveyance, not of title. *Rae* v. *Geddes*, 18 Gr. 217.

On a sale of lands the purchaser objected to the title on the grounds (1) that there was no evidence that a certain mortgage had been discharged; and (2) that title being deduced through the devisee of a person who had died since the coming into force of the Devolution of Estates Act, R. S. O. 1887 c. 108, the legal estate was outstanding in the executor of such person. It appeared that all debts of the testator had been paid:—Held, that both matters were matters of conveyancing, and not of title. *Martin* v. *Magee*, 19 O. R. 705.

**Copies**—*Memorials.*]—A vendor is bound, at his own expense, to furnish a purchaser with copies of all instruments relating to the title which are not of record. *Re Charles*, 4 Ch. Ch. 19.

A purchaser is entitled to copies of title deeds registered by memorials, but not of deeds registered under the Registry Act of 1867. *Ib.*

**Costs of Investigating Title.**]—Although the general rule is, that a vendor must pay the costs of shewing a good title, a different rule may be applied as to the expense of investigating the title in the master's office. On a sale of land the purchase money was payable by instalments, which were paid into court as they fell due, and the purchaser had gone into possession and was not entitled for some time to a conveyance. Without calling for an abstract, or affording the vendor an opportunity of clearing up the title, he filed a bill for specific performance. The court, on further directions, refused the purchaser the costs of investigating the title in the master's office. *Wardell* v. *Trenouth*, 26 Gr. 245.

**Costs.**] — The ordinary rule in a vendor's suit, is, that the costs are given against him up to the time when he has first shewn a good title; but where the question as to title is not the chief matter in dispute the costs will follow the result. *Laird* v. *Paton*, 7 O. R. 137.

Where a purchaser's objections to the title have caused the litigation and have been overruled, he will be liable for costs, notwithstanding any decision in his favour on particular points in dispute. *Ib.*

**Decree**—*Master's Office.*]—Notwithstanding that a decree declares that the defendant "has accepted the title of the plaintiff," the defendant has a right to object to a conveyance by the plaintiff alone if it appear that the legal estate is partly out of him. Where it had been referred to the master "to settle the conveyance or conveyances to the purchaser or purchasers, and all proper parties are to join therein, as the master shall direct," and the master did not, in settling the conveyance, direct that an infant, whose lands had been sold, should be made a party, but merely that her guardian should; and subsequently, after such infant had married, directed that she, being still an infant, and her husband, should join in a new conveyance, which was done:—Held, that this was within the master's powers, and was in effect as if the court had directed the execution of the conveyance under 12 Vict. c. 72, and that the deed was binding and passed the estate. *Rae* v. *Geddes*, 3 Ch. Ch. 404.

**Effect of Abstract.**]—Effect of registrar's abstract as evidence of title. *Reed* v. *Ranks*, 10 C. P. 202.

**Estate Divided into Shares.**]—The purchaser of an entire estate which has been divided into shares is not bound to accept if the title to one share is defective. *Hurd* v. *Robertson*, 5 L. J. 67.

**Evidence of Alienation.**]—In ejectment the lessor of the plaintiff proved a patent from the Crown to himself, which had been in his possession since 1803. Defendant claimed under a deed from one A. to B. in 1806. A. was not shewn to have been in possession, and no deed from the lessor to A. was produced, nor any evidence given that he had ever executed such a deed. The facts proved only went to shew a bare probability that he might have done so; the jury, however, upon these facts having been left to them as very slight evidence of the patentee's having made a deed to A., found a verdict for the defendant:—Held, that the verdict must be set aside without costs, there being no legal evidence to be left to the jury, on the facts stated, to shew alienation by the patentee. *Doe d. Petit* v. *Renard*, 6 U. C. R. 591.

**Evidence Required.**] — More evidence may be required as between a vendor and purchaser than in a suit where the owner or those claiming under him are parties. *Re Morton and County of York*, 7 O. R. 59.

**Good and Sufficient Deed.**]—A. agreed to sell to B. "all his right, title, and interest," in certain specified property "owned by" A., and to "give a good and sufficient deed of the said land free of all incumbrance:"—Held, that he was bound to shew a good title. *Gordon* v. *Harnden*, 18 Gr. 231.

**Memorials**—*Trusts—Mortgage in Fee by Life Tenant.*]—A contract for sale of land provided that the vendors should not be bound to produce any deeds or evidence of title except such as they might have in their possession, but should shew a good title, &c. It appeared that A. P., by an indenture of 16th January, 1858, conveyed the lands in question to trustees on certain trusts, which deed was registered by memorial not containing the trusts. By deed of appointment dated 4th July, 1862, made in pursuance of the deed of 1858, also registered by memorial which purported to contain a full copy of the deed in which were recitals which set out what purported to be the trusts of the former deed, and shewed a life estate in A. P., with a power of appointment in him, A. P. duly appointed to trustees who were represented by the vendors, with directions to sell after his death, which had recently occurred; neither of these deeds was in the possession or power of the vendors, the trustees. On an application under the Vendors and Purchasers Act:—Held, that the vendors were not bound to produce these two deeds, and that the production of the memorial of the deed of appointment twenty years old, reciting the trusts of the trust deed, was sufficient evidence of what those trusts were; and as there was an absolute trust for sale the purchaser should take the title. A. P. in 1873, assumed to mortgage the lands in fee, and died in 1887:—Held, that the mortgage only bound his life estate, and that the vendors were not bound to procure a discharge thereof. *Re Panton and Swanston*, 16 O. R. 669.

**Mortgage**—*Discharge.*]—A discharge of mortgage was signed by "Eliza" Switzer, whereas the mortgage purporting to be discharged was made to "Elizabeth" Switzer:—Held, on a vendor and purchaser application, that there was no valid objection to the discharge, for the identity of the person signing was established by affidavit to the satisfaction of the registrar, and as a matter of family usage the names are synonymous and interchangeable. *Re Clarke and Chamberlain*, 18 O. R. 270.

**Nature of Proof Required.**]—It appeared that the vendor, although by the contract he had limited himself to certain proofs, had elected to make out a title perfect both as to abstract and verification, in order that he might compel the purchaser to accept it:—Held, that the purchaser was entitled to have the title made out as strictly and completely as if the vendor had not in any way guarded himself by the terms of the contract. *McIntosh* v. *Rogers*, 12 P. R. 389.

**Outstanding Trust.**] — On a reference as to title to land, it appeared that one H. entrusted certain moneys to a loan association to invest for her on mortgage, under an agreement that the association should guarantee to her payment of interest at seven per cent. and in consideration thereof should retain to their own use all interest over that rate. The mortgage which recited the said agreement was taken to the trustees appointed by the association, and was made in 1861. By 32 Vict. c. 62, s. 5 (O.), all lands, mortgages, &c., held by trustees of the association were to be deemed vested in the C. S. Co., so that the same might be sold, assigned, &c., by the latter. Subsequently the mortgagor released his equity of redemption to the C. S. Co. in full satisfaction of the mortgage moneys, but not so as to merge the mortgage. By 36 Vict. c. 121, s. 5 (O.), all lands, mortgages, &c., held by the C. S. Co., were to be deemed vested in the C. T. Co., so that the same might be sold, assigned, &c., by the C. T. Co. Afterwards the latter company conveyed the lands to the vendor:—Held, that,

inasmuch as the above Acts made no mention of H., the vendor could not make a good title free from her claim, who, unless the moneys advanced by her had been repaid, was in equity substantially the owner of the mortgage, and if she chose to adopt the act of the trustees in taking a conveyance of the equity, then of the land. *Macklin* v. *Dowling*, 19 O. R. 441.

**Payment of Consideration** — *Onus.*]—Semble, that R. S. O. 1877 c. 109, s. 2, is retrospective so as to cast the onus of disproving the payment of the consideration on the party impeaching a conveyance as voluntary even though the transaction took place prior to that enactment. *Sanders* v. *Malsburg*, 1 O. R. 178.

**Possessory Title.**]—In order to make a good title by possession, it must be shewn that the whole of the land has been actually cleared or occupied for a period of at least twenty years. *Wishart* v. *Cook*, 15 Gr. 237.

A title by possession can only be made to so much of a parcel of land as has been actually cleared or occupied for twenty years. *Ib.*

**Power of Sale.**]—An agreement between defendant and one S. recited that S. owned certain land, and had agreed to convey to defendant for a certain sum, and that in default of payment defendant should cease to have any right to the land, and S., after giving a month's notice, might sell, and after deducting the amount due and interest, pay to defendant any surplus. Defendant then covenanted to pay, and on payment S. covenanted to convey to him, and S. also covenanted in the event of a sale to pay defendant any surplus. S. sold under the power, and conveyed to the plaintiff by deed, reciting the sale, and that he, S., was the owner in fee of the land. The plaintiff, in ejectment, claimed under this deed:—Held, that the conveyance to the plaintiff was open to objection as being executed by S. as owner in fee, while the agreement, though it recited his ownership, conveyed no estate to S. from the defendant, but was at most only a mortgage with power of sale. *Bartels* v. *Benson*, 21 U. C. R. 143.

**Presumption of Satisfaction of Mortgage.**]—Upon a sale of land the abstract of title set out a mortgage given to a building society in 1850, the mortgagor being a shareholder by subscription. The proviso was for repayment at the times appointed in the company's rules, by monthly subscriptions, to be continued until the objects of the society should be attained. The mortgage was produced, and had indorsed upon it a memorandum, without date, purporting to be signed by the secretary-treasurer of the society, that it was paid and settled in full, but the signature was not proved. In conveyances made in 1856 and 1874 this mortgage was treated as a subsisting incumbrance: — Held, that this mortgage should not, in favour of the vendor, be presumed to have been satisfied; nor, having regard to the provisions of Chy. G. O. 0. 394 and 396, should the question be disposed of upon a presumption of law. The vendor should shew that some portion of the purchase money did not become payable under the rules of the society within the period of ten years before the contract, or that this could not be ascertained; or that the records of the society could not be referred to; or that there was difficulty in proving the fact set forth in the indorsement on the mortgage, that it had been paid in full. *McIntosh* v. *Rogers*, 12 P. R. 389.

*See* MORTGAGE.

**Proof of Execution.**]—Where there was no other proof of the execution of a conveyance, which constituted a link in the chain of title, than a memorial purporting to be executed by the grantee in such conveyance, the court refused to force the title upon a purchaser. *Wishart* v. *Cook*, 15 Gr. 237.

**Proving Execution of Deeds** —*Affidavits.*]—On the investigation of title between vendor and vendee, under the ordinary jurisdiction of the court, it is not usually necessary to prove the execution of deeds produced. *Brady* v. *Walls*, 17 Gr. 699.

Affidavits are admissible for some purposes on such an investigation. Where, however, an affidavit was offered to prove the loss of a will, which had been proved in a surrogate court in New York, but had never been registered or proved in Ontario, and there was some reason for apprehending that there existed no legal means of proof of the will by the purchaser, should he be compelled to accept the title, the affidavit was held insufficient evidence. *Ib.*

**Reference**—*Construction of Judgment.*]—On a reference as to title under a judgment which contained this clause: "And in case a good title can be made an inquiry when it was first shewn that such good title could be made;"—Held, that these words meant when was a good title first shewn upon the abstract. *Laird* v. *Paton*, 7 O. R. 137.

**Registration.**] — In case of a registered title, a purchaser is in this country entitled to require the registration by his vendor of all the instruments through which the title is derived. *Brady* v. *Walls*, 17 Gr. 699.

Held, in this case, that the title, being a registered one, had not been deduced, inasmuch as one of the deeds in its chain was not upon registry. *Kitchen* v. *Murray*, 16 C. P. 69.

A vendor does not complete his title until his deed is registered; i. e., that registration is essential to the title. *Laird* v. *Paton*, 7 O. R. 137.

**Release of Judgments.**]—Held, that a purchaser is entitled to call for a release from all judgment creditors who have registered their judgments in the county where the lands sold are situate, or that the creditors join in the conveyance to the purchaser, although it appears that the purchase money will be exhausted in discharging prior incumbrances. If the vendor cannot procure such release or concurrence in the conveyance, the court will not compel the purchaser specifically to perform the contract. *Spohn* v. *Ryckman*, 7 Gr. 388.

**Solicitor's Approval.**] — It was agreed that as soon as a title to the lands and premises satisfactory to the solicitors of the vendee could be accorded him, the vendee should purchase for $4,000 cash:—Held, that in the absence of mala fides, the approval of the title by the solicitors of the vendee was a condition precedent to the right of the vendor to call for a specific performance of the agreement. *Boulton* v. *Bethune*, 21 Gr. 110, 478.

*See Dewitt* v. *Thomas*, 7 C. P. 565.

**Title Acquired Pendente Lite.**]—The plaintiff instituted proceedings to restrain waste and obtain possession of the property, but at the time he had not such a title as would enable him to maintain ejectment, and the evidence failed to establish the waste complained of. The court, under these circumstances, refused to give effect to a title acquired subsequently, and dismissed the bill, with costs, without prejudice to any other suit. *Adamson* v. *Adamson*, 25 Gr. 550.

**Trustee and Cestuis Que Trust.**]—A testatrix devised to trustees all her estate, real and personal, which, or a sufficient portion of which, they were to dispose of for payment of debts, and the support and education of her two youngest daughters C. and M. during their minorities, excepting two tenements known as the Westminster property, which were to be reserved for the use of C. and M. so long as they or either of them should remain unmarried, and in order that C., on attaining twenty-one and being unmarried, might in her option occupy and enjoy for her life, so long as she should be unmarried, one of the houses for her own residence and that of her sister; and, in the event of her marriage, the youngest daughter M. was to have the same option and choice, the intention of the testatrix "being that in addition to their support and maintenance out of all my estate, as devised, my youngest daughters C. and M. shall have a home within their control so long as they or either of them shall remain unmarried;" and upon the marriage of both C. and M. the whole of such Westminster property was to be sold, and the proceeds thereof to form part of the residuary estate and be divided amongst all her children, sons and daughters, then living, share and share alike. C. and M. attained majority and were unmarried, when all the children, including C. and M., together with the trustee, joined in a contract to sell the Westminster property. In answer to a question submitted to the court, under the Act R. S. O. 1877 c. 109:—Held, that all these parties joining in a conveyance, a good title could be made; and although in applications of this kind the costs are in the discretion of the Judge, the purchaser was ordered to pay the costs. *Givins* v. *Darvill*, 27 Gr. 502.

A testator devised his lands to executors and trustees, to lease and pay the amount received to his widow for life, and after her death to sell and divide the proceeds between two sons. One of the sons sold and conveyed all his interest to his brother's wife. During the lifetime of the widow the trustees, the widow, and the remaining son and his wife, all being sui juris, conveyed by way of exchange all their interests to a purchaser:—Held, that the grantee claiming through that conveyance could make a good title. *Re Rathbone and White*, 22 O. R. 550.

**Verifying Abstract.**] — A vendor does not shew a good title by furnishing an abstract shewing on the face of it a good title; he must verify such abstract. *Granger* v. *Latham*, 14 Gr. 209.

Before an abstract was asked for, the purchaser had sold small portions of the land, and he and his vendee had cut down some of the wood thereon; but the vendor notwithstanding promised afterwards to give an abstract as demanded, and delivered an abstract accordingly:—Held, that the plaintiff was entitled to have this abstract verified. *Gordon* v. *Harnden*, 18 Gr. 231.

**Voidable Tax Sale.**] — Held, that the purchase under a tax sale by the township clerk was a voidable transaction. *Beckett* v. *Johnston*, 32 C. P. 301.

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*2. Clouds on Title.*

**General Rule.**]—The registration of any instrument which casts doubt or suspicion on the title, or which embarrasses the owner in maintaining his estate, or in disposing of his property, is a cloud upon the title against which the courts will relieve. And in such case it is sufficient if there is a registered instrument apparently valid on its face, accompanied by a chain of title, although an intruder on the chain of title, which is likely to work mischief to the real owner. A purchaser at a sale of lands held under an order of court objected to the title on the ground that four deeds had been registered against half of the lot by parties who apparently had no title, but one of whom had notified the purchaser that he claimed some interest in the lands:—Held, that such registered deeds were clouds upon the title, and that the purchaser could not be compelled to take it. *Keefer* v. *McKay*, 10 P. R. 345.

**Amending Answer.**]—Where on a bill for the cancellation of a sheriff's deed as a cloud on the legal title of the plaintiff, defendant omitted to set up by his answer one ground of defence, the court at the hearing, though against defendant on the ground taken by the answer, declined to make a decree in the plaintiff's favour until the other defence was tried; and on payment of costs allowed a supplemental answer to be filed, setting up the omitted defence. *McKinnon* v. *McDonald*, 13 Gr. 152.

**Decreeing Reconveyance.**]—The court will, in a proper case, order a deed to be cancelled; or, if registered, a conveyance of the estate to the person properly entitled; and that although his title may be such that he would succeed in defending any action brought against him at law. *Harkin* v. *Rabidon*, 7 Gr. 243.

**Deed by Mistake.**] — The plaintiff declared against the executors of C., on a joint and several bond executed by C. and W., reciting that the plaintiff had agreed to purchase from W. certain land in fee simple free from all incumbrances, and that C. had conveyed the land to one K., deceased, having made a previous conveyance to W., by which conveyance to K. a cloud upon the title was created; and the condition was, that C. should within two months procure from K.'s representatives a conveyance of all their interest in the land to the plaintiff, or in case of their being unable to execute such conveyance by reason of any disability, should within said two months take such proceedings as would remove said cloud, and within that time remove the same, and make and complete a good, absolute, and clear paper title to said land free from all incumbrances. Breach, that neither C. nor W. did within said two months, or at any time, procure such conveyance from the representatives of K., nor had such proceedings been taken, nor said cloud removed, nor a good title, &c., made. Plea, on equitable grounds,

in substance, that the deed from C. to K. was made by mistake, and K. in the same way mortgaged back to C.; that C. before this deed and mortgage had conveyed to W. in fee, and W. to the plaintiff, who was aware of the title and bought from W. on the understanding that proceedings should be taken to foreclose said mortgage, on which default had been made, in order that C. might execute a quit claim to the plaintiff; that C. accordingly proceeded to foreclose the mortgage, but before foreclosure C. died, whereby the proceedings were suspended until revival of the suit in the name of defendant as executor; but they were afterwards conducted to a final decree without delay. And defendant alleged his readiness and willingness to release all K.'s interest in the land to the plaintiff, and that in fact there was and is no cloud on the title, the deed to W. having been executed and registered before the conveyance to K.:—Held, that the plea was bad, for although the conveyance to K. was, under the facts alleged, no cloud upon the title, defendant could not set this up as an excuse for non-performance of his express contract to remove it, and make a clear title to the plaintiff within a specified time. Semble, that in such a case time would be of the essence of the contract in equity as well as at law. *Matthews* v. *Cragg*, 38 U. C. R. 319.

*See* also *Matthews* v. *Walker*, 26 C. P. 67.

**Deed without Consideration.**] — Although the prior registration of a deed executed without consideration confers no title as against a bonâ fide purchaser for value, still, as such a deed being upon record will create a cloud upon the title, the court will decree its removal. *Ross* v. *Harvey*, 3 Gr. 649.

**Dispute as to Title.**]—Persons having a legal title to land of which defendants had been in possession for many years, were held not entitled, before establishing their right at law, to set aside, in equity, as clouds on their title, instruments to which they were not parties, under which they made no claim, and which they did not allege to be fraudulent. *McGregor* v. *Robertson*, 15 Gr. 543.

**Execution.**]—D., who was a naturalized British subject, possessed of a large quantity of lands in Canada, residing in the State of New York, was, with his co-partners, duly declared bankrupt by the courts of that State on the 15th November, 1873. On the 26th August, 1874, an execution against D.'s lands in Canada was placed in the hands of the proper sheriff, which was kept duly renewed. All his lands in Canada were conveyed to a trustee for creditors, by deeds which the court held to be valid:—Held, that the retention by the defendants, the execution creditors, of their writ in the hands of the sheriff, formed such a cloud upon the title of the trustee as this court would decree the removal of. *McDonald* v. *Georgian Bay Lumber Co.*, 24 Gr. 356.

**Instrument Void on its Face.**]—The rule is, that instruments void upon the face of them will not be ordered to be removed as forming a cloud upon the title. Under the circumstances of this case, the court dismissed the bill without costs, the purchaser having been guilty of great negligence and carelessness; accompanying such dismissal with a declaration of the reasons of the court for so decreeing. *Hurd* v. *Billinton*, 6 Gr. 145.

**Instrument Executed by Person not Interested.**]—The court will decree the cancellation of deeds which the parties to them have registered, as being a cloud upon title, although the parties executing them are not shewn to have any title to or interest in the lands embraced in them. The preceding case observed upon and distinguished. *Dynes* v. *Bales*, 25 Gr. 593.

**Lost Deed.**]—Lands had been sold pursuant to an order of the court in a proceeding (under 12 Vict. c. 72), for the sale of infants' estate; and the purchaser thereof sold and took back a mortgage for purchase money, upon which a decree of foreclosure had been obtained. The conveyance from the original patentee was alleged to have been destroyed without being registered. The defendant in the foreclosure suit subsequently procured a deed from the heirs of the patentee, and instituted proceedings to set aside the mortgage as a cloud on his title; but the court being of opinion that the evidence sufficiently established the existence at one time of the missing deed, and that the conduct of the plaintiff had been too much that of a prowling assignee, refused the relief sought and dismissed his bill with costs. *Johnson* v. *Sovereign*, 25 Gr. 454.

**Mortgage Held for More than Advance.**]—A bill alleged that a mortgage was executed by W. to the defendant in consideration of $450; that defendant advanced only $150 thereon, and W. being entitled to receive the balance assigned such right and conveyed his equity of redemption to the plaintiff; that the defendant refused to pay the balance and claimed to hold the mortgage as security for $450. The prayer was for specific performance or, in the alternative, a declaration of the above facts, and for general relief:—Held, that upon the facts alleged in the bill, namely, that the mortgage was being held for more than had been advanced thereon and therefore to that extent had formed a cloud on the title, the plaintiff would be entitled to a declaration to that effect, and appropriate relief. *Calvert* v. *Burnham*, 6 A. R. 620.

**Privity.**] — A bill by the owner will lie to set aside a registered deed as a cloud on his title, though no privity exists between him and the parties to such a deed, and no fraud on their part is alleged. *Shaw* v. *Ledyard*, 12 Gr. 382.

Quære, whether a bill will lie to remove a cloud on the plaintiff's title unless it appears that the impeached deed, if valid, would affect the equitable title only, or unless it appears that the plaintiff is in possession, or that the lot is wild and not in possession of any one, so that there is no opportunity of first vindicating the plaintiff's title at law. *Ib.*

**Resale by Grantee under Voidable Deed.**]—A deed purporting to convey land to M. was executed by the plaintiff, under circumstances that disentitled the grantee to hold it as a valid deed entitling him to the beneficial interest in the property. The grantee, M., having afterwards sold and conveyed the land to R., receiving part of the purchase money and a mortgage for the balance:—Held, affirming 11 Gr. 426, that on confirming the title of R., the purchaser, the plaintiff was entitled to the balance of the mortgage money from R., and to a decree against M. for what M. had received; but the court upon the facts, refused to remove the invalid deed as a cloud on the title of the grantor. *Fraser* v. *Rodney*, 12 Gr. 154.

**Tax Sale by Mistake.**] — The plaintiff was owner in fee of certain lands which were conveyed to him by deed of 27th July, 1868, registered 11th August, 1868. Subsequently, by mistake, the lands were sold for taxes, although no taxes were actually in arrear; and by deed of 11th March, 1880, were conveyed to A. McL., the tax purchaser, which deed was registered 18th May, 1880. On 29th November, 1881, A. McL. conveyed the said lands to J. W. by deed absolute in form, but intended as security for money advanced by J. W., which deed was registered 1st December, 1881. The plaintiff found out that this sale for taxes had taken place shortly before bringing this action, in which he sought the cancellation of the deeds to McL. and J. W.:—Held, that the plaintiff was entitled to have the deeds cancelled, and J. W. was entitled to judgment against A. McL. for the moneys advanced by him. *Charlton* v. *Watson*, 4 O. R. 489.

**Voluntary Deed.**] — As against a purchaser for value, a voluntary deed, though registered, is void; and as this objection will avail the purchaser in any proceeding adopted by or against him, the court will not interfere to remove the registration of the void deed as a cloud on the title. *Buchanan* v. *Campbell*, 14 Gr. 163.

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3. *Waiver and Acceptance.*

**Erecting Buildings**—*Demanding Deed—Onus.*]—In May, 1860, a purchase was made by parol of a lot of land in addition to three other lots previously bought by the same purchaser from the same vendor. The purchaser went into possession and erected thereon a coach house and stables, and the other portion of it was used as a lawn for the house which he had erected on the other lots, which had been duly conveyed to him. In 1860 and again in 1863, the purchaser repeatedly asked for a deed, offering to give the vendor his promissory note for the purchase money, but this he refused to accept. A bill for specific performance was subsequently filed by the vendor:—Held, that the purchaser by his conduct had waived his right to compel the vendor to make out a good title; but that he was at liberty to shew that the vendor had no title, in which case he would be entitled to get rid of his contract; the onus of proof under such circumstances being shifted from the vendor to the purchaser. *Denison* v. *Fuller*, 10 Gr. 498.

——— *Accepting Conveyance under same Title.*]—Where a contract for sale of building lots provided for immediate possession, and for the payment of the purchase money in eight annual instalments:—Held, that the erection of two workshops on the lots by the vendees, was no waiver of their right to examine the title; nor was the division of the property between them, when they dissolved their partnership, nor the acceptance of a conveyance at another time of another lot said to depend on the same title. *Darby* v. *Greenlees*, 11 Gr. 351.

**Giving Mortgage.**] — Writing a letter apologising for non-payment, accepting a release of dower from a person whose title is identical, or giving a mortgage to secure the payment of the purchase money, are circumstances indicating the approval of the title. *McDonald* v. *Garrett*, 8 Gr. 290.

**Implied Acceptance.**]—An abstract of title and the title deeds having been sent to a purchaser in November, 1859, at his own request, for the purposes of examination and advice, he retained the same for a considerable time, intimated no objection to the title, and in correspondence with the vendor's solicitors implied that he was content with the title; but in June, 1870, he claimed the right of investigating it afresh:—Held, that by the lapse of time and the letters which he had written, he had impliedly accepted the title. *Rae* v. *Geddes*, 18 Gr. 217.

**Making Alterations in Buildings.**]—The purchaser of real estate, on which was a grist mill, took possession, and while in occupation, made several alterations in the property; took the mill-gearing and machinery from the premises, and removed the partitions in the mill, intending to convert it into a planing factory. The expense of restoring the property as it was when he took possession was variously estimated at from £100 to £500:—Held, that the purchaser had waived his right to call for a good title. *Commercial Bank* v. *McConnell*, 7 Gr. 323.

**Mortgage for Purchase Money.**]—On a sale of land, the deed and mortgage back were executed by the vendor and purchaser, and left with an attorney until their respective wives should come in and bar their dower, but nothing was said as to title. The defendant went into possession of the land, improved it, and made a payment on the mortgage, but raised no objection to the title until he discovered, upon endeavouring to raise money on the land four years after he had gone into possession, that there was a mortgage on it sixteen years old, which had not been foreclosed:—Held, varying 27 C. P. 203, though upon a ground not taken there, that the defendant was entitled to have a release of the dower; but that he had waived his right to have an unlimited inquiry as to title. *O'Connor* v. *Beatty*, 2 A. R. 497.

**Payment of Part of Purchase Money.**]—On a purchase of land, the price for which is payable by instalments, the purchaser, although not entitled in the meantime to call for a rescission of the contract, may require his vendor to shew a good title before parting with any portion of the purchase money; and in the event of the vendor taking proceedings to enforce payment, the purchaser, upon bringing into court the amount of principal and interest actually due, will be entitled to an injunction to restrain the action until the title has been investigated; and the fact that prior instalments of the purchase money have been paid will not disentitle the purchaser to insist upon a good title being shewn. *Thompson* v. *Brunskill*, 7 Gr. 542.

**Resale.**]—Before an abstract was asked for, the purchaser had sold small portions of the land, and he and his vendees had cut down some of the wood thereon; but the vendor, notwithstanding, promised afterwards to give an abstract as demanded, and delivered an abstract accordingly:—Held, that the plaintiff was entitled to have this abstract verified. *Gordon* v. *Harnden*, 18 Gr. 231.

**Sowing Crops.**]—A purchaser, before the time appointed for the completion of a contract for the sale of land, and while the investigation was in progress, went upon and

cleared a portion of about two or three acres of the land, and sowed the same with turnip seed, which it was necessary to do at the time or lose the whole season; he did not, however, harvest the crop, but abandoned the possession entirely, in consequence of objections to the title not being removed:—Held, no waiver of the purchaser's right to an inquiry as to title. *Mitcheltree* v. *Irwin*, 13 Gr. 537.

**Taking Possession.**]—Where a person went into possession under a contract for the purchase of a wild lot, in order to clear and cultivate it, and thereby raise the purchase money which was to be paid by instalments; on a bill filed by the purchaser, for specific performance:—Held, that he had not, by going into possession, waived his right to a reference as to title; and that he was bound to pay his purchase money into court, pending the inquiry before the master. *O'Keefe* v. *Taylor*, 2 Gr. 305.

The contractors for the construction of a railway having agreed for the conveyance to them of certain lands for such railway, took possession, erected a station house, and made other improvements thereon in connection with the road. The contractors having obtained a decree for specific performance:—Held, that what they had done did not amount to an acceptance of the title. *Jackson* v. *Jessup*, 6 Gr. 156.

Possession and user of the premises do not deprive the vendee of his right to have a good title shewn; but where unreasonable delay has occurred in requiring title to be adduced, the court will order the purchase money to be paid into court, pending the investigation of the title. *Crooks* v. *Glenn*, 8 Gr. 239.

Acceptance of title by the act of the purchaser in going into possession, was held to be waived by the vendor's solicitors delivering the abstract of title, and answering some of the requisitions. *Aldwell* v. *Aldwell*, 6 P. R. 183.

The purchaser under contract for sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him and always ready to carry out the contract on his part within a reasonable time even though time was not of its essence; nor when he has declared his inability to perform his share of the contract. The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements. *Wallace* v. *Hesslein*, 29 S. C. R. 171.

*See People's Loan and Deposit Co.* v. *Bacon*, 27 Gr. 294; *Clemow* v. *Booth*, 27 Gr. 15; *Locclace* v. *Harrington*, 27 Gr. 178; *Graham* v. *Stephens*, 27 Gr. 434; *Clark* v. *Bogart*, 27 Gr. 450.

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IV. PREPARATION AND TENDER OF CONVEYANCE.

**Bond to Convey.**]—Where to a bond conditioned that the defendant should "well and truly convey in fee simple to the plaintiff, his heirs and assigns for ever," the defendant pleads that he did make, seal and execute, a conveyance in fee simple to the plaintiff:—Held, on demurrer, no answer to the condition. *Prindle* v. *McCan*, 4 U. C. R. 228.

The obligor of a bond conditioned to convey land must prepare and tender the conveyance, unless the condition be to convey by such deed as the obligee shall require, or to execute a conveyance. *Harrison* v. *Livingstone*, T. T. 1 & 2 Vict.; *Mouck* v. *Stuart*, 4 U. C. R. 203; *Prindle* v. *McCan*, 4 U. C. R. 228; *Scott* v. *Reikie*, 15 C. P. 200.

So if the condition be to convey at the expense of the obligee, the obligor must prepare the deed and tender the delivery of it to the obligee on his paying the expenses thereof. *McDonald* v. *Snitzsinger*, 5 U. C. R. 312.

Declaration on a bond by defendants' testator to "execute to plaintiff a good and sufficient deed in law" of certain land. Plea, that defendants, under a power in the will, had executed a deed of the land:—Held, plea bad, for that defendants had executed a deed was no answer, without shewing that they had conveyed the land; and because it was not shewn that the heirs were parties to the deed. *Wiseman* v. *Williams*, 17 C. P. 262.

Debt on bond conditioned to make a deed of 200 acres, "which is to be drawn by a U. E. right due to me;"—Held, not necessary for the obligee to tender a deed for execution. Held, also, that the obligor was bound to make a deed within a reasonable time. *Rogers* v. *Lake*, 9 U. C. R. 264.

In a bond for a deed, where the condition required that a deed should be "executed and delivered before a certain day:"—Held, that the due execution of the deed before the day, and forwarding it to a third party for the obligee, though it was not received until after the day, was a sufficient delivery under the bond. *Muirhead* v. *McDougall*, 5 O. S. 642.

**Payment**—*Conveyance.*]—Where no time is fixed for the conveyance, but the times for payment of the purchase money are stated, the payment is not a condition precedent to the execution of the deed. *Wilson* v. *Dickie*, E. T. 7 Wm. IV.

**Purchaser's Duty.**]—The plaintiff under an oral agreement, purchased lands from the ancestor of defendants, to whom he paid his purchase money in full. The agreement provided that, upon payment of the purchase money, "a proper conveyance was to be executed" of the premises. It appeared that the vendor had given instructions to have a conveyance prepared in favour of the plaintiff, but that this was not communicated to the plaintiff, and formed no ground for his never having tendered any conveyance to the vendor for execution:—Held, that under the agreement the plaintiff was bound to prepare and tender a conveyance for execution; and that he was not entitled to his costs of a suit brought against the representatives of the vendor for specific performance of the agreement. *Moody* v. *Prevost*, 20 Gr. 418.

——— *Pleading.*] — Defendant agreed by bond to sell to plaintiff certain land for £600, of which £50 was to be paid down and the remainder "within ten years from the date thereof," with interest, and conditioned that defendant, "on receiving the said principal

money and interest at the days and times and in manner hereinbefore mentioned for payment thereof," should "sign, seal, deliver and execute" unto plaintiff a good, valid and sufficient deed in fee simple of said land, and so convey the same to him free from all incumbrances:"—Held, that plaintiff was bound to tender a deed for execution, and was not relieved by the general allegations in the declaration that defendant could not give a good title, &c. *Burns* v. *Boyd*, 19 U. C. R. 547.

**Purchaser's Expense.**]—On a covenant by defendants to convey to the plaintiff certain land at the plaintiff's expense, free from incumbrances made or suffered by defendants; it was held to be defendants' duty to make a conveyance, and offer to deliver it to the plaintiff on payment of expenses. *Parker* v. *Watt*, 25 U. C. R. 115.

**Special Agreement.**]—Semble, that under the agreement in this case, the deed was to be prepared by the plaintiff; the words, "execute and deliver to the plaintiff" not indicating a contrary intention. *Smith* v. *Doan*, 15 U. C. R. 634.

Held, that upon the agreement set out in this case, the covenantor, and not the covenantee, was the party to prepare the papers for execution. *Henderson* v. *Nichols*, 5 U. C. R. 398.

**Vendor's Inability to Make Title.**]—Declaration on a special agreement by defendant to sell to the plaintiff certain land with two mills, and a head of water for the purpose of working said mills, of twelve feet, and to convey the same to plaintiff at defendant's expense. Semble, that though defendant was not expressly to make a deed and at his own expense, yet the fact that he would not allow the plaintiff to have it prepared, but insisted on its being drawn by his own lawyer, was some evidence that this was the bargain. The court, however, allowed an amendment by striking out this allegation, and inserting an averment (which would excuse the not making and tendering a conveyance) that defendant could not make a title and give a right to raise the water twelve feet, this being clearly in accordance with the evidence. *Clarke* v. *McKay*, 32 U. C. R. 583.

**Vendor's Option.**]—On a bond conditioned that defendants should, on a certain day, or before, if they obtained a title, convey to plaintiff a certain quantity of land in one of two counties in one of the United States, to be taken from lands to be located by defendants:—Held, that it was defendants' duty to convey, and not to wait till plaintiff tendered a deed. *Thayer* v. *Street*, 11 C. P. 243.

**Waiver.**]—A. agreed to pay B. for land upon receiving a deed. When B. offered the deed, A. declared his inability to pay, and proposed new terms, which were accepted:—Held, that B. was thereby relieved from proving a tender of the deed to enable him to sue, or rescind the contract. *Mulgrew* v. *Pringle*, Dra. 289.

The general scope of the Judicature Act, and especially s. 16, s.-s. 8, requires that the matters in controversy between the parties may be completely and finally determined, and multiplicity of legal proceedings concerning such matters avoided; so that, whenever a subject of controversy arises in an action, the court should, if possible, determine it so as to prevent further and useless litigation. In an action for the specific performance of an agreement to convey land, the defendant set up as a defence that there was no tender of a deed for execution before action commenced; but at the same time indicated that if there had been a tender it would have been refused:—Held, that though, in strictness, there should have been a tender, yet, under the circumstances, it should be dispensed with, and judgment was entered for the plaintiffs. *McDougall* v. *Hall*, 13 O. R. 166.

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V. Purchase for Value Without Notice.

**General Rule.**]—It is a clear and well settled rule that equity will never deprive a purchaser for value without notice of any advantage he has, arising from either a legal or equitable title or even from mere possession, although as between or amongst mere equitable claimants it will enforce the rights of the prior against the subsequent claimants in point of time. *Mitchell* v. *Gorrie*, 6 Gr. 625.

**Assignee of Right to Patent.**]—The purchaser of land from the Crown sold and transferred his right to C. in 1834. C. subsequently transferred his interest to T. H., who took possession, and held it until 1839, when he died, leaving an infant son his heir-at-law. About a year after his death his widow assumed to sell the estate to E. H., his brother, who took possession; and having subsequently procured from the original vendee of the Crown an assignment of the same date and in the same words as the one executed by him to C., by means thereof procured the patent in his own name, and mortgaged the property to his brother H. H., who had notice of all the circumstances attending the title, and to whom E. H. afterwards released his equity of redemption. In the spring of 1861 H. H., by ejectment, evicted E. H., who had continued in possession, and in November of that year H. H. sold and conveyed to S., who took without notice, and paid the whole of his purchase money except £175, for which sum the father of S. gave his note to facilitate the carrying out of the bargain. S. leaving in the hands of his father certain securities, out of which it was agreed that the father should collect means, over and above a sum owing by the father to S., to retire the note, which note, however, was not paid in full, £75 being still due thereon. In 1863 a bill was filed by the heir-at-law of T. H., claiming under the circumstances to be entitled to the estate, and to set the sale to S. aside, but the bill was ordered to be dismissed with costs. *Harvey* v. *Smith*, 2 E. & A. 480.

**Chose in Action.**]—A bond was executed for the conveyance of real estate, which by the contrivance of the agent of the obligee, falsely stated that the purchase money agreed upon had been all paid to the obligor, which bond the obligee transferred to a bonâ fide assignee, who filed a bill to enforce the execution of a conveyance. The court, however, following the rule that the assignee of a chose in action takes subject to all equities affecting the same, refused a decree except upon

the terms of payment of such sum as might, on taking an account, be found due to the obligor in respect of the purchase money. *Gould* v. *Close*, 21 Gr. 273.

**Claim before Registration**—*Outstanding Contingent Claim.*]—Land was sold for $400, and the purchasers bound themselves that, in case of gold being found on the land in paying quantities, a joint stock company should be formed and incorporated for working the same; and that the grantor should in that case, in addition to the $400, have $900 in paid up shares of the capital of the company. No company was formed; and it was held, that this contingent agreement did not prevent the grantees from defending themselves, to the extent of their interest, as purchasers for value without notice. *Sanderson* v. *Bardett*, 16 Gr. 119.

Where a purchase was completed, conveyance executed, and purchase money paid without notice of an outstanding equity, but a bill claiming it was afterwards filed and certificate of lis pendens registered, before registration of the purchasers' deed:—Held, that they did not thereby lose their defence as purchasers for value without notice. *Ib.*

**Constructive Notice.**]—The doctrine of constructive notice, and the defence of purchase for value, as applicable to this country, commented on. *Henderson* v. *Graves*, 2 E. & A. 9.

**Crown.**]—A plea of purchase for value without notice, cannot be set up against the Crown. *Attorney-General* v. *McNulty*, 11 Gr. 281, 581.

**Equitable Interest.**]—Semble, the defence of purchase for value without notice is available, although the interest conveyed is an equitable one only. *Davison* v. *Wells*, 15 Gr. 89.

**Intermediate Purchaser.**] — A purchaser, though with notice, is entitled to the benefit of the position of the person under whom he claims, where such person was a purchaser for value without notice. *Rogers* v. *Shortis*, 10 Gr. 243.

**Mistake.**] — A purchaser from the heir with notice of the will, but under an erroneous supposition that, according to its true construction, the land was not affected by it, cannot set up, as against claimants under the will, the defence of a purchase for value without notice. *Smith* v. *Bonnisted*, 13 Gr. 29.

W., claiming as heir-at-law of his father, mortgaged to a bank certain lands which he alleged had descended to him as heir-at-law. In fact, the father had executed a will, whereby the mortgaged property, with other estate of the ancestor, was devised to his five sons, to be equally divided amongst them. The officer of the bank through whom the mortgage was taken was aware that the father had made a will, but understood that the mortgaged estate had been devised to W.:—Held, that there was sufficient notice to put the officer on inquiry as to the estate devised to W., and that the bank had a claim on the interest of W. only. *McIntosh* v. *Ontario Bank*, 19 Gr. 155.

**Notice by Agent.**]—Although the rule in equity is that a notice to be binding must be given by a person interested in the property, and in the course of the treaty for the purchase, still where notice of an incumbrance was given to an intending purchaser by the son, and while acting on behalf of the incumbrancer in endeavouring to effect a loan upon the security of such incumbrance, the purchaser was held bound by such notice. *McNames* v. *Phillips*, 9 Gr. 314.

**Pleading.**]—A bill was filed setting up an equitable right to land, and alleging that the defendant, who had obtained the legal title, purchased with notice of the plaintiff's equity. The defendant, by his answer, said, that when he purchased he had no notice of the plaintiff's claim, and the consideration he had paid was actual and bonâ fide; but he did not negative notice before paying his purchase money or receiving the conveyance, and did not prove payment of any consideration:—Held, that by reason of these defects his defence failed. *Prince* v. *Brady*, 16 Gr. 375.

**Possession.**]—Possession is notice of the title of the person having possession without proving notice of such possession to the person charged with notice of such title. *Attorney-General* v. *McNulty*, 11 Gr. 281, 581.

The rule that possession is notice of the title of the person so in possession, considered and acted on. *Gray* v. *Coucher*, 15 Gr. 419.

**Prior Mortgage** — *Costs.*] — A bill was filed impeaching sales to purchasers on the ground of notice of the prior incumbrance—a mortgage for unpaid purchase money — and praying to have the conveyances to the purchasers postponed to such incumbrance, or, in the alternative, that the money still due might be paid to the plaintiffs. On the hearing, it appeared that the purchases were made bonâ fide and without notice; that one purchaser had paid nearly all his purchase-money at the time of sale and given his notes for the balance and that the other had given a mortgage to secure his unpaid purchase money; and both submitted at the hearing to pay such amounts as were still unpaid to the plaintiffs, or as the court might direct. The court, under the circumstances, granted the alternative relief prayed; but ordered the plaintiffs to pay to defendants, the purchasers, their costs of suit, and refused to the plaintiffs any costs as against the vendor, he never having opposed the relief to which they were entitled. *Ferguson* v. *Kilty*, 10 Gr. 102.

**Quit Claim.**]—A person claiming under a quit claim deed is, in general, not protected as a purchaser for value without notice. *Goff* v. *Lister*, 14 Gr. 451.

**Right to Redeem.**]—A. held a bond for a deed, and assigned it absolutely to B., but for the purpose of security only. B. sold the property to C., and C. sold to others. C. before his purchase had no notice that the bond to B. was a security merely. A. having become bankrupt, his assignee applied to redeem, and was held entitled, in the absence of any evidence that C. was a purchaser for value; but the court directed the cause to stand over with liberty to C. to give such evidence, upon payment of costs, unless the plaintiff should desire also to give evidence, in

which case the cause was to stand over without costs. *Cherry* v. *Morton*, 8 Gr. 402.

A bill which was filed against McF., R., McK., and B., alleged that a deed made by the plaintiff and her husband in 1806 to McF., although absolute in form, was made only as security for a loan of $500, from McF. to the plaintiff; that McF. sold to R. and M. who took with notice of the plaintiff's right to redeem; that R. and M. sold the land to B., who took with notice; and that B. gave back a mortgage to secure part of the purchase money, which was still unpaid, and had been assigned to one Watson. The defendant B. admitted by his answer the alleged character of the conveyance from the plaintiff to McF., and that the sale by McF. to R. and M. was in fraud of the plaintiff; but he denied notice of the plaintiff's claim, and alleged that he was a purchaser for value without notice. At the hearing, B., who was the only appellant, made an application for leave to file a supplemental answer, setting up the facts shewn by the evidence, that his deed from R. and M., and their deed from McF., as well as his deed from the plaintiff, had been duly registered—which was refused. A decree was made declaring that the conveyance to McF. was only a security for the repayment of the $500; that R. and M. bought with actual notice of the plaintiff's claim, and that B. bought from them with actual notice. It did not appear whether the decision was on the ground that B. had actual notice when he purchased, or that B., not having paid his purchase money, was unable to plead purchase for value without notice:—Held, that the evidence did not shew that B. had actual notice of the plaintiff's claim when he purchased; that the amendment should have been allowed, and that the court of appeal had power now to allow it under the A. J. Act, s. 50; but as it would not be proper to conclude the plaintiff without an opportunity of producing further evidence, the case was sent down for another hearing. *Peterkin* v. *McFarlane*, 4 A. R. 25.

**Sale Subject to Mortgage.**]—A sale of land was effected subject to a mortgage created by a former owner:—Held, that this circumstance did not preclude the purchaser from setting up the defence of a purchase for value without notice. *Campion* v. *Fairbairn*, 15 Gr. 674.

**Solicitor's Knowledge.**] — A testator, the registered owner of the property, gave an annuity to his wife, and charged it on his real estate. His heirs, being also his devisees, did not register the will, and made a partition of the property as heirs. One of the heirs, who was an attorney, sold part of his share to P., the latter employing no other attorney in the transaction; P.'s interest afterwards passed to the defendant M. The widow filed her bill to enforce her annuity against this property, and M. set up that P. was a purchaser for value without notice:—Held, that P.'s vendor was not his attorney so that his knowledge of the charge could be imputed to P.; and the court, not being satisfied with the evidence of express notice, dismissed the bill with costs. *Rykert* v. *Miller*, 14 Gr. 25.

Though the rule of the court is, that notice to the solicitor of a purchaser is notice to the client of any question affecting the validity of the title, this does not apply where the information he obtains from the vendor is such as it may be said shews that the vendor and solicitor were conspiring together to effect a fraud. Therefore, where the same solicitor acted for the vendor and purchaser on the sale of property, and it was shewn that the vendor had previously told the solicitor that he desired to sell his property in order to avoid paying certain demands against him:—Held, that this was a case in which the court would not impute to the client (the purchaser) knowledge which his solicitor possessed. In such a case the duty of the solicitor clearly is to refuse to be a party to any arrangement whereby the vendor intends to cheat his creditors; but if unable to do this he should not act for the purchaser, whom he thus places in a position of peril; and in no case, unless when necessity compels him to do so, should a solicitor act for both vendor and purchaser in the purchase and sale of property. *Driffill* v. *Goodwin*, 23 Gr. 431.

M. and G. were negotiating for the formation of a partnership, to be carried on in respect of premises which G. was negotiating for the purchase of. During the pendency of negotiations, and on the day before the purchase was completed, M. was informed that the object of the vendor in disposing of this property was to defraud his creditors, but this information M. did not communicate to G.:—Held, that this was not sufficient to affect G. with notice; although on the completion of the purchase, M. might have some rights against G. in respect of the property so purchased. *Ib.*

**Successive Conveyances of Portions of Mortgaged Lands.**]—Several parcels of land were embraced in one mortgage. Subsequently the mortgagor further mortgaged some of them to the plaintiffs with the usual mortgagor's covenants. He afterwards conveyed another parcel to S., who, when he took his conveyance, was not aware of the plaintiff's mortgage, but it was registered against the parcels embraced in it, though not against the other parcels:—Held, that the plaintiffs were entitled to require as between them and S. that the parcel conveyed to the latter should be resorted to for satisfaction of the prior mortgage before recourse should be had to the parcels embraced in the plaintiffs' mortgage. (2) That the registration of the prior mortgage against the parcel bought by S. was notice to him of the right of persons who purchased other parcels before he purchased to throw the mortgage upon his parcel, and that S. was affected with notice of the plaintiffs' mortgage, and the right it conferred. *Clark* v. *Bogart*, 27 Gr. 450.

**Tenant in Tail Conveying in Fee—***Acquiescence of Son.*]—A tenant in tail, who was supposed to have the fee simple, sold the property a few weeks before the passing of the Act respecting Assurances of Estates Tail. The purchaser accepted the conveyance and paid the purchase money without seeing the will or having the title investigated. The eldest son of the vendor was not quite twenty-one at the time; he was aware of his interest, but was anxious that the sale should be effected, urged the purchaser to buy, and was privy to the completion of the purchase, without giving any notice of his title, or of the defect in the father's right to convey. The purchaser went into possession and improved the premises, and had no notice of the defect in

his title until after the death of the vendor:—Held, that he was entitled to hold the property in equity against the issue in tail. In such a case, constructive notice of the defect in the vendor's title is no bar to the purchaser's right to relief. *Re Shaver*, 3 Ch. Ch. 379.

VI. Rights Arising in Carrying out the Contract.

1. *Adjustment and Removal of Incumbrances.*

**Apportionment of Taxes.**] — The vendors contended that they were not liable to pay taxes which were not actually imposed on the 25th July, when the sale took place under a decree:—Held, that under 32 Vict. c. 36, ss. 18 and 107 (O.), no matter at what time in the year a rate is imposed, the taxes relate back and are deemed to accrue and to be due, for the purpose of forming a lien on the land, from the 1st January. The vendors were, therefore, required to pay the proportion of the year's taxes due up to the 7th October, the day from which the purchaser was to be deemed to be in possession. *Bank of Montreal* v. *Fox*, 6 P. R. 217.

A mortgagee, under two mortgages, sold the land under the power of sale in the second, and by his conditions of sale stipulated amongst other things that he was selling merely all his estate or interest under the second, subject to the first mortgage and interest; that if a second mortgage was taken for part of the purchase money, it should be a first lien after the first mortgage and interest; that if no objection was made within a certain time the vendor's title was to be held good and considered accepted by the purchaser, and the vendor entitled to the consideration; and further, that the said first mortgage could be paid off:—Held, that the taxes due up to the sale should be paid by the vendor. *Re Wilson and Houston*, 20 O. R. 532.

**Commutation.**]—A purchaser is not entitled to require a vendor to pay the amount necessary to commute a sewer rate. *Bank of Montreal* v. *Fox*, 6 P. R. 217.

**Execution against Cestui Que Trust.**]—Lands were conveyed to and held in the name of a trustee, at the instance and for the benefit of another, but without any disclosed trust. Writs of fi. fa. lands against the cestui que trust were placed in the sheriff's hands before his death, but after the conveyance to the trustee. After the death of the cestui que trust, his administrators sold the lands, and offered to convey the lands with the trustee:—Held, that the purchaser was not bound to carry out the sale unless the writs were removed or released. *Re Trusts Corporation of Ontario and Medland*, 22 O. R. 538.

**Execution after Agreement to Sell.**]—The administrators of an insolvent deceased person contracted to sell some of his lands. Subsequently to the contract a creditor who had obtained a judgment against the deceased in his lifetime issued execution thereon under an ex parte order therefor against the estate in the hands of the administrators:—Held, that the execution formed no charge or incumbrance on the lands contracted to be sold. *In re Trusts Corporation of Ontario and Bockmer*, 26 O. R. 191.

**Fraudulent Concealment of Incumbrances.**]—See Fraud and Misrepresentation, I.

**Judgment Creditors.**] — A purchaser is entitled to call for a release from all judgment creditors who have registered their judgments in the county where the lands sold are situate, or that the creditors join in the conveyance to the purchaser, although it appear that the purchase money will be exhausted in discharging prior incumbrances. If the vendor cannot procure such release or concurrence in the conveyance, the court will not compel the purchaser specifically to perform the contract. *Spohn* v. *Ryckman*, 7 Gr. 388.

**Local Improvement Rates.**] — Semble, that a rate imposed under 36 Vict. c. 48, s. 464 (O.), for assessing property immediately benefited by improvements, &c., does form a charge upon land. *Bank of Montreal* v. *Fox*, 6 P. R. 217.

The defendant joined in a petition to a municipal council to pass a by-law to open a street through the property of the defendant and others under the local improvement clauses of the Municipal Act. The petition was adopted and a by-law passed under which the work petitioned for was done. Subsequently the defendant sold his land to the plaintiffs and conveyed it to them by deed made in pursuance of the Act respecting Short Forms of Conveyances, containing the statutory covenants for title. A rate to pay for the improvements payable in ten annual instalments, but subject to commutation, was imposed afterwards upon the land benefited, including that sold by the defendant:—Held, that the rate was an incumbrance created in part by the action of the defendant, and that the plaintiffs were entitled to recover damages under the covenants for quiet enjoyment and against incumbrances, the amount recoverable being the smallest amount necessary to discharge the incumbrance. *Cumberland* v. *Kearns*, 18 O. R. 151, 17 A. R. 281.

In a contract for sale and exchange of certain lands free from incumbrances, it was provided that "unearned fire insurance premium, interest, taxes, and rental" should be "proportioned and allowed to date of completion of sale:" — Held, notwithstanding, that special frontage rates imposed for local improvements and construction of sewers by by-laws passed prior to the contract, the period for payment of which had not expired, were incumbrances to be discharged by the vendors respectively. Held, also, that the vendors were likewise bound to discharge a special frontage rate imposed by a by-law passed subsequently both to the date of the contract and the date fixed for the completion of the sale, inasmuch as the work was actually done and the expenditure actually made before the contract, the council having first done the work and then passed the by-law to pay for it, under 53 Vict. c. 50, s. 38 (O.) The substantial charge as a whole came into existence upon the finishing of the work. Cumberland v. Kearns, 18 O. R. 151, 17 A. R. 281, commented on and distinguished. *Re Graydon and Hammill*, 20 O. R. 199.

Local improvement rates imposed by municipal by-laws after the work having been done before the dates of the contract, were incumbrances to be discharged by the vendor; but

rates imposed and work done after the contract were not so. Re Graydon and Hammill, 20 O. R. 199, followed. Ecclésiastiques de St. Sulpice de Montreal v. City of Montreal, 16 S. C. R. 399, distinguished. *Armstrong* v. *Auger*, 21 O. R. 98.

Assessment rolls were made by the city of Montreal under 27 & 28 Vict. c. 60 and 29 & 30 Vict. c. 56 apportioning the cost of certain local improvements on lands benefited thereby. One of the rolls was set aside and the other was lost. The corporation obtained power from the legislature by two special Acts to make new rolls, but in the meantime the property in question had been sold and conveyed. New rolls were made assessing the lands for the same improvements and the purchaser paid the taxes and brought suit en garantie to recover the amount from the vendor:—Held, that as two taxes could not both exist for the same purpose at the same time, and the rolls made after the sale were therefore the only rolls in force, no taxes for the local improvements had been legally imposed till after the vendor had ceased to be owner of the lands, and that the vendor was not obliged by her warranty and declaration that taxes had been paid to reimburse the purchaser for the payment of the special taxes apportioned against the lands subsequent to the sale. *Banque Ville Marie* v. *Morrison*, 25 S. C. R. 289.

**Sale by Heir of Debtor.**]—The liability of lands for debts under 5 Geo. II. c. 7, is not affected by the death of the debtor. He, or his heir or devisee, may sell and convey to a bonâ fide purchaser for value, at any time before judgment entered against him or his personal representatives, or execution against land issued upon it; and such purchaser will have a good title as against creditors. Leviscomte v. Dorland, 17 U. C. R. 437, remarked upon. *Reid* v. *Miller*, 24 U. C. R. 610.

**Sewer Rate.**]—A sewer rate imposed under 36 Vict. c. 48, s. 384, s.-s. 52 (O.), forms no charge on land, and is, therefore, not an encumbrance which a vendor is bound to remove. *Bank of Montreal* v. *Fox*, 6 P. R. 217.

Sewer rates in the city of Toronto, under by-law 468, do not form a charge upon lands. *Squire* v. *Oliver*, 24 Gr. 441.

**Taxes.**]—Taxes for the year are apportionable between the vendor and purchaser according to the date of the sale. *In re Manufacturers' Life Ins. Co. and McLean*, 10 C. L. T. Occ. N. 295.

*See People's Loan and Deposit Co.* v. *Bacon*, 27 Gr. 294; *Stewart* v. *Hunter*, 2 Ch. Ch. 335.

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2. *Interest.*

**Appropriation of Purchase Money.**]—To save interest by an appropriation of the purchase money on a sale of land, the money should be separated from the purchaser's general bank account, and notice of the appropriation must be given to the vendor. *Great Western R. W. Co.* v. *Jones*, 13 Gr. 355.

**Mortgage for Purchase Money.**]—A vendor agreed to convey land and receive back a mortgage for part of the price payable by instalments, but omitted to say that the mortgage should be made payable with interest. In a suit for specific performance, and to compel the vendor to accept a mortgage without interest, parol evidence was admitted to shew that the real understanding of the parties was that interest should be made payable by the mortgage. *Gould* v. *Hamilton*, 5 Gr. 192.

**Possession**—*Quantum.*]—Where a purchaser takes possession before conveyance he is liable to interest from the time of taking possession, and the liability is not limited to a period of six years. *Great Western Railway Co.* v. *Jones*, 13 Gr. 355.

**Quantum.**]—In a suit for specific performance, even where the purchaser has taken possession of the premises, as a general rule, he is only liable for arrears of interest for a period of six years prior to the filing of the bill. *Airey* v. *Mitchell*, 21 Gr. 510.

Held, that where the purchaser dies, the right of no incumbrancer intervening, the vendor is entitled to a charge on the land in the hands of the heirs for a period beyond the six years, in order to prevent circuity of action. *Ib.*

**Shewing Title.**]—In an agreement for the sale of land it was provided that the cash payment should be made and the mortgage for the balance given "so soon as the solicitors for the purchaser shall be satisfied with the title:"—Held, that the meaning of the contract was that payment was not to be required, until such title was shewn as would justify the purchaser in taking possession, and, following Wells v. Maxwell, 32 Beav. 552, that no satisfaction being given as to a prior mortgage affecting the land until two years after the agreement, the purchaser could not prudently take possession until then, and interest on the purchase money should only be allowed from that time. *Re McLean and Walker*, 19 O. R. 161.

**Taking Possession**—*Delivery of Key.*]—The delivery to a purchaser of a house of the key thereof is not of itself delivery of possession; it is but a symbolical delivery, and may be evidence of possession if given or received with that view. *People's Loan and Deposit Co.* v. *Bacon*, 27 Gr. 294.

Merely obtaining the keys of a building in order to view the premises, so as to estimate alterations intended to be made, and to perform other acts to preserve the premises from deterioration, is not such a taking possession under a contract for sale as will bind the purchaser and render him liable to pay interest on the purchase money. What will be a sufficient taking of possession of a purchased house considered and treated of. *Ib.*

By one of the conditions of sale the purchaser was required to pay a deposit of ten per cent. at the time of sale and the remainder within one month thereafter, and upon such payment the purchaser was to be entitled to a conveyance and to be let into possession of the property purchased:—Held, that under this condition the payment of the purchase money by the purchaser and the delivery to him by the vendor of possession were concurrent acts, and unless the vendor was in a position to put the purchaser in possession he could not be called upon to pay interest on the unpaid purchase money. Neither was he bound in such a case to pay ground rent

accruing due upon the property whilst he was so kept out of possession. In such a case, letting a purchaser into receipt of rents and profits is not a compliance with the condition to give the purchaser possession. Under such circumstances the purchaser was held entitled to make a deduction of a proportionate share of the taxes assessed on the premises for the year in which the sale was effected. *Ib.*

**Time.**]—Interest on purchase money runs from the date when, after the acceptance of the title, the purchaser could have safely taken possession, and a difficulty respecting the conveyance may justify his not taking possession. *Rae* v. *Geddes*, 3 Ch. Ch. 404.

**Time Allowed to Make Title.**]—Defendants being in possession of land as tenants under the plaintiffs for a year at $100, they, on the 26th October, 1865, entered into an agreement under seal, by which it was witnessed that the plaintiffs sold to defendants the premises, which it was said they had leased from the plaintiffs "with this understanding of purchase." The plaintiffs were to give the defendants credit "on purchase money for all rents or money paid or that shall be paid until the time of the first parties (plaintiffs) making the title, and said party to make the title by the 1st January, 1868, or as soon as he can get the acknowledgment of his father to a deed that is now made, and in possession of said first party; and the said first party to pay ten per cent. on all moneys paid by the second party over $100 a year, until the said title be made. The second party (defendants) agrees to pay for the above property $2,000, in three equal annual payments, after the deduction of such money as has been paid at the making of the title." Defendants continued in possession until 1870, paying various sums:—Held, that up to 1st January, 1868, when the title should have been completed, the seller was not to receive interest nor the benefit of the rents, if the purchase went on, but that after that date the purchaser remaining in possession was bound to pay interest. *Vanzant* v. *Burke*, 38 U. C. R. 104.

**Time not Fixed**—*Possession.*]—A purchaser becomes liable to pay interest when no time is fixed by the contract, from the time when he could prudently take possession, and in the case of the purchase of several properties under an indivisible contract he cannot prudently take possession until the title to the whole is made. *Laird* v. *Paton*, 7 O. R. 137.

**Time Fixed.**]—Where in the contract for the sale and purchase of land, the parties fix the time for payment of the purchase money and the period from which interest thereon is to be computed, irrespective of the time fixed for completion, interest must, in the absence of default or breach of contract or of actual misconduct in relation thereto on the part of the vendor, be paid from the period named, notwithstanding the existence of difficulties as to title justifying the purchaser in refusing to complete until they are removed. De Visme v. DeVisme, 1 Mac. & G. 352, observed upon as being no longer an authority. *In re Dingman and Hall's Contract*, 17 A. R. 398.

Under contract of purchase of real estate providing that "if from any cause whatever" the purchase money was not paid at a specified time interest should be paid from the date of the contract, the purchaser is relieved from payment of such interest while the delay in payment is caused by the wilful default of the vendor in performing the obligations imposed upon him. A contract containing such provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor. A conveyance was tendered which the vendee would not accept, whereupon the vendor brought suit for the rescission of the contract, which the court refused on the ground that the conveyance tendered was defective. He then refused to accept the purchase money unless interest from date of the contract was paid. In an action by the vendee for specific performance:—Held, affirming 19 A. R. 291, that the vendee was not obliged to pay interest from the time the suit for rescission was begun as until it was decided, the vendor was asserting the failure of the contract, and insisting that he had ceased to be bound by it, and after the decision in that suit, he was claiming interest to which he was not entitled, and in both cases the vendee was relieved from obligation to tender the purchase money. By the terms of the contract the vendor was to remain in possession until the purchase money was paid and receive the rents and profits:—Held, that up to the time the vendor became in default, the vendee, by his agreement was precluded from claiming rents and profits, and was not entitled to them after that time, as he had been relieved from payment of interest, and the purchase money had not been paid. *Hayes* v. *Elmsley*, 23 S. C. R. 623.

A person in possession of the land under a contract for purchase, by which he agreed to pay the purchase money as soon as the conveyances were ready for delivery, and interest thereon from the date of the contract, is not relieved from liability for such interest, unless the vendor is in wilful default in carrying out his part of the agreement, and the purchase money is deposited by the vendee in a bank or other place of deposit, in an account separate from his general current account. The vendor is not in wilful default where delay is caused by the necessity to perfect the title, owing to some of the vendors being infants, nor by tendering a conveyance to which the vendee took exception, but which was altered to his satisfaction while still in the hands of the vendor's agent as an escrow, and before it was delivered. A provision that the purchase money is to be paid as soon as the conveyance is ready for delivery, does not alter the rule that the conveyance should be prepared by the purchaser. *Stevenson* v. *Davis*, 23 S. C. R. 629, 19 A. R. 591, 21 O. R. 642.

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## VII. Rights Arising out of the Contract.

### 1. *Compensation and Damages.*

**Agreement to Purchase Lease.**]—When A. purchased a lease from B., and B. covenanted with him to repurchase at the end of three years at a greater price than he paid, and after the three years had expired A. tendered an assignment of the lease, which B. refused:—Held, that in an action on the covenant, A. was entitled to recover as the amount of damages the price agreed on by B. for the repurchase. *Gibson* v. *Cubitt*, 5 O. S. 711.

**Attachment.**]—The claim of a debtor to compensation for misrepresentation of parties in obtaining a patent of land is not liable to be seized, attached, or sequestered before the amount is determined by decree or otherwise. *Roberts* v. *City of Toronto*, 16 Gr. 236.

**Bond to Convey.**]—Partial performance of the condition is no answer to an action on a bond; and a plea to debt on a bond, with a condition to convey land in the lifetime of a testator, brought by his executor, must negative the request of a conveyance by the heir or executor, as well as by the testator. *Hershey* v. *Warren*, H. T. 7 Wm. IV.

Debt on bond, conditioned to make to the plaintiff a good and sufficient deed, clear of all incumbrances, of a certain strip of land within eight years. Plea, that within the said eight years the council of the district of London by by-law established a public road over and upon the said strip of land, whereby defendant was and has been since prevented, &c.:—Held, on demurrer, no defence; that he should at least have conveyed such interest as he could. *Cæsar* v. *Norton*, 9 U. C. R. 100.

**Chancery Jurisdiction.**]—Under s. 32 of the Administration of Justice Act, 1873, the court of chancery has cognizance of all the rights of all the parties arising out of an agreement; and if either is entitled to damages, the court ought to ascertain them. In this view, in a suit for specific performance, to which the plaintiff was found not entitled, a reference was directed to inquire as to damages sustained by a purchaser by reason of breach of the contract, and also as to damages sustained by the vendor by reason of breach of covenants in the instrument constituting the agreement. *Casey* v. *Hanlon*, 22 Gr. 445.

**Crops.**]—The owner of property sold and took a mortgage to secure payment of the purchase money by instalments. Default having been made in payment of the first instalment, an action was brought and judgment recovered upon the covenant; whereupon the purchaser filed a bill setting up that a tenant of the vendor had by virtue of a lease previously made by the vendor, carried away the crops from off the premises, and praying to redeem upon payment of the amount of the judgment, after deducting therefrom the value of the crops so taken away. The court, by consent of parties, directed a reference to the master to inquire as to the amount of damages sustained by reason of the removal of the crops, but refused to interfere with the judgment already recovered, the remaining instalments of purchase money being more than sufficient to cover any sum to which the purchaser could be entitled in respect of such damages. *Moore* v. *Merritt*, 6 Gr. 550.

The growing crops on land are part of and go with the freehold when sold. Where, therefore, a tenant in possession at the time of sale carried away the growing crops, compensation was granted to the purchaser out of the purchase money, and the same order was made to extend to taxes due on the land and unpaid. *Stewart* v. *Hunter*, 2 Ch. Ch. 335.

**Default on Both Sides.**]—Defendant agreed to sell land to plaintiff for £400, £100 by two approved notes, to be given on the 16th May, and the remaining £300 to be secured by mortgage; and that the defendant, on receiving said notes on the 16th May, should execute and deliver to the plaintiff a good and sufficient deed of the premises. It appeared that the plaintiff was not ready to give the notes until the 19th:—Held, that this precluded him from recovering damages from the defendant for non-performance of the agreement on his part. *Smith* v. *Doan*, 15 U. C. R. 634.

**Delay in Conveying.**]—New trial granted for excessive damages for the non-execution and delivery of a deed four days after the time of contract, the verdict being founded on the value of the estate. *Muirhead* v. *McDougall*, 5 O. S. 642.

There was a lapse of fourteen years after the vendor's conveyance, before the bill for compensation was filed, the heir having been a minor all this time:—Held, that the vendor having caused this delay by his own agreement with the infant's relations, which deprived the infant of their protection, this lapse of time was no bar to the suit. *Forsyth* v. *Johnston*, 14 Gr. 639.

With a view to fixing the amount of compensation, inquiry was directed as to the condition of the estate left by the deceased purchaser, and whether the plaintiff or the estate received the benefit of any part of the purchase money on the subsequent sale of the property. *Ib.*

**Dilapidation.**]—A vendor who contracts for the sale of property of which he has not taken possession, is accountable to the purchaser for dilapidations by the parties in possession before the vendor takes the possession from them. *Fisken* v. *Wride*, 11 Gr. 245.

A vendor in possession is, generally speaking, responsible for dilapidations that take place before he shews a good title, where the dilapidations are such as a prudent owner or his tenants might have prevented. *Ib.*

Where buildings are torn down after a contract for sale, and before the purchaser takes or was bound to take possession, the vendor is primâ facie accountable for the loss. *Ib.*

**Eviction**—*Fraud.*]—Where on a sale of land there has been a conveyance perfected, and the seller having no title the purchaser is evicted, unless fraudulent misstatement or concealment is clearly made out, there can be no action except on the covenants, and where there are no covenants, or none that will extend to the cause of eviction, there can be no action against the vendor. *Thomas* v. *Crooks*, 11 U. C. R. 579.

Semble, that where fraud is established, but the conveyance has been made, and the parties cannot be placed in statu quo, then the remedy is by an action for deceit; and assumpsit for money had and received, to recover the purchase money will not lie. Held, that on the evidence in this case, the defendant was not shewn to have been guilty of fraudulent misrepresentation or concealment of title. *Ib.*

The defendant was not the person who conveyed the land or had the beneficial interest. He acted in making the sale, and receiving the moneys, merely as agent for the trustees of his wife and his wife's sister, and before action brought he had paid it over:—Quære, whether an action would lie against him, or whether the principal should not have been

sued, so that he might defend his own title. *Ib.*

**Failure to Make Title**—*Damages.*]—In an action on an agreement to deduce a good title to land sold to plaintiff, and on the common counts, defendant pleaded non assumpsit, that he had made a good title to the land, and never indebted:—Held, that under these pleadings defendant could not shew that plaintiff had cut timber on the lot of greater value than the improvements made and the money paid by him for the lot; and semble, that, even if such facts could be shewn, they would form no defence, as defendant had no title in himself to the land. *Kitchen* v. *Murray*, 16 C. P. 69.

**Misrepresentation as to Rent.**]—K. purchased certain property at auction which had been advertised. Among the representations made in the advertisement, was one that it "at present rents for $1,160." After the sale the purchaser applied for compensation on two grounds: (1) that the landlord was bound to heat the building for the tenants, the cost of which was not included in the $1,160; and (2) that the $1,160 did not include the taxes which the landlord had to pay:—Held, that he was entitled to compensation on both grounds, and a reference was ordered to ascertain the amounts. *Re Murray and Kerr*, 13 O. R. 414.

**Neglect to Obtain Title.**]—In an action on a bond to convey land within a certain time, where defendant's inability arose from his having neglected to do the settlement duties, and take out the patent:—Held, that the damages were not confined to the purchase money paid and interest. *Plumer* v. *Simonton*, 16 U. C. R. 220.

**Purchaser's Default.**]—Semble, that on a contract to purchase land the measure of damages is the same whether it be under seal or by parol, and that the plaintiffs, the vendors, under the facts in this case, could have recovered only damages for the loss of their bargain, not the full purchase money according to the contract. *Marcus* v. *Smith*, 17 C. P. 416.

**Purchase for Specific Purpose**—*Effect on Value of Adjoining Lands.*]—Defendant on the 14th March, 1872, agreed to buy two acres of land in a village from the plaintiff, for $325, and to complete upon it within eighteen months a brick factory of specified dimensions, and at or before its completion to commence and prosecute therein the manufacture of plated-ware on a scale commensurate with its size; and that in case he should not perform his agreement in this respect, he would at the end of the eighteen months reconvey the land to the plaintiff, receiving back the purchase money the $325, and compensating the plaintiff for damages, if any. The defendant did not pay the purchase money, and at the end of sixteen months elected not to go on with the agreement, whereupon the plaintiff sued, alleging in his declaration that the plaintiff's adjoining land would have been much enhanced in value by the sale to defendant, and the erection of the factory, and claiming as damages profits which he would have derived therefrom:—Held, that such damages were not recoverable, being altogether too remote. Quere, whether he could recover interest, though he had demanded the $325, for he had not offered at the time to make a conveyance. *Dullea* v. *Taylor*, 35 U. C. R. 395.

**Refusal to Convey.**]—Where defendant contracted to sell land belonging to his son, who was under age, and afterwards declined to convey:—Held, that he was liable to substantial damages, not merely the purchase money paid with interest and costs, but the true value of the property at the time defendant ought to have conveyed. *Vallier* v. *Walsh*, 6 C. P. 459.

Plaintiff declared on a bond, reciting that defendant had agreed to sell to him certain land for £600, of which £50 was to be paid down, and the remainder "within ten years from the date thereof," with interest thereon half-yearly; and conditioned that defendant, "on receiving the said principal money and interest at the days and times and in manner thereinbefore mentioned for payment thereof," should "sign, seal, deliver, and execute" unto the plaintiff, a good, valid, and sufficient deed in fee simple of said land, and to convey the same to him free from all incumbrances. The breach assigned was, that although the plaintiff had paid the £50, and £250 on account of interest, and was at all times ready and willing, and offered to pay defendant the balance of principal and interest, on receiving from him such deed, yet that defendant could not and would not give him said deed or any title to said land:—Held, on demurrer, declaration bad, for (1) the condition being to convey on receiving the purchase money within ten years, defendant could not be compelled to convey before the last day of that time, or at least not without notice of the intention to pay at an earlier day, and a tender accordingly, which was not averred; (2) the offer alleged was only to pay on receiving a deed, and defendant was entitled first to receive the money. *Burns* v. *Boyd*, 19 U. C. R. 547.

**Repairs by Vendor.**]—On taking an account of what was due to a plaintiff in possession, who claimed under a vendor of real estate in a specific performance suit, the master allowed certain repairs and improvements, some of which were made after the commencement of the suit. On further directions the court expressed the opinion that the only repairs made after suit commenced that could be allowed were such as it was the plaintiff's duty to make in order to save the premises from deterioration. *Hawn* v. *Cushion*, 20 Gr. 518.

**Rescission**—*Contract Perfected by Conveyance—Compensation.*]—After a contract has been perfected by conveyance an action for compensation for deficiency in the land conveyed will not lie. The purchaser is confined to his remedy upon the covenants or in a proper case, where he applies promptly, to a rescission of the contract. See Follis v. Porter, 11 Gr. 442. *Penrose* v. *Knight, Cassels' Dig.* 776.

**Small Deficiencies.**]—Held, upon the evidence in this case, that the purchasers were not entitled to a conveyance of or compensation for a small part of the land contracted for, to which the vendors were not able to make title. *Re Bobier and Ontario Investment Association*, 16 O. R. 259.

**Vendors Claiming Damages because of their own Conditions.**]—The defendant company contracted by letter to sell cer-

tain lands upon the condition, amongst others, of the vendee building a saw mill. The vendee proceeded to erect a saw mill and construct a dam across a river, the effect of which was to overflow a large tract of the company's land. Subsequently the company conveyed the lands contracted for, which were situate on both sides of the river, reserving the bed of the river and about thirty feet on either bank, the title to the bed being then in the Crown. Afterwards the company, having obtained a patent for the bed of the river, proceeded at law against the persons owning the mill for the damage done by the overflowing, and recovered a verdict for £500; and other actions were also brought for the same injury. The court decreed a perpetual injunction restraining the actions, and a conveyance of the bed of the river and the portions on either side which had been reserved, and ordered the company to pay the costs. *Brewster* v. *Canada Company*, 4 Gr. 443.

**Vendor Conveying to Third Person.**]—Where a purchaser died after paying three-fourths of the purchase money, leaving an infant heir, who was entitled to specific performance of the contract; and the vendor at the instance of the administratrix conveyed the property, which had greatly increased in value, to a third person; and it afterwards passed into the hands of persons without notice:—Held, that the heir could sue the vendor in equity for compensation. *Forsyth* v. *Johnston*, 14 Gr. 659.

**Vendor's Default.**]—The defendant having wilfully broken his agreement by selling to a third party at an increased price:—Held, to make the case an exception to the general principle of fraud being necessary to recover damages for the value of the bargain. *Pierce* v. *Small*, 10 C. P. 161.

**Vendor No Title.**]—Where a person executes a bond to convey land, with the knowledge that he has no title, he is liable to such reasonable damages, within the penalty, as the obligee can prove. Sikes v. Wyld, 1 B. & S. 587, commented upon. *Scott* v. *Reikie*, 15 C. P. 200.

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2. *Possession.*

**Breach of Agreement.**]—Defendant, who was entitled to purchase, had made default in payment; had failed to erect a new saw mill on the land, as stipulated for; had allowed the saw mill already there to fall into disrepair; and had been cutting and removing the timber, so that the saw mill would become utterly lost to the plaintiffs if defendant was allowed to retain possession; and the saw mill and timber constituted the almost entire value of the mortgage security:—Held, that the plaintiffs were entitled to an order for possession in case defendant did not pay the overdue instalments in a month, without prejudice to plaintiffs' right to enforce the agreement for sale. *Phillips* v. *Preston*, 14 Gr. 67.

It was agreed between plaintiff and defendant that defendant should sell to plaintiff the land in question, and should deduce a good title, and convey in one year from date; that defendant should in the meantime have possession, on condition of not cutting timber; and that on or before the 19th October, 1855, he should convey on receiving £200, in consideration whereof the plaintiff agreed to pay the £200, &c. In the winter of 1855 defendant cut and sold saw logs, contrary to agreement, and in February the plaintiff brought ejectment on this ground, without having either paid or tendered the £200:—Held, that he could not recover. *McKindsey* v. *Johnston*, 14 U. C. R. 209.

**Condition.**]—Plaintiff's devisor gave a bond to defendant, conditioned to convey to him upon payment of £175 on the 1st March, 1856, when the obligor was to give the deed, and defendant to secure the balance of the purchase money by mortgage on the premises. Then followed these words: "The said I. A. (defendant) is to have possession of the said lands and premises, with the exception of the house and barn, from the sealing and delivery of these presents:"—Held, that the right of possession was subject to the payment of the £175 at the time specified, and that on default the plaintiff might eject. *Stringham* v. *Ammerman*, 14 U. C. R. 548.

**Instalments**—*Right of Entry.*]—Where a purchaser is in possession of land either under a written contract of sale, or with the assent of the vendor, the purchase money being payable by instalments, the vendor's right of entry does not first accrue until default occurs in payment of an instalment. *Irvine* v. *Macaulay*, *McLellan* v. *Macaulay*, 28 O. R. 92, 24 A. R. 446.

**Life Interest.**]—The patentee conveyed the land to the person through whom plaintiff claimed, and took a bond to reconvey on payment of a certain sum, and to allow the wife of the patentee to have possession during her life, whether the land should be reconveyed or not:—Held, that the plaintiff could not, in the face of this bond, dispossess the patentee during the life of his wife. *Arnold* v. *Buller*, 15 U. C. R. 255.

**Non-payment.**]—Plaintiff, A., gave a bond to convey within a specified time certain premises to defendant, B., and put B. in possession, which possession, by the terms of the writing obligatory, B. was entitled to hold until A. conveyed to him, and he took B.'s notes for the purchase money, but was never in a position to convey. B. refused to pay his notes or to give up possession:—Held, that being in possession under the bond, he was entitled to hold it, and his right was not dependent on payment of the notes. *Fulton* v. *Burrill*, 9 C. P. 101.

**Vendor's Action.**]—The court will not compel a vendee who has recovered back the purchase money and interest for a defect in the vendor's title, to stay proceedings on his judgment until he gives up possession of the land conveyed. The vendor must proceed by action to recover possession. *McKinnon* v. *Burrows*, 4 O. S. 71.

**Working Farm.**]—M., owning the land, executed a bond to defendant, reciting that defendant was to reside with him and work the farm for their mutual advantage; that it had been agreed that after M.'s death it should become defendant's, and to secure this M. had that day made his will leaving it to him; and the condition was, that if defendant should work the farm properly, &c., M. should not execute any other will, nor dispose of nor

incumber the land. Afterwards they disagreed, and M. conveyed to plaintiff, who brought ejectment, after having demanded possession:—Held, that he was entitled to recover, as the bond gave to defendant no legal right to possession. *McDonald* v. *Murphy*, 20 U. C. R. 355.

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3. *Right of Purchaser to Recover Deposit or Payments.*

**Abandonment**—*Common Counts.*] — Declaration, that the defendant, by oral agreement, contracted to sell land to plaintiff for £2,500, and received on account £50. The contract was afterwards mutually abandoned, defendant agreeing with plaintiff, in consideration of such abandonment, that he would repay the £50, provided that he sold the land for more than £2,500; and defendant did sell, &c., yet refused to pay, &c. Common counts were added:—Held, that plaintiff could not recover on the common counts, for the abandonment having arisen on his own inability to fulfil the agreement, there was no implied promise of defendant to refund the deposit; and the absence of a written agreement for the purchase of land, did not entitle the plaintiff to recover back the money paid. *Campbell* v. *Greer*, 10 C. P. 295.

Upon a second trial, the court, upon the evidence given:—Held, that the abandonment of the contract was not proved to be the consideration for defendant's promise, and that there was no other consideration proved sufficient to maintain an action for the £50. *S. C.*, 11 C. P. 231.

H., a lessee of land, assigned to defendant, who agreed to sell to the plaintiff for $449, and received $100 on account. The plaintiff having made default in his other payments, defendant sold to one C., for $349, stipulating with him that he should give the plaintiff a chance of redeeming the place for the same sum, which C. said the plaintiff agreed, but failed to do:—Held, following the previous case, that the plaintiff could not recover back the $100 on the common counts, for the agreement having been abandoned through his inability to fulfil it, there could be no implied promise on defendant's part to refund the deposit. *Delong* v. *Oliver*, 26 U. C. R. 612.

**Agreement to Repay.**] — Defendant agreed to execute to plaintiff a deed of certain land, with bar of dower, on payment of $200, and on the agreement that if the Crown lands department would not "recognize" his assignment of said land, defendant would return the purchase money to plaintiff:—Held, that the true construction of the contract between the parties was, that the money was to be refunded in the event of the Crown lands department not acknowledging that defendant's vendee had, by virtue of the assignment, acquired a beneficial interest in the land, entitling him to the benefit of the contract between the Crown and the original locatee. *Arthur* v. *Monck*, 21 C. P. 76.

**Agreement Void under Statute.**]—Money paid on an oral agreement for the sale of land, cannot, without shewing more, be recovered back, on the ground that the agreement is void by the Statute of Frauds. *Barber* v. *Armstrong*, 6 O. S. 543.

**Assumpsit.**]—When A. and B. agreed by deed for the sale and purchase of land, and B. paid £35 on the agreement, but afterwards refused to complete the purchase, as the title could not be made good, and requested A. to pay back the money advanced, which he then promised to do, but afterwards refused to do, and B. brought an action of assumpsit against him and recovered judgment:—Held, that the action would not lie, the remedy being on the sealed instrument. *Clarke* v. *Anderson*, E. T. 3 Vict.

**Bond to Convey.**] — Plaintiff bargained with defendant for the purchase of land, and took a bond for a deed and went into possession. Certain goods were turned over to defendant as part payment. Subsequently defendant resumed possession and sold the land:—Held, that defendant did not thereby rescind the contract, and therefore an action for the amount paid on the transaction would not lie; but that the plaintiff must proceed on his bond. *Mulholland* v. *Holcomb*, 6 C. P. 520.

**Cancellation** — *Resale.*] — Defendant agreed to sell to plaintiff certain buildings specified, "with the land which they occupy, with the whole of the dam and water privilege," for £3,500; £250 to be paid on the 1st January, and £250 on the 1st March, &c.; plaintiff to have full possession by the 1st February; a free and satisfactory deed to be given on the 1st January, when the first £250 was to be paid. The plaintiff took possession, and the two sums of £250 were paid. After he had taken possession, it appeared on a survey that some of the buildings were on an original allowance for road, and that defendant in consequence could not convey that part. The plaintiff being told of this by the surveyor said that this must be put right between defendant and himself, and that those buildings must be left out of the deed, which the surveyor was to prepare. Afterwards he made the second payment of £250, and a deed was prepared, including the land not within the road allowance, and also the buildings on the allowance. This, however, was not executed, and the plaintiff remained until July, when he left and defendant assumed possession, under what circumstances did not appear, and afterwards sold again to another person for £3,650:—Held, that the plaintiff could recover the £500 paid, either on a count for money had and received, as being paid on a consideration which had failed, or on a special count, as damages for the breach of agreement, in not giving a deed. Held, also, on motion for arrest of judgment, that the declaration, set out in the report, sufficiently shewed that the plaintiff had given up possession; and if not, that the defect was supplied by the ninth plea. *Snyder* v. *Proudfoot*, 15 U. C. R. 532.

**Common Counts.**]—A person purchasing land through the persuasion of another, who did not pretend to have a title himself, with notice of an incumbrance thereon, and making no search at the registry office, and paying the consideration to the person through whose persuasion he purchased, who appropriated it, with his knowledge and consent, towards the payment of the incumbrance as far as it went:—Held, not entitled to recover upon the common counts from the person to whom he paid it. *Miller* v. *Cummings*, 10 C. P. 448.

**Contemporaneous Agreements.**] — On the 5th June the plaintiff executed an agreement whereby he agreed to purchase from de-

fendant a lot in Winnipeg, at and for the sum that might be placed thereon by D., provided, that if the price exceeded $6,000, the excess should be secured by the plaintiff by mortgage on the property, the sum so fixed to be paid by plaintiff "deeding" to the defendant his interest in certain lots in Toronto. On the same day defendant executed an agreement whereby he agreed to purchase the plaintiff's interest in the Toronto lots for $6,000, the defendant to pay the interest and taxes to date, but to deduct same out of the $6,000. The Toronto property was conveyed to the defendant who entered into possession and paid off the mortgages on it. The defendant refused to convey the Winnipeg property except for $8,000, at which sum he contended D. had valued same, but the evidence shewed that D. had declined to make any valuation. The defendant also refused to appoint another valuator. In an action to recover from defendant the sum of $6,000, the plaintiff intimated he would accept a conveyance of the Winnipeg property in settlement of his claim on defendant paying the costs:—Held, that unless the defendant accepted the offer, there should be judgment for the plaintiff for the $6,000, less $858.28 paid for interest and taxes. Semble, that the two agreements must be deemed to be independent. Held, also, that this was not a case for specific performance nor for rescission. *Proctor* v. *Mulligan*, 13 O. R. 683.

**Defect in Title**—*Possession.*]—The plaintiff had gone on a Thursday without defendant's knowledge to a mill which he had agreed to purchase from defendant, and remained till Saturday. On the Tuesday following he returned and stayed a day or two, not using the mill, but mending a leak in the mill gate; and he gave it up because a title could not be made:—Semble, that such possession, not taken by the agreement nor sanctioned by defendant, could not prevent the plaintiff from recovering back under the common counts what he had paid on account of the purchase money. *Clarke* v. *McKay*, 32 U. C. R. 583.

——— *Repayment—Improvements.*] — A vendor who was unable to complete his contract for sale of real estate by reason of his title being defective, had, notwithstanding, instituted proceedings at law to enforce payment of the purchase money. Thereupon the purchaser filed a bill, alleging his willingness to perform the contract, if a good title could be made, but that a good title could not be made; and that he had paid part of the purchase money, and made improvements on the property. Upon a reference as to title, it was shewn that the vendor was unable to make a good title. On further directions, the court ordered a perpetual injunction to restrain the action at law; repayment of the amount of purchase money paid with interest; and that the same should form a charge on defendant's interest in the land; and that defendant should pay the costs of the suit; but refused the plaintiff any allowance in respect of the improvements made by him. *Kilborn* v. *Workman*, 9 Gr. 255.

——— *Waiver.*] — Plaintiff, having orally agreed with defendant for the purchase from him of an interest in certain mining leases, discovered, within a short time after making a payment on account, that there was some defect in the title. He, however, never repudiated the bargain until just before action brought, but continued to act as if it was valid:—Held, that he could not recover back the money paid by him, and that the agreement being an oral one could not avail him, defendant having sworn that he was ready and willing to carry out his engagement and convey, as agreed upon. *Patterson* v. *Irwin*, 21 C. P. 132.

**Defect Discovered after Conveyance.**]—Defendant sold certain land at auction under a power of sale in a mortgage, the conditions of sale stating that the land was unpatented, and the purchaser should take subject to the amount due to the Crown. The plaintiff being the highest bidder purchased, and signed an agreement at the foot of these conditions. Subsequently he paid his purchase money, and received a conveyance, in which the defendant covenanted only against his own acts. It appeared that the title was defective, and that the patent had issued to another, but there was no evidence of any fraud or misrepresentation on the defendant's part, or of any agreement as to title except in the conveyance:— Held, that the plaintiff could not recover, his only right being under the covenant. It was urged that the intention of the parties was that the acceptance of the conveyance was not to be an acceptance of the title, and that the efforts made by defendant to remove the alleged defects, and his conduct in the matter after the conveyance, were evidence of such intention, and affidavits to shew such conduct were tendered under the Administration of Justice Act of 1874. Held, that such conduct after the execution of the conveyance could not have the effect contended for. *Binsmore* v. *Shackelton*, 26 C. P. 604.

**Executors of Purchaser.**]—Money paid by a testator on an agreement for the purchase of lands, which the vendor has failed to carry out, may be recovered back by the executors as money had and received to the use of the testator. *Innes* v. *Brown*, *Smart* v. *Brown*, 5 O. S. 665.

**Failure to Give Possession.**]—By the conditions of sale of a house and lot, the title was guaranteed, and the purchaser was to have possession within a named time. The plaintiff, who became the purchaser and paid the required deposit, did so on the faith of possession being delivered within the stipulated time, as he wanted the place as a residence for his family, and had made his arrangements accordingly. In consequence of a difficulty as to the title, possession was not given within the time, and the plaintiff then notified defendant, the vendor, that unless the title was complete and possession given within a week's further time, he would consider the contract at an end. Defendant answered that he considered the notice unreasonable, and would complete the title within a reasonable time, and that he held the plaintiff to the bargain. He also offered to let plaintiff into possession, and to indemnify him against all objections as to title, but the plaintiff refused to take possession until a good title was shewn:—Held, that under the conditions, the purchaser was entitled to receive, by the time named, not merely possession, but possession with a good title previously shewn; and that on the vendor's failure to give such possession, the purchaser was entitled to rescind the contract and recover back his deposit. *Burns* v. *Griffin*, 26 C. P. 61.

**Failure of Title.**]—An attorney selling property of which he was the apparent but not the real owner, acted for the purchaser, who had confidence in him and employed no other solicitor in the matter. The attorney did not disclose to the purchaser the true state of the title, but alleged it to be good, though without any fraudulent intention. The true owner having, after the conveyance was executed, recovered the property from the purchaser:—Held, that the purchaser was entitled to have his payment and expenditure on the property made good to him by his vendor, and that the latter was not protected by having given only limited covenants for title. *McRory* v. *Henderson*, 14 Gr. 271.

O. agreed to purchase land from defendant which at the time was subject to a mortgage, of which O. was not aware. O. gave a note to defendant for £30 on account of the purchase money, and afterwards assigned by parol his bargain to the plaintiff, and informed defendant thereof, who orally agreed thereto. Plaintiff paid the amount of the note and £20 10s. in addition to defendant, and the mortgage was afterwards foreclosed. The plaintiff sued for the amount paid by him:—Held, that if plaintiff paid and defendant received the money on an intended sale and purchase of land, though not binding, which failed from defendant's inability to make title, plaintiff should recover; and a nonsuit was set aside that the jury might find on this question. *Gibb* v. *Davidson*, 12 C. P. 588.

In an action on an agreement to deduce a good title to land sold to the plaintiff, and on the common counts, defendant pleaded non assumpsit, that he had made a good title, and never indebted:—Held, that under these pleadings defendant could not shew that plaintiff had cut timber on the lot of greater value than the improvements made and the money paid by him; and semble, that such facts could form no defence, as defendant had no title in himself to the land. *Kitchen* v. *Murray*, 16 C. P. 69.

**False Representation of Agency.**]—Where a person, falsely representing himself to be the agent for the owner of certain land, entered into a contract for the sale thereof, and received a deposit on account of the purchase money, but the vendee could not obtain specific performance of the contract:—Held, that his remedy against the agent for the return of the deposit was at law, and that a bill for that purpose would not lie. *Graham* v. *Powell*, 15 Gr. 327.

**Forfeiture** — *Default.*]—Action on common counts. A contract was proved by which defendant sold and plaintiff bought land for £400, £50 to be paid down and balance in one month, and if not so paid, the £50 "to be forfeited and this to be no sale." A deed to be given on full payment, and the £50 to be ascertained damages for a breach. By another agreement of the same date as the contract, plaintiff covenanted that in case defendant should fail to recover the balance of the mortgage above £400 from A., plaintiff would pay it and all costs to be incurred in prosecuting B. on his covenant to defendant, the deed and mortgage and all papers to remain in defendant's hands as security; and plaintiff also covenanted to pay any costs payable by defendant of proceedings arising out of the sale. Defendant, it appeared, was assignee of a mortgage by A. to B., and sold to plaintiff under a power in it. The £50 was paid on the day of sale. A., within a week, filed a bill to set aside the sale, and by decree, about two years after the contract, the sale was set aside:—Held, that the plaintiff had not forfeited the £50, for he was not in default when the bill was filed, and during the suit he was not required to take any further step. Held, therefore, that he was entitled to recover back the £50; but as he had been in possession from the execution of the contract to the decree, he was held not entitled to interest. *Turley* v. *Evans*, 13 C. P. 214.

**Fraudulent Representations.**] — See FRAUD AND MISREPRESENTATION, II.

**Lien for Deposit**—*Costs.*]—Where the purchaser paid a deposit on effecting a purchase, which he afterwards rescinded in consequence of a good title not having been made out, and recovered judgment at law for the amount of the deposit, which he was unable to realize under execution:—Held, notwithstanding the Administration of Justice Act, that the purchaser had a right to institute proceedings in court to enforce his lien, his object being to obtain a lis pendens, which he could not obtain at law, in order to prevent the vendor disposing of his lands as he had of his goods. The costs of a suit at law to recover back a deposit paid on account of purchase money, do not form any lien upon the land, although the deposit itself does constitute such a lien. *Burns* v. *Griffin*, 24 Gr. 451.

**Payment in Goods.**] — Plaintiff orally agreed to purchase land of defendant, giving goods in part payment on account of the purchase money:—Held, that the absence of any written agreement for purchase of the land would not entitle the plaintiff to sue for the price of his goods as if payable in money. *Hoskins* v. *Mitcheson*, 14 U. C. R. 551.

**Payment on Invalid Sale.**]—The maxim that "he who comes into equity must do equity." applied in a case where defendant became the purchaser at sheriff's sale of plaintiff's lands, paid the amount bid, and obtained a conveyance from the sheriff. In fact such sale was wholly invalid, the lands having been previously sold under the same execution to the mother of defendant, to whom the sheriff had conveyed them, although she had paid only a portion of the amount bid for her by the defendant as her agent. Such conveyance, however, had been to defendant's knowledge treated and intended as a security merely. Defendant's object in purchasing at the second sale was to obtain a title adverse to plaintiff, which he set up against the plaintiff, who thereupon filed a bill seeking to redeem on payment of the amount paid on account of the first sale and interest merely, less rents received:—Held, that the payment made by defendant having enured to the benefit of the plaintiff, the defendant was entitled to be repaid the amount, although paid for an improper purpose; and the plaintiff having sought to deprive defendant of this money on purely technical grounds, the court, on overruling his objections to the claim, did so with costs. Semble, that if the plaintiff had not sought to charge defendant with rents and profits he could not have claimed the amounts he had so paid. *Taylor* v. *Brown*, 25 Gr. 53.

**Payment to Mortgagee's Agent.**]—S. having mortgaged certain land to F. agreed to sell it to the plaintiff, and went to the office

of defendant, who acted as agent for F., where S. executed a bond to convey to the plaintiff on payment of £200 down and the balance by instalments, and at the request of S. the plaintiff paid this £200 to defendant for F. on account of the mortgage. Afterwards, at their joint request, defendant returned £50 to the plaintiff, and S. having released to F. his equity of redemption, the plaintiff sued defendant to recover back the £150 remaining, as money paid to his use. Some evidence was given at the trial to shew that the title was defective: — Held, that the plaintiff clearly could not recover, for the money was not paid to defendant on any contract between him and the plaintiff, but was a payment by S. of his debt due to F. Semble, that the evidence was not sufficient to shew a failure of title, but that if it had been, F., under the circumstances, could at most have been liable only, on receiving payment of his mortgage, to convey to the plaintiff such title as he had derived from S. *Branigan* v. *Cartwright*, 25 U. C. R. 264.

**Possession by Purchaser.**]—An action for money had and received as the purchase money of an estate, will not lie so long as the vendee enjoys the estate and continues in possession. *Smart* v. *Brown*, 5 O. S. 650.

**Purchaser Making Payments for Vendor.**] — Where the plaintiff had agreed orally with defendant to purchase land from him, and having been let into possession, had made payments on account of money and cattle, and defendant afterwards sold the land to another person, promising to repay what he had received from the plaintiff:—Held, that on his refusal to do so the plaintiff could recover the amount from him in an action for money paid. *Hill* v. *Stanton*, 2 U. C. R. 149.

**Refusal to Complete** — *Vexatious Exercise of Power of Sale.*]—Plaintiff was a purchaser under a power of sale in a mortgage for $200 taken by a solicitor for costs, only $30 of which had been incurred at the date of the mortgage. The power was exercised to collect the full amount of the mortgage and interest. Before the purchase was completed the mortgagee's right to sell was raised as a question of title by the plaintiff, who had become aware of these facts. Before these objections were removed, the property was sold again under a prior mortgage:—Held, that the mortgage was a valid security for no more than $30; that the plaintiff having become aware of the vexatious user of the power, was justified in refusing to complete the purchase, and was entitled to recover back the deposit paid by him. *Locking* v. *Halsted*, 16 O. R. 32.

**Rescission** — *Incumbrances.*]—W. bought property at auction, signing on purchase a memorandum by which he agreed to pay ten per cent. of the price down and the balance on delivery of the deed. The auctioneer's receipt for the ten per cent. so paid stated that the sale was on the understanding that a good title in fee simple clear of all incumbrances up to the first of the ensuing month was to be given to W., otherwise his deposit to be returned. After the date so specified W., not having been tendered a deed which he would accept, caused the vendor to be notified that he considered the sale off, and demanded repayment of his deposit, in reply to which the vendor wrote that all the auctioneer had been instructed to sell was an equity of redemption in the property; that W. was aware that there was a mortgage on it and had made arrangements to assume it; that a deed of the equity of redemption had been tendered to W.; and that he was required to complete his purchase:—Held, that the vendor having repudiated the agreement, W., being entitled to a title in fee clear of incumbrance, and not bound to accept the equity of redemption, could at once treat the contract as rescinded and sue to recover his deposit. *Wrayton* v. *Naylor*, 24 S. C. R. 295.

**Tenant in Common Selling in Fee.**]—A., one of several tenants in common of a lot of land, conveyed it in fee, as an entirety, to B., who conveyed to C., who conveyed to D. On the sales to B. and C. £100 of the purchase money was allowed to remain unpaid until all matters of title could be settled, it being then known that A. had only a tenancy in common in the land, and that proceedings for a partition of that and other lands, held on the same tenancy, were pending. In February, 1855, C. paid the £100, on receiving from A.'s husband and E., one of the other tenants in common, a covenant under seal to have a partition made without delay, and if possible to have the lot so sold included as part of their share, and to execute such further assurances as might be necessary to make C.'s title good, and in default to repay the £100, with compensation for improvements and charge for occupation rent. In a suit for partition D. was made a party, and this lot was charged with various sums in favour of A.'s heirs and E. and other tenants in common for equality of partition, rents, &c. D. had no knowledge of the existence of this covenant until after the master's report, when he procured an assignment of it, and filed a petition in May, 1875, to be relieved of the charges on his land under the report, and to be indemnified against them by A.'s representatives and E.:—Held, that D. was entitled to the relief prayed; and that the application was not too late, as laches could not be imputed until after knowledge of the facts; that it was immaterial whether the covenant ran with the land or not; and that E.'s liability was not limited to the £100 but was for a complete indemnification of C. and his assigns. *Rice* v. *George*, 24 Gr. 513.

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4. *Right of Vendor to Purchase Money.*

**Bond** — *Partial Failure.*]—Debt on bond for the payment of £350 and interest, by instalments. Equitable pleas, that the bond was given for the purchase money of a lease, which the plaintiff then held of a certain lot, and on condition that she should also procure from the rector of S. a lease of a certain other lot and assign it to defendant; and that the plaintiff had no term or interest in either lot:—Held, that the plea was bad, for not averring that defendant had not gone into possession under his purchase, and therefore not shewing a total failure of consideration. The plaintiff, however, did not demur but took issue, and upon the evidence obtained a verdict, which the court refused to disturb. *Carlisle* v. *Hoshel*, 20 U. C. R. 199.

**Common Counts.**]—In an action on the common count for land sold, it appeared that the land was put up at auction under handbills signed by the plaintiffs, and having been

knocked down to defendant his name was entered as purchaser in a book by the auctioneer's clerk, and he paid the deposit required down, but afterwards refused to pay the subsequent instalments. A bond to convey had been executed by the plaintiffs, and left ready for defendant, with a bond for payment of the money, which he did not execute:—Held, that the plaintiffs could not recover, for the land was not conveyed, and therefore an action on the common count would not lie. *Thomas* v. *Ross*, 19 U. C. R. 370.

To a declaration on the common count for land sold, defendant pleaded payment; and the plaintiff replied on equitable grounds, as to £316, that the cause of action was for land conveyed by plaintiff to defendant by a certain indenture, in consideration of £930, the receipt whereof was then acknowledged; that notwithstanding said acknowledgment, defendant had not paid the sum of £316, but the same remained due, and defendant since the date of this indenture had always been in possession of the land:—Held, bad on demurrer, as shewing the plaintiff's right to be an equitable one only. *Shaw* v. *Ross*, 20 U. C. R. 262.

**Declaration of Intention not to Perform.**]—Where one party to a contract before the time stipulated for performing his contract, declares that he will not perform it, the other party may treat this as a breach and sue. *Dalton* v. *Taylor*, 34 U. C. R. 12.

Declaration, that the plaintiff agreed to sell and defendant to buy certain land in Oshawa, adjoining the lands of the plaintiff, which would be thereby enhanced in value to the plaintiff, for $325, upon the following terms: the money to be paid and the conveyances executed on demand, and that defendant should within eighteen months put up a factory thereon, of the dimensions specified, and carry on there the manufacture of plated ware. And that in case he should not do this, he would at the expiration of said eighteen months reconvey the land and receive back the purchase money. And all things happened and all times elapsed, &c., and plaintiff was ready to convey, yet defendant did not pay the plaintiff, nor complete the purchase, but notified the plaintiff that he abandoned and would not perform the agreement, &c. Plea, on equitable grounds, that defendant made the agreement on behalf of himself and others, who were about to associate themselves as a company to manufacture plated ware on the said lot, and with the intention of procuring said land as a site for their factory in case the company should decide to erect it thereon; that the plaintiff knew this when he made the agreement; and before any demand by the plaintiff for payment, and before any conveyance of said land, defendant and the others decided not to carry on said business, and gave notice thereof to the plaintiff, and that they would not require said land, and that the plaintiff was released; and defendant did not otherwise abandon said agreement; — Held, following Hochster v. De La Tour, 2 E. & B. 678, that the declaration was good, and the plea no answer to it. *Ib.*

**Dependent Covenants**—*Shewing Title.*]—By an agreement for the sale of land for $20,000, $4,000 was to be paid on execution of the agreement, $40,795 within sixty days thereafter, and the balance to remain on mortgage. The purchasers paid the $4,000 but refused to pay the $40,795, to recover which this action was brought after the expiration of the sixty days:—Held, reversing 2 O. R. 573, that the agreement to convey the lands, and that to pay the money at the expiration of sixty days, were not mutual but dependent, so that the vendor before being entitled to recover the purchase money must shew that he was ready, willing and able to convey, and that the purchaser, until he did so, could not be called on to pay his money and rely on the ability of the vendor to convey the estate, or in the event of his being unable to do so, look to him for repayment. Per Rose, J.—Without determining that point expressly, the neglect and delay of the vendor to take the necessary steps to shew his title to the lands, part of which the vendor admitted was vested in one Y., were such as disentitled him to call for payment, and therefore that the finding of the Judge at the trial was correct. Held, also, that the provision as to the mortgage not stating when it was to be payable did not render the agreement void for uncertainty. *McDonald* v. *Murray*, 11 A. R. 101.

*See Armstrong* v. *Auger*, 21 O. R. 98.

On 2nd May, 1882, the plaintiff by agreement under seal sold certain land to defendant for $856, $156 to be paid on the execution of the agreement and the balance without interest on 1st January, 1883, the defendant covenanting to pay accordingly; and in consideration thereof the plaintiff covenanted to convey or cause the land to be conveyed in fee simple to defendant, free from incumbrances, and to permit defendant to occupy same until default. By the agreement defendant also might assume possession, and might collect the rent then due from M., the tenant of the premises, and make arrangements with him for giving up possession. Defendant took possession, but was turned out by M., who claimed the land and registered a lis pendens against it. Defendant in April, 1883, recovered judgment in ejectment against M., when M.'s solicitors undertook to, and on 17th October, 1883, did, remove the lis pendens. In an action brought by plaintiff on 12th October, 1883, for recovery of the purchase money:—Held, following McDonald v. Murray, 2 O. R. 573 (but see S. C., 11 A. R. 101), that shewing a good title was not a condition precedent to the recovery of the purchase money; and moreover the plaintiff's covenant was to convey or cause to be conveyed. Per Rose, J., that apart from McDonald v. Murray, the plaintiff was entitled to recover, for as the judgment in the ejectment action disposed of defendant's claim to the land, the existence of the lis pendens, which could be removed for $5 or $10, was no answer to the plaintiff's claim. The defendant also counterclaimed, setting up an agreement by plaintiff to pay the ejectment costs; and also claiming damages for being kept out of possession:—Held, that to entitle the defendant to recover these costs an unqualified promise to pay should be shewn, which the evidence failed to do; but as plaintiff admitted he intended to pay a portion of them he was charged with half the costs; and he was disallowed interest for the time defendant was kept out of possession. *McCrae* v. *Backer*, 9 O. R. 1.

**Evidence** — *Admissions.*]—An assignment of a right to real estate executed under seal by the defendant only, in which the consideration money is acknowledged to have been paid, will not support an action for the purchase money, nor be received as proof of an original executory agreement in writing for the sale of the premises; nor will subsequent admissions

of defendant's liability supply the place of written proof or of an account stated, unless some specific amount be acknowledged. *Green* v. *Burtch*, 1 C. P. 313.

**Failure to Furnish Abstract.**]—Where vendors had not furnished an abstract of title notwithstanding repeated notices, and had at length brought an action at law on a note given by the purchaser for part of the purchase money, the purchaser filed a bill alleging that, by reason of the delay, the contract was at an end, and praying an injunction to stay the suit at law. The vendors failing to justify their neglect, the court granted the injunction. *Walton* v. *Armstrong*, 11 Gr. 379.

**Instalments**—*Title.*]—On a purchase of land, to be paid for by instalments, the purchaser, although not entitled in the meantime to call for a rescission of the contract, may require his vendor to shew a good title before making any payment, and if the vendor proceeds to enforce payment, the purchaser, upon bringing into court the principal and interest actually due, will be entitled to restrain the action, until the title has been investigated; and the payment of prior instalments will not disentitle the purchaser to insist upon a good title being shewn. *Thompson* v. *Brunskill*, 7 Gr. 542. See *Crooks* v. *Glenn*, 8 Gr. 239.

**Judgment** — *Subsequent Cancellation.*]—The vendor recovered a judgment against his vendee for a portion of the purchase money. Afterwards he wrote the vendee a letter cancelling the agreement:—Held, that having cancelled the contract, he could not afterwards enforce his judgment. *Cameron* v. *Bradbury*, 9 Gr. 67.

**Judgment for Balance of Purchase Money**—*Notice Making Time the Essence—Right to Rescind—Forfeiture of Moneys Paid.*]—A vendor who has recovered judgment against the purchaser for the balance of purchase money, due on a contract for the sale of land in which time is not of the essence of the contract, is not estopped by such judgment, from afterwards making time of the essence by notice terminating the contract within a reasonable time on non-payment of the balance due. Cameron v. Bradbury, 9 Gr. 67, followed. Moneys paid on a contract under such circumstances are forfeited to the vendor, who, however, is not at liberty to proceed on the judgment for the balance. Howe v. Smith, 27 Ch. D. 89; Fraser v. Ryan, 24 A. R. 441, followed. *Gibbons* v. *Cozens*, 29 O. R. 356.

**Pleading.**]—Declaration for non-payment of purchase money:—Held, bad, on demurrer, in not averring in precise terms that the plaintiff had conveyed the premises, &c., to the defendant, or was ready and willing to convey. *McArthur* v. *Winslow*, 6 U. C. R. 144.

The first count claimed £100, being the consideration for the assignment by plaintiff to defendant of his interest in an agreement for the purchase of certain freehold property. Second count, for money payable for land bargained and sold by plaintiff to defendant, on an account stated, and for interest. J., the owner of fifty acres, agreed to convey certain lots, in accordance with a lottery, to be held by one D. Lot No. 107 in the lottery was the prize, and was supposed to have a mill privilege upon it. One V., the holder of the ticket No. 35, became entitled to No. 107, and he requested J. to convey it to plaintiff, which was done. Subsequently C. (defendant) agreed to purchase the mill privilege from plaintiff, but not being satisfied with his title, he took a quit claim deed from J., paying him £15 7s. which he said he would deduct from the amount he was to pay plaintiff. L. (plaintiff) had drawn another lot, and obtained a conveyance of it upon giving his notes for the purchase money, which notes J. gave to C. (defendant) when he conveyed the mill pond to him. These notes formed no part of plaintiff's payment for lot 107:—Held, that the evidence did not support the declaration, inasmuch as if the lot mentioned therein was the mill pond, plaintiff had no right or title to it, and could not therefore bargain to sell it; and if it related to lot 107, the transfer alleged in the declaration was not proved, because plaintiff, at the commencement of the suit, was the holder of it. Held, also, that the evidence did not support a claim upon an account stated. *Lloyd* v. *Clark*, 12 C. P. 320.

**Purchaser's Default**—*Costs.*]—In case of a decree for unpaid consideration money, the sale of the property should be provided for, and in case the same does not realize sufficient to pay the money with six years' arrears of interest there should be a personal decree for payment of the balance by the purchaser. Where the amount in dispute is under $200, but defendant is out of the jurisdiction, the plaintiff is entitled to costs on the higher scale. *Skelly* v. *Skelly*, 18 Gr. 495.

**Promissory Notes Outstanding.**] — Where promissory notes had been given in payment of the purchase money of land, and several years afterwards a bill was filed by a vendee of the original proprietor against the heirs-at-law of the original purchaser:—Held, that the promissory notes must be produced or satisfactorily accounted for before the purchase money would be ordered to be paid, even although a good title were shewn. *Crooks* v. *Glenn*, 8 Gr. 239.

**Rescission**—*Promissory Note.*]—Where a contract for the sale of property is rescinded by the vendor for default of payment of the purchase money, he cannot afterwards recover from the purchaser the amount of a promissory note given by the latter before the default, in part payment. Semble, moneys paid by the purchaser after rescission cannot be recovered back by him. *Fraser* v. *Ryan*, 24 A. R. 441.

**Restraining Action for Purchase Money.**]—Where a purchaser sued to recover back his purchase money, alleging, but not shewing, that the vendor could not make a title, and the question arose whether the vendor or purchaser should prepare the conveyance, the proceedings at law in this case were enjoined until the hearing, it being the practice in England to have the conveyance prepared by the purchaser. *Watt* v. *Parker*, 2 Ch. Ch. 33.

A vendor unable to complete his contract for sale, his title being defective, had, notwithstanding, proceeded at law to enforce payment of the purchase money. Thereupon the purchaser filed a bill alleging his willingness to perform the contract, if a good title could be made, but that it could not; and that he had paid part of the purchase money and made

improvements. Upon a reference as to title it was shewn that the vendor was unable to make a good title. On further directions, the court ordered a perpetual injunction to restrain the action at law; repayment of the amount of purchase money paid with interest, and that the same should form a charge on defendant's interest in the land, and that the defendant should pay the costs of the suit; but refused the plaintiff any allowance in respect of the improvements made by him. *Kilborn* v. *Workman*, 9 Gr. 255.

Where vendors had not furnished an abstract of title, notwithstanding repeated notices, and had at length brought an action at law on a note given by the purchaser for part of the purchase money, the purchaser filed a bill alleging that by the delay the contract was at an end, and praying an injunction to stay the suit at law. The vendors failing to justify their neglect, the court granted the injunction. *Walton* v. *Armstrong*, 11 Gr. 379.

**Right to Conveyance.**]—By agreement under seal, A. sold to B. certain land for £150, payable £50 in three months, and the remainder in two instalments, on the 12th January, 1858 and 1859, with interest. B. covenanted to pay at the days named, and A. covenanted "on payment of the said sum of money with interest as aforesaid, in manner aforesaid," to convey and assure the land to B., his heirs and assigns, "by a good and sufficient deed in fee simple, as per abstract of title to be furnished by the said A. within a reasonable time before the 12th of January, 1858;" and it was stipulated that time should be of the essence of the agreement, and that unless the payments were punctually made, A. should be at liberty to resell the land as if the contract had not been made. B. paid the first two instalments, and A. never furnished any abstract, but on the 13th January, 1859, he tendered to B. a conveyance, which B. refused. On the 20th B. tendered the remaining instalment and interest, and demanded an abstract, which was not given. A. then sued B. for the instalment unpaid, to which B. pleaded that no abstract was furnished to him, and that on the 12th January, 1859, he tendered the money if A. would then furnish the abstract and convey, which he refused to do. And B. brought a cross-action against A. to recover back the money paid, alleging that A. covenanted to furnish him with an abstract of the title within a reasonable time before the 12th January, 1859, and to convey on that day, but did neither. A. denied the covenant:—Held, that A. was entitled to succeed in his action, for the furnishing the abstract was not a condition precedent to payment of the last instalment, and B. did not tender the money on the 12th. (2) That he was also entitled to a verdict in the suit against him, for his covenant was not to convey on the 12th January, 1859, absolutely, but upon payment of the money agreed; and although he did covenant to furnish an abstract as alleged (the agreement in that respect being held to amount to a covenant) yet the covenant declared upon was not proved. *Wilson* v. *Wittrock*, *Wittrock* v. *Wilson*, 19 U. C. R. 391.

First count, that plaintiff, being owner of certain land subject to two mortgages, of which defendant at the time had notice, agreed to sell to defendant, who agreed to buy for $2,300, of which $1,000 were to be paid down, under a penalty of $300, to be paid on the 19th September following by either, in case he refused to carry out the agreement. Breach, that though the 19th September had passed, and plaintiff had been ready, able and willing to fulfil his part of the agreement, and to have had the mortgages discharged prior to that date, if defendant had paid down the $1,000, yet defendant had not paid the $1,000, &c. The second count was similar, except that it stated the $1,000 was to be paid down for the purpose of satisfying the mortgages, and it averred that plaintiff executed a deed before the 19th September, ready to be delivered to defendant on his paying the $1,000, to be applied as aforesaid, and otherwise complying with the agreement as to the residue of the purchase money, of which defendant had notice; yet defendant did not accept the conveyance or pay the $1,000, &c.:—Held, on demurrer, first count bad, as not shewing that plaintiff had made or tendered any conveyance to defendant at the time of action brought, at which time defendant was not obliged to pay any part of the purchase money without getting at the same time a good title to and conveyance of the land from plaintiff. Held, also, second count good, as disclosing a breach of contract by defendant to pay down $1,000 as a condition precedent to his receiving a conveyance from plaintiff, for which the plaintiff was entitled to maintain an action before he could make or could be called upon to make a good title to defendant. *Koster* v. *Holden*, 16 C. P. 331.

At the trial of the last case it was held, that it was not necessary to prove the purpose alleged in the second count, and that evidence of it offered, the terms not being contained in the agreement, did not make any alteration in the contract; and that the plaintiff should not, therefore, have been nonsuited. Held, also, that inasmuch as the plaintiff was entitled to sue for the $1,000 independently of any act by him in conveying or making a good title, and as nothing appeared in the pleadings to this count which shewed that there could be any circuity of action created by his recovering upon it, the plaintiff was entitled to the $300, as liquidated damages. The nonsuit was, therefore, set aside, the defendant being allowed to plead the defence of circuity of action. *S. C.*, 17 C. P. 139.

Action for not accepting a conveyance of land or paying $1,000 as agreed, claiming $300 as liquidated damages under the contract. Defendant, after two trials of the case, pleaded that the plaintiff had not at the time of the alleged breach, or at any time before this suit, a good title to the land, and was not able to convey the same as agreed, and the issue on this was found for defendant:—Held, that as plaintiff had not sued till after the time for payment by defendant, and had not title, he was as much in default at the commencement of the suit as defendant, and as the damages would be the same against both parties, the defence was a good answer, in avoidance of circuity of action. *Koster* v. *Holden*, 17 C. P. 650.

**Supposed Defect.**]—Plaintiffs sold to defendant land for £500, the title to which appeared defective in the registry office, and defendant only paid £400, giving his bond, conditioned that if plaintiffs should, within two years, make a good paper title to the satisfac-

tion of F., he would pay the other £100. No further title was given, and the plaintiffs sued on the bond, contending that the title when given was perfect, and that F.'s opinion in its favour, which had been given, was conclusive:—Held, that as the bond was given to cure a supposed defect, which had never been remedied, the plaintiff could not recover on it. *Dewitt* v. *Thomas*, 7 C. P. 565.

**Title before Payment.**]—When the price is payable by instalments, the purchaser of land has a right to have a reference as to title, and to have the title manifested before he makes a single payment. *Cameron* v. *Carter*, 9 O. R. 426.

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5. *Right to Removal of or Indemnity against Incumbrances.*

**Apportionment of Payment.**]—Where a purchaser of a portion of an estate subject to a mortgage gave a covenant to pay a proportion of the mortgage money, on a bill filed by the vendor's assignee to compel payment by the purchaser, the court refused to give such relief except upon the terms of the vendor's share of the mortgage debt being paid at the same time, although there was no covenant on the part of the vendor that he would pay. But the court refused to include a direction that the payment by the purchaser of his share should be conditional on the payment by other and independent purchasers of other parts of the estate of their shares of the sum due. In such a case, however, it would seem that any of such purchasers paying the amounts properly payable by others would be entitled to use the name of the plaintiff in proceeding against such defaulting purchasers, upon indemnifying him against costs. *Clemow* v. *Booth*, 27 Gr. 15.

**Assignee Enforcing Vendor's Covenant.**]—A vendor of lands, which were subject to incumbrances created by himself, covenanted with his vendee to pay off the incumbrances, and discharge the lands sold from them. The vendee subsequently mortgaged the lands to the plaintiffs, with the usual mortgagor's covenants. In a suit by plaintiffs seeking (amongst other things) to have the lands relieved of the incumbrances:—Held, that the plaintiffs were entitled to the benefit of the vendor's covenant, and he was ordered to discharge the incumbrance, and pay the costs of the incumbrancers. *Clark* v. *Bogart*, 27 Gr. 450.

**Compelling Vendor to Pay.**]—A purchaser having paid all his purchase money, filed a bill, under the covenant for further assurance, to compel his vendor to pay off a mortgage disclosed at the time of sale:—Held, that the bill was properly filed, although the purchase money had been paid, and there was no concealment of the incumbrances. Held, also, that under a covenant for further assurance a purchaser has the right to require the removal of incumbrances created by his vendor. *Tripp* v. *Griffin*, 5 L. J. 117.

**Covenant to Pay** — *Subsequent Assignment.*]—In 1856, C. mortgaged some ten acres of land to H. for £2,000, and H. covenanted, on request by C. or his assigns, and on payment of a specified rate per acre, to release any portions of said land. Subsequently C. subdivided the land into a number of small lots, and on the 2nd January, 1857, sold two of these lots to defendant for £93 15s., C. agreeing to pay off and indemnify and save harmless the defendant from the mortgage to H. The defendant paid £20 down, which C. agreed to apply on the mortgage, but never did, and defendant gave back a mortgage to C. for £73 15s., the balance of the purchase money. In February, 1857, C. assigned defendant's and six similar mortgages to one H. as collateral security for two promissory notes made by C. for £100 each, payable at four and eight months respectively, on payment whereof the mortgages were to be given up; and, so far as it appeared, these notes might have been paid. C., not having paid any of the principal money of H.'s mortgage, on the 20th January, 1866, executed an indenture, whereby after reciting such nonpayment of said principal money, &c., he, in consideration of his discharge from the mortgage indebtedness, released all his equity of redemption and estate in the mortgaged premises to the executors and trustees of the will of H., who had since died, the indenture being declared to be made under the Act entitling mortgagees to receive such release without merging the mortgage debt, and that it was only to operate as a release of such debt against C., and not against said lands or subsequent incumbrances. On the 10th January, 1867, by an indenture, which, after reciting C.'s mortgage to H. and his said covenant therein, and a chancery suit in which the court had directed a sale of C.'s mortgage upon which said principal was due as aforesaid, the said trustees, by the conveyance, the terms of which were settled by the parties, in consideration of $100, granted and conveyed to S., his heirs and assigns, the defendant's and forty-three similar lots in which the equity of redemption had been sold by C. as aforesaid, subject to such equity of redemption as was then subsisting therein; and the said trustees did thereby purport to assign to S. the mortgage debt and interest payable and chargeable on said lots under H.'s covenant and all benefit therefrom; and for better enabling S. to recover such portions from C. or any persons entitled to pay the same, they appointed him their attorney. S. then conveyed to one Chambers, and Chambers' personal representatives conveyed to H. In an action by plaintiff as assignee of H. of the defendant's covenant in his mortgage to C. to pay the £73 15s.:—Held, that, after the execution of the indenture of the 20th January, 1866, C. would not, in equity, be permitted to recover, and the plaintiff, claiming as his assignee, could be in no better position; and that the subsequent conveyances did not confer any new right. *Campbell* v. *Spurgeon*, 29 C. P. 86.

**Deed to Purchaser's Nominee.**]—Plaintiff declared on defendant's agreement to sell him certain lands, and convey the same to him in fee simple free from all incumbrances —alleging in one count that he had not so conveyed, and in another that, although defendant by deed pretended to convey the land to one H., at the plaintiff's request, free from incumbrances, yet defendant had allowed part of it to be sold for taxes. Defendant pleaded, that the incumbrances were created by a former owner, of which defendant had no notice, and which he was not legally bound to pay, and that afterwards he at plaintiff's request conveyed the land to H., by a deed

with qualified covenants, which the plaintiff accepted, whereby defendant was released from said agreement:—Held, no defence, for there was no merger, because the deed was not to the plaintiff, no release was shewn, and no accord and satisfaction. Quære, as to the effect of the deed if it had been given to the plaintiff. *McLennan* v. *Chequin*, 37 U. C. R. 301.

**Form of Action.**]—P. conveyed land to defendant, "subject to a mortgage," and with a covenant for quiet enjoyment free from incumbrances. Defendant then demised the same land to P. and wife for their respective lives, and P. assigned to plaintiff all his interest therein, to hold during the life of P. The assignee of the mortgagees brought ejectment against both plaintiff and P., when the plaintiff paid the amount due under the mortgage, and sued defendant for money paid to his use:—Held, that he could not recover in this form of action. *Snyder* v. *Snyder*, 22 C. P. 501.

**Indemnity.**]—Declaration, that in consideration that the plaintiff would sell and convey to defendant certain lands for £275, which were then subject to a mortgage for £700, defendant promised to pay off said mortgage and save the plaintiff harmless therefrom; that in pursuance of said agreement the plaintiff so sold and conveyed: that the defendant not having saved harmless the plaintiff from said mortgage, and the sum of £123 being due thereon, the plaintiff was obliged to pay it, of which defendant had notice, but hath not repaid the same to the plaintiff, or indemnified him for such payment:—Held, good, on demurrer, for that it shewed a sufficient consideration for the promise, and it was unnecessary to allege such promise to be in writing. *Martin* v. *Arthur*, 16 U. C. R. 483.

The bill alleged the purchase by plaintiff of certain land which was subject to a mortgage not then due, which the vendor agreed to pay off; and that having conveyed the land to the plaintiff by a deed containing covenants for quiet enjoyment and freedom from incumbrances, he, with a surety, executed a bond to the plaintiff "conditioned to indemnify and save her harmless from the said mortgage;" that the mortgage had since become due and payable. And the plaintiff prayed that the defendants (the vendor and his surety) might be ordered to pay it off. The bill, however, did not contain any allegation that the plaintiff had been disturbed in her possession or hindered in the enjoyment of the premises, neither did it allege any demand of payment by the mortgagees. A demurrer by the surety for want of equity was allowed, with costs. *Leeming* v. *Smith*, 25 Gr. 256.

Where the purchaser of a mortgaged estate takes the same subject to the vendor's mortgage, and sells to another without paying it off, he will be compelled to fulfil his undertaking to do so. Thus, A., being the owner in fee of certain land, mortgaged it to B., and then sold to C., leaving the mortgage to be paid by C. to B. as the balance of the purchase money. C. then sold to D. without paying the mortgage, and default having been made B. sued A. at law on his covenant, whereupon A. then filed a bill against C. and D. to pay off the mortgage:—Held, that A., as surety for C., had a right to call upon him to pay the mortgage to B., and also his costs of the action at law. Held, also, that D. was a proper party, where the vendor sought to enforce his lien on the land. *Joice* v. *Duffy*, 5 L. J. 141.

The acceptance of a deed reciting that the property is conveyed subject to a mortgage or other incumbrance implies an agreement to indemnify the grantor, but does not enure as an undertaking to pay the debt, unless the amount is included in the consideration and retained by the vendee as so much money belonging to the incumbrancer. *Re Cozier, Parker* v. *Glover*, 24 Gr. 537.

M., who was the owner of Whiteacre and Blackacre, both subject to incumbrance of $1,600 and $500, sold Whiteacre to C. subject to the $1,600 mortgage, with covenants for title, save as to that mortgage, the mortgage debt in reality being the consideration or purchase money therefor. M. afterwards sold Blackacre to N., subject to the $500 mortgage, which conveyance also contained absolute covenants for title, the payment of the $500 being taken as part of the consideration. Default having been made in payment of the $1,600 mortgage, the mortgagee proceeded to a sale under the power, and N. became the purchaser of both parcels with a view of protecting himself, and thereupon took proceedings to compel M. and the representatives of C. to pay the amount due on the $1,600 mortgage:—Held, affirming 28 Gr. 334, that there was not any privity between the plaintiff and C.'s representatives, and that the demand remained with M., the original vendor, against C.'s estate. *Norris* v. *Meadows*, 7 A. R. 237.

M. conveyed land to the plaintiff subject to a mortgage to the T. & L. Co. for $2,000, and one to C. for $500, which the plaintiff covenanted to pay and save M. harmless therefrom. The plaintiff then conveyed to the defendant in consideration of "$1,050 and assuming the payment of the mortgages" aforesaid. The defendant gave back a mortgage for the balance of the purchase money. He went into possession and paid some interest on the T. & L. Co. mortgage. Subsequently a new arrangement was made, and the defendant's mortgage was discharged, and a mortgage for $1,850 was given by the defendant to the plaintiff, which included the amount of three promissory notes for $350 and other items, besides the balance of the purchase money. There was no covenant for payment therein. The T. & L. Co. mortgage fell due and was not paid, and the plaintiff paid C.'s mortgage of $500:—Held, that the defendant was bound to pay off the T. & L. Co. mortgage and relieve the land therefrom, and indemnify the plaintiff against it if personally liable thereon. *Canavan* v. *Meek*, 2 O. R. 636.

Although where land is sold subject to an outstanding mortgage, there arises a presumption or supposed intention in equity on the part of the purchaser, to indemnify the vendor against the mortgage (that is, if under the actual circumstances, the parties are to be considered to have really occupied the relation of vendor and purchaser), yet this presumption may be rebutted by parol evidence; and it was held to have been so rebutted in this case, in which it appeared to be contrary to the real intention of the parties to the transaction in question, who, moreover, were not strictly in the relation of vendor and purchaser. Parol evidence, however, could not

have been given in support of or to strengthen the presumption or equity in the first place, though such evidence could be given in answer to the evidence advanced to rebut such presumption or equity. *Corby* v. *Gray*, 15 O. R. 1.

*See* INDEMNITY.

**Instalments.**] — Where the property is sold upon credit, and the vendor executes a bond for a conveyance free from incumbrances, on payment of the last instalment, the purchaser cannot, during the term of credit, call upon the vendor to remove a mortgage created by him upon the property, or to allow the purchase money to be applied as it becomes payable in discharge of the incumbrance. *Chantler* v. *Ince*, 7 Gr. 432.

A contract for the sale of land provided for the payment of the purchase money in quarterly instalments; when half was paid, the vendor was to convey and give the usual statutory covenants; the purchaser was to pay taxes from the date of the contract: — Held, that the covenant for payment of the instalments and the covenant against incumbrances, were independent; and the vendor was entitled to judgment for the instalments: but the purchaser was entitled to shew the existence of incumbrances as an equitable ground of relief, and, the time for completion of the contract not having arrived, to pay into court so much of his purchase money as might be necessary to protect him against the incumbrances. McDonald v. Murray, 11 A. R. 101, and Tisdale v. Dallas, 11 C. P. 238, distinguished. *Armstrong* v. *Anger*, 21 O. R. 98.

**Mortgage for Purchase Money.**]—Upon the sale of land the vendor gave a bond to indemnify the purchaser against a mortgage on the land sold, and thereupon the purchaser gave a mortgage for £500, and paid the residue of the purchase money in cash. The mortgage given by the purchaser was transferred to a third person for value, but with notice of the prior incumbrance, and he sued the purchaser on his mortgage, who thereupon filed a bill claiming a right to apply the amount due by him in discharge of the prior mortgage, then due and unpaid. A motion for an injunction to restrain the action at law was refused. *Tully* v. *Bradbury*, 8 Gr. 561.

Upon an action on the covenant to pay a mortgage given by defendant to the plaintiff for the purchase money of land, defendant pleaded equitably that one L. had commenced a suit in chancery against one J. B., together with plaintiff and defendant, founded on a contract made by said J. B., before the conveyance to defendant, for the sale to him of the same land:—Held, bad, on demurrer, as for any thing therein contained defendant bought with the knowledge of L.'s claim. *Boyce* v. *McGregor*, 8 C. P. 244.

Declaration on defendant's covenant to pay £133, and interest. Plea, on equitable grounds, as to £96, part thereof, that defendant purchased from plaintiff the west half of the south half of lot 7 in the 4th concession of London, which the plaintiff then had in his possession, and of which he had enclosed that portion on the north side of the Thames, which runs through said quarter lot, leaving five and nine-tenth acres on the north side of the river: that—relying upon the fact that the conveyance which the plaintiff had lately taken to himself was of the west half of the south half of the lot, whereby the plaintiff appeared to be the owner of said quarter lot; and relying also on the plaintiff's representation that a stone quarry on the river belonged to the plaintiff, from which defendant had from time to time procured stone before the purchase, and which formed an important portion of the value thereof; and relying chiefly on the fact that the plaintiff had enclosed that part of said quarter lot north of the river, and represented and claimed it as belonging to him—he, the defendant, purchased from the plaintiff said quarter lot, at the rate of £15 10s. per acre, or £77 5 for the whole, and gave a mortgage thereon for the balance of the purchase money, payable by instalments, of which he had paid all but the one sued for: that since paying the last instalment he discovered that the plaintiff did not at any time own that part of said quarter lot north of the river, and never had any right thereto; and defendant claimed a ratable deduction of the purchase money in respect thereof, amounting to £96: — Held, on demurrer, plea bad, as shewing no equitable defence. *Hendra* v. *Moffatt*, 19 U. C. R. 444.

To an action on a covenant for payment of mortgage money, defendant pleaded, on equitable grounds, in substance, that he purchased land from the plaintiff, who professed to own it free from incumbrances, and took a deed with the usual covenants for title, and gave this mortgage for the balance of purchase money; but that there was a mortgage on it to the T. & L. Co., under which they sold the land, which defendant thereby lost; and that the plaintiff was insolvent. The plaintiff demurred to this plea, and replied that before action he had assigned the mortgage for valuable consideration, to an assignee without notice, for whose benefit the suit was brought; that the conveyance to defendant was executed by one W. and not by the plaintiff; and that at the execution thereof defendant had notice of the mortgage to the T. & L. Co.; that defendants had offered no defence to two prior actions on the covenant, and had taken possession, exercised ownership, and been guilty of laches, &c.: — Held, on demurrer, that the plea was insufficient, for the covenants for title in the deed, which must be assumed to be qualified, would afford no ground of action for the incumbrances complained of, not created by the plaintiff; and there was no allegation of fraud on the plaintiff's part which would entitle defendant to relief in equity. Held, also, that if the plea were sufficient the replication contained a clear answer to it. Quære, whether the plea was bad as shewing an equitable defence not admissible under the C. L. P. Act. *Whitehouse* v. *Roots*, 20 U. C. R. 65.

Defendant having been allowed to amend his plea, alleged a fraudulent representation as to title by plaintiff, in reliance on which he purchased; that the plaintiff's deed to him contained absolute covenants. The plaintiff replied the assignment as before, denied the fraud alleged, and averred that the mortgage to the company had been duly registered before the execution of the conveyance to the plaintiff; and that the defendant had notice of the mortgage when he executed that declared on; and the former actions and defendant's conduct were alleged as before:—Held, on demurrer to the replication, that it was clearly a good answer. Semble, that the

plea shewed a good legal defence on the ground of fraud, but was not such an equitable plea as could be admitted under the C. L. P. Act. *S. C.*, 20 U. C. R. 78.

To a declaration on the covenant to pay contained in a mortgage of lands for the balance of purchase money, defendant pleaded a prior mortgage fraudulently concealed from him, which had been foreclosed, and defendant ejected. The plaintiff replied, in substance, that the mortgage sued on had been assigned to D., for whose benefit the plaintiff was suing, and that before this action D. had procured a release of such prior mortgage, of which defendant had notice:—Held, good on demurrer, for D., the beneficial plaintiff, having procured the discharge of B.'s mortgage, had removed the only objection urged by defendant, and was in a position to give him a good title. *McDermott* v. *Workman*, 24 U. C. R. 467.

In a suit for foreclosure upon a mortgage given by the purchaser for part of the purchase money, damages or loss sustained by failure of title or by incumbrances or charges on the property sold, cannot, under the covenants for title, form the subject of set-off to the amount secured by the mortgage, before the amount is ascertained by action or otherwise. *Hamilton* v. *Banting*, 13 Gr. 484.

On the sale of land subject to a prior mortgage by the vendor, not then due, the vendor covenanted with the purchaser, B., that he had not incumbered the property, and B. executed a mortgage for his unpaid purchase money. The intention was, that the vendor should pay the prior mortgage, but he failed to do so. After it became due, he sold and assigned B.'s mortgage to the plaintiff, who had notice of all the facts; the plaintiff afterwards obtained an assignment of the prior mortgage, and B. paid off the same:—Held, that B. was entitled to apply on his mortgage the money so paid by him to the plaintiff. *Henderson* v. *Brown*, 18 Gr. 79.

After a conveyance, incumbrances upon the property sold were discovered, created by a former owner, but of which neither the vendor nor the purchaser had been previously aware. The covenants given by the vendor only extended to his own acts and the acts of those claiming under him:—Held, that the vendor was not bound to pay off the incumbrances; and therefore that the purchaser was not entitled to set off against them a balance of his purchase money remaining unpaid and secured by mortgage. *Re Buck, Peck* v. *Buck*, 6 P. R. 98.

The purchaser of land gave back a mortgage to secure part of the purchase money, with absolute covenants for payment, &c. In fact a part of the land had been sold for taxes accrued before the vendor acquired title, and the time for redemption had elapsed at the time of sale:—Held, no answer to a claim for the full amount secured by the mortgage, although the conveyance by the vendor contained covenants limited to his own acts only. Harry v. Anderson, 13 C. P. 476, followed though doubted; Cockenour v. Bullock, 12 Gr. 138, doubted. *In re Kennedy, Wigle* v. *Kennedy*, 26 Gr. 33.

A purchaser who had taken a conveyance and given a mortgage for the purchase money had been compelled to pay off a prior mortgage, under threat of proceedings being taken against the land by the prior mortgagee. The purchaser had taken a covenant from the vendor for the discharge of this prior mortgage:—Held, overruling Henderson v. Brown, 18 Gr. 79, that as against an assignee of the mortgage made by the purchaser with notice of these facts, the purchaser has no equity to set off or deduct from the mortgage assigned what he has paid on the first mortgage, subsequent to the assignment. *Egleson* v. *Howe*, 3 A. R. 506.

Where lands are sold upon which there is a subsisting mortgage, of which the purchaser is aware, and the vendor covenants that he will pay it off, the purchaser cannot set off against such mortgage the amount due upon a mortgage given by himself for unpaid purchase money, which has been transferred to a bonâ fide purchaser. His only recourse in case of damage is to proceed on the covenant of his vendor. Egleson v. Howe, 3 A. R. 506, referred to and acted on. *Wood* v. *Page*, 26 Gr. 395.

On a sale of lands the purchaser gave his note for the balance of purchase money, and received a conveyance containing the usual covenants. There was a mortgage on the property at the time for a sum less than the note, and the purchaser claimed to set off against the note damages he had sustained by being unable to resell the land in consequence of the mortgage:—Held, not allowable. *Stevenson* v. *Hodder*, 15 Gr. 570.

**Present Cash Value of Mortgage.**]—The plaintiff purchased a house and lot from defendant for $2,000, paying $1,000 in cash, and assuming a mortgage to a building society "on which $664 is yet unpaid," and giving a mortgage to the defendant for the balance. The defendant covenanted that he had not incumbered, save as aforesaid. Subsequent inquiries shewed that there were due the society seventy-one monthly instalments of $16.75, in all $1,189.25, and the plaintiff insisted that she was entitled to credit from the defendant for the difference between $664 and the latter sum. But:—Held, that the plaintiff was entitled to retain in his hands only the cash value of the mortgage at the date of his purchase, if the society would accept it, if not then such a sum as, with interest on it, would meet the accruing payments. The defendant by his answer admitted an error in the computation of the amount due the society, and offered to pay the difference between the $664 and what he alleged was the cash value and costs up to that time:—Held, that in the event of the society accepting present payment of the cash value, the defendant was entitled to his costs of suit, subsequent to answer. *Stark* v. *Shepherd*, 29 Gr. 316.

**Purchaser Assuming Payment.**]—B. sold land to C., who was to pay a mortgage thereon as part of the purchase money, and the deed described the land as being "subject to a mortgage in favour of McF. for $596, with interest, as therein mentioned:"—Held, that in a suit to administer the estate of C. the executors were entitled to credit for all moneys paid by them on account of the mortgage; and that the mortgagee was entitled to prove for the balance of the mortgage debt against the general estate of C. *Re Cozier, Parker* v. *Glover*, 24 Gr. 357.

**Purchaser Covenanting to Pay** — *Rights of Mortgagee.*]—The owner of land, after creating a mortgage thereon, assigned his equity of redemption to a third party, who covenanted to pay off the mortgage debt, and afterwards purchased the mortgaged premises, under a decree at the suit of the mortgagee. At the sale the amount realized was not sufficient to cover the amount due to the mortgagee:—Held, that under the circumstances he was not entitled to any lien on the estate for the deficiency. *Forbes* v. *Adamson*, 1 Ch. Ch. 117.

**Purchaser's Default**—*Sale under Prior Mortgage.*]—The price being payable by instalments, and there being a mortgage on the property not due, the vendor was to give the vendee a bond of indemnity in respect of it. A decree was afterwards made at the suit of the vendor for specific performance, on his undertaking, recited in the decree, to procure a release of the mortgage; the overdue instalments were ordered to be paid into the bank, subject to a further order of the court. Part only was so paid, and, in consequence of the default as to the residue, the mortgage was not paid when due, and was foreclosed in a suit to which both the vendor and vendee were defendants. The purchaser then applied by petition to stay all proceedings in the specific performance suit, which (the plaintiff not objecting) was granted, and the money in court was ordered to be paid to the vendor, in consideration of the loss he had sustained through the purchaser's default. *Robson* v. *Wride*, 15 Gr. 111.

**Removal before Payment of Purchase Money.**] — Cain agreed to sell lands to Carter for $1,400, payable in yearly instalments of $100 each, with interest, and covenanted that on payment he would convey to Carter in fee simple, free from incumbrances. There was, at the time of this agreement, a mortgage on the property still in force, payable some years before the last instalment of purchase money. C. & C., to whom Cain had assigned the agreement, now sued Carter for certain instalments overdue:—Held, that C. & C. were bound to ensure the defendant, in making the intermediate payments, that he, the defendant, would have a good title, clear of incumbrances, when the period of completion of the contract had arrived. *Cameron* v. *Carter*, 9 O. R. 426.

Held, as to the alleged misrepresentation, that it was not such as would avoid the contract, but it would cast it upon the vendor to make good his representation before he could compel the payment of the purchase money. But, in any event, a purchaser of land has a right to assume that the title is good, and that it is free from incumbrance, and to require this to be shewn before he can be compelled to pay any part of his purchase money. Gamble v. Gummerson, 9 Gr. 199, approved of. *Ib.*

**Repudiation of Delivery of Mortgage.**]—Under an agreement for the sale of land the defendant, on the execution to him of the deed thereof and removal of certain prior incumbrances, was to give back a mortgage for the balance of the purchase money. The defendant by agreement went into possession, and afterwards executed a mortgage and left it with his solicitors, with, as he stated, express instructions not to deliver it over until he was satisfied that all was right and assented to their doing so, and he alleged that without such approval or consent they had filled in the date and delivered it over. In consequence of delay in removal of the incumbrances defendant claimed that the agreement was at an end and quitted possession, repudiating the delivery of the mortgage as being without his consent. In an action by the plaintiff, assignee of the mortgage, on the covenant to pay the mortgage money:—Held, that the evidence, set out in the report, shewed that the defendant was fully cognizant of his solicitors' dealings in the matter, and had authorized their delivering the mortgage whenever they should deem it advisable to do so in defendant's interests, which it appeared they had fully protected; and that on the faith of the solicitors' acts the position of the parties was changed, namely, a conveyance executed vesting the title in the defendant and incumbrances removed, all of which took place before the defendant quitted possession. The plaintiff was therefore held entitled to recover. *Leys* v. *Hollingshead*, 29 C. P. 66.

**Vendor's Agreement** — *Application to Compel Payment.*]—A vendor agreed to pay off a mortgage existing on the property, and the decree directed a good and sufficient conveyance "according to said agreement." The defendant, the vendor, neglected to pay off the mortgage, and the plaintiff thereupon moved upon petition to amend the decree by ordering the defendant to obtain a discharge of such incumbrance; but the court directed that the vendor pay off the mortgage within a limited time, or in default, that the purchaser should be at liberty to do so, procure an assignment, and have his remedy against the vendor, whose conveyance he was not bound to accept till this mortgage was paid off; the purchase money in court to be applied pro tanto thereto. *Stammers* v. *O'Donohoe*, 29 Gr. 64.

**Vendor Concealing Existence of Incumbrance.**]—Where on the sale and conveyance of land the existence of an incumbrance is concealed by the vendor, who covenants against incumbrances; and the purchaser executes a mortgage to secure a balance of unpaid purchase money, the court will restrain an action to enforce payment of such mortgage, brought at the instance of the mortgagee—or the voluntary transferee—unless the amount of the incumbrance so concealed is deducted from the sum secured by such mortgage. The principle was applied in a case where the purchaser was a married woman, and her husband had joined in and executed the mortgage, by which he covenanted to pay the amount secured thereby, although the covenant against incumbrances was to the wife and not to the husband, the covenantor, himself. *Lovelace* v. *Harrington*, 27 Gr. 178.

**Vendor's Creditors Enforcing Claim.**]—In a bill filed by the administrators with the will annexed and creditors of B., it was alleged that on a sale of land by B. to K. the latter executed a mortgage to secure the purchase money, but that by the fraud and design of B. such mortgage was withheld from registration; and that the lands were subsequently sold by K. to two purchasers, who, before the conveyances to them were executed, or, at all events, before the payment of their purchase money, had notice and were well aware that K. had not paid his purchase

money, and had given his mortgage therefor; and that they, fraudulently intending to cut out such mortgage, had caused the conveyances to themselves to be registered. The bill further alleged that neither of these purchasers had yet paid his purchase money, and claimed that the mortgage to B. should be fastened on the land as a charge prior to their conveyances, and failing that relief, that the amount payable by them to K. in respect of their purchase money respectively might be ordered to be paid to the plaintiffs on account of the mortgage money due under the mortgage from K. The purchasers demurred generally to such bill for want of equity; the demurrer was overruled, the court holding that the plaintiffs were not bound to wait till the purchase money payable by the purchasers was overdue before taking proceedings; and that in case of notice before the execution of these conveyances, the mortgage would take precedence thereof; or if only before payment, the purchase money payable by the purchasers could be claimed by the plaintiffs. *Ferguson* v. *Kilty*, 10 Gr. 102.

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VIII. Sale by the Court.

1. *Conduct of the Sale.*

**Auctioneer's Declaration.**] — The "highest bidder" at an auction sale is the "purchaser" under the general orders of the court, and the omission of the auctioneer to declare him the purchaser will not deprive him of his position. *McAlpine* v. *Young*, 2 Ch. Ch. 171.

**Confirming Sale.**]—Semble, that a purchaser at a sale under decree has a right to take out the report on sale, and get it confirmed, so as to obtain a completion of the purchase to himself, at least where he is the sole purchaser. *Crooks* v. *Glenn*, 1 Ch. Ch. 354.

The secretary in chambers will not entertain a motion to confirm a sale where an irregularity has occurred, unless the sale has been approved of by the master. *Thomas* v. *McCree*, 2 Ch. Ch. 456.

When a sale has been held and the master's directions have not been followed, the vendor will have to shew, at his own expense, that no person interested has been injured by the non-observance of the directions; otherwise the master will not confirm the sale. *Royal Canadian Bank* v. *Dennis*, 4 Ch. Ch. 68.

Where the person having the conduct of a sale under a decree of the court is the highest bidder, and applies to be confirmed as the purchaser, the application will not be granted if any of the parties in the suit object. *Crawford* v. *Boyd*, 6 P. R. 278.

*See*, also, *Patterson* v. *Stanton*, 4 Gr. 100.

**Form of Advertisement.**] — Advertisements for sales should be as short as possible; the short style of the cause and a short description of the property and improvements is sufficient, and no merely formal parts, such as convey no information to intending purchasers, should be inserted therein. The practice of puffing animadverted upon. *Baxter* v. *Finlay*, 1 Ch. Ch. 230.

An advertisement for the sale of property under decree should set out all the improvements on the property, otherwise it will be referred back to the master to resettle the advertisement, and appoint a new day for sale. *Howard* v. *Ridout*, 1 Ch. Ch. 244.

**Leave to Bid.**]—A master has no power to give leave to bid to a party conducting a sale. Application must be made to the court. *Re Laycock*, *McGillivray* v. *Johnson*, 8 P. R. 548.

Liberty of trustee to bid at sale. See *Ricker* v. *Ricker*, 7 A. R. 282.

**Omission to Fix Reserved Bid.**]—On a motion in chambers, liberty to have a reserved bid was granted, where accidentally omitted in settling terms of sale, and the master's advertisement of the terms and conditions of the sale altered in accordance therewith, on payment by the plaintiff of the costs of the application. *Fraser* v. *Bens*, 1 Ch. Ch. 71.

**Postponement.**] — Where a sale is put off, a note of such postponement at the foot of the old advertisement will suffice, without incurring the expense of a fresh advertisement. *Thompson* v. *Milliken*, 15 Gr. 197.

**Reserved Bid.**]—Parties to the suit will not be allowed to bid at the auction, but will be permitted to have a reserved bidding. *Phillips* v. *Conger*, 1 O. S. 231.

**Sale of Part of Land**—*Confirmation.*]—Under a decree for the sale of land or a competent part thereof, it is the mortgagor's duty to see to the parcelling out of the land directed to be sold, and if the mortgagor considers that too much is offered he should urge the objection at the time of settling the advertisement, and it should be stated in the advertisement that the unsold lots will be withdrawn from sale when the debt is realized, if that course is intended to be taken. *Beaty* v. *Rodenhurst*, 3 Ch. Ch. 344.

The confirmation of a sale may be opposed before the master, and the sale disallowed on grounds which would afford material for a motion to set aside the sale. Where the confirmation of the sale is opposed on the ground of there having been an unnecessary number of lots sold, the purchaser should be notified. Semble, the objection will not prevail against an innocent purchaser, when urged against the confirmation of the report on sale. *Ib.*

**Sale without Reserve.**]—Upon a sale without reserve, it is not open to the vendor to refuse a bid, however small. *O'Connor* v. *Woodward*, 6 P. R. 223.

**Tender.**]—On the reference under the decree in a mortgage suit, the plaintiff put in several affidavits as to the value of the property, $3,500 being the highest price named in them. The defendant did not file any affidavits in answer. The plaintiff then tendered $3,500 for the property, which the master declined to accept without an order directing him to do so. An application for such order was refused. *Ramsay* v. *McDonald*, 8 P. R. 283.

The words "peremptory" or "peremptorily" do not always mean "absolutely final," there being a discretion in the court, under special and urgent circumstances, whether

they shall have that meaning or not. A sale by tender (not saying that the property will be sold to the highest bidder) is a mere attempt to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt. In winding-up proceedings of a joint stock company, tenders were advertised for the purchase of the company's property, to be received by a certain time, when the sale was to be "peremptorily closed." At the time fixed one tender only had been received, and the referee enlarged the time for the arrival of a train which was late. Two more tenders were received by that train; one on behalf of the largest beneficiary under the mortgage to enforce which the sale was being held, and the other by a stranger, which was a little higher than that of the beneficiary. The latter then by his agent handed in a much higher tender, whereupon the referee instructed notice of the last tender to be given to the other tenderers, and on a subsequent day accepted the last, which was the highest tender:—Held, that he was justified in so doing. *Re Alger and Sarnia Oil Co.*, 21 O. R. 440, 19 A. R. 446.

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2. *Purchase Money and Allowances.*

**Abatement.**]— Where land was advertised for sale under a decree, and the purchaser, the owner of the adjoining lot, who had also been in possession, by his son, of the advertised premises, tendered for them, knowing that the lands comprised fewer acres than the advertisement stated, and intending to seek an abatement after the purchase was completed, and a subsequent incumbrancer offered to give the same price for them as the purchaser:—Held, that the purchaser should be put to his election either to take the land without abatement of the purchase money, or to let it go to the subsequent incumbrancer. *Carmichael* v. *Ferris*, 8 P. R. 289.

**Compensation for Delay.**]—Where on a reference granted at the instance of a purchaser under a decree, the master had found him entitled to a less sum by way of compensation for delay, &c., than the evidence appeared at a subsequent stage of the proceedings to have warranted, and he applied for further relief after an interval of eleven months, the court refused the application on the ground of delay. *Dudley* v. *Berczy*, 3 Ch. Ch. 81.

**Dispensing with Payment.**]—In case of a motion to dispense with payment of the purchase money into court, and for a vesting order, in favour of a purchaser under a decree, who is also one of the plaintiffs, notice must be served on the mortgagor where he has appeared by solicitor. *McMaster* v. *Kempshall*, 1 Ch. Ch. 329.

**Eviction.**]—A purchaser by taking a conveyance or vesting order waives all objections to the title. He also takes upon himself the responsibility of obtaining possession, and if evicted by a title to which his covenants do not extend, he has no right to compensation on that account. *Bull* v. *Harper*, 6 P. R. 36.

**Excess in Acreage** — *Lump Sum.*]—In proceeding to a sale of lands under a decree of the court of chancery in 1876, one parcel was advertised as containing 100 acres, and was bid off by one A. at $31 per acre, which in the agreement to purchase signed by A., as well as in the conveyance to him, was described as "100 acres more or less, composed of the east part of lot 9," &c.; he paying or securing according to the conditions of sale, the sum of $3,100. In reality the portion so sold contained 124 acres and sixty-eight one-hundredths of an acre, a fact neither party to the transaction was aware of. There was no provision in the conditions of sale for compensation. The purchaser became aware that there was an excess on the same day, immediately after the sale, but the vendors not until long afterwards, though before the execution of the conveyance. In the report on sale several of the sales were referred to as at so much per acre, while the one in question was mentioned as a sale at a bulk sum of $3,100. After the conveyance to A. he had been obliged to take proceedings against C. T., the person who had conveyed the land in question to the father of the vendors, to obtain possession of the portion in dispute, which he succeeded in obtaining. The vendors, however, refused to interpose in such proceedings, or to assist A. in any way in such litigation:—Held, reversing 5 O. R. 704, that the sum of $3,100 was bid for the whole parcel; that the sale being in bulk, and there being no provision in the conditions of sale for compensation, there could be no rectification after the execution of the conveyance, nor could there have been, under the circumstances of the case, a rescission of the contract, had such relief been asked for. There was no mistake as to what was intended to be sold, or in the price intended to be paid for it. *Cottingham* v. *Cottingham*, 11 A. R. 624.

*See Sea* v. *McLean*, 14 S. C. R. 632.

**Interest.**]—A purchaser at a sale under order of the court was held liable for interest from the time of his purchase, although delay had taken place in perfecting the title for which he was in no way responsible, such delay however not being caused by any fault of the vendors, the conditions of sale stipulating for the payment of interest from the day of sale. Semble, in the absence of such stipulation in the conditions of sale, the court would relieve the purchaser from the payment of interest where the delay was not caused by him. Such a stipulation in the conditions of a sale is not to be approved of. *In re Thompson, Biggar* v. *Dickson*, 2 Ch. Ch. 196.

Interest on purchase money runs from the date when, after the acceptance of the title, the purchaser could have safely taken possession, and a difficulty respecting the conveyance may justify his not taking possession. *Rae* v. *Geddes*, 3 Ch. Ch. 404.

Where there is no stipulation as to interest, the general rule of the court is, that the purchaser, when he completes his contract after the time mentioned in the particulars of sale, shall be considered as in possession from that time, and shall thence pay interest on his purchase money, taking the rents and profits. If, however, such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor, then the court gives the vendor no interest, but leaves him in possession of the interim rents and profits. *Bank of Montreal* v. *Fox*, 6 P. R. 217.

A sale under a decree took place on the 25th July. The time fixed for completion of the contract was the 25th August (one

month after the sale); but under the rule above stated the purchaser was relieved from payment of interest on his purchase money up to the 7th October. *Ib.*

Where in a sale under a decree, no undue delay in investigating the title is attributed to either party, interest upon purchase money is payable only from the date of the acceptance of the title, and not from the time named in the conditions of sale. *Harrison* v. *Joseph*, 8 P. R. 293.

**Misdescription.**]—Misdescription in the advertisement, where it amounts to a material representation, is ground for compensation even after conveyance. *Bull* v. *Harper*, 6 P. R. 36.

**Occupation Rent.**]—Where there had been considerable delay in completing the title to property, and the purchaser paid the purchase money into court without prejudice, it was held improper, in charging the vendors with the rents during the interval, to direct the master, in fixing the amounts, to have regard to what the purchaser might have rented the premises for, or to charge the vendors with an occupation rent, without evidence of such occupation, or with deterioration and damage to the property, except such as occurred through the act or default of the vendors. *Dudley* v. *Bercsy*, 2 Ch. Ch. 364.

**Payment into Court.**]—A purchaser of real estate, at a sale under a decree, will not be ordered to pay his purchase money into court until the title has been accepted or approved of. *Crooks* v. *Street*, 1 Ch. Ch. 95.

Where a sale has taken place under a decree, and has been confirmed, an order will be made for the purchaser to pay the balance of his purchase money into court, though no inquiry has been made as to the title. *In re Stewart, Stewart* v. *Stewart*, 1 Ch. Ch. 243.

Where the party having the conduct of a sale, neglects to pay into court the deposit paid to him by the purchaser at the time of sale, the court will, on application of the purchaser, order him to do so. *Crooks* v. *Glean*, 1 Ch. Ch. 354.

A motion made to compel the purchaser to pay the purchase money into court before he had accepted the title was refused, and a reference directed as to title; but neither party desiring such a reference, the application was dismissed. Crooks v. Street, 1 Ch. Ch. 95, followed. *Ellwood* v. *Peirce*, 7 P. R. 427.

**Possession** — *Purchaser's Knowledge.*]—At a judicial sale of a farm, the conditions of sale were the usual conditions of the court, providing for the delivery of possession to the purchaser upon payment of the balance of the purchase money one month after the sale. The purchaser lived upon a part of the lot which was not sold, and was aware that the farm sold was occupied by a tenant, but swore that he did not know the terms of the tenancy, that he relied upon the conditions of sale, and that he bid more for the land because there were growing crops thereon. The purchaser paid the balance into court at the proper time, but did not get possession then, nor had he got possession at the time of this application, 7th January, 1884:—Held, that the vendors were bound by the terms of the printed and published conditions of sale, and that it was not the business of the purchaser to acquaint himself with the terms of the tenancy, and by inquiry to ascertain whose were the crops. Order made for possession, with a reference as to compensation. *Manson* v. *Manson*, 10 P. R. 155.

——— *Compensation.*]—The advertisement of a judicial sale stated that the property was in possession of a tenant, who would permit the purchaser to obtain possession on the 1st November. The purchaser, however, was prevented by the tenant from taking possession till the month of January following. About the middle of November the purchaser obtained a vesting order:—Held, that the purchaser was entitled to compensation from the vendor for being kept out of possession, and that he had not waived his right by taking a vesting order. The failure to give possession was a breach of the representation in the advertisement, a representation on account of which it was to be assumed that the purchase money was greater than it would otherwise have been. *Barber* v. *Barber*, 11 P. R. 137.

**Prior Tax Sale.**]—After a purchaser of land, sold under a decree, had accepted a vesting order, he ascertained that the land had been sold for taxes:—Held, that the purchaser was entitled to payment out of the money in court of the amount required to redeem. *Turrill* v. *Turrill*, 7 P. R. 142.

**Rents and Profits.**] — Where there had been considerable delay in completing the title to property, and the purchaser paid the purchase money into court without prejudice, it was held improper, in charging the vendors with the rents during the interval, to direct the master, in fixing the amounts, to have regard to what the purchaser might have rented the premises for, or to charge the vendors with an occupation rent, without evidence of such occupation, or with deterioration and damage to the property, except such as occurred through the act or default of the vendors. *Dudley* v. *Bercsy*, 2 Ch. Ch. 364.

A purchaser is entitled to all the rents and profits arising from the estate purchased which accrue due subsequent to the time when he becomes such purchaser. *Brady* v. *Keenan*, 6 P. R. 262.

Where the conditions of sale were silent as to possession, and the purchase money was payable by instalments, and there was no stipulation as to securing the same by mortgage:—Held, that the purchaser was entitled to the rents and profits from the time of purchase. *Ib.*

By the conditions of a sale the purchaser at a sale under a decree of the court was entitled to a conveyance one month after the day of sale, upon forty per cent. of his purchase money being then paid and the remainder secured, but he was not entitled to possession (except for the purpose of doing the fall ploughing,) until the expiry of a subsisting lease of the premises. The rent payable under the lease was payable yearly in advance, and a year's rent accrued due a few days before the day of sale:—Held, that the purchaser was entitled to a proportionate part of the rent received in advance for that portion of the term which had to expire subsequently to the day fixed for the

completion of the contract, i. e., one month after the day of sale. *Liscombe* v. *Gross*, 6 P. R. 271.

**Sale under Second Mortgage.**]—The bill was filed by a second mortgagee, the first mortgagee not being made a party. At a sale under the decree, M. purchased the land, and afterwards paid the purchase money into court; he then mortgaged the land, then conveyed his equity of redemption, and then took out a vesting order. A subsequent mortgagee claimed payment of his claim out of the moneys in court. On the application of M., an order was made directing payment to the assignee of the first mortgagee of his claim out of the purchase money in court. It appeared that M. thought he was purchasing free from incumbrances and was ignorant of the first mortgage. *Fleming* v. *McDougall*, 8 P. R. 200.

**Solicitor's Default.**]—Where the plaintiff's solicitor made default in payment into court of the ten per cent. paid to him at the time of sale, under the conditions of sale:—Held, that the other parties entitled to the purchase money should not suffer thereby, but that the plaintiff's share should be charged with the deficiency. *Mulkins* v. *Clarke*, 11 P. R. 350.

**Taxes**—*Apportionment.*]—The purchasers claimed that the vendors should pay a proportion of the taxes for the year 1880 up to 6th March, when the title was accepted and possession given. The by-law for the collection of taxes in Toronto for 1880, was passed on the 2nd April, 1880, and provided that the taxes should be due and payable on the 4th June, 1880, but that if an instalment was then paid, further payment by instalments might be made on the 15th July and 3rd September:—Held, that under R. S. O. 1877 c. 174, s. 347, and the terms of the city by-law, no taxes were due so as to form a charge on the land until 4th June, the date when the first instalment of taxes was due, and that the vendors therefore were not bound to pay any part of the taxes for that year. *Harrison* v. *Joseph*, 8 P. R. 293.

**Vendor's Lien**—*Payment into Court.*]—The order of the 29th June, 1861, directing money ordered to be paid to be paid into some bank, does not apply to a suit by a vendor to enforce his lien for purchase money. *Sawdon* v. *Heasty*, 1 Ch. Ch. 254.

In a suit of this nature, in applying for the final order for sale, it is not necessary that the affidavit of the plaintiff as to non-payment should negative the fact of possession or the receipt of rents and profits. *Ib.*

**Vesting Order.**]—Payment of an incumbrance out of the purchase money in court refused, the purchaser having accepted a vesting order. *Kincaid* v. *Kincaid*, 6 P. R. 93.

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3. *Resale and Setting aside Sale.*

**Abortive Sale.**]—Where property has been put up for sale under an order of the court, but the sale has proved abortive for want of bidders, the property may be advertised and put up for sale again without further order. *Sherwood* v. *Campbell*, 1 Ch. Ch. 299.

**Adjournment** — *Acquiescence.*]—A sale under the decree of the court cannot be adjourned by the vendor's solicitor without the authority of the court. An irregular sale acquiesced in by the plaintiff and one of the defendants who appeared in the suit, was held not to bind the other defendant, against whom the bill was taken pro confesso. Semble, that if the plaintiff and the defendant who appeared were the only parties, it would not be open to them, having concurred in the irregular proceedings, to dispute the validity of those proceedings. *O'Connor* v. *Woodward*, 6 P. R. 223.

**Agreement to Prevent Competition.**]—Biddings will not be opened and a sale set aside on the ground that a party (the defendant) was prevented from bidding by promises made to him by the purchaser. Such fact, if established, would constitute the purchaser a trustee for him, and would be subject for a suit. *Brock* v. *Saul*, 2 Ch. Ch. 145.

**Approbation of Master.**]—Although a decree for sale should direct the same to take place with the approbation of the master, the omission of such direction is no ground for moving to set aside the sale under the decree where the same really took place with such approbation, even in a case where infants are interested. *Ricker* v. *Ricker*, 27 Gr. 570.

**Change of Interest.**]—Where the plaintiff, who had the conduct of the sale, assigned his interest, and an order to revive, making the assignee a party, was, a few days before the sale, taken out, but not served, and an order taken to substitute for the plaintiff's solicitor the solicitor of the assignee, and the case went on under the control of such new solicitor, the court set aside the sale, although reluctantly, as great delay had been shewn on the part of the mortgagor in making the application; and he was, under the circumstances, ordered to pay the costs incurred by the new sale. *McAlpine* v. *Young*, 2 Ch. Ch. 171.

**Default**—*Resale at Increased Price.*]—At a sale under the standing conditions of sale of the court the purchaser paid ten per cent. of the purchase money, but made default in paying the balance, and on a resale the property brought $25 more than at the first sale. An application by the purchaser to have his deposit repaid to him was refused, but as it appeared that the deposit would cover the expenses and costs incurred by the resale, the purchaser was not required to pay them in addition. *Tilt* v. *Knapp*, 9 P. R. 314.

**Deficiency on Resale**—*Set-off.*]—The purchaser at a sale under a decree was by the decree entitled to an allowance for permanent improvements on the property. The purchaser died, and neither he nor his representatives having carried out the purchase, an order was made in the usual terms directing a resale and the payment of any deficiency by the administrator of the purchaser's estate. The lands were sold and realized less than the sum bid by the purchaser at the previous sale. An order was granted allowing the amount of the deficiency on resale to be set off pro tanto against the amount found due by the report for improvements. *Ontario Bank* v. *Sirr*, 6 P. R. 277.

**Deterring Bidders.**]—One of the testator's sons bid at a chancery sale of his father's property, such bidding being by those present supposed to be for himself, but being in reality for another person, who had secretly employed the son to bid under the expectation that there would be less competition against the son than against a stranger, and the property was knocked down to the son, but the contract thereupon was signed by his principal, and it appeared that the effect of the son's bidding being supposed to be for himself had been to deter others from bidding. The court, holding this to be a surprise on other bidders and an unjust advantage to the purchaser, refused to enforce the purchase, and directed a resale at the risk and cost of the purchaser. *Rodgers* v. *Rodgers*, 13 Gr. 143.

**Error in Conditions.**]—Where in the conditions of sale it was stated erroneously that the property was subject to dower, when in reality the dower attached to the equity of redemption only, in consequence of which the property brought much less than it otherwise would, a resale was ordered on the petition of the executors of a party who had been surety to the creditor at whose instance the sale was had; and under the circumstances the costs of the petitioners were ordered to be charged upon the estate. *Jones* v. *Clarke*, 1 Gr. 368.

**Indulgence.**] — Although the court is averse to interfering with sales under decrees or orders of the court, yet, where a sufficient case is made, it will nevertheless grant indulgence to a purchaser in aid of carrying out a sale previously made, and when a resale is about to take place. *Denison* v. *Denison*, 4 Ch. Ch. 37.

**Inadequate Description.**]—An inadequate description of the property in the advertisement will be a sufficient ground to open biddings, if calculated to mislead or deter the public from purchasing, but not otherwise. Exceptions of this kind, amounting only to a complaint that all the advantages of the property have not been sufficiently dwelt upon in the advertisement, should be taken upon the settling of the advertisement. *Creswick* v. *Thompson*, 6 P. R. 52.

**Increased Offer.**]—One lot of land out of several sold was purchased for £79 5s. After the sale another person came into the office of the plaintiff's solicitor and offered £100. An application by the plaintiff made under the circumstances to substitute the latter person for the purchaser was refused with costs. *McRoberts* v. *Durie*, 1 Ch. Ch. 211.

The court will in a proper case, and upon conditions, substitute a proposed purchaser at an increased price for a person who has purchased property at a sale under a decree, instead of opening the biddings generally and directing a resale; giving the present purchaser the option to take it at the increased price. *Harrison* v. *Patterson*, 1 Ch. Ch. 363.

**Insolvent Purchaser.**]—Where a purchaser under a decree of the court makes default in completing the purchase, the court, if it see fit, will order the property to be resold and the purchaser to make good any deficiency that may arise upon such resale; but if the purchaser becomes insolvent, and unable to complete the purchase, he will be discharged from it. *Re Heely*, 1 Ch. Ch. 54.

**Invalid Sale.**]—Proceedings under a decree which is not absolute are invalid. The purchaser at a sale under such a decree was refused a vesting order, though he offered to waive all objections to the proceedings, it being considered that it was only the defendants who could waive this objection. *Clariss* v. *Ellis*, 6 P. R. 115.

**Irregularities**—*Purchaser's Good Faith.*]—The rule of the court is, that a purchaser at a sale under the decree is not bound by any irregularity in the proceedings so as to cause him to lose the benefit of his purchase. Where, therefore, the master in settling the conditions of sale had given permission, contrary to the general orders of the court, to all parties to the cause, including the plaintiff, who had the conduct of the sale, to bid; and in his report erroneously stated that the sale had been duly advertised in two newspapers for four weeks next preceding the sale, when, in reality the advertisement had been published in one of the papers for two weeks, and in the other for three weeks only; but the practice under the general order of court of the 22nd February, 1862, being that the party having the conduct of the sale, and not the purchaser, takes and files the report of the master, and there being no allegation of the purchasers having been aware of these irregular proceedings, or any ground for imputing bad faith to them in the transaction, the court refused an application made on behalf of the debtor to set aside these sales on account of such irregularities; and ordered the debtor to pay all parties, including the purchasers, the costs of the application. *Dickey* v. *Heron*, 1 Ch. Ch. 149.

**Irregularity.**]—Where an irregularity had occurred in advertising, but no injury had thereby accrued, and a fair price had been obtained, the court confirmed the sale. *Cayley* v. *Colbert*, 2 Ch. Ch. 455.

**Lease not Mentioned.**]—The omission in an advertisement of sale to state that the premises are leased advantageously will afford good grounds for staying the sale, but an application for such purpose should be made promptly and before sale. *McAlpine* v. *Young*, 2 Ch. Ch. 171.

**Misconduct.**]—An order to open biddings will not be made after great delay against an innocent purchaser, unless misconduct is shewn on the part of the purchaser. *Crooks* v. *Crooks*, 2 Ch. Ch. 29.

**Next Friend of Plaintiff.**]—The plaintiff had the conduct of the sale, and the next friend of the plaintiff was the highest bidder. The master certified that by reason of the next friend having bid, the sale was abortive. The certificate was not filed or confirmed. A motion by the plaintiff to confirm the sale, notwithstanding the master's certificate, was refused, the guardian for the infant defendants objecting, and an order for a resale was refused, because until the master's certificate stood confirmed it was open to the parties to appeal from the certificate on the ground that the master ought to have reported that the next friend was the purchaser; and because if the master was right in finding the sale abortive no order for a resale was necessary. *Denison* v. *Denison*, 4 Ch. Ch. 37

**Notice to Purchaser.**]—Where a sale has proved abortive by reason of the purchaser refusing to complete the contract, a resale will be granted ex parte, but if any relief is asked against such defaulting purchaser, notice must be served on him. *Martin* v. *Purdy*, 1 Ch. Ch. 263.

**No Wrong or Fraud.**]—The court refused to set aside an order of court made on notice allowing a purchase, though it afterwards appeared that there were circumstances not known to the court when making the order, it not appearing that the allowance was a wrong to those complaining of it, or was procured by any fraud or wrong practice on the part of those by whom or in whose interest the order was obtained. *Campbell* v. *Royal Canadian Bank*, 19 Gr. 334.

**Opening Biddings.**]—The practice of opening up biddings observed upon. *Dickey* v. *Heron*, 1 Ch. Ch. 149; *McRoberts* v. *Durie*, 1 Ch. Ch. 211.

The court is strongly disinclined to open biddings unless very special grounds are shewn. The fact alone that a price can be obtained in advance upon that realized at the sale, does not constitute such a special ground. *Creswick* v. *Thompson*, 6 P. R. 52.

After a sale under a decree or order, biddings will not be opened merely upon the offer of an advanced price, whether the purchaser at the sale is a stranger to the suit, or a party allowed by an order of the court to bid. *Mitchell* v. *Mitchell*, 6 P. R. 232.

**Order Staying Sale.**]—An auctioneer acting under an order for sale, or master or other officer conducting such proceedings, is not bound by an order staying the sale, of which he has not notice. Where an order staying a sale for three weeks was granted on the day the sale was to take place, and the registrar telegraphed to the master conducting the sale that such order was granted, and the message reached him after the sale, but before payment of the purchase money; an order made by a Judge in chambers, refusing an application to set aside the sale, was sustained by the full court on rehearing. *Freehold Permanent Building Society* v. *Choate*, 3 Ch. Ch. 440.

**Purchaser's Default.**]—When a purchaser neglects to pay in his purchase money, and no objection is made to the title, the court will order him within a limited time to pay in the amount with interest; or in default direct a resale of the property, and that the purchaser pay costs of motion and deficiency, if any, on such resale. *Crooks* v. *Crooks*, 4 Gr. 376.

**Staying Resale.**]—Where a resale had been advertised and was about to take place, the purchaser, who was a devisee and had reason to expect to receive a balance from the estate, in which he was disappointed, and had been unable to carry out his purchase sooner, applied for a stay of the resale. He was let in to complete his purchase on payment of costs and of the purchase money into court, with subsequent interest, and of $100 to cover his share of costs of second sale, and of the application. *Denison* v. *Denison*, 4 Ch. Ch. 37.

**Withdrawing from Purchase.**] — A person contracted to purchase lands of persons not capable of selling without the authority of the court, which was subsequently obtained. The purchaser having in the meantime gone into possession of and improved the property, afterwards applied to be relieved from the purchase, and to have the improvements paid for out of the estate, alleging his inability to carry out the bargain. The application was granted in so far as he sought to be relieved from the purchase, and he was declared entitled to be treated as the purchaser of the widow's dower, but the court refused to make him any allowance in consideration of his improvements, or return him the money he had paid. *In re Yaggie*, 1 Ch. Ch. 52.

At a sale under a decree on the 25th March, 1879, A. purchased the land in question. On the 19th April, 1879, he transferred his interest to W., and on the 26th April, one H. purchased and took an assignment of the dower of one S. in the land. On the 16th February, 1880, A. applied to be released from the contract to purchase on the ground of the outstanding dower. The evidence shewed that S. had agreed with the heir-at-law to accept a gross sum in lieu of her dower, that W. really purchased the dower, but took the assignment in H.'s name, and that this application though in A.'s name, was really made by W.:—Held, that no relief could be granted, the applicant having himself created the obstacle by means of which he sought to prevent the sale being carried out. *Fraser* v. *Gunn*, 8 P. R. 278.

**Withdrawing Property.**]—A solicitor having the conduct of a sale, cannot withdraw the property after a bid has been made. His course would appear to be to move to open the biddings, if he has grounds for such a motion. *McAlpine* v. *Young*, 2 Ch. Ch. 85.

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### 4. *Title.*

**Acceptance of Title.**]—A purchaser who enters into possession of the land purchased, even though he does so by leave of the parties to the suit, is deemed to have accepted the title unless the sanction of the court has been obtained to his entering into possession without waiving his right to call for a good title. *Patterson* v. *Robb*, 6 P. R. 114.

Acceptance of title by the act of the purchaser on going into possession, was held to be waived by the vendor's solicitor delivering an abstract of title, and answering requisitions. *Aldwell* v. *Aldwell*, 6 P. R. 183.

Where, after a sale under decree of the court, an abstract had not been demanded, and no steps had been taken by the purchaser or his representatives for twenty-three months after the confirmation of the report, a reference as to title was refused, and the purchaser held to have accepted the title. *Ontario Bank* v. *Sirr*, 6 P. R. 216.

On a sale under a decree, the purchaser, except under special circumstances, will not be compelled to pay his purchase money into court until he has accepted or approved of the title or the master has reported that the vendor can make a good title. *McDermid* v. *McDermid*, 8 P. R. 28.

**Certified Copies.**]—In a sale under a decree:—Held, that the purchaser had no right to certified copies of registered and other documents procured at the expense of the vendor. *Harrison* v. *Joseph*, 8 P. R. 293.

**Cloud on Title.**]—See *Keefer* v. *McKay*, 10 P. R. 345.

**Conditions as to Title.**] — Where the title or the proof of it is involved in no difficulty, a condition of sale that "The vendor is not to be bound to give any evidence of title or any title-deeds or copies thereof, other than such as are in his possession, or procure any abstract," was held to be very objectionable, and one which should not be sanctioned by masters even by consent. *McDonald* v. *Gordon*, 2 Ch. Ch. 125.

The principle upon which sales under decrees of court should be conducted as regards the title and the proof of it, considered and commented upon. *Ib.*

**Evidence that Interested Persons are Living.**]—A party purchasing under a decree of the court has a right to call for evidence shewing that persons whose interests were intended to be disposed of were alive at the time of such sale, before accepting title by means of a vesting order. *Slater* v. *Fiskin*, 1 Ch. Ch. 1.

**Final Order**—*Proof of Defendant being Alive.*]—Where a bill was served on a defendant personally, and about a year afterwards a final order of foreclosure was granted in the suit:—Held, that a purchaser was not entitled to insist on the plaintiff (the vendor) proving that the defendant was alive when the final order was made. *Henderson* v. *Spencer*, 8 P. R. 402.

**Leave to File Objections.**] — By an agreement for the sale of certain land, the vendor was to give a good marketable title of which the purchaser was to satisfy himself at his own expense, and was not to call for any abstract of title, deeds or evidences of title other than those in the vendor's possession. Subsequently on a reference in a suit by the vendor for specific performance, the defendant filed three objections to the title having reference to a small portion of the land, which were answered by the plaintiff, and the reference was proceeding when the defendant applied and obtained from the master leave to file other objections:—Held, that the master in ordinary had no jurisdiction to grant such leave, but on a subsequent application the court gave the leave required on terms. *Clarke* v. *Longley*, 10 P. R. 208.

**Objections to Abstract and Title.**]—On receiving an abstract of title upon a sale of land by order of the court the purchaser has seven days within which to object to the completeness of the abstract, and after any question of the completeness is disposed of, and the abstract made perfect in the sense of being complete, seven days to object to the title. If, however, he takes his objections to the title in the first instance, the master will not go into the question of the perfectness of the abstract, but will confine the purchaser to the objections he has made to the title. No objections other than those specifically taken will be entertained by the master. The indorsed receipts for consideration money should appear in a perfect abstract, at all events as to deeds executed before the Registry Act. *McManus* v. *Little*, 3 Ch. Ch. 263.

A purchaser, on receipt of the abstract, is, under con. orders 399-3, bound within seven days to take all the objections he intends to take to the sufficiency of the abstract. These being removed, it is not open to the purchaser to take any further objections to the sufficiency of the abstract; he can only require the vendors to verify the title shewn on the abstract. Under the standing conditions of sale a purchaser is not entitled to possession until he has paid the full amount of his purchase money into court. *Bank of Montreal* v. *Fox*, 6 P. R. 217.

**Removing Objections** — *Waiver.*]—The party having the conduct of the sale represents, for the purposes of the sale, so far as the purchaser is concerned, all the other parties to the suit, and it is his duty to remove, or procure to be removed any objection which may properly be made to the title. *Street* v. *Hallett*, 6 P. R. 312.

A defendant who claimed to be the sole owner of the land in question in the suit, pendente lite sold to one H. the right to cut timber on the land. The purchaser at the sale under decree, refused to carry out his purchase until the right was released, which H. refused to do:—Held, that the decree having been made by consent, H. was not bound by it, and that therefore the existence of H.'s incumbrance was a valid objection to the title, and had not been waived by the purchaser's merely taking a consent to obtain, without having actually obtained, a vesting order, nor by his having under the circumstances had the conveyance settled by the master without making H. a party to it. *Ib.*

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5. *Vesting Order and Conveyance.*

**Costs of Settling Conveyance.**]—In a case where infants were interested, and it was necessary to have the conveyance settled by the master, and one of the parties to the conveyance being out of the jurisdiction, it also became necessary to obtain a vesting order, the referee allowed the purchaser the extra costs so incurred. But a question being raised as to the executors, and it being shewn that they disclaimed all interest when applied to, no costs occasioned by such question were allowed. *Re McMorris*, 3 Ch. Ch. 430.

**Effect of Vesting Order.**] — A vesting order operates on equitable as well as legal estates. *Re Robertson* v. *Robertson*, 22 Gr. 449.

**Evidence of Title.**]—Held, that a vesting order made in a chancery suit, vesting all the estate of O., including the land in question in the plaintiff, was sufficient proof of plaintiff's title without shewing why it was made. *In re Morphy, Feehan* v. *McPhail*, 32 U. C. R. 480.

**Execution of Conveyance.**]—Under the fifth clause of the standing conditions of sale the purchaser makes a sufficient tender of the conveyance for execution by delivering it to the vendor's solicitor; and it is the duty of the vendor to procure its execution by all necessary parties. The purchaser is not

bound to pay the expense of procuring the execution of the conveyance, unless there be an express condition to that effect. Until the conveyance is completed and delivered to the purchaser, he may properly resist payment out of court of any part of his purchase money. *Weiss* v. *Crafts*, 6 P. R. 151.

**Infants' Estate.**] — When the heirs are minors the court has jurisdiction, on petition of the executor and executrix, to make an order vesting the estate in the purchaser, or as they may direct. *Donaldson* v. *Berry*, 2 Ch. Ch. 16.

**Legal Estate Outstanding.**]—A sale of real estate had taken place in pursuance of the decree made in a creditor's suit. It appeared that the legal estate remained in the debtor's vendors, to whom there was still owing a part of the purchase money. The court ordered the vendors, upon payment of this amount, to convey to the purchaser under the decree. *Heal* v. *Harper*, 2 Gr. 695.

**Misdescription in Conveyance.**] — A vesting order will be granted, vesting the property sold, without the execution of a new deed, when the original deed misdescribes it. *Allan* v. *Martin*, 13 C. L. J. 198.

**Mortgage** — *Parties to Conveyance.*]—A mortgagor or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under the decree of the court. *Ross* v. *Steele*, 1 Ch. Ch. 94.

**Notice of Application for Vesting Order.**]—Where the property of infants has been sold under order of the court, and the purchaser applies for a vesting order, notice need not be given to the infants. *Boulton* v. *Stegman*, 1 Ch. Ch. 199.

Where a party to a suit is directed by decree or order to execute a conveyance to another party, but cannot be found after due diligence, and the deed therefore cannot be tendered for execution, a vesting order will be granted ex parte. *McNair* v. *Simpson*, 1 Ch. Ch. 299.

**Plaintiff Purchasing.**]—Where under a decree for sale the plaintiff becomes the purchaser, the court will not grant a vesting order in his favour. *Bowman* v. *Fox*, 2 C. L. J. 302.

**Refusal to Execute Conveyance.**]—In a suit by creditors to set aside a settlement, lands were ordered to be sold, and the proceeds paid into court. A purchaser after confirmation of sale paid his money into court, and had his conveyance prepared and tendered for execution to the trustees, who were absent from the jurisdiction, and who refused to execute it. A vesting order was granted, and the costs of the motion were ordered to be paid out of the fund in court. *Lawrason* v. *Buckley*, 3 Ch. Ch. 270.

**Right to Conveyance.**] — Quære, whether it is compulsory on a purchaser under a decree of the court to take a vesting order instead of a conveyance. *Slater* v. *Fisken*, 4 L. J. 261, 1 Ch. Ch. 1.

One of the defendants in a suit purchased the lands in question upon a sale under the usual decree for partition or sale. The appellant, the plaintiff, was first mortgagee, and the purchaser was second mortgagee of the interest of one S., the owner of an undivided sixth interest in the lands:—Held, that the purchaser was entitled to a conveyance from S. with the usual covenants for title as to his interest, and was not bound to accept a vesting order. *Laplante* v. *Scamen*, 8 A. R. 557.

**Right to Vesting Order.**]—To obtain a vesting order under 20 Vict. c. 56, s. 8, it must be shewn that all the parties to be affected can be bound. *Slater* v. *Fisken*, 4 L. J. 261, 1 Ch. Ch. 1.

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6. *Miscellaneous Cases.*

**Costs of Deed and Mortgage.**]—Where in an administration suit property was sold upon credit, part of the purchase money to be paid down and the balance secured by mortgage, the sale being under the ordinary condition that the purchaser should prepare the conveyance at his own expense:—Held, that the purchaser must bear the expense of both deed and mortgage. *Fahner* v. *Ran*, 1 Ch. Ch. 246.

**Costs of Registering Mortgage.**]—A purchaser who, to secure a balance of purchase money, has given a mortgage to the court, must pay the fees for registration of his mortgage. *Sweetnam* v. *Sweetnam*, 6 P. R. 83.

**Decree Erroneously Framed.**]—A decree had been pronounced in plaintiff's favour with costs, declaring him entitled to maintenance out of certain lands, and directing him to be paid the amount found due, or in default a sale. In drawing up the decree, costs as between solicitor and client were inserted, and default having been made an application made for an order absolute to sell the lands was refused. *McDuffie* v. *McDuffie*, 1 Ch. Ch. 41.

**Emblements.**]—A person having become purchaser of land under a sale in chancery, and having received possession on condition that he allowed the wheat and straw there to be removed, does not acquire any legal right to the straw as emblements under such purchase. *Odell* v. *Coyne*, 4 C. P. 452.

**Fire after Sale and before Report.**]—A purchaser at a sale under decree signed the usual contract to purchase, and paid the deposit. The next day the buildings on the property were burned down:—Held, reversing 8 P. R. 166, that the loss would not fall on the purchaser, as the interest contracted for did not vest in him till the report on sale was confirmed. *Stephenson* v. *Bain*, 8 P. R. 258.

**Guardian's Costs.**]—The court will direct the costs of a guardian to be paid before granting a vesting order to the purchaser. *Thorne* v. *Chute*, 2 Ch. Ch. 221.

**Inchoate Right of Dower.**]—The court has jurisdiction in a suit, as well as on a petition, to decree a sale of an inchoate right of dower. *Cassey* v. *Cassey*, 15 Gr. 399.

**Rescinding Contract.**]—Where in a suit by a vendor for specific performance, a decree for a sale has been made, with a proviso that if the sale prove abortive the contract is to be

rescinded, and the sale proves abortive, and an application is made to rescind the contract, it must be shewn that the purchase money has not been paid. *Grange* v. *Conroy*, 1 Ch. Ch. 198.

**Settled Estate** — *Sale of Part.*] — The court of chancery has no power to order the sale of a portion of a settled estate in order to raise money to make improvements upon the remainder; nor can it authorize a mortgage for that purpose. *Re Moore's Estate*, 6 P. R. 281.

**Settled Estates Act** — *Sale of Vacant Land—Life Tenant—Income—Taxes—Infant —Maintenance.*] — The Settled Estates Act was intended to enable the court to authorize such powers to be exercised as were ordinarily inserted in a well drawn settlement, and ought accordingly to receive a liberal construction. Where the widow of the settlor was entitled to the whole income of the estate for her life, not charged with the support and maintenance of the children, who were the remaindermen, an order was made, upon the petition of the widow and adult children and with the approval of the official guardian, authorizing the sale, in the widow's lifetime, of vacant and unproductive land forming part of the estate, notwithstanding that the effect would be to relieve the widow of the annual charge upon such land for taxes, to add to her income the profit to be derived from the investment of the proceeds of the sale, and to deprive the remaindermen of the benefit of any increase in the value of the land; the price offered being the best obtainable at the time or likely to be obtained in the near future; the court deeming the sale in the best interests of all parties; and the widow agreeing to charge her income from the settled estates with the obligation of maintaining the infant remainderman. *Re Hooper*, 28 O. R. 179.

**Time for Sale.**]—Where a decree directed a sale of certain property at the expiration of a year from the date of a master's report, a sale at the end of a year from the date of the decree, instead of the date of the report, was allowed under special circumstances, on the ground that the decree was in effect equivalent to a judgment at law. *Porte* v. *Irwin*, 8 P. R. 40.

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## IX. Setting Aside or Withdrawing from Sale.

**Additional Purchase.**] — By an agreement between plaintiff and defendant, defendant agreed to sell and plaintiff to buy certain buildings specified, "with the land which they occupy, with the whole of the dam and water frontage" for £3,000; £250 to be paid on 1st January, £250 on 1st March, &c.; plaintiff to have full possession by 1st February, and a free and satisfactory deed to be given on 1st January, when the £250 was to be paid:—Held, that upon the evidence, stated in the report, the agreement to purchase the saw mill, in addition to the other buildings, was to be considered as an additional purchase only, not as an alteration or abandonment of the first agreement. *Snyder* v. *Proudfoot*, 15 U. C. R. 532.

**Attempt to Resell.**]—Under an agreement with plaintiff, dated 18th September, 1874, defendant agreed to purchase certain land for $6,500, $500 to be paid in cash, $1,000 and interest on the 1st May, 1875, and two further instalments of $500 each on the 1st May, 1875, and 1876, respectively, and defendant to assume a mortgage on the property of $4,000. Defendant was to recoup the plaintiff for any interest he should pay on the mortgage up to 1st May, 1875, and was to have a deed on the payment of the moneys and mortgage, and possession on payment of the instalment on 1st May, 1875. The agreement then provided for time being of the essence of the contract; and that unless said payments were punctually made the agreement should be null and void, and the plaintiff should be at liberty to resell the land. Defendant having made default in payment of the $1,000 on the 1st May, 1875, the plaintiff attempted, without notice to defendant, to resell the property by auction, but failed to do so. He also, after the 1st May, made arrangements with the tenants in possession for an increased rent, payable monthly, instead of yearly as before. On the 18th of the same month he sued the defendant on the agreement for the instalment due:—Held, that neither the offering the property for sale, without any sale being effected, nor the new arrangements made with the tenants, amounted to an election by the plaintiff to put an end to the agreement, so as to form a defence to the action. *McCord* v. *Harper*, 26 C. P. 96.

**Conditional Rescission.**] — In 1850 S. agreed with M. for the purchase of 100 acres of land, and they entered into a written contract. S. having paid part of the purchase money, applied to M., offering the remainder, and requiring his conveyance. M. then stated that he had no title to convey, offered to pay back the money received, and allow S. to remain in quiet possession of the land. This was done, and the written contract was given by S. to M., to be rescinded. M. then conveyed the land to his son, who, with knowledge of these facts, brought ejectment against S. At the trial the written agreement was put in as evidence against S., and was held to be an admission by him of the title of the plaintiff at law, and a verdict was accordingly recovered against S. On a bill filed for the specific performance of the original contract, and to stay the action at law:—Held, that the rescission of the contract was only conditional, M. then undertaking not to disturb the plaintiff in possession; that the use made of the contract at the trial at law re-established it as against M. and his co-defendant, and that the plaintiff was entitled to a decree for specific performance, and to a perpetual injunction against the action at law. *Stuart* v. *McNab*, 10 Gr. 234.

**Conveyance Accepted.**]—H.D.C. agreed in writing with C. C. on 17th January, 1882, to sell to him lots 37 and 39 for $5,450, payable $1,791 on the delivery of the deed, and upon the title to lot 37 being found satisfactory to C. C. or his solicitor, and upon a quit claim deed of lot 39 being delivered; the balance to be secured by mortgage; said sale to be completed within thirty days, otherwise the deposit of $25 to be forfeited. H. D. C., bonâ fide believing such to be the case, represented to C. C. at the time of the sale that a patent from the Crown had issued for lot 37, and relying on this representation C. C. entered into the agreement and afterwards orally agreed to sell lot 37 at a large advance to one R. On 10th February, 1882, the con-

veyance was executed, the bulk of the purchase money, $4,025, having been paid prior thereto in cash, a promissory note being taken for the balance in lieu of a mortgage. It afterwards appeared that no patent had ever issued for lot 37, and notwithstanding the efforts of H. D. C., it was not till 25th April, 1883, that the department at length issued a patent, and then only for four chains of the lot, leaving ninety links outstanding. In February, 1883, C. C. had told H. D. C. that he would not keep the property, that by reason of no patent having issued, R. had withdrawn from his offer, and he demanded his money back with his actual expenses incurred. H. D. C. refused to cancel the sale, and C. C. now took these proceedings to have the sale rescinded, and the deed delivered up to be cancelled:—Held, that there having been no actual fraud, and the deed of conveyance having been executed, the plaintiff could not have the relief sought for. Wilde v. Gibson, 1 H. L. Cas. 605; Brownlee v. Campbell, 5 App. Cas. 925; and Hart v. Swaine, 7 Ch. D. 42, distinguished. *Cameron* v. *Cameron*, 14 O. R. 561.

**Deficiency in Quantity.**]—The plaintiff purchased from defendant, who held a bond for a deed from one C., his right to certain land. Before the purchase money was paid by plaintiff, and after defendant had obtained his deed from C., defendant conveyed to a railway company a small part of the lot for their road. It appeared that the railway had been surveyed before the sale to the plaintiff; that the plaintiff had taken and for some time held possession of the land under his agreement; and defendant declared that he was ready to convey to the plaintiff on receiving what was due, giving him credit on account for the sum paid by the company:—Held, that under these circumstances the plaintiff could not treat the contract as rescinded, and recover the amount paid by him, with interest, as moneys had and received. *Reynolds* v. *Crawford*, 12 U. C. R. 168.

After contracting for the purchase of land, the vendee discovered a deficiency in the quantity sold, and insisted upon an abatement of price in respect thereof. After a good deal of negotiation in respect of title as well as the deficiency, the purchaser proposed to waive the contract upon condition of the vendor paying the costs incurred by the purchase, and interest from the time of the contract, which was acceded to by the vendor. After some weeks, a bill of charges was furnished to the vendor's solicitor, but he, objecting to some of the items, tendered the amount less three items (amounting in all to about £4 or £5.) A few days afterwards he offered to pay the full costs, but this was also refused, and a bill was filed praying for the specific performance of the contract:—Held, that what had taken place between the solicitors was no abandonment of the contract, and that the plaintiff was entitled to have it specifically performed. *McDonald* v. *Jarvis*, 5 Gr. 568.

**Delay.**]—Where vendors had not furnished an abstract, notwithstanding repeated notices, and had at length sued at law on a note given by the purchaser for part of the purchase money, the purchaser filed a bill alleging that by reason of the delay the contract was at an end, and praying an injunction to stay the suit at law. The vendors failing to justify their neglect, the court granted the injunction. *Walton* v. *Armstrong*, 11 Gr. 379.

**Election to Forfeit** — *Extension of Time.*]—Plaintiff, on 20th January, 1866, agreed under seal with defendants, to sell to them certain land for $5,000: $2,500 to be paid on 1st April, 1866, and $2,500 on 1st May, 1866, with interest; and to convey on these payments being made. Defendants covenanted to pay, and that if they made default "the agreement should be void and of no effect, and all moneys paid thereunder up to the time of such default should be forfeited to the plaintiff;" and that time should be of the essence of the contract. To an action on this covenant, alleging non-payment by defendants, and their neglect to complete the purchase, defendants pleaded, on equitable grounds, that defendants went into possession and paid $1,000; but having made default in a further payment, the plaintiff evicted and kept them out of possession, and elected to treat the agreement as forfeited, whereby the covenant became void. At the trial it appeared that the whole purchase money was $6,000, of which $1,000 was paid down, and $1,000 more on the 7th April, 1866, when, by an indorsement under seal on the agreement, the plaintiff extended the time for payment of the balance to 20th May, 1866. Defendants had taken possession under a previous lease, in May, 1865, and expended about $4,000 in boring for oil, and had a steam engine on the premises. They were not interfered with until about the 25th May, when they were about to move this engine, which the plaintiff refused to allow, saying that they had forfeited the land, having failed to make their payments, and that the property was his and they were trespassers. He brought several men with him, who threatened defendants with violence if they attempted to cross the fence into the premises, and he nailed up the engine house, refusing to let defendants enter it. The plaintiff gave evidence tending to shew that his object in this was to obtain payment. The jury having found for defendants upon the plea:—Held, that, under the agreement, defendants were not entitled to rescind on forfeiture of the moneys paid, but that the option was with the plaintiff. (2) That there was evidence to go to the jury that the plaintiff had elected to forfeit the agreement as alleged; and the verdict was upheld. (3) That the indorsement extending the time for payment did not do away with the provision for forfeiture, but incorporated the extended time in the agreement as if originally there. *Marcus* v. *Smith*, 17 C. P. 416.

**Failure of Title.**]—Where upon the sale of lands the purchaser pays his purchase money, and is let into possession, but upon a reference it is found the vendor cannot make a good title, and the court rescinds the contract, the purchaser is bound to redeliver possession, on being repaid his purchase money, and if he insists on interest on the purchase money he must submit to account for rents and profits. *Simmers* v. *Erb*, 21 Gr. 289.

Where two owners of land exchange, and mutual conveyances are executed, and one of them loses his estate in consequence of the want of title in his grantor, he is not obliged to sue on the covenants in the deed conveying the property to him, but may file a bill for a rescission of the bargain, and a restoration of

the lands conveyed by him. *Rose* v. *Anger*, 22 Gr. 525.

**Fraud.**]—Where a party complaining of fraud in the execution of a contract filed a bill to have it rescinded, and it appeared that after discovering the alleged fraud the vendee had continued to deal with the property:—Held, that on that account, even if the fraud had been clearly established, the vendee was not entitled to the relief prayed; and that the same rule must prevail in granting or refusing relief in cases where the title to the lands in question is vested in the Crown, as where the lands have been granted. *Bowen* v. *West*, 1 E. & A. 117.

A person agreed with the owners of lands for the purchase of certain lots at stipulated prices, and he was to have a certain time to accept. The purpose was to form a company to buy at an advance. To facilitate this the real prices were to be concealed. One of the vendors was to write a letter purporting to offer the whole at an advanced price which he named; the interest of the other, whose judgment in such matters parties would be likely to rely on, was not to appear, and he was to write a letter recommending the transaction. The project was successful; the property was bought, conveyed and paid for. The shareholders before completing the transaction had notice that something was wrong, but they carried out the purchase notwithstanding, and did not object to the transaction until after oil lands had greatly fallen in the market:—Held, that the company were entitled to a rescission of the contract, and to an order for all the defendants jointly to repay the purchase money; 16 Gr. 147. The court of appeal (reversing the decree below in this respect) held that it was too late to rescind the purchase; but that the company were entitled to a decree for payment of the agent's profit, first against the agent himself, and in default of his paying, then against the other parties. *Lindsay Petroleum Oil Co.* v. *Hurd*, 17 Gr. 115. Upon appeal to the privy council, the decree of the court of error and appeal was reversed, and it was held that the contract must be wholly rescinded, the price repaid, and the land reconveyed. L. R. 5 P. C. 221.

**Injunction to Restrain Second Sale.**]—The court will restrain a vendor from selling leasehold property previously contracted to be sold, if the vendee has not been negligent in carrying out his part of the agreement. *McLean* v. *Coons*, 3 Gr. 112.

**Innocent Misrepresentation**—*Common Error—Failure of Consideration.*]—An executed contract for the sale of an interest in land will not be rescinded for mere innocent misrepresentation. But where, by error of both parties and without fraud or deceit, there has been a complete failure of consideration, a court of equity will rescind the contract and compel the vendor to return the purchase money. Thus where, on the sale of a mining claim, it turned out that the whole property sold was included in prior claims whereby the purchaser got nothing for his money the contract was rescinded though the vendor acted in good faith and the transaction was free from fraud. *Cole* v. *Pope*, 29 S. C. R. 291.

**Judgment against Purchaser.**]—Where judgment is registered against the vendee prior to the conveyances being executed, the vendor is not entitled to a rescission of the contract in default of payment, but to a decree of foreclosure or sale. *Galt* v. *Bush*, 8 Gr. 360.

**Laches.**]—Semble, that the peculiar condition of real property here, and the peculiar practice which has grown up in relation to sales, may require a modification of English cases as to the doctrine of laches. *O'Keefe* v. *Taylor*, 2 Gr. 95.

Semble, that when one party to a contract (in which time is not of the essence) desires to put an end to the contract in consequence of the laches of the other party thereto, the proper mode of doing so is to give notice that unless completed within a period to be fixed, the contract will be considered at an end. *Ib.*

**Mistake**—*Reservation of Minerals.*]—The E. & N. R. W. Co. executed an agreement to sell certain lands to H., who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him which he refused to accept as it reserved the minerals on the land while the agreement was for an unconditional sale. In an action by H. for specific performance of the agreement the company contended that in its conveyances the word "land" was always used as meaning land minus the minerals:—Held, reversing 6 B. C. Rep. 228, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance. *Hobbs* v. *Esquimalt and Nanaimo R. W. Co.*, 29 S. C. R. 450.

**Purchaser's Right.**]—A purchaser cannot file a bill to rescind his contract, but must wait until the vendor attempts to enforce it. *McDonald* v. *Garrett*, 7 Gr. 606.

**Refraining from Bidding.**]—Where, at a sale under a power in a mortgage, out of twenty-five or thirty persons at a sale, three or four were induced to refrain from bidding, because they were informed that a person attending intended to buy the property for the family of the debtor, the court refused to set aside the sale, which was made to such person at a small advance upon the upset price, although he purchased for the benefit of persons other than the family of the debtor. *Brown* v. *Fisher*, 9 Gr. 423.

**Representations not Fulfilled.**]—The owner of a mill wrote to an intending purchaser, "I will sell the mill as it now stands at G., with all rights and privileges belonging to it, as sold me; and I will guarantee to give a head of five feet, by laying out about £30; but as it is, there are four feet, and there is water enough to run ten run of stones if necessary:"—Held, that these representations amounted to express guarantees upon the several points embraced in them, and it being shewn that a head of five feet of water could not be obtained except by an outlay of a large sum of money; and that raising the water to that height would have the effect of damming back the water on the lands of parties higher up the stream, and also of diverting water to which the riparian proprietor on the other side of the stream was entitled, the court ordered the agreement

entered into to be rescinded, and the vendor to pay the costs of the suit and the amount expended in repairing the premises by the vendee, who was to account for rents and profits during his possession. *Gale* v. *Hubert*, 6 Gr. 312.

*See* FRAUD AND MISREPRESENTATION, V.—MISTAKE.

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## X. VENDOR'S LIEN.

**Advances**—*Notice.*]—W. S., being indebted to R. & Co., who held a saw mill and timber license, &c., belonging to W. S. in their own name, as security therefor, wrote to them that he had arranged with his son W. A. S. for the transfer to him of his business, and upon his arranging with R. & Co. the liability of W. S., that W. A. S. was entitled to be placed in the position of W. S. with respect to the property held by R. & Co., and that on settling that liability they were to convey to W. A. S. By a subsequent agreement W. S. agreed with W. A. S. that the latter was to pay off the liabilities of W. S. in two years, upon which W. S. was to transfer to him other lands than those held by R. & Co. Subsequent advances were made by R. & Co. to W. A. S. The defendant B. afterwards paid off R. & Co., and R. & Co. and W. A. S. joined in conveying the property in question to the defendant B., who subsequently made advances to W. A. S. and to his assignee, on his becoming insolvent. To some of these advances the plaintiffs, the executors of W. S., agreed by instrument under seal, stipulating that it should not affect their lien as against any one but the defendant B. They then claimed a lien on the lands for the amount of the liabilities of their testator W. S., which W. A. S. had agreed to pay as the consideration for the transfer to him of the business:—Held, that no such lien existed, even if the defendants had had notice of the transaction between W. S. and W. A. S.:—Held, also, that even if such lien existed B. could not be said to be affected with notice of it. *Scott* v. *Benedict*, 14 S. C. R. 735, 5 O. R. 1.

**Bond.**]—L. sold land to R., who paid £175 in cash, and assumed two mortgages made by L. as one-third of the consideration agreed on; and a mortgage was executed by R. to secure another third, L.'s wife refusing to bar her dower, a bond was executed by R. providing for payment of the remaining one-third at a certain period. It was arranged that, in case of the death of L. or his wife before the time fixed, the money secured by the bond was to be paid within one year thereafter to the survivor:—Held, that L. had not waived his lien for the money secured by the bond. *Rutherford* v. *Rutherford*, 11 Gr. 505.

**Buildings by Vendor**—*Extras.*]—The owner of certain land agreed with a company to build a factory thereon, which, when completed, was to be conveyed to the company in return for a certain number of shares. During the progress of the building certain extra work for the company, agreed to be paid for in cash, became necessary, and was begun before but not completed until after the execution of the conveyance to the company:—Held, that the owner had no vendor's lien for the value of the extra work. *Re Toronto Drop Forge Co.*, 24 O. R. 191.

**Endorsed Note.**]—A tract of land was bought by several parties with a view to laying off a portion into building lots and selling it. For greater facility in doing so the legal estate was vested in one of them, as trustee, however, for the several parties interested. Subsequently one of the owners sold out his share, receiving in payment notes of land made by his vendee and indorsed by two others:—Held, that the vendor retained no lien for the purchase money unpaid. *Boulton* v. *Gillespie*, 8 Gr. 223.

**Enforcement.**]—A vendor who has conveyed without receiving the purchase money, is entitled against the vendee to a decree for the sale of the property and payment of any deficiency. Where a purchase is made by one in his own name, but on the joint behalf of himself and another, the decree for payment of the purchase money may be against both. *Sanderson* v. *Burdett*, 16 Gr. 119. See *S. C.*, 18 Gr. 417.

In case of a decree for unpaid consideration money, the sale of the property should be provided for, and in case the same does not realize sufficient to pay the money with arrears of interest, there should be a personal decree for payment of the balance by the purchaser. *Skelly* v. *Skelly*, 18 Gr. 495.

**Equitable Assignment.**]—On the occasion of the defendant effecting a purchase of land from one H., against whom the plaintiff had a claim for money advanced to effect the original purchase jointly by H. and himself, the plaintiff refused to join in the conveyance of a portion of the land until assured by his solicitor, with defendant's assent, that part of the purchase money would be paid to the solicitor, out of which the solicitor agreed to pay the amount due the plaintiff, whereupon the plaintiff joined in the conveyance to the defendant, which was duly registered. The defendant and H. however made other arrangements for discharging all the purchase money, no portion of which was paid to the solicitor or the plaintiff:—Held, that under the circumstances an equitable assignment had been made of so much of the purchase money as the plaintiff's demand amounted to, and for which purchase money H. had a vendor's lien; and that the defendant was bound to pay the same to the plaintiff. *Armstrong* v. *Farr*, 11 A. R. 186.

**Exchange.**]—J. and S., the owners of two distinct parcels of land, agreed to exchange. S.'s land was subject to a mortgage, which he agreed to pay off but did not; and J. was compelled to redeem the same:—Held, that J. was entitled to a lien on the land conveyed by him to S., as for unpaid purchase money, for the amount paid to redeem the mortgage. *Seney* v. *Porter*, 12 Gr. 546.

**Form of Action.**]—Where the locatee of the Crown assigned his interest absolutely, and the purchaser gave his bond for the purchase money, payable if the title should prove good:—Held, that a bill was wrong in treating the transaction as a contract, and praying specific performance; and that the bill must be amended, and a lien prayed, to entitle the vendor to relief. *Sanderson* v. *Burdett*, 16 Gr. 119.

**Infant Purchaser**—*Mortgage.*]—The defendant, a minor, purchased an estate, and gave the vendor a mortgage for the purchase money. The mortgage was afterwards assigned to the plaintiff. On coming of age the defendant repudiated the mortgage, but adopted the purchase, by bringing an action to recover possession. The mortgage, being the deed of an infant, was held absolutely void. But it was also held that the mortgage being void, a lien for the purchase money resulted to the vendor, and that such lien passed to the plaintiff by assignment of the mortgage. *Grace* v. *Whitehead*, 7 Gr. 591.

**Insurance**—*Incumbrance.*] — One of the conditions of a policy of insurance was that every incumbrance affecting the property at the time of insurance must be mentioned in the application, otherwise the policy should be void. The property in question had been conveyed to the plaintiff and his wife by one S., and wife, in consideration, as expressed in the deed, of a then subsisting indebtedness by S. and wife to plaintiff, and of a bond by plaintiff alone to support S. and wife during their lives, who by the said deed released to plaintiff and wife all their claims upon the property. In his application for insurance the plaintiff stated the property to be unincumbered:—Held, affirming 16 C. P. 493, that there was no lien for purchase money, and that the property was not incumbered. *Mason* v. *Agricultural Mutual Assurance Association of Canada*, 18 C. P. 19.

Remarks upon the equitable doctrine of the vendor's lien for unpaid purchase money. *Ib.*

Held, that a vendor's lien for unpaid purchase money, according to the law of Quebec, of land situate in that Province, was an incumbrance within the meaning of the question in that behalf in the application for insurance in this case. *Chatillon* v. *Canadian Mutual Fire Ins. Co.*, 27 C. P. 450.

Held, also, that a person may truly state that he owns a building erected on the land, notwithstanding such vendor's lien; and also that he occupies such building, notwithstanding that his son and son-in-law live with him. *Ib.*

**Judgment against Purchaser.**] — Where the purchase money of an estate was left unpaid, and a creditor of the purchaser (without notice) sued out an execution against lands, under which the premises in question were sold to defendant, who had notice, the vendor's lien for the unpaid purchase money was held to attach in defendant's hands. And quære, whether, if the purchase at sheriff's sale had been completed without notice, the conveyance by the sheriff would not have conveyed the property subject to all existing equities against the debtor. *Strang* v. *Lewis*, 1 Gr. 443.

Land subject to a vendor's lien for unpaid purchase money, was sold under execution to a purchaser without notice. The execution debtor subsequently repurchased the land from the sheriff's vendee in the name of a third person who conveyed to a brother of the debtor in trust for the latter, who, having become insolvent, made an assignment under the Insolvent Act of 1864:—Held, that the vendor's lien attached on the land in the hands of the assignee; but, semble, that the sheriff's vendee would have held free from the lien. *Van Wagner* v. *Findlay*, 14 Gr. 53.

A vendor's lien for unpaid purchase money has priority over the lien created by a registered judgment against the vendee. *Hughson* v. *Davis*, 4 Gr. 588.

A purchaser of real estate gave his creditor a mortgage thereon for a balance of purchase money, which was not registered until after a judgment against the purchaser had been registered:—Held, that the judgment had priority over the mortgage, although the deed to the purchaser had never been registered; and that the vendor retained no lien for the unpaid purchase money. *Burgess* v. *Howell*, 8 Gr. 37.

The lien of a vendor for purchase money is not waived by his suing and recovering judgment for the amount, although such recovery is subsequent to another judgment registered against the purchaser. *Flint* v. *Smith*, 8 Gr. 339.

**Judgment against Vendor.**]—To an action for the purchase money of land sold and conveyed, defendant pleaded equitably, that the plaintiff retained a lien on the land in equity for the price, and had an interest by reason of such lien, which might be bound by judgment; and that two judgments had been recorded against the plaintiff and remained unpaid, for an amount exceeding that sued for:—Held, on demurrer, no defence. *Shaw* v. *Ross*, 17 U. C. R. 257.

**Lands and Chattels.**]—B. having an interest in unpatented lands, entered into partnership with D. and A., and each acquired an undivided one-third in the lands. A. then conveyed his third to D., who continued the business with B., having an undivided two-thirds, and also owning chattels in partnership with B. B. afterwards agreed to withdraw and sell all his interest in both land and chattels to D. in a "lumping bargain," for £350. Conveyances of the chattels and of the real estate were then executed, in which the consideration stated was merely nominal, and there was no means of distinguishing the price of the land from that of the chattels. Notes were given for the purchase money, and possession of all the chattels was taken by D. On a bill filed by indorsees of the notes against D. and purchasers under him, claiming a lien upon the land:—Held, that the mode of sale and the circumstances shewed it to be the intention of the parties that no lien should exist. *Wilson* v. *Daniels*, 9 Gr. 491.

**Maintenance.**]—Land being conveyed in consideration of the vendee providing the vendor with maintenance, washing, &c., the vendor retains a lien for the consideration. *Paine* v. *Chapman*, 6 Gr. 338.

**Mortgage for Purchase Money**—*Adding Claims.*]—The vendor of lands, having a mortgage on them for the purchase money, accepted from the purchaser a transfer of other lands, the price of which he indorsed on the mortgage; and the lands so transferred being subject to incumbrances, the vendor took from the purchasers their bond to discharge them, and they having failed to do this the vendor was held entitled to claim under his mortgage against the lands sold by him the amount of such incumbrances, the rights of no third party having in the meantime intervened. *Maulson* v. *Moore*, 8 Gr. 448.

**Mortgage.**]—C., on the 20th August, 1874, sold land to one G. for $8,500, and took a mortgage on the property for $6,000, and two joint notes of G. and M. for the balance:—Held, that C. having taken a mortgage on the land for part of the purchase money, had waived his vendor's lien for the remainder. *Driffill* v. *McFall*, 41 U. C. R. 313.

Where a vendor on the sale of land takes a mortgage thereon for part of the price agreed to be paid, he loses his lien for such portion as remains unsecured. *Anderson* v. *Trott*, 19 Gr. 619.

——— *Notes.*]—On the sale of land the purchaser paid a certain sum, gave a mortgage on other property of his for another portion; and for the balance four notes were to be given, made by the purchaser, and such other persons as would render them saleable without indorsement by the vendor. Only one of the notes was delivered:—Held, that the vendor retained no lien. *De Gear* v. *Smith*, 11 Gr. 570.

**Note.**]—A vendor who takes as security for the purchase money the joint and several notes of the vendee and a surety, does not lose his lien on the estate for the purchase money, though he took no mortgage therefor. *Colborne* v. *Thomas*, 4 Gr. 102.

*See*, also, *Mitchell* v. *McGaffey*, 6 Gr. 361.

On a sale of land for £3,000, the purchaser paid on the execution of the conveyance £2,750, and gave his notes for the balance, payable in three and four years; afterwards he mortgaged to his father for the £2,750 alleged to have been advanced by him to his son to effect the purchase. The purchaser died intestate without issue, and before the notes fell due the vendor filed a bill against the father as heir-at-law, alleging that he intended to sell the property so as to defeat the vendor's lien, and praying that it might be declared that he had a first lien upon the estate for the amount due him:—Held, that he was entitled to a decree for that purpose, but without costs. *Foulds* v. *Powell*, 6 Gr. 375.

On the sale of land notes were taken by the vendor for a portion of the purchase money:—Held, that the vendor retained his lien for the amount unpaid, although, in fact, he did not intend to retain any lien; and one witness swore that "the notes were taken in payment of the land"—it appearing that there was no agreement that there should be no lien. *McDonald* v. *McDonald*, 16 Gr. 678.

The vendor took promissory notes for the purchase money, indorsed and sold some of them, and was liable on these in case of non-payment by the makers:—Held, that on the sale of the property these were entitled to priority of payment over the notes retained by the vendor. In such a case notes indorsed without recourse are payable pari passu with the retained notes. *O'Donoghue* v. *Hembroff*, 19 Gr. 95.

**Parties.**]—In a suit to enforce a lien for an annuity secured upon real estate, it is not necessary to make the personal representative of the person bound to pay a party, unless an account of the personal estate of the deceased is asked. *Paine* v. *Chapman*, 7 Gr. 179.

Where a suit to enforce by sale a vendor's lien is instituted against the heirs-at-law of the purchaser, the widow of the vendee is a necessary party in respect of her right to dower. *Ib.*

**Payment into Court.**]—The order of the 29th June, 1861, directing money ordered to be paid, to be paid into some bank, does not apply to a suit by a vendor to enforce his lien for purchase money. In a suit of this nature, it is not necessary that the affidavit of the plaintiff as to non-payment should negative the fact of possession or the receipt of rents and profits. *Sawdon* v. *Heasty*, 1 Ch. Ch. 254.

**Performance of Agreement.**]—In the absence of agreement or circumstances operating to the contrary a vendor's lien arises whenever land is conveyed in consideration of acts to be done by the grantee; the right is not limited to cases of conveyance for a money consideration. Where, therefore, upon the partition of a piece of land held by tenants in common, one grantee, as part of the consideration for his grant, covenanted to obtain for the other tenants in common a release of the contingent interest of two persons in the land conveyed to them, it was held that a lien attached upon the portion conveyed to him for the due performance of this covenant. *Ward* v. *Wilbur*, 25 A. R. 262.

**Railway.**]—It is clearly settled that the rights and franchises of a railway company do not prevail over a vendor's lien; and where land was sold to a railway company, for the purposes of the road, and a mortgage taken to secure the unpaid purchase money:—Held, that the lien was not lost. *Galt* v. *Erie and Niagara R. W. Co.*, 15 Gr. 637.

For compensation for lands taken by railway company. See *Ross* v. *Grand Trunk R. W. Co.*, 10 O. R. 447.

**Retiring Partner.**]—One of two partners on retiring conveyed all his interest in the partnership lands, mill, and stock-in-trade, to the remaining partner, who gave him his note for £500, payable on the 1st September, 1867, agreeing at the same time, in case of his effecting a sale of the premises before that time, to pay the note though not due. There was no evidence of any express agreement for lien on the property assigned:—Held, that the circumstances negatived the retention of any vendor's lien by the retiring partner. *Mathers* v. *Short*, 14 Gr. 254.

**Sale before Chancery Act.**]—See *Davis* v. *Bender*, 4 Gr. 620.

**Special Act**—*Buffalo and Lake Huron Railway.*]—See *Paterson* v. *Buffalo and Lake Huron R. W. Co.*, 17 Gr. 521.

**Surety.**]—D., having negotiated for the purchase of unpatented lands, and the vendee of the Crown requiring security for the purchase money, obtained from his father a letter addressed to himself as follows: "If you make the contemplated purchase from H. of wild lands, amounting to 16,000 acres, at 86 per acre, and deducting all amounts due or hereafter payable on the same, I will become your security for the payment of the

principal on the Crown lands, and interest: and the interest on all deeded lands. P.S.—I will see you have £2,000 to pay in cash when all papers are signed." The vendor having conveyed to the son, and taken the bonds of the father for the price above the £2,000, and without any reference to it, one of which bonds was subsequently delivered up to the father upon other security being given, and a large portion of the lands to which it referred having been conveyed by the son to the father:—Held, that the vendor was not entitled to enforce his lien against these lands in the hands of the father, for the portion of the £2,000 remaining unpaid; but that his lien therefor would attach only upon the lands remaining in the possession of the son. *Hellikwell* v. *Dickson*, 9 Gr. 414.

The principle that a vendor, by taking from a purchaser an indorsed note as security for unpaid purchase money, does not lose his vendor's lien, is equally applicable where the security given is a bond, in which a third person joins as surety. *Sheanan* v. *Parsill*, 18 Gr. 8.

**Timber.**]—The plaintiff sold woodland to defendants on credit; stipulating that any cordwood or timber removed from the premises by defendants should be paid for at specific rates, if the plaintiff should demand such payment, the sums so paid to be credited to defendants on instalments due or to become due. Defendants cut a quantity of cordwood, and were removing it before making the payments:—Held, that the plaintiff, as vendor, had no lien on the cordwood, and was not entitled to restrain the removal of what had been cut. *Smith* v. *Bell*, 11 Gr. 519.

**Vendor's Creditor Enforcing Lien.**]—A bill was filed by a creditor against his debtor to obtain the benefit of a vendor's lien, and the decree declared the lands (four parcels) subject to the lien for unpaid purchase money, and directed an account to be taken of what was due to the vendor, and also to the plaintiff and other incumbrancers. It appeared that to one of the four parcels the vendor had not any title; and that the purchase had been of all at a gross sum of £2,000. After the accounts had been taken, one of the purchasers filed a petition praying for a reference back, with a view of obtaining an abatement of the purchase money on account of such defect; but, as this would have been in effect a varying of the decree, which could only be obtained upon a rehearing, the relief was refused; and quære, whether, after the delay that had occurred and the proceedings that had been taken, it would have been proper to grant leave to rehear. *O'Donohoe* v. *Armbroff*, 20 Gr. 350.

See LIEN, III., VI.

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XI. VENDORS AND PURCHASERS ACT.

**Abandonment of Contract.**] — On an application under R. S. O. 1877 c. 109, s. 5, the question of the abandonment of the contract between the parties cannot be raised. *Henderson* v. *Spencer*, 8 P. R. 402.

**Assignment of Mortgage.**]—In an application under the Vendors and Purchasers Act, R. S. O. 1887 c. 112, it appeared that a registered memorial of a deed poll or indorsement executed by the party assigning made on the back of a mortgage (describing it) habendum "to have and to hold the said mortgaged premises unto (assignee) his heirs and assigns, &c. . . . subject to the provisos and conditions in said mortgage, which said deed poll or indorsement by way of assignment, is witnessed," &c., was offered as evidence of the assignment: — Held, sufficient. *Re Mara*, 16 O. R. 391.

**Infants**—*Settlement.*] — Though on a bill filed for specific performance if the infant children ultimately entitled under the settlement were made parties, the court might order the completion of the sale and payment of the money into court for investment, where the corpus of the estate would be protected for the children, yet on application under the Vendors and Purchasers Act, in the absence of the other parties to the settlement, it would not compel the purchaser to accept the title. *In re Treleven and Horner*, 28 Gr. 624.

**Mortgage**—*Receipt.*]—A mortgage which contains an acknowledgment of receipt of the mortgage money, but no covenant for repayment of money, does not of itself afford conclusive evidence of a debt, so that the mortgagee or his assigns can maintain an action for its recovery. In this case it was shewn that no money was ever advanced by the mortgagee to defendant, the mortgagor, but that the mortgage was given for a debt due by defendant to one C., who in consideration of getting it agreed to relieve defendant from all personal liability; and the plaintiffs, assignees of the mortgage, were held not entitled to recover. Quære, whether s. 1, s.-s. 4, and s. 2 of the Vendors and Purchasers Act, R. S. O. 1877 c. 109, apply to such an action as this, or only to actions where the title to land is in question. *London Loan Co.* v. *Smyth*, 32 C. P. 530.

**Purchaser's Subsequent Default.**] — If under R. S. O. 1877 c. 109, the court adjudicates upon a question of title between vendor and purchaser, and directs the purchaser to carry out his contract, and the purchaser then fails to carry out the contract, it is unnecessary to bring an action for specific performance of the contract; the requisite relief may be had on notice of motion for payment of the purchase money, or in default a resale, &c. *Re Craig*, 10 P. R. 33.

**Scope of Inquiry.**]—The Act R. S. O. 1877 c. 109, is intended to provide for a simple case where there is no dispute as to the validity of the contract and the court ought not to enter upon the question of the validity of the title, until it is decided that the contract is binding. Henderson v. Spencer, 8 P. R. 402, not followed. *Re Robertson and Dagneau*, 9 P. R. 288.

On a petition under the Vendors and Purchasers Act, the question of the existence or the validity of the contract for sale cannot be tried, but only those matters which would be entertained upon a reference as to title under a decree for specific performance. The only parties necessary on such a petition are those who would be parties to a suit for specific performance, and therefore mortgagees who had been joined were dismissed with their costs. *Re MacNabb*, 1 O. R. 94.

*See Re Bingham and Wrigglesworth*, 5 O. R. 611.

**Scope of Reference.**] — The plaintiffs having agreed to lease to the defendants a certain property known as the "alternative site," for successive terms of fifty years, during all time then to come, at a fixed rental, an order was made, by consent, upon a petition by the defendants under the Vendors and Purchasers Act, directing the plaintiffs to deliver to the petitioners an abstract of title of the property, "and that it be referred to J. S. C., referee; and that all matters as to time of delivery of the abstract, the sufficiency thereof, and all subsequent questions arising out of or connected with the title to the said site, and the carrying out of the said agreements respecting the making of title to and the conveying of the said alternative site, be from time to time determined by the said referee, including the costs of the said reference, subject to appeal." Pursuant to this order, an abstract was carried into the referee's office and the title was accepted by the defendants, who had before this been and since continued in possession of the property. The terms of the lease not having been settled by the referee, and no rent having been paid by the defendants, while the reference was still pending this action was brought to recover the rent of the property from the time at which it was agreed the first term should begin. By s. 4 of the Vendors and Purchasers Act, R. S. O. 1897 c. 134, any question arising out of or connected with the contract, excepting a question affecting the existence or validity of the contract, may be the subject of adjudication:—Held, that the order directed a reference of all questions and matters arising out of the agreements and the carrying of them into effect; that the settlement and payment of the rent was one of the matters virtually, if not expressly, embraced in the reference; that it was a matter in respect of which an order might be made under s. 4; that the plaintiffs could not, without the leave of the court, single out one of the matters so pending and bring and sustain a separate action in regard to it; and therefore this action should be perpetually stayed. Frank v. Bassett, 2 My. & K. 618, Bell v. O'Reilly, 2 Sch. & Lef. 430, and Prothero v. Phelps, 25 L. J. Ch. 105, referred to. *City of Toronto* v. *Canadian Pacific R. W. Co.*, 18 P. R. 374.

**Unorganized Territory.**] — Notwithstanding anything in R. S. O. 1897 c. 109, s. 7, and R. S. O. 1897 c. 51, s. 185, Judges of district courts who are local Judges of the high court, have no jurisdiction to deal with applications under the Vendors and Purchasers Act, or under the Land Titles Act. *In re Michell and Pioneer Steam Navigation Co.*, 31 O. R. 542.

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## XII. Miscellaneous Cases.

**Agreement or Assignment.**]—Articles of agreement between O. of, &c., and S. of, &c., witnesseth that the said O. hath agreed to sell, and by these presents doth bargain and sell unto said S., all and singular that certain leasehold property, being composed of, &c., for £250, to be paid as follows: £50 down and the remainder in four equal annual instalments. Then followed a covenant by O. that if S. should duly pay said sums, and should pay and save harmless said O. from the rent due by the leases under which O. held, then O. would assign and convey said leasehold, and the appurtenances thereof, to S.:—Held, an agreement to assign only, not an assignment of O.'s interest. *Taylor* v. *Sutton*, 18 U. C. R. 615.

**Appurtenances.**] — K., the plaintiff, a barrister and solicitor, who had been in the habit of acting professionally for the defendant, purchased from the defendant a "cottage and lot on the south-east corner of Gerrard and Jarvis streets, in Toronto"—the conveyance for which was prepared by the plaintiff under the Short Forms of Conveyances Act, describing the premises by metes and bounds. These premises and a small additional portion of land were occupied by one L., as tenant of the defendant, and at the extreme limit thereof was a water-closet, which at the time of the conveyance to the plaintiff was used with the premises:—Held, that the water-closet passed as appurtenant to the cottage, although distant nearly two feet from the extreme limit of the land conveyed to the plaintiff, and although defendant swore that he had never intended to convey any interest therein to the plaintiff. *Kerr* v. *Coghill*, 25 Gr. 179.

**Assignment** — *Novation—Surety.*] — An agreement for the purchase and sale of certain specified lots of land in consideration of a price payable partly in cash and partly by deferred instalments on dates therein specified was subject to payments being made in advance of those dates under a proviso that "the company will discharge any of said lots on payment of the proportion of the purchase price applicable on each." The vendee assigned all his interest in the agreement to a third party by a written assignment registered in the vendors' office and at the time there were several conversations between the three parties as to the substitution of the assignee as purchaser of the lots in the place of the original vendee. The vendors afterwards accepted from the assignee several payments upon interest and upon account of the principal remaining due from time to time as lots and parts of lots were sold by him, and without the knowledge of the vendee arranged a schedule apportioning the amounts of payments to be made for releases of lots sold based on their supposed values, and in fact released lots and parts of lots so sold and conveyed them to sub-purchasers upon payments according to this schedule and not in the ratio of the full number of lots to the unpaid balance of the price and without payment of all interest owing at the time sales were made. The vendors charged the assignee with and accepted from him compound interest and also allowed the assignee an extension of time for the payment of certain interest overdue and thus dealt with him in respect to the property in a manner different from the provisions of the agreement in reference to the conveyance of lots to sub-purchasers:—Held, that the dealings between the vendors and the assignee did not effect a novation by the substitution of him as debtor in the place of the original vendee, or release the vendee from liability under the original agreement. Held, also, that though the course of dealing did not change the relation of the parties to that of principal creditor, debtor and surety, notice to the vendors of the assignment and their knowledge that the vendee held the land as security for the performance of the assignee's obligations towards him, bound the vendors so to deal with the property as not to affect its value injuriously or impede him in having recourse to

it as a security. In a suit taken by the vendors against the vendee to recover interest overdue, equitable considerations would seem to be satisfied by treating the company as having got from the third party on every release of a part of a lot the full amount that they ought to have got from him on a release for an entire lot, and as having received on each transfer all arrears of interest. In the absence of any sure indication in the agreement the ratio of apportionment of payments for the release of lots sold should be established by adopting the simple arithmetical rule of dividing the amount of the deferred instalments stated in the agreement by the total number of lots mentioned therein. *Wilson* v. *Land Security Company*, 26 S. C. R. 149. See *Land Security Company* v. *Wilson*, 22 A. R. 151.

**Church Property** — *Sale of.*] — See CHURCH.

**Commission to Agents on Sales.**]—See PRINCIPAL AND AGENT.

**Crops.**]—Held, that on the finding of the jury in this case the plaintiff must be taken to have paid the full price of the crop at the time of the bargain for its purchase, and the delivery being as complete as the circumstances would admit of, H.'s interest passed at that time to the plaintiff, and could not be divested by the subsequent sale to defendant. *Brady* v. *Arnold*, 19 C. P. 42.

Crops to be sown upon certain land may be the subject of sale, as any other after-acquired property, and the property in them will pass, when sown, if they are so described as to be capable of being identified when acquired. *Grass* v. *Austin*, 7 A. R. 511.

**Disputing Title.**]—It was proved that defendant went into possession as assignee of a person from whom the plaintiff had given a bond for a deed; that he had received indulgence as to the payments required by the bond; that he had expressly promised to go out of possession if such payments were not made; and that he was in default. This bond was in defendant's possession, and he had received notice to produce it:—Held, that defendant could not dispute the plaintiff's title; and that the bond not being produced, no secondary evidence was required of its contents. *Doe d. Lount* v. *Simpson*, 9 U. C. R. 544.

**Insurable Interest of Vendor and Purchaser.**]—*See* INSURANCE, III.

**Possession under Contract**—*Title from Another.*]—A person who makes an agreement to purchase land from another, and enters into possession of the land under the agreement, which he subsequently fails to perform, cannot defend an action of ejectment brought by the heir of the vendor for breach of agreement, by shewing a title purchased over his head; he must first surrender up the possession taken under the contract of purchase. *Doe d. Mill* v. *Mill*, 2 U. C. R. 26.

**Rights of Creditors of Purchaser.**]—W. had an interest in land as vendee, but had made default in paying the purchase money and otherwise. The plaintiff, B., and one H. had executions in the sheriff's hands on judgments recovered at law against W., H.'s execution having priority. The plaintiffs B. and D. (the latter having the control of H.'s executions) severally inquired of the vendor whether, if he purchased at sheriff's sale, the vendor would give him the benefit of the contract; and each had received a favourable answer. The defendant D. became the purchaser at sheriff's sale at a fair price. Meanwhile the vendor had brought ejectment to put an end to the original contract; and after the sheriff's sale, executed a writ of hab. fac. poss., but subsequently received payment from D. of the arrears, without objection by B. Two years afterwards B., who had kept alive his executions against W.'s land, filed a bill against D., claiming that he, B., was entitled to a lien on the interest acquired by D. in the land under this agreement with the vendor. Bill dismissed with costs, affirming the decree reported 11 Gr. 490. *Burnham* v. *Dennistoun*, 12 Gr. 135.

**Vendor Accounting for Purchase Money.**]—Held, affirming 26 Gr. 1, that the evidence shewed that the deceased, the plaintiffs' father, was the owner of half of lot 18; that the whole of the land having been sold with his assent, and the whole of the purchase money received by the defendant, it was so received for their joint use and benefit; and that the plaintiffs were therefore entitled to an account. Held, also, that the right to claim the purchase money did not arise till the sale, and therefore the Statute of Limitations did not prejudice the plaintiffs' claim. *Curry* v. *Curry*, 4 A. R. 63.

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*See* ASSESSMENT AND TAXES—FIXTURES, IV. —SET-OFF, I. 7—SPECIFIC PERFORMANCE.

## VENDORS AND PURCHASERS ACT.

*See* VENDOR AND PURCHASER, XI.

## VENDOR'S LIEN.

*See* VENDOR AND PURCHASER, X.

## VENIRE.

*See* TRIAL, IX. 5.

## VENIRE DE NOVO.

*See* PLEADING—PLEADING AT LAW BEFORE THE JUDICATURE ACT, VIII.

## VENIRE FACIAS.

*See* CRIMINAL LAW.

## VENUE.

*See* COUNTY COURTS, IV. 1—CRIMINAL LAW, VIII. 7—DEFAMATION, XI. 4—EJECTMENT, VI. 19—PLEADING—PLEADING AT LAW BEFORE THE JUDICATURE ACT, IV. 6—PLEADING IN EQUITY BEFORE THE JUDICATURE ACT, III. 7 — PLEADING SINCE THE JUDICATURE ACT, XII.—TRIAL, XV.

## VERDICT.

*See* NEW TRIAL, XVII.—PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, XXII.—REPLEVIN, II. 5—TRIAL, XVI.

## VESTING ORDER.

*See* VENDOR AND PURCHASER, VIII. 5.

## VICE-ADMIRALTY COURT.

*See* CONSTITUTIONAL LAW, II. 21.

## VOLUNTARY CONVEYANCE.

*See* FRAUD AND MISREPRESENTATION, III. 2 (c).

## VOTERS.

*See* INTOXICATING LIQUORS, IV. 2—MUNICIPAL CORPORATIONS, XIX. 14—PARLIAMENT, I. 12.

## VOTERS' LIST.

*See* INTOXICATING LIQUORS, IV. 2—PARLIAMENT, I. 12 (a).

## VOTING.

*See* PARLIAMENT, I. 13—RAILWAY, IV. 3.

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*See* MASTER AND SERVANT, II. 5—SHIP, XV.

## WAIVER.

Of breach of contract and resort for recovery of money paid. *Murray* v. *Hutchinson*, 14 A. R. 489.

Of claims against the Crown. *Starrs* v. *The Queen*, 1 Ex. C. R. 301; *McGreevy* v. *The Queen*, *ib.* 321, 18 S. C. R. 371; *Peterson* v. *The Queen*, 2 Ex. C. R. 67; *The Queen* v. *Malcolm*, 2 Ex. C. R. 357.

Of claim under chattel mortgage by directing sheriff to sell. *Segsworth* v. *Meriden Silver Plating Co.*, 3 O. R. 413.

Of condition for inspection in contract for purchase of grain. *Goodall* v. *Smith*, 46 U. C. R. 388.

Of condition in fire insurance policy. *Atlas Assurance Co.* v. *Brownell*, 29 S. C. R. 537.

Of condition making time the essence of the contract, by receipt of money after default. *Demorest* v. *Helme*, 22 Gr. 433.

Of condition requiring the approval of the court to sale, by acquiescing in proceedings to perfect the title. *McDonald* v. *Garrett*, 7 Gr. 606.

Of deed of composition and discharge, by arbitration on plaintiff's claim. *Piggeon* v. *Martin*, 25 C. P. 233.

Of defect in title to certain leases, by not repudiating bargain after discovering it. *Patterson* v. *Irwin*, 21 C. P. 152.

Of delay in delivering particulars of set-off, by not refusing to receive them. *McLellan* v. *McManus*, 1 U. C. R. 271.

Of delay in proceeding on bill, by filing answer. *Cotton* v. *Rodgers*, 7 P. R. 423.

Of excessive consignment of goods. *Goodyear Rubber Co.* v. *Foster*, 1 O. R. 242.

Of forfeiture by non-payment of assessments by member of benefit association. *Supreme Tent Knights of the Macabees of the World* v. *Hilliker*, 29 S. C. R. 397.

Of forfeiture by non-payment of instalment on sale of land, by receipt of interest. *Barber* v. *Allen*, 6 C. P. 329.

Of forfeiture, by receipt of rent. *Dobson* v. *Southeran*, 15 O. R. 15.

Of forfeiture of breach of covenant to repair. *Leighton* v. *Medley*, 1 O. R. 207; *Holderness* v. *Lang*, 11 O. R. 1.

Of illegality vitiating a contract, by conduct or pleading. *Association St. Jean Baptiste* v. *Brault*, 30 S. C. R. 598.

Of inspection of timber under contract of sale. *Aitcheson* v. *Cook*, 37 U. C. R. 490.

Of insufficiency of resolution of school trustees requiring money for school purposes, by passing by-law in pursuance thereof. *Re Sandwich School Trustees and Town of Sandwich*, 23 U. C. R. 639.

Of insufficiency of sureties in bond to the sheriff, by taking assignment thereof. *Kerr* v. *McEwan*, 27 U. C. R. 170; *S. C.*, 12 C. P. 241.

Of irregularity, by appearance and pleading to summons of justice of the peace.

*Regina* v. *Bernard*, 4 O. R. 603; *Regina* v. *Collins*, 14 O. R. 614; *Regina* v. *Roe*, 16 O. R. 1.

Of irregularity in quieting titles proceeding. *Re Harris*, 12 P. R. 430.

Of irregularity in return of commission. *Darling* v. *Darling*, 9 P. R. 560.

Of irregularity in service, by admission of service. *Alexander* v. *Watson*, 13 C. L. J. 224.

Of irregularity in service, by service of demand. *Carpenter* v. *City of Hamilton*, 2 Ch. Ch. 282.

Of mechanics' lien. *Makins* v. *Robinson*, 6 O. R. 1.

Of notice of application for certiorari. *Regina* v. *Whitaker*, 24 O. R. 437.

Of notice of dishonour. *Blackley* v. *McCabe*, 16 A. R. 295; *Britton* v. *Milsom*, 19 A. R. 96.

Of notice of distress. *Shultz* v. *Reddick*, 43 U. C. R. 155.

Of notice to arbitrator of time and place for signing award. *Norvell* v. *Canada Southern R. W. Co.*, 9 A. R. 310.

Of notice to quit, by payment of rent after action brought. *Laxton* v. *Rosenberg*, 11 O. R. 199.

Of notice to vendor of defect in machinery sold. *Tomlinson* v. *Morris*, 12 O. R. 311.

Of objections, by giving cognovit. *Doe d. Kerr* v. *Schoff*, 9 U. C. R. 180.

Of objection by railway company to right of municipality to receive preferential bonds. *Township of Eldon* v. *Toronto and Nipissing R. W. Co.*, 24 Gr. 396.

Of objection that no notice to reply served. *Lock* v. *Todd*, 8 P. R. 60.

Of objection to affidavit of service, by acceptance of service. *Re Lake*, 42 U. C. R. 208.

Of objection to assessment. *Ex parte Lewis*, 11 S. C. R. 484.

Of objection to examination before magistrate, after submitting to it. *Regina* v. *Ramsay*, 11 O. R. 210.

Of objection to finding of arbitrators. *Conmee* v. *Canadian Pacific R. W. Co.*, 16 O. R. 629.

Of objection to judgment signed after such removal, without appearance by defendant, by moving against the judgment on other grounds. *Hanley* v. *Grand Trunk R. W. Co.*, 17 U. C. R. 472.

Of objection to jurisdiction, by application for new trial. *In re Evans* v. *Sutton*, 8 P. R. 367.

Of objection to jurisdiction on appeal to quarter sessions, by applying to postpone. *In re Myers* v. *Wonnacott*, 23 U. C. R. 611.

Of objection to misnomer of corporation in by-law, by moving against it. *Fisher* v. *Township of Vaughan*, 10 U. C. R. 492.

Of objection to recognizance on appeal to sessions. *Regina* v. *Crouch*, 35 U. C. R. 433.

Of objection to subpœna, by attending thereunder. *Stovel* v. *Coles*, 3 Ch. Ch. 362.

Of objection to title. *Clarke* v. *Langley*, 10 P. R. 208.

Of objection to title, by taking conveyance or vesting order. *Bull* v. *Harper*, 6 P. R. 36.

Of objection to trial without a jury, by proceeding with the defence. *Denmark* v. *McConaghy*, 29 C. P. 563.

Of objection to want of notice to appear before court of revision, by appearance. *Regina* v. *Court of Revision of Cornwall*, 25 U. C. R. 286.

Of objection to want of similiter, by giving notice of trial. *Archibald* v. *Cameron*, 1 P. R. 138.

Of objection to witness, by afterwards calling him. *Hall* v. *Shannon*, E. T. 2 Vict.

Of omission to file new declaration after removal of case by certiorari, by going to trial without objection. *Fulton* v. *Grand Trunk R. W. Co.*, 17 U. C. R. 428.

Of order for particulars, by giving notice to proceed to trial. *Gilmour* v. *Strong*, 7 P. R. 154.

Of order to set aside judgment of non pros., by delay in taking it out. *Herr* v. *Douglass*, 4 P. R. 102; *S. C.*, 26 U. C. R. 357.

Of personal liability on note. *Brown* v. *Howland*, 9 O. R. 48, 15 A. R. 750.

Of prescription of actions for personal injuries by failure to plead. *City of Montreal* v. *McGee*, 30 S. C. R. 582.

Of presentment and notice of dishonour. *Blackley* v. *McCabe*, 16 A. R. 295.

Of priority of rights of the Crown, by acceptance of dividends. *The Queen* v. *Bank of Nova Scotia*, 11 S. C. R. 1.

Of priority over judgment by purchasers of land. *McQuestion* v. *Campbell*, 8 Gr. 242.

Of proof of preliminary proceedings required to give jurisdiction, by going to trial on the merits. *Regina* v. *Essery*, 7 P. R. 290.

Of remedy against sheriff for escape, by issuing fi. fa. *Hoskin* v. *Rabidon*, 1 Ch. Ch. 133.

Of remedy by specific performance, by suing at law. *McAvoy* v. *Simpson*, 6 L. J. 94.

Of right of allegiance, by Crown. *Regina* v. *Lynch*, 26 U. C. R. 208.

Of right of inspection of goods by purchaser. *Ballantyne* v. *Watson*, 30 C. P. 529.

Of right of mortgagee, a company, by conduct of officers. *Re Town of Cornwall and Cornwall Waterworks Co.*, 30 O. R. 81.

Of right of property in goods, by taking and discounting note for purchase money. *Mason* v. *Bickle*, 2 A. R. 291.

Of right of purchaser to compensation from vendor for being kept out of possession, by taking a vesting order. *Barber* v. *Barber*, 11 P. R. 137.

Of right of tenant to redeem mortgage. *Martin* v. *Miles*, 5 O. R. 404.

Of right to appeal from order of court, by having complied with such order. See APPEAL, II.

Of right to apply for appointment of next friend, by asking for time to answer. *Mallory* v. *Mallory*, 15 C. L. J. 82.

Of right to be elected owing to opponent's disqualification, by going to the polls. *Regina ex rel. Forward* v. *Dellor*, 4 P. R. 197.

Of right to complain of work by acceptance and delay. *Town of Richmond* v. *Lafontaine*, 30 S. C. R. 155.

Of right to consolidate mortgages, by proving claim. *Ross* v. *Stevenson*, 7 P. R. 126.

Of right to goods sued for, by suing as guardian for plaintiff. *Barker* v. *Tabor*, 5 O. S. 570.

Of right to notice of claim to goods seized by collector of customs. *Dame* v. *Carberry*, 10 U. C. R. 374.

Of right to prohibition, by admitting jurisdiction. *In re Cleghorn and Judge of County Court of Elgin*, 2 C. L. J. 133.

Of right to prohibition, by not objecting at the trial. *In re Burrowes*, 18 C. P. 493.

Of right to rent distrained for, by proceeding under power of attorney from tenant. *Tyrrell* v. *Rose*, 17 Gr. 394.

Of right to security for costs by filing answer. *Pendry* v. *O'Neil*, 7 P. R. 52.

Of rules of building societies for the payment of fines by the directors. *Wilson* v. *Upper Canada Building Society*, 12 Gr. 206.

Of statutory requirements as to notes "given for patent right." *Girvin* v. *Burke*, 19 O. R. 204.

Of summons, by entering on defence. *Regina* v. *Bennett*, 3 O. R. 45; *Regina* v. *Clarke*, 19 O. R. 601.

Of time for delivery of goods. *Molson* v. *Bradburn*, 25 U. C. R. 457.

Of time for giving security in interpleader, by neglecting to appraise the goods. *Black* v. *Reynolds*, 43 U. C. R. 398.

*See* APPEAL, II.—BILLS OF EXCHANGE, IV. 4, V. 3 — COSTS, VII. 2 (g) — DIVISION COURTS, XIV. 7—ESTOPPEL—INSURANCE, II., III. — LACHES — LANDLORD AND TENANT, XIII. 5 — LIEN, VI. — LIMITATION OF ACTIONS, VIII.—MISNOMER, IV.—NEW TRIAL, VIII.—PLEADING—PLEADING AT LAW BEFORE THE JUDICATURE ACT, XI. — PLEADING SINCE THE JUDICATURE ACT, XIII. — PRACTICE—PRACTICE AT LAW BEFORE THE JUDICATURE ACT, XVI. 2, XIX. 6—PRACTICE SINCE THE JUDICATURE ACT, XIX.—SESSIONS, II. 10 — SPECIFIC PERFORMANCE, V. 19 (f) — TRIAL, VII. 6 (f)—VENDOR AND PURCHASER, III. 3.

*See* further under particular titles.

## WARDEN.

*See* MUNICIPAL CORPORATIONS, XIX. 8.

## WAREHOUSEMEN AND WAREHOUSE RECEIPTS.

I. ADVANCES BY WAREHOUSEMEN, 7272.

II. DELIVERY OF GOODS, 7272.

III. LIABILITY OF WAREHOUSEMEN, 7273.

IV. LIEN OF WAREHOUSEMEN, 7273.

V. WAREHOUSE RECEIPTS, 7274.

### I. ADVANCES BY WAREHOUSEMEN.

**Time for Repayment**—*Sale of Goods.*]—The plaintiff, who was a warehouseman and dealer in grain, received in his warehouse from defendant between the 1st and 14th October 832 bushels of barley, and between the 15th September and 2nd November had advanced to defendant $242. Disputes having arisen, defendant sued the plaintiff for the value of the barley, and the plaintiff sued defendant in this action for the advance as money lent. In the first suit the now plaintiff pleaded the money paid, and received the benefit of it. The jury in this action found that the money was advanced upon the grain, not to be repaid until the sale of the grain to the plaintiff or some one else, and that there was no sale to the plaintiff:—Held, that this finding entitled defendant to a verdict. *Trumpour* v. *Crandall*, 31 U. C. R. 9.

### II. DELIVERY OF GOODS.

**Delivery Order**—*Effect of—Constructive Delivery.*]—Where A., having 217 bushels of wheat stored in B.'s warehouse, gave C., who had paid the price of the wheat, a delivery order upon B., who refused to deliver the wheat to C. until he, B., had been previously satisfied in respect of a demand of his own against C., wholly unconnected with the transaction between A. and C.:—Held, that upon such refusal C. could sustain an action against A. for the non-delivery of the wheat; the delivery order, when given to the purchaser, not being an actual delivery of the wheat, but merely an evidence in the hands of the seller that he had the wheat in B.'s warehouse, and in the hands of the purchaser that he had the right to demand the wheat from B. *Proudfoot* v. *Anderson*, 7 U. C. R. 573.

Held, that the delivery of warehouse receipts for flour, and of the delivery orders

therefor, is not a constructive delivery of possession of the flour. *Deady* v. *Goodenough*, 5 C. P. 163.

**Delivery to Warehouseman** — *Purchaser—Property Passing.*]—Plaintiffs contracted for the manufacture of a quantity of glassware, which, though invoiced to and paid for by the plaintiffs, was stored with a warehouseman as the goods of the manufacturers, who obtained warehouse receipts for them. These receipts were transferred by the manufacturers to defendants, as collateral security for advances made to them:—Held, in an interpleader to try the right to the goods, that there had not been a sufficient delivery of the goods to pass the property in them to plaintiffs, and that defendants were therefore entitled to succeed. *Gowans* v. *Consolidated Bank of Canada*, 43 U. C. R. 318.

*See Wilmot* v. *Maitland*, 3 Gr. 107, *post* V.; *Llado* v. *Morgan*, 23 C. P. 517, *post* V.

### III. Liability of Warehousemen.

**Collapse of Warehouse.**]—See *Wilmot* v. *Jarvis*, 12 U. C. R. 641; *Page* v. *Defoe*, 24 U. C. R. 569, 21 A. R. 466.

**Negligence**—*Unloading into Elevator — Damages—New Trial.*]—In an action against the owners of a grain elevator to recover damages for alleged negligence in the care of grain, one of the grounds of negligence found by the jury was that the grain had been taken into the elevator from the vessel while rain was falling and that the vessel's hatches had not been protected:—Held, that the responsibility of the defendants did not commence till the grain was delivered to them; that therefore there was no duty cast upon them to protect the grain during the process of unloading; and a general assessment of damages having been made upon this and other grounds of negligence, a new trial was ordered. *Dunn* v. *Prescott Elevator Co.*, 26 A. R. 389, 30 S. C. R. 620.

**Receiving Goods to Forward**—*Common Carrier.*]—A warehouseman receiving goods to forward, discharges himself by delivering them properly directed to the master of a vessel, on board of his vessel, which is engaged in the carrying trade between the place at which the goods were received and that to which they are to be forwarded; and averring in the declaration that he received the goods to be forwarded by him, does not charge him as a common carrier. *Beckett* v. *Urquhart*, 1 U. C. P. 188.

### IV. Lien of Warehousemen.

**Extent of**—*Storage—General Charges.*]—A warehouseman has only a lien on the property stored for the storage of grain in his warehouse, and not for the general charges thereon. *Renald* v. *Walker*, 8 C. P. 37.

**Untenable Claim**—*Assertion of—Tender —Conversion.*]—Held, that the mere fact of a warehouseman who has a lien on goods for a certain sum for storage, claiming also to hold them for an untenable claim as due either to himself or a third person, does not dispense with a tender of the sum due, and amount to a conversion, unless the evidence fairly warrants the conclusion that such tender would be useless, as it would be refused; and that in this case the evidence set out in the case was insufficient for that purpose. *Llado* v. *Morgan*, 23 C. P. 517.

*See In re Coleman*, 36 U. C. R. 559; *Sills* v. *Bickford*, 26 Gr. 512.

### V. Warehouse Receipts.

**Assignment of** — *Property Passing — Change of Possession.*]—The defendants, warehousemen, holding certain grain for one M., gave him a warehouse receipt, which on the 3rd September he indorsed to the plaintiff, who had purchased the grain either from or through him. On the 5th September the sheriff received a fi. fa. against M., under which he seized, and M. having on the 22nd made a voluntary assignment in insolvency, the sheriff gave an order for the grain to the assignee. The plaintiff having brought detinue and trover against defendants, who had shipped a portion of the grain to him on the 23rd October, but retained the rest:—Held, that he was entitled to recover; that the grain passed to the plaintiff by the sale; and there was a sufficient change of possession, and the only one that the nature of the case permitted, in the fact that upon and after the sale the defendants held the grain for the plaintiff, instead of for M., who was not himself in actual possession when he sold. *Richardson* v. *Gray*, 29 U. C. R. 360.

——— *Property Passing to Purchaser—Removal without Notice.*]—The plaintiff declared that one G. had deposited with defendant certain wheat, and obtained from him a warehouse receipt therefor; that by the course of trade such receipt was transferable by indorsement, and the property in the wheat would pass to an indorsee; that G. sold said wheat to the plaintiff, and indorsed to him the receipt; but that, when he presented it to the defendant, the latter refused to deliver to him the wheat. Defendant pleaded that, before he had any notice or knowledge of such transfer or sale, the wheat was taken out of his warehouse by G.:—Held, a good defence; for at common law the indorsement and transfer of the receipt would clearly not pass the property, and C. S. C. c. 54, relied upon by the plaintiff, has no application to an absolute sale of goods, but to pledges only, to secure payment of a bill or note negotiated, or a debt contracted, when the receipt is indorsed over. *Glass* v. *Whitney*, 22 U. C. R. 290.

——— *Right to Sue Warehouseman—Representation as to Quantity—Estoppel.*]—Defendants gave a receipt to C. H. & Co., stating that they had received in store and held on their (C. H. & Co.'s) account 500 bushels of wheat. Plaintiff, relying upon this and the representations made by C. H. & Co., purchased from the said C. H. & Co. the supposed 500 bushels of wheat, and took an assignment of the said receipt as evidence of his purchase, and as authority to defendants to deliver the same to plaintiff. In fact, however, the defendants at the date of the receipt had only received some 270 bushels on account of C. H. & Co.:—Held, that defendants, having given their receipt for 500

bushels of wheat, were estopped from setting up that they had not at the date thereof the quantity of wheat mentioned therein in store for C. H. & Co. 2. That from the evidence it was to be assumed that the defendants gave this receipt to C. H. & Co. for the purpose of enabling C. H. &Co. by means thereof to sell the amount of wheat therein mentioned to any person to whom they offered the same for sale, and thereby sufficient privity was established between plaintiff and defendants to enable him to sue for the damages he sustained by reason of their (defendants') false representation. *Holton* v. *Sanson*, 11 C. P. 390.

——— *Security—Private Person.*]—Under C. S. U. C. c. 54, private persons, and not banks alone, are entitled to take warehouse receipts, and such right has not been interfered with by subsequent legislation. *Cockburn* v. *Sylvester*, 27 C. P. 34. See *S. C.*, 1 A. R. 471.

**Assignment of, to Bank**—*Insurable Interest.*]—A., a warehouseman, insured certain wheat with defendant company, and assigned the policy to a bank, to which he gave a warehouse receipt, signed by B., his clerk, and indorsed by himself. In an action on the policy, on behalf of the bank:—Held, reversing the judgment in 18 C. P. 192, that the bank had no insurable interest, as B. was not a warehouseman within C. S. C. c. 54, s. 8; and that the receipt was not in compliance with 24 Vict. c. 23, s. 1, not being signed by the warehouseman. *Todd* v. *Liverpool and London and Globe Ins. Co.*, 20 C. P. 523.

——— *Insurable Interest — Owner.*]—A condition of a policy provided that property must be insured in the names of the owners. It appeared that the policy was on grain insured in the name of the plaintiff, who had given warehouse receipts for it, indorsed to certain banks:—Held, that such banks were the owners by virtue of these receipts, not the plaintiff; and the condition was broken. *McBride* v. *Gore District Mutual Fire Ins. Co.*, 30 U. C. R. 451.

**Extension to Substituted Goods.**]—A warehouse receipt described the goods as "40 bales of corks," not distinguishing them by any separate marks or values. Some of these were taken out and replaced by others. It appeared that the bales had all distinguishing marks, and were of varying values, some twice that of others:—Held, that the receipt only extended to the particular bales in the warehouse when the receipt was given, and did not cover other bales which came in afterwards, in lieu of those taken away. *Llado* v. *Morgan*, 23 C. P. 517.

——— *Usage of Trade—Transferee—Injunction.*] — When a warehouseman had delivered warehouse or transfer receipts to a person for 1,000 barrels of flour, and afterwards delivered over some portion thereof, at the instance of the person who had left it in his custody, on the understanding that the quantity so delivered out should be made up by other flour to be brought to his warehouse, and it appeared that such a course of dealing was in accordance with the usage of his trade, the court refused an injunction to restrain the delivery of flour subsequently brought by the same person to the warehouse, although such latter flour had been assigned bonâ fide to the plaintiff, who had made advances thereon after it was stored; and although such flour had not been manufactured at the time of giving the warehouse receipts. *Wilmot* v. *Maitland*, 3 Gr. 107.

**Fraudulent Issue** — *Property Passing—Possession—Notice.*] — T. & T. delivered, subject to their order, some hogs to the plaintiffs, with a request to notify G. & Co. at Windsor. T. & T. transmitted the bills of lading to the Merchants Bank at Windsor, which the bank, on receiving payment from G. & Co., but not till then, were to indorse over to G. & Co. G. & Co. with knowledge of these facts, procured the plaintiffs' station agent at Windsor, on arrival of the hogs there, to deliver up the hogs to them, but on the express agreement that until they obtained a delivery from T. & T. they would hold the same for plaintiffs. G. & Co., who were curers and packers of pork, drew up a document purporting to be a warehouse receipt for hogs received in store from H. & Co., to be delivered to the order of H. & Co., who had no property stored with G. & Co., and, without H. & Co.'s indorsement, enclosed the same to one D., the manager of the Bank of Montreal at Windsor, together with a draft on H. & Co. for $5,000, with a request to have the same discounted, and to return to G. & Co. currency drafts for the amount thereof, to enable them to pay through the Merchants Bank the price of said hogs. The draft was discounted, but, instead of returning the currency drafts, the manager wrongfully, and without any authority from G. & Co., applied the proceeds in payment of a previous advance made to G. & Co. on H. & Co.'s credit. G. & Co. killed the hogs and mixed the pork and lard made therefrom with other pork and lard in their factory. Subsequently G. & Co. delivered to the defendant, who was aware of its not having been paid for, the said pork and lard, together with other pork and lard, and so mixed as aforesaid as to be undistinguishable except by G. & Co. and their servants. The plaintiffs claimed the said pork and lard so made from the hogs obtained from the plaintiffs, and issued writs of replevin therefor. At the time of the issue of these writs the pork continued so mixed with the other pork; and the sheriff, neither the defendant nor his servants giving him any assistance in distinguishing it, in executing the writs, unavoidably took some pork not the produce of the plaintiffs' hogs, but left with defendant an equal quantity in amount and value of the plaintiffs' pork:—Held, that the plaintiffs were entitled to recover; that G. & Co. obtained no right or title to the hogs or the produce thereof as against the plaintiffs; and the defendant, having obtained possession with full notice of the plaintiffs' claim, acquired no better title than G. & Co. had. Held, also, that nothing passed under the alleged warehouse receipt; that G. & Co. were not warehousemen or persons entitled to give warehouse receipts; and that the receipt itself had nothing to support it, for H. & Co. had no property stored with G. & Co., and it was proved that the property for which the alleged warehouse receipt was given was held by G. & Co. on a special bailment which precluded their giving warehouse receipts therefor; and further, it appeared from the evidence that the warehouse receipt was received under agreement between G. & Co. and D., which D. did not fulfil, and that no property therein or in the said logs vested in said bank. Held, also, that neither G. & Co. nor defendant could set up G. & Co.'s wrongful mixture and

confounding of the property in order to defeat the plaintiffs' right to recover. *Great Western R. W. Co.* v. *Hodgson*, 44 U. C. R. 187.

**Issue to Partner** — *Goods of Firm.*]—Where two partners, not carrying on the business of warehousemen, have their partnership stock in their own cellar, a receipt given by one to the other for that stock, though in the form of a warehouse receipt, is not a warehouse receipt within C. S. C. c. 54. *Ontario Bank* v. *Newton*, 19 C. P. 258.

**Issue to Purchaser** — *Property Passing—Non-separation—Insurable Interest.*]—A warehouseman sold 3,500 bushels of wheat, part of a larger quantity which he had in store, and gave the purchaser a warehouseman's receipt under the statute, acknowledging that he had received from him that quantity of wheat to be delivered pursuant to his order to be indorsed on the receipt. The 3,500 bushels were never separated from the other wheat of the seller:—Held, that the purchaser had an insurable interest. *Box* v. *Provincial Ins. Co.*, 18 Gr. 280; *S. C.*, 15 Gr. 552.

**Transfer as Security** — *Transferor — Insurable Interest.*]—Where warehouse receipts given on goods are transferred to a bank as collateral security for discounts:—Held, that the insured has still an insurable interest in the goods. *Parsons* v. *Queen Ins. Co.*, 20 C. P. 188.

**Validity** — *Form—Statutes—Assignment to Secure Debts — Lien of Warehouseman—Factor.*]—One C., being the lessee of a coal yard and premises, assigned the property to S. & H., who agreed to receive as warehousemen therein such wood and coal as C. might deposit, and grant him warehouse receipts therefor, in consideration of which he agreed to pay them two and a half per cent. on the value of such goods, and to give them a first lien therefor. C. continued to hold possession of the premises as before the assignment, no visible change being made; his sign remained up, he brought in and took out coal as he pleased, and he was to pay the rent and taxes; but S. & H. entered from time to time to see that there was coal enough to meet their receipts, and on some occasions they prevented him from removing more coal, fearing that there would not be enough for this purpose. It was expressly agreed between them that all coal taken out for which receipts had been given should be replaced with other coal. C. having become insolvent, a question arose as between his assignee and the receipt holders, and R. & Co., mentioned in the case, as to the right to the coal in the yard:—Held, that S. & H., being legal owners of the premises, could grant warehouse receipts. The receipts stated that S. & H. had "received in store from vessels, deliverable only on surrender of their receipt duly indorsed and payment of charges, to order of C.," so many tons of coal:—Held, sufficient in form; that they imported primâ facie that the coal was the property of C.; that the omission to state for or from whom it was received was immaterial; and that, as to the description of the goods, it was unnecessary to state the quality, for the holder might elect, or to identify the specific property covered by the receipt. One of the receipts was given to one Cockburn, as security for an acceptance which he gave at the time for C.'s accommodation; another to S. & H., as security against their indorsement for C.; and another to S. & H. was given for C.'s cheques had been refused payment, on their application to him for security:—Held, that these receipts were given for debts within the Act respecting warehouse receipts, &c., 31 Vict. c. 11 (D.) The decision on this point was, however, overruled (see the next case), 1 A. R. 471. Held, also, that under s. 10 of the Insolvent Act of 1869, the assignee could take only what was the property of the insolvent, and that S. & H., whether the receipts were strictly regular or not, had a lien upon the coal in the premises to the extent of the receipts outstanding, and for their commission. Some of the coal had been sent to C., the insolvent, by R., to sell for him on commission, after the receipts had been given, and were outstanding:—Held, that C. could not, under the Factors Act, C. S. U. C. c. 59, pledge this coal for payment of the receipt-holders; and that R. was entitled before them to so much of his coal as remained unsold. *In re Coleman*, 36 U. C. R. 559.

The plaintiff accepted two accommodation bills for one C. on the 29th June, 1874, and C. procured a warehouse receipt for coal from the defendants, dated on the same day, which he indorsed to the plaintiff by way of security. In an action on this receipt, for non-delivery of the coal:—Held, reversing the judgment in 27 C. P. 34, which followed Re Coleman, 36 U. C. R. 559, that the plaintiff could not recover, for there was no debt contracted from C. to the plaintiff at the time of the indorsement of the receipt, within the meaning of C. S. U. C. c. 54, s. 86, and 24 Vict. c. 23, the liability incurred by C. to indemnify the plaintiff against these acceptances not constituting a debt until default made by C. Macnee v. Gorst, L. R. 4 Eq. 315, 15 W. R. 1198, distinguished. *Cockburn* v. *Sylvester*, 1 A. R. 471.

*See*, also, *Clark* v. *Western Ins. Co.*, 25 U. C. R. 209; *Gilpin* v. *Royal Canadian Bank*, 27 U. C. R. 310; *Gore Bank* v. *Royal Canadian Bank*, 13 Gr. 425.

*See*, also, *ante* II.

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*See* BANKS AND BANKING, III. 4—RAILWAY, V. 3—SHIP, II. 11.

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## WAREHOUSE RECEIPTS.

*See* BANKS AND BANKING, III. 4—WAREHOUSEMEN AND WAREHOUSE RECEIPTS, V.

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## WARRANT.

*See* ARREST—CRIMINAL LAW, VII.—HABEAS CORPUS—JUSTICE OF THE PEACE.

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## WARRANT OF ATTORNEY

*See* FRAUD AND MISREPRESENTATION, IV. 2.

# WARRANTY.

I. Action for Breach,

1. *Generally—When Action Lies*, 7279.

2. *Damages*, 7281.

3. *Evidence*, 7282.

4. *Pleading*, 7283.

II. Action for Recovery of Price on Breach of Warranty, 7283.

III. Authority of Agent, 7285.

IV. Implied Warranty, 7285.

V. Representations, 7288.

VI. Miscellaneous Cases, 7289.

## I. Action for Breach.

### 1. *Generally—When Action Lies.*

**Against Bank** — *Bank Act.*] — By the Bank Act, 34 Vict. c. 5 (D.), banks were prohibited from buying or selling goods or merchandize:—Held, therefore, that an action would not lie against an incorporated bank for breach of warranty on the sale of a horse-power machine. *Radford* v. *Merchants Bank*, 3 O. R. 529.

**Conditional Sale**—*No Sale—Statute of Frauds.*]—The plaintiff sued defendant for a breach of warranty of a hay press, which he had agreed to purchase from him if it should be capable of pressing into bales ten tons of hay per day, which, as he alleged, the defendant had warranted it would do. The machine was delivered to the plaintiff, but upon trial failed to do the stated amount of work, and was returned. The defendant denied the warranty, and gave evidence to shew that the sale was only a conditional one. At the close of the plaintiff's case a nonsuit was moved for, on the ground that an action would not lie on the warranty, as there had been no sale, and that the Statute of Frauds was a bar. Leave was reserved to move on the whole case. These objections were renewed at the close of the case, and it was afterwards arranged that the questions to be submitted to the jury should be, whether a guarantee was given by the defendant that the machine would do the above amount of work, and was broken; and the damages. The jury found a verdict for the plaintiff:—Held, affirming the judgment in 28 C. P. 202, that the verdict was amply supported by the evidence, as to the guarantee. Semble, that the arrangement entered into at the trial precluded defendant from objecting that no action would lie on the warranty, because there was no sale; but that it did not apply to the objection founded on the Statute of Frauds, which, however, did not affect the plaintiff's right of action, for that it was not necessary for such a warranty to be in writing. *Northwood* v. *Rennie*, 3 A. R. 37.

——— *Property not Passing.*]—The defendant delivered a piano to the plaintiff on a "hire contract," the price being stated to be $500, payable by crediting $100 on an old piano taken in exchange, and the balance of $400 by monthly instalments, the plaintiff giving a note for the $400, payable by like instalments. The contract stated that the defendant did "neither part with said piano," nor did the plaintiff "acquire any title" to it until the note was fully paid. Certain instalments fell due and payment was enforced, and there were instalments in arrear when action was brought. The plaintiff sued for fraudulent misrepresentations, and for general damages for breach of implied warranties, the alleged misrepresentations or warranties being that the piano was worth $500; that it was a first-class instrument; and as good as any Steinway or Chickering piano. The jury found for the plaintiff with damages:—Held, that, as the property had not passed, an action for the breach of warranty would not lie. *Frye* v. *Milligan*, 10 O. R. 509.

By a written agreement the defendants sold a threshing machine for $500 to the plaintiff, taking an engine in part payment of $250, the balance to be secured by promissory notes. The right of possession was to be in plaintiff until default, but until payment the right of property was to be in defendants; with a warranty by defendants that with good management the machine would do good work and was superior to any other machine made in Canada, &c., and if upon starting the machine, the plaintiff, following the printed hints, rules, and directions of defendants, was unable to operate it well, he was to give defendants written notice of the defect, and a reasonable time was to be allowed defendants to get to the machine and remedy the defect, unless they could advise by letter; but if they were unable to make it operate well, &c., and the fault was in the machine, they were to take it back and refund the payments made, or remedy the defective part, but if the fault was through improper management or neglect to observe the printed, &c., directions, the plaintiff was to pay all necessary expenses incurred; and if, plaintiff observing such directions, any part, except belting, failed during the year, through any defect in material, the defendants, on presentation at the manufactory of the defective piece, were to furnish a duplicate thereof, but defects in pieces were not to condemn other parts. Deficiencies in general adaptation for threshing, separating, &c., for which alone the machine should be taken back, must be reported ten days after starting the machine, and not after continued use or injury thereto. The defendants had, on the plaintiff's complaint, attended and made alterations in the machine, whereupon the plaintiff used the machine for six weeks, and then sent it back to the defendants, because, as the plaintiff said, it failed to comply with the warranty, and he had no further use for it; but, as defendants understood, to be repaired. The plaintiff did not ask for the return of the engine. No printed hints, &c., were given by defendants, nor written notice of the defect given by plaintiff; and no default was made by plaintiff in payment of the instalments. In an action to recover the $250, the value of the engine taken as part payment, for the redelivery of the notes, and $500 damages for breach of warranty:—Held, following Frye v. Milligan, 10 O. R. 509, that, as the property in the machine had not passed to the plaintiff, he could not maintain an action for breach of warranty. Held, also, that the plaintiff was not entitled to return the machine after the expiration of the ten days, no notice in writing of the defect complained of having been given:

and that the fact of the defendants' previous attendance to make alterations did not constitute a waiver of their right to such notice, as the evidence shewed that when plaintiff sent for defendants he did not intend giving notice with a view of availing himself of the right to rescind; and the starting under the contract must be regarded as that which took place after the machine was so altered. *Tomlinson* v. *Morris*, 12 O. R. 311.

**Division Court** — *Jurisdiction.*]—Held, that an action for breach of a warranty of a horse, where the damages recovered were over $40 and under $100, was within the jurisdiction of the division court. *Morris* v. *Cameron*, 12 C. P. 422.

**Limitation of Actions** — *Fraud.*]—The defendant, who was a nurseryman, sold to the plaintiff a number of peach trees, stating in the sale agreement that they were "No. 1 peaches, warranted true to name:" — Held, that this was merely a warranty that the trees were of the varieties contracted for; that the trees not being of the varieties contracted for, the warranty was broken at the time of the delivery; and that in the absence of fraud an action for damages for its breach brought more than six years after the delivery was barred, although, until the trees came into bearing between three and four years before the action, it was impossible to tell that they were not of the varieties contracted for. *Bogardus* v. *Wellington*, 27 A. R. 530.

**Return of Article.**]—Where in a contract for the sale of a gasoline engine and tank there was a warranty that if the engine would not work well, notice thereof was to be given to the defendants, stating wherein it failed, and giving a reasonable time to get to it and remedy the defect, and if such defect could not be remedied, the engine was to be returned to the defendants and a new engine given in its place:—Held, that the plaintiff's remedy under such warranty was for the return of the engine and its replacement by another engine, and not for damages for breach of warranty. *Hamilton* v. *Northey Mfg. Co.*, 31 O. R. 468.

*See Bennett* v. *Tregent*, 24 C. P. 565; *Craig* v. *Miller*, 22 C. P. 348; *Stewart* v. *Atkinson*, 22 S. C. R. 315.

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2. *Damages.*

**Amount.**]—Defendant sold plaintiff a stallion for £112.10, warranting him to be a good covrer and foal-getter. In an action for breach of this warranty the jury found £150 damages, and the court refused a new trial. *Natrass* v. *Nightingale*, 7 C. P. 266.

**Measure of**—*Removal of Defect.*]—The plaintiff sued the defendant, a piano maker, for breach of a warranty given by his salesman on the sale of a piano, that the instrument was then sound and in good order. The plaintiff signed the ordinary receipt note, providing for payment of the price, and that until paid the property should remain in defendant, in which there was no mention of the warranty:—Held, that parol evidence of the warranty was admissible, as it was apparent that the receipt note was not intended to be the evidence of the whole contract. Quære, whether this question should not have been left to the jury. Held, also, that the salesman had authority to give the warranty. Quære, whether any evidence of an express warranty was necessary. Held, also, that the proper measure of damages to allow was the price which at the time of sale would have been required to remove the alleged defect, and the jury having given much more, the court named a sum to which the plaintiff might reduce his verdict, and directed that in default of his doing so there should be a new trial. *McMullen* v. *Williams*, 5 A. R. 518.

——— *Sale of Machine.*]—The defendant was a manufacturer of steam threshing machines, which were recommended on the grounds that they were safe from fire; that the engine would not throw out sparks; that the separator, which was sold and used therewith, would not throw out grain in the chaff; and that altogether these were the best threshing machines in the world. The plaintiff alleged that after hearing these recommendations he sent a written order to the defendant for a steam engine and separator, which when used proved defective, the engine throwing out sparks and the separator wasting the grain by throwing it out with the chaff; and he claimed rescission of the contract of purchase, the return of the notes given by him in payment for the machine, and $300 damages. The Judge at the trial having ruled that the plaintiff could not rescind the contract, but could only recover, as damages for breach of warranty, the difference in value between the machine contracted for and the one which was delivered—the jury found (in answer to questions) that there was a warranty which had been broken and that by such breach the plaintiff had sustained damages to the amount of $500. A divisional court having refused a rule, the defendant appealed. The court of appeal being divided in opinion, the appeal was dismissed, some expressions of opinion being given as to the measure of damages. *Ellis* v. *Abell*, 10 A. R. 226.

——— *Sale of Vessel—Insurance.*] — The defendants bought a vessel from the plaintiff, who, as the jury found, warranted her to class B. 1, and promised to get her insured in a company, of which he was agent, for $1,400. She would not class as B. 1, and no insurance could be effected under that class; but defendants sailed her uninsured until she foundered and was totally lost. In an action for the purchase money:—Held, that the measure of damages to which defendants were entitled for breach of the warranty was not the $1,400 for which she might have been insured, but the sum which it would have taken to make her class B. 1, which it was for defendants to shew. *LaRoche* v. *O'Hagan*, 1 O. R. 309.

*See Wilmot* v. *Wadsworth*, 10 U. C. R. 594; *Gordon* v. *Waterous*, 36 U. C. R. 321.

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3. *Evidence.*

**Parol Evidence** — *Supplementing Writing.*]—Under a written contract for the sale by description of a specific article, namely, a gasoline engine with a pump standard, it not being pretended that it did not answer such description, such contract must be taken to cover, as it purported to do, the whole contract between the parties, and parol evidence is not admissible to shew a warranty made

prior to the entering into of the contract which is inconsistent with the written warranty, as it would be allowing the admission of parol evidence to control, vary, add to, or subtract from the written contract; and statements alleged to have been made by the vendors, and acted on by the purchaser, to the effect that the engine would pump sufficient water for a certain number of horses and cattle were not such as to constitute a separate and independent collateral agreement, and admissible in evidence as such. *Northey Mfg. Co.* v. *Sanders*, 31 O. R. 475.

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4. *Pleading.*

**Declaration**—*Representation as to Title.*]—The third count of plaintiff's declaration alleged that defendant, by falsely pretending and representing himself to be official assignee of the insolvent, and as such to have a lawful right and title to the goods then in his possession, and to sell and deliver same to plaintiff, induced plaintiff to buy same, and thereupon plaintiff paid defendant for same, whereas in truth defendant was not such assignee, and had no right to sell, whereby the goods were lost to plaintiff, and taken from him by process of law:—Held, good, as a count in case upon a breach of warranty. *Johnston* v. *Barker*, 20 C. P. 228.

——— *Scienter.*]—When the declaration is framed in case, charging a false and deceitful warranty, knowing it to be untrue, the plaintiff may recover on proving the warranty only, without the scienter. *Chisholm* v. *Proudfoot*, 15 U. C. R. 203.

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II. Action for Recovery of Price on Breach of Warranty.

**Delay in Suing**—*Defence.*]—A. and B. exchanged horses, and B. gave A. a note for the difference in the exchange; A. sold the horse he got from B. almost immediately, and after two years, during which nothing appeared to have been done by either party, B. was sued upon his note by A.:—Held, that B. could not set up as a defence that the horse he received was unsound, although A. had declared him free from fault and blemish at the time of sale. *Hall* v. *Coleman*, 3 O. S. 39.

**Delay in Testing Goods**—*Evidence of Oral Warranty — Right to Return — Entire Contract.*]—The plaintiff, the agent for an English firm, sold a number of files to defendants, to be paid for by note at six months, and received from them an order, "Please ship," &c., describing the different sizes required, and the price. A subsequent order was given, as a recapitulation of the previous order. Neither contained any warranty, but it appeared that an oral warranty of quality was given at the time of sale, that they should be as good as the files made by Jowitt, another maker. They were to be delivered in October following, but did not arrive until about the 1st December; and defendants having in the meantime purchased others, they were not opened for some time, and were not tested until March, when defendants, alleging that they did not fulfil the warranty, refused to pay for them. A correspondence took place, in which the plaintiff offered to take back a portion of the files, of a particular kind, but not the rest; and in May, having written to the plaintiff that they would do so, defendant sent the files to their broker in Montreal for sale. In an action for the price, defendants paid into court the amount realized by this sale, with the invoice prices of the files which they had used, and set up the breach of warranty as a defence to any further claim. The trial Judge found that, admitting the warranty, the defendants took an unreasonable time to test the goods; that the defendants should in reason have returned that portion which the plaintiff offered to take back; that the price realized in Montreal could not, under the circumstances, afford a fair criterion of value, by which to bind the plaintiff; and that in certain respects specified these files were inferior to those made by Jowitt; and he rendered a verdict for the plaintiff for the price agreed upon. The court set aside the verdict, and entered a verdict for defendants, holding: (1) that evidence of the oral warranty was admissible, the orders for the goods not containing the whole contract, but being given on the faith of the previous oral warranty; (2) that the weight of evidence shewed the files not to be first-class, and inferior to those made by Jowitt; (3) that, looking at all the circumstances, the delay in testing the files was reasonable; (4) that defendants were not bound to return that portion of the files which the plaintiff was willing to take back; for, the contract and order being an entire one, the defendants were entitled to have all the files contracted for or to reject all; (5) that there being no sufficient evidence to shew the actual value of the files, or that they were worth more than they sold for in Montreal, the plaintiff was not entitled to more than the sum paid into court. *Gordon* v. *Waterous*, 36 U. C. R. 321.

**Evidence in Mitigation of Damages** — *Previous Recovery on Warranty.*] — C. wishing to procure a water-wheel which, with the existing water power, would be sufficient to drive the machinery in his mill, A. undertook to put in a "four-foot Sampson turbine wheel," which he warranted would be sufficient for the purpose. The wheel was afterwards put in, but proved not to be fit for the purpose for which it was wanted. The time of payment for the agreed price of the article having elapsed, C. sued A. for breach of the warranty, and recovered $438 damages. A. subsequently sued C. for the price; and C. offered to give evidence in mitigation of damages that the wheel was worthless and of no value to him. Objection was taken that it was not competent for C. to give any evidence in reduction of damages by reason of the breach of warranty, or on the ground of the wheel not answering the purpose for which it was intended, and the Judge at the trial declared the evidence inadmissible:—Held, on appeal, reversing the judgment of the court of appeal, 26 C. P. 338, that, as the time for payment of the agreed price of the article had elapsed when the first action was brought, and only special damages for breach of warranty had been recovered, the evidence tendered by C. in this case of the worthlessness or inferiority of the article was admissible. *Church* v. *Abell*, 1 S. C. R. 442.

——— *Rescission.*] — The breach of warranty of a specified chattel does not entitle the purchaser to return the chattel and rescind the contract, and it forms no defence to

an action by the seller for the price, but the purchaser, on being sued for the price, is allowed to give evidence of the breach of warranty in reduction of damages. *Moocrs* v. *Gooderham*, 14 O. R. 451.

**Failure of Consideration**—*Parol Evidence.*]—Assumpsit on a note made by defendant jointly with A. and B. Plea, that the note was given for the purchase money of a schooner and sold by plaintiff to A. and B., defendant being their surety; that the plaintiff on such sale guaranteed the vessel to be sound, but she was not sound, but unsafe and rotten, as plaintiff well knew; and said A. and B. immediately after the sale discovered the unsoundness, returned the vessel to plaintiff, and repudiated the sale. At the trial the written instrument was produced, from which it appeared that the sale was to defendant alone, and no such guarantee as alleged was contained in it. It was proved that A. and B., after keeping the vessel a fortnight, tendered her back to the plaintiff, but she was refused, and they went on using her:—Held, that oral evidence of a warranty stated in the plea was not admissible. Semble, that the facts did not shew a total failure of consideration, and therefore formed no defence. Semble, that the defendant could not shew, in the face of the writing produced, that the sale was to A. and B., not to himself. *Henderson* v. *Cotter*, 15 U. C. R. 345.

*See LaRoche* v. *O'Hagan*, 1 O. R. 300; *Cull* v. *Roberts*, 28 O. R. 591.

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III. Authority of Agent.

**Sale of Piano**—*Authority of Salesman.*]—See *McMullen* v. *Williams*, 5 A. R. 518.

**Sale under Execution**—*Deputy Sheriff.*]—Semble, that the deputy sheriff cannot, in any sale of property in execution, bind the sheriff by giving of his own accord a warranty that the goods belonged to the debtor in the fi. fa. The deputy sheriff would be clearly liable himself on such a warranty. *Mink* v. *Jarvis*, 8 U. C. R. 397.

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IV. Implied Warranty.

**Fit for Purpose Intended.**]—A person manufacturing an article in his own particular line (such as a portable threshing machine) must be taken impliedly to warrant that the article shall be made in a proper and workmanlike manner, and be fit for doing what was expected of it. *Grant* v. *Cadwell*, 8 U. C. R. 161.

An agricultural society, wishing to purchase a bull for breeding purposes, sent their agent to defendant, who gave him the choice of two. The agent chose one on his own judgment, and defendant gave no express warranty except as to pedigree, but he was aware that the bull was purchased for the purpose of getting stock:—Held, that there was no implied warranty of the bull's fitness for the purpose for which he was required. *County of Simcoe Agricultural Society* v. *Wade*, 12 U. C. R. 614.

Where an article is supplied for a particular purpose—such as, in this case, a furnace to heat the plaintiff's offices—and the vendor is to put it up for that object, there is an implied warranty that it will answer. In this case:—Held, that there was nothing in the defendant's written tender, set out in the case, to exclude the implied warranty, and that the evidence supported a verdict for the plaintiffs. *Bigelow* v. *Boxall*, 38 U. C. R. 452.

Plaintiff sued the defendants for the value of a portable engine and boiler which had been hired by the defendants, and which boiler had exploded when in their possession immediately after they had begun to use it, and while in charge of a competent engineer:—Held, that, as the lessor of a chattel for hire impliedly warrants that it is reasonably fit for the purpose for which it is let, the plaintiff, in the absence of negligence on the part of the defendants, could not recover. *Reynolds* v. *Roxburgh*, 10 O. R. 649.

**Freedom from Latent Defects**—*Caveat Emptor—Deceit—Pleading.*]—The law does not imply a warranty that the article sold shall be free from latent defects unknown to the seller, and without fraud on his part:—Held, therefore, upon a sale of garden seeds, that there was no implied warranty that the seeds were fresh or otherwise good and fit for growing, and that they would grow, but merely that the packages contained such seeds as the labels indicated, and that to a sale of this kind the maxim "caveat emptor" must apply. The third count of the declaration alleged that defendant, by fraudulently representing the seeds to be good and fresh, &c., induced plaintiff to buy them:—Held, that, if the defendant had known that the seeds would not grow by reason of age or defect in drying or keeping, he would have been liable for the deceit in the fraudulent representation made. *Sudgrove* v. *Bruce*, 16 C. P. 561.

**Quality of Article**—*Caveat Emptor.*]—Defendants, carrying on business at Woodstock, and having a large quantity of crude oil at a refining establishment there, contracted to sell to plaintiffs, who lived at Hamilton, 6,000 gallons of rock oil, to be delivered at Woodstock, and marked with the brand of the refining company. The plaintiffs sent the barrels to Woodstock, and defendants sent their clerk to see them filled, the plaintiffs agreeing to pay half of his expenses. It was proved that rock oil meant oil so refined as to be fit for illuminating purposes, and the jury, being directed to say whether what was delivered was substantially that article, found in favour of the plaintiffs:—Held, that the direction was right, and that the evidence amply sustained the verdict; that the maxim "caveat emptor" did not apply, for that, as the delivery was at Woodstock, the plaintiffs living at Hamilton had no opportunity of exercising their own judgment, and defendants' clerk was plaintiffs' agent only to see the oil barrelled. *Edgar* v. *Canadian Oil Co.*, 23 U. C. R. 333.

——— *Knowledge of Purchaser—"Brands"—Conditions of Sale.*]—At an auction sale of wines and liquors, defendant, a liquor dealer, became a purchaser. The goods, including port, sherry, and brandy, though marked with the brands of well known foreign wines and liquors, were proved to be of home manufacture, and on this account defendant refused to accept them. It was proved that the prices of genuine wines and liquors would have far

exceeded what was given here, and that it was well known in the trade that low priced wines were of home manufacture and branded as these were. There was no written warranty as to the genuineness of the articles, and the jury found that there was no oral representation to that effect made at the sale:—Held, that, under these circumstances, defendant was not justified in his refusal to accept on the ground that the goods sold were not what they professed to be. By the conditions of sale, in case of refusal to accept, the plaintiff was authorized to resell the goods and recover the expenses of the resale:—Held, therefore, that the plaintiff was entitled to recover such expenses from the defendant. Part of the goods in question were in the plaintiff's warehouse, and the residue were in another person's cellar, of which the plaintiff had the key:—Held, that there was sufficient possession in the plaintiff to enable him to maintain the action for not accepting. *Coate* v. *Terry*, 26 C. P. 35.

——— *Opportunity of Inspection—Caveat Emptor.*] — The plaintiff bought 138 barrels of apples from the defendant, the latter saying they would be found to be "a good lot." Some of the barrels were opened and the contents examined by the plaintiff, and he might, if he chose, have examined all. They proved to be inferior in quality:—Held, that, as the sale was not by sample, and the plaintiff had not been deterred by any act or conduct of the defendant from making a full inspection of all the barrels, the defendant was not liable on any warranty, express or implied, and the maxim caveat emptor applied. *Borthwick* v. *Young*, 12 A. R. 671.

Under a contract to supply goods of a specified description which the buyer has no opportunity of inspecting, the goods must not only, in fact, answer the specific description, but must be saleable or merchantable under that description. On a sale of goods where the buyer has no opportunity of inspection, the maxim caveat emptor does not apply. The plaintiffs sold a cargo of rye to the defendants to be shipped from K. and delivered afloat at the defendants' dock at T. On being unloaded at T. into the defendants' elevator, it was discovered by the defendants' inspector that the bottom of the cargo was heated; and subsequently the whole of it became heated. There was no opportunity to inspect the rye at the time of the making of the contract, nor did the defendants waive inspection. There was no express warranty as to quality or condition:—Held, that there was an implied warranty on the part of the plaintiffs that the commodity delivered would be saleable or merchantable under the description "rye," that there was a breach of such warranty, and that the maxim caveat emptor did not apply. Jones v. Just, L. R. 3 Q. B. 197, followed. Borthwick v. Young, 12 A. R. 671, distinguished. *Moores* v. *Goodcham*, 14 O. R. 451.

**Title to Article.**]—The plaintiff agreed to sell to defendant certain timber which he was about to cut on land of which he was in occupation. He cut and delivered it at the place agreed on, but the government had a claim upon it for timber dues: — Held, although there was no express warranty of title, that this being an executory contract for purchase and sale of a subject unascertained and afterwards to be conveyed, the purchaser had the right to insist upon a good title; and that in an action for not accepting he might deduct the amount of dues for which the Crown held a lien. Semble, however, that in all cases of the sale of chattels, the vendor, by selling them as his own, impliedly warrants the title, unless the facts shew that he intended only to transfer his interest. *Brown* v. *Cockburn*, 37 U. C. R. 592.

*See Johnston* v. *Barker*, 20 C. P. 228; *Bennett* v. *Tregent*, 24 C. P. 565; *Frye* v. *Milligan*, 10 O. R. 560; *Struthers* v. *Mackenzie*, 28 O. R. 381; *McMullen* v. *Williams*, 5 A. R. 518.

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## V. Representations.

**Auction** — *Previous Representation—Relation.*]—In a printed catalogue of articles for sale, a bull was stated to be "a sure stockgetter," but at the commencement of the sale the auctioneer publicly announced that the seller warranted nothing: — Held, that the purchaser, in an action as for a breach of warranty, was obliged to shew that the warranty, if any, contained in the catalogue, was imported into the sale. *Craig* v. *Miller*, 22 C. P. 348.

**Description of Article**—*"New"—Jury.*]—The question being whether defendant had warranted a hearse sold by him to the plaintiff to be new, it appeared that defendant, having two hearses for sale, one of which was old and the other all new except a part of the running gear, the plaintiff came to him to purchase. Defendant said his old hearse was at a place named, where they went to see it. Plaintiff then said that he wished to see the new one, and they went to the paint shop where it was, the wheels being off, and the last coat of paint not finished, with some ornamental work yet to be done. The plaintiff examined it, and having agreed on the price, then went to the house of one S., a friend, where the following memorandum was drawn up: "Messrs. Baker & Blewett (plaintiff's firm) to S. Fawkes (defendant)—Drs.:—To 1 new hearse; 1 set ostrich plumes; also 1 set white plumes, $800; received on account, $300; interest at 7 per cent.—balance, $500. "Hearse to be delivered at station in Toronto, finished and complete." This the plaintiff said was prepared by S. as the memorandum of the terms of sale. The last line was added at plaintiff's request. S. said he wrote the memorandum (which was not signed by defendant) without dictation, and used the word "new" to distinguish it from defendant's old hearse. The defendant said he always spoke of the two in that way for distinction; that he told the plaintiff a portion of the running gear was not new, and that the plaintiff, who examined it carefully, could not have failed to see this. The plaintiff, on the other hand, said the defendant told him it was new, which he believed, and that he would not otherwise have purchased:—Held, that it was a question for the jury whether defendant sold his new hearse, calling it "new" simply as a matter of description, without any warranty that it was new, or whether he described it as a new hearse, and contracted to sell it as such; and in an action on the alleged warranty a nonsuit was set aside. *Baker* v. *Fawkes*, 35 U. C. R. 302.

**Fraud** — *Absence of—Jury.*]—The plaintiff purchased a steam vessel from defendant.

on the faith, as he alleged, but which defendant denied, of certain representations made by defendant as to her power and capability; and, after some discussion, a document called a bill of sale, but not under seal, the vessel being unregistered, was executed. This merely stated that the defendant, in consideration of $3,000, sold and assigned the vessel to plaintiff, with a warranty only as to title. The boat did not answer the alleged representations as to power and capability, but no fraud was charged against defendant. The plaintiff having brought an action for a false representation, and also for breach of warranty:—Held, that the plaintiff could not recover as for a false representation, there being no imputation of fraud; that his remedy, if at all, must be for breach of warranty, and that, although the document contained only a warranty as to title, still it was a question for the jury upon the whole evidence, whether the defendant had in fact intended to warrant her power and capability, or whether the document contained the whole contract. *Bennett v. Tregent*, 24 C. P. 565.

VI. Miscellaneous Cases.

**After Sale** — *New Consideration.*] — A warranty made after sale, without a new consideration, is not binding. *Grant v. Cadwell*, 8 U. C. R. 161.

**Assignee in Insolvency**—*Sale of Goods Assigned—Warranty of Title.*] — Defendant, having been duly appointed by the proper authority official assignee in insolvency for a county in which he was non-resident, sold the goods of an insolvent to plaintiff, who purchased on defendant's assertion that he had the right to sell, after full discussion between the parties as to this right, and plaintiff having been satisfied by defendant's assertion, made in the honest belief that he had such right. The sale to plaintiff having been pronounced invalid:—Held, that defendant's honest belief in his right to sell, as assignee, did not protect him from liability to plaintiff, if he warranted his title, nor was the knowledge on plaintiff's part of the possible defect in defendant's title fatal to the warranty on the sale of the goods. Held, also, that had nothing occurred beyond the discussion of his title, and plaintiff had bought with this full knowledge, defendant would not have been liable; but, as defendant might have induced plaintiff to buy on express warranty, a new trial was granted to ascertain this fact. *Johnston v. Barker*, 20 C. P. 228.

**Assignment of Patent Right** — *Covenant to "Warrant and Defend."*]—See *Green v. Watson*, 2 O. R. 627, 10 A. R. 113.

**Charges and Incumbrances on Sale of Land in Province of Quebec**—*Warranty against.*] — See *Windsor Hotel Co. v. Cross*, 12 S. C. R. 624.

**Incidental Demand** — *Relief over — Premature Proceeding—Costs—Quebec Law.*]—See *Archbald v. DeLisle, Baker v. DeLisle, Monat v. DeLisle*, 25 S. C. R. 1.

**Sale of Timber Limits.**]—See *Duconda v. Dupuy*, 9 App. Cas. 150.

See Insurance, III., V., VI.

## WASTE.

**Lessee** — *Alterations in Building.*]—See *Holderness v. Lang*, 11 O. R. 1.

——— *Clearing Land.*]—A tenant who, for the purpose of clearing the land and rendering it more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them, and is liable for their value if he disposes of them. Saunders v. Breakie, 5 O. R. 693, commented on. *Lewis v. Godson*, 15 O. R. 252.

——— *Covenant—"Tapping" Trees.*]—It is a question for the jury whether the tapping of trees for sugar making has the effect of destroying the trees, or of shortening their life, or injuring them for timber purposes; and if so found, a covenant not to cut down timber except for the lessee's use, or for purposes of improvement on the premises, will be broken by such tapping. The general question of waste discussed. *Campbell v. Shields*, 44 U. C. R. 449.

——— *Right to Bore for Oil.*]—The plaintiff, in consideration of $25 paid by defendant, executed in his favour a lease of a small plot of land, at a yearly rent of one cent if demanded, with the right on the part of the defendant to remove all buildings at any time during the lease. The lease contained no covenants on the part of the lessee other than those to pay rent and to pay taxes, and it was silent as to any right on the part of the lessee to bore for oil:—Held, that, prima facie, the lessee had not the right to bore for oil, and having done so and commenced operations in pumping crude oil, an injunction was granted to restrain the further removal of oil from the premises until the hearing of the cause. *Lancey v. Johnston*, 29 Gr. 67.

**Mortgagor in Possession.**]—A mortgagor continuing in possession is not liable to the mortgagee for rents and profits, nor in general for waste. *Wafer v. Taylor*, 9 U. C. R. 609.

After a decree for foreclosure, if the mortgagor in possession commits waste, the court will enjoin it, though an injunction may not have been prayed for in the bill. *Cawthra v. McGuire*, 5 L. J. 142.

**Mortgagor**—*Lumber Cut on Mortgaged Premises.*]—See *Scott v. Vosburg*, 8 P. R. 336; *McLeod v. Avey*, 16 O. R. 365.

**Permissive Waste**—*Fire.*]—In the absence, in a lease, of an express covenant to repair by the lessee, he is not liable for permissive waste, and an accidental fire, by which the leased premises are burnt, is permissive not voluntary waste. *Wolfe v. McGuire*, 28 O. R. 45.

——— *Growth of Weeds — Tenant for Life.*]—An action for permissive waste will lie against a tenant for life. In re Cartwright, 41 Ch. D. 532, followed. The spread of noxious weeds from natural causes, or by the action of cattle depasturing or eating hay or straw coming from the fields where the weeds were, and the failure to stop the growth thereof, is no evidence of waste, but only of ill-husbandry; and the fact that there is a statute, R. S. O. 1887 c. 202, for the

prevention of the spread of noxious weeds does not make any difference. *Patterson* v. *Central Canada L. and S. Co.*, 29 O. R. 134.

**Remainderman**—*Action by—Tenant for Life—Timber.*]—An action on the case for waste may be brought under 6 Edw. I. c. 5, by him in remainder for life or years; and where land was devised for life, with a reservation of the oak timber thereon, it was held that a power to dispose of other descriptions of timber was not thereby implied, and that the tenant for life was guilty of waste in disposing of such other timber. *Taylor* v. *Taylor*, 5 O. S. 501.

**Reversioner**—*Action by—Tenant for Life—Timber—Pleading.*]—Case by the reversioner against the tenant for life for cutting timber. Plea, that the defendant, as the servant of the tenant for life, and by her command, entered upon the lands, and cut down the trees, for the purpose of clearing the land and cultivating the same:—Held, that the plea was bad on special demurrer; and, semble, that it was also bad in substance, as shewing no justification. *Weller* v. *Burnham*, 11 U. C. R. 90.

**Tenant for Life** — *Impeachment for Waste.*]—See *Clow* v. *Clow*, 4 O. R. 355.

——— *Right to Cut Timber.*]—See *Saunders* v. *Breakie*, 5 O. R. 693; *Mansie* v. *Lindsay*, 10 P. R. 173.

——— *Timber — Cultivation — Pleading.*]—Held, that it was not waste in a tenant for life to cut down timber on wild land for the sole purpose of bringing it into cultivation, provided the inheritance be not damaged thereby, and it is done in conformity with the rules of good husbandry. *Drake* v. *Wigle*, 24 C. P. 405.

*See*, also, as to the form of pleas justifying in such a case, *S. C.*, 22 C. P. 341.

**Tenants in Common**—*Suit by One—Restraining Waste—Costs.*]—Where costs were incurred by a tenant in common, suing on behalf of himself and his co-tenants, in restraining waste on the joint property by a stranger:—Held, that, on its being shewn that the suit was necessary and proper, and that it resulted in benefit to the co-owners, they should share the expense, in proportion to the advantage they had derived from the suit. *Gage* v. *Mulholland*, 16 Gr. 145.

**Title Acquired after Action.**]—The plaintiff instituted proceedings to restrain waste and obtain possession of the property, but at the time he had not such a title as would enable him to maintain ejectment, and the evidence failed to establish the waste complained of. The court, under these circumstances, refused to give effect to a title acquired subsequently, and dismissed the bill with costs, without prejudice to any other suit. *Adamson* v. *Adamson*, 25 Gr. 550.

*See White* v. *Nelles*, 11 S. C. R. 587; *Mill* v. *Mill*, 8 O. R. 370; *Crawford* v. *Bugg*, 12 O. R. 8.

*See*, also, LANDLORD AND TENANT—TIMBER AND TREES.

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I. ACCRETIONS.

**Crown Grant**—*Water's Edge—Natural Accretion—Artificial Cause.*]—Where land was granted by the Crown bordering on Lake Ontario, and described in the grant as extending to the water's edge, it was held that the water's edge must be the boundary wherever it might be, and therefore that land which was gradually and imperceptibly formed by the receding of the water would belong to the grantee, the boundary of the lake being fluctuating, and the grantee not being restricted to the land extending to where the water's edge was at the time of the grant. Land gradually and imperceptibly formed by the washing of sand and shingle from the lake, is the property of the owner of the adjoining land, described in the patent as extending to the water's edge, even although the formation is caused by the artificial erections of a harbour company entitled to peculiar privileges by statute. *Doe d. McDonald* v. *Cobourg Harbour Co.*, M. T. 7 Vict.

**Deed**—*Bank of Lake—Extension by Alluvial Deposit.*]—The deeds under which plaintiff claimed title conveyed "to the bank of Lake Ontario, thence along the said bank the several courses thereof." It appeared that so much alluvial deposit had been washed upon the shore, and even upon the bank of the lake, that all traces of the former bank were now obliterated, and could only be discovered by digging through the surface or new soil:—Held, that as plaintiff would, by the encroachment of the lake, be the loser (the owner of the shore, consisting of the part between high and low water mark, always being able to claim the shore whether it shifted or not), so he should be entitled to the benefit of the extension of the bank seaward, upon the principle that whoever would sustain the injury should also be entitled to the benefit. *Throop* v. *Cobourg and Peterborough R. W. Co.*, 5 C. P. 509.

Affirmed in appeal on the 3rd March, 1859, but the judgment has not been reported. See the extract in 2 A. R. 212 note.

——— *Boundary of Lake—Shifting Line.*]—A parcel of land conveyed being described as so many chains more or less, running to Lake Ontario, and thence along the lake shore, &c., and a beach or strip of land having been formed by accretion between what was then the line and the edge of the lake as at present:—Held, that the owner of the land was entitled to such strip of land to the water's edge, and was not limited to the boundary of the lake as it was when the above deed was made, the distance to the lake being more or less according to circumstances. *Buck* v. *Cobourg and Peterborough R. W. Co.*, 5 C. P. 552.

**Harbour Company**—*Statutory Powers—Construction of Pier—Owner of Land to Water's Edge—Alluvial Deposit—Access.*]—By 10 Geo. IV. c. 11, the Cobourg Harbour Company were authorized to construct a harbour at Cobourg, and also to erect all such needful wharves, buildings, &c., as should be useful and proper for the protection of the harbour, and for the accommodation and convenience of vessels entering, lying, loading, and unloading within the same, and to alter, repair, and enlarge the same as might be expedient. The plaintiff's land extended to the water's edge and fronted on a public highway, at the end of which the company constructed a pier originally of 30 feet in width. From time to time earth dredged from the basin was deposited to the east of this pier, and crib work was placed on the outside to prevent it from being washed away. On the additional land thus formed, partly by accretion and partly by the action of those representing the company, the defendants, in whom the powers conferred on the harbour company had been vested, built a storehouse and a fence dividing it from that part of the plaintiff's land which had accrued to him from alluvial deposits, whereupon the plaintiff filed a bill to compel their removal, on the ground that they were on the highway and prevented him from having access thereto from his land:—Held, reversing the judgment in 23 Gr. 507, that the plaintiff was not entitled to relief, as the formation in question was not part of the highway, but an artificial structure constructed for harbour purposes under the authority of the Act. Held, also, that gradual accretions in front of a road allowance running down to the lake form part of the road, just as similar deposits in front of a lot accrue to the owner thereof. Held, also, that although the statute 10 Geo. IV. c. 11 did not expressly authorize the company to build a wharf in front of the street, the recognition of the right in subsequent statutes was sufficient. *Standly* v. *Perry*, 2 A. R. 195.

Held, affirming the above, that land gained by alluvial deposits arising from natural or artificial causes or from causes in part natural and in part artificial, so long as the fact is proved that the accretion was gradual and imperceptible, accrues to the owner of the adjacent land. (2) That the storehouse and fence complained of in this case were not constructed on any part of Division street, but on an artificial structure constructed under the authority of a statute on the line of Division street for harbour purposes, and, therefore, appellant was not entitled to be indemnified because he was denied access to his alluvial land through the premises of the respondents. (3) That the public right of way from the end of Division street to the water of Lake Ontario, was extinguished by statute by necessary implication. Corporation of Yarmouth v. Simmons, 10 Ch. D. 518, followed. *Standly* v. *Perry*, 3 S. C. R. 356.

*See post* VIII.

II. ACTIONABLE INFRINGEMENT OF RIGHTS.

**Declaration of Right**—*Damages.*]—This court refused to recognize the existence of such a rule as that the first action at law for damages to a mill site is brought simply to try the right, not to obtain substantial damages, if any such have been sustained. *Wadsworth* v. *McDougall*, 24 Gr. 1.

**Diversion of Water**—*Raising Dam.*]—In an action for diverting water from plaintiff's mill, the defendant by his plea admitted that he had raised his dam erected for his own land to a greater height than he was legally entitled to do, but denied the consequences arising from such act:—Held, plea good. *Tucker* v. *Paren*, 8 C. P. 63.

**Erection of Dam**—*Necessary Consequence—Negligence.*]—Where the necessary and unavoidable consequence of a lawful act done by a person on his own land (such as the erection of a mill dam) is to

produce an injury to his neighbour, an action lies for such injury; but it is otherwise if such act per se would not be necessarily or probably injurious, but becomes so from a cause not under the control of either party. In such case negligence must be proved to render a defendant liable. *Peters* v. *Devinney*, 6 C. P. 389.

**Injury to Right**—*Choking Stream—Damages.*]—The plaintiff declared that he was entitled to the water of a certain stream for working his mill, and complained that defendant, owning a mill higher up, had unlawfully deposited sawdust, &c., in the stream, which was carried down and choked up the plaintiff's mill pond and races, &c. Defendant denied the plaintiff's right to the water, which the plaintiff sufficiently proved, but, there being no appreciable damage, the jury found a general verdict for the defendant:—Held, that there must be a new trial, for, the right being established, the deposit of sawdust, &c., was an injury to it, for which the plaintiff was entitled to a verdict. When an act done would be evidence against the existence of a right, it is an injury to such right, for which the party injured may sue. *Mitchell* v. *Barry*, 26 U. C. R. 416.

**Injury to Watercourse** — *Permanent Right.*]—An injury to a watercourse is considered as an injury to a permanent right, and in such a case the court will grant the plaintiff a new trial, although the probable amount to be recovered by a verdict may not be large. *Applegarth* v. *Rhynal*, Tay. 590; *Mitchell* v. *Barry*, 26 U. C. R. 416.

**Obstruction of Stream**—*Bridge—Municipal Corporation—Negligence.*]—Declaration charged that the defendants, the municipal corporation of a town, on the 1st March, 1868, and on divers other days, pewed back the water of a stream in the town, on which the plaintiff had a tannery, so that it flooded his land, &c. The obstruction complained of was a bridge along a street in the town, where there had been a bridge for about 30 years. One D., who owned land on the stream below the bridge, had a wheel in the stream, and persons above him cut away and sent down ice in the spring, which formed a jam at D.'s, and filled the stream thence up to and under the bridge. The weight of evidence tended to shew that but for this obstruction at D.'s, the plaintiff would not have been injured. It was left to the jury to say whether the injury complained of was caused by the bridge, or by the ice jam at D.'s, irrespective of the bridge, and they found for the plaintiff:—Held, a misdirection: that they should have been told that, if the damage was caused by persons sending ice down, which lodged against the bridge, and not by the ordinary action of the ice, defendants were not liable. And semble, that upon the declaration and evidence the plaintiff could not recover, for it was defendants' duty to build the bridge there, and no negligence was charged. *Patterson* v. *Town of Peterborough*, 28 U. C. R. 505.

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### III. Canals.

(*See*, also, *post* XVII.)

#### 1. *Desjardins Canal.*

**Bridge**—*Injury to Ship—Negligence.*]—A railway company had the control of a swing bridge over this canal. The plaintiff's ship was navigating the canal when trains were about passing and repassing the bridge. Notice was given of the plaintiff's vessel being about to pass, by blowing a horn and hailing, and notice was given by the company's servants by signal that the bridge could not then be swung, and the plaintiff's vessel was injured by running against the bridge while it remained closed:—Held, that, as the requirements of the railway traffic compelled the bridge to be closed, the company were not then bound to open the bridge, and were not liable for such injury, to which the plaintiff had contributed by his own negligence. *Turner* v. *Great Western R. W. Co.*, 6 C. P. 536.

——— *Repair—Railway Company—Action against.*]—Held, that the G. W. R. Co. were bound by s. 5 of 16 Vict. c. 54 to maintain in repair the bridge over the Desjardins canal, which it allows them to erect. That bridge forms part of a road leading into the plaintiffs' road:—Held, that the loss of custom and tolls occasioned to the plaintiffs was not sufficient to enable them to maintain an action against defendants for allowing such bridge to fall out of repair. *Hamilton and Brock Road Co.* v. *Great Western R. W. Co.*, 17 U. C. R. 567.

——— *Repair—Railway Company—Indictment.*]—The Desjardins Canal Company having been indicted for not keeping in repair the bridge over their canal where it crosses the highway built for them by the G. W. R. Co.:—Held, that they, and not the company, were bound to keep such bridge in repair. *Regina* v. *Desjardins Canal Co.*, 27 U. C. R. 374.

——— *Repair—Road Company—Erection of New Bridge—Injunction.*]—An Act of parliament having provided that it should be lawful for the Desjardins Canal Company to cut a channel across a certain highway, and to erect, keep, and maintain a safe and commodious bridge across the canal, and the bridge after being erected having become unsafe through the default of the canal company, an incorporated road company, which had acquired the road, made several endeavours to get the bridge repaired, but all of them having failed through the insolvency of the canal company, the road company at length commenced the erection of a fixed bridge, which would impede the navigation of the canal:—Held, reversing the decision in 17 Gr. 31, that they had no right to do so, and a permanent injunction was granted. *Town of Dundas* v. *Hamilton and Milton Road Co.*, 18 Gr. 511.

——— *Statutory Authority for Erection of—Pleading.*]—Held, that, by the various Acts of parliament referring thereto, the erection of defendants' drawbridge over the Desjardins canal was sanctioned and recognized; and that it must be assumed to have been lawfully erected, though the formalities required by ss. 136, 137, and 138 of the Railway Act, might not have been complied with. Held, also, that the first count of the declaration, charging defendants with neglect and refusal to open the bridge and permit vessels to enter or leave the canal, was defective, in not alleging that it was not at such times being actually used by defendants for the passage of their trains; and that the second count was good. *Des-*

*gardins Canal Co.* v. *Great Western R. W. Co.*, 27 U. C. R. 363.

**Sale of Canal**—*Creditors—Lien—Injunction.*]—Injunction granted at the suit of the creditors of the Desjardins Canal Company, who had a lien on the canal, against a sale thereof under a subsequent execution. *Town of Dundas* v. *Desjardins Canal Co.*, 17 Gr. 27.

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2. *Welland Canal.*

**Surplus Water**—*Escape of — Damages.*]—The Welland Canal Company have power under their charter, 4 Geo. IV. c. 17, to let surplus water out of the canal in time of flood; and no action can be maintained for the preservation of the canal. *Griffiths* v. *Welland Canal Co.*, 5 O. S. 686.

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IV. Ditches and Watercourses Act.

[See R. S. O. 1877 cc. 198, 199; R. S. O. 1887 cc. 284, 285.]

**Award**—*Appeal—Right of.*]—The right of appeal to a county court Judge against an award of fence-viewers, under 32 Vict. c. 46, s. 8, is not restricted to an award made under s. 6, s-s. 2, of the Act, when the land benefited is in two municipalities, but extends to an award made by three fence-viewers under C. S. U. C. c. 57, which the latter Act amends and is made part of. *In re McDonald and Cattanach*, 5 P. R. 288; *S. C.*, 30 U. C. R. 432.

——— *Appeal—Time.*]—The provisions of s-s. 6 of s. 22 of 57 Vict. c. 55 (O.), the Ditches and Watercourses Act, 1894, which require the Judge of the county court to hear and determine an appeal from an award thereunder within two months after receiving notice thereof, are merely directory. *Re McFarlane* v. *Miller*, 26 O. R. 516.

——— *Authority of Fence-viewers — Obstruction of Ditch.*]—In an action for obstructing a drain, called "the old drain," the jury found for the plaintiff, with 6d. damages, saying that their verdict was founded upon an award which had been made by fence-viewers:—Held, upon the evidence, that a verdict must be entered for defendant, for it was not "the old drain" which was obstructed (as stated in the declaration), but the new cut made by the plaintiff; and as to the award, the effect of that was only to allow this new cut to be kept open for a certain time; whereas the verdict, if sustained, would establish a right in the plaintiff to keep "the old drain" open for ever. Held, that it was unnecessary to prove the regular appointment of the fence-viewers; and that their award was binding under 8 Vict. c. 20. *Malone* v. *Faulkner*, 11 U. C. R. 116.

——— *Authority of Fence-viewers—Time for Making Ditch — Position of Ditch—Demand — Trespass—Pleading.*]—The declaration was against the defendant as owner of a lot adjoining the plaintiff's land, alleging the existence of a large quantity of surplus water upon both lots, and that both parties disputed as to their respective rights and liabilities under the Fence-viewers Act, C. S. U. C. c. 57. The declaration then went on to recite the award of the fence-viewers verbatim, which directed two ditches to be made by the parties, one by each, and concluded thus, "said ditch to be made before the 1st October, 1865." Plaintiff then averred performance of the award on his part, and a neglect and refusal to perform it on the defendant's part, and claimed damages for such neglect and refusal:—Held, on demurrer, that the declaration was not bad as failing to disclose a case which gave the fence viewers jurisdiction, which it sufficiently did; but that it was bad as setting out an award which did not fix the time each party should have within which to perform his share of the ditching, or direct where such ditching should be made; and also, for not shewing that a demand in writing had been made on the defendant to perform the award, the non-compliance with which would have entitled the plaintiff under the Act to have completed the ditch and sued for the price fixed, instead of bringing an action for damages, which could not be maintained. The eleven sub-sections of s. 16 of the above Act, C. S. U. C. c. 57, refer to ditches and watercourses as well as to fences. *Murray* v. *Dawson*, 17 C. P. 588.

The plaintiff and defendant, occupying adjoining lots, having disputed as to the drainage of surface water, referred the question to fence-viewers, who awarded that the defendant should open a ditch from the line fence between himself and defendant, through the plaintiff's farm, of sufficient depth to carry off the water then in the ditch opened by defendant, about twenty rods in length, and that the plaintiff should make and keep open this same portion of ditch, commencing at the line fence, and of sufficient length, width, and fall, to carry off the water; to be two and a-half feet deep at the line fence; said ditch to be made before the 1st October, 1865:—Held, following the last case, that the award was bad, for not sufficiently defining the point of commencement and course and position of the ditch. Semble, that the award was not bad, as decided in Murray v. Dawson, 17 C. P. 588, for omitting to specify the time within which each party was to perform his share of the work, for that the time mentioned applied to both. To an action for trespass on the plaintiff's land, defendant pleaded justifying under the award, alleging that the plaintiff paid half the expense of the award as thereby directed, and that defendant, in pursuance of it, having first duly notified the plaintiff, entered on the plaintiff's land and opened the ditch there as directed by the award, doing no unnecessary damage:—Held, that the plea was bad, as setting up a right which the award, being invalid, could not give; but that the facts might be found to support a plea of leave and license. *Dawson* v. *Murray*, 20 U. C. R. 464. See, also, *Murray* v. *Dawson*, 19 C. P. 314.

——— *Defective Requisition — Liability—Municipal Corporations.*]—A township municipality, within the limits of which a ditch is constructed under the provisions of the Ditches and Watercourses Act, R. S. O. 1887 c. 220, in accordance with the award of the township engineer, made in assumed compliance with the requisition of the ratepayers interested, is not liable for damages caused to a resident of the township by the construction of the ditch, even though the requisition be in

fact defective. *Seymour* v. *Township of Maidstone*, 24 A. R. 370.

——— *Easement — Obstructing Ditch — Remedy.*]—An award of fence-viewers directing a drain to be constructed on one man's land for the benefit of another, operates as the grant of an easement on the land through which it passes, binding privies in estate as well as parties; and so long as such award remains unchanged, the rights of the parties and the nature of the easement must be governed by it. An action, therefore, will lie against the owner of the land through which the drain passes for obstructing it to the injury of the person for whose benefit it is required. Semble, that such person may enter upon the land and clear out the drain to the extent to which he is bound to maintain it under the award. *Kelly* v. *O'Grady*, 34 U. C. R. 562.

——— *Engineer — Appointment — Revocation — Notice — Jurisdiction — Estoppel — Appeal.*]—By s. 4 (1) of the Ditches and Watercourses Act, R. S. O. 1897 c. 285, it is provided that "every municipal council shall name and appoint by by-law (Form A.) one person to be the engineer to carry out the provisions of this Act, and such engineer shall be and continue an officer of such corporation until his appointment is revoked by by-law (of which he shall have notice) and another engineer is appointed in his stead, who shall have authority to commence proceedings under this Act or to continue such work as may have been already undertaken." The defendants' council duly appointed R. such engineer, and he accepted the office. Subsequently they, without any notice to him, and without any by-law expressly revoking his appointment, duly passed a by-law purporting to appoint S. as such engineer; the latter by-law in no way referring to the former or to R.:—Held, that the prior appointment had not been revoked; that S. did not become "the engineer;" and that an award purporting to be made by him as such engineer under the Act was invalid. S. was not de jure the engineer, because R.'s appointment had not been revoked by by-law, either with or without notice to him; nor could the defendants assert that S. was de facto the engineer, for he had not the reputation of being the engineer. Quære, whether the notice required is one of intention to revoke or of having revoked. Held, also, even supposing that consent could confer jurisdiction, or that the plaintiffs might waive or be estopped from urging an objection to S.'s jurisdiction, that there was no reasonable evidence of any such consent, waiver, or estoppel; for the plaintiffs' requisition called for "the engineer," and they were ignorant that R. had not been properly superseded. The point was raised upon an appeal against the award and was overruled; but, as it went to the root of the jurisdiction of the whole proceedings, including such appeal, there was nothing in such proceedings which could prevent a consideration of the question in a subsequent action. *Turtle* v. *Township of Euphemia*, 31 O. R. 404.

——— *Engineer—County Court Judge—Registration—"Owner"—Tenant at Will—Trespass.*]—Held, by the Queen's bench division, that where the engineer of a municipal corporation purports to make an award under the Ditches and Watercourses Act with respect to the making of a drain, the affirmance of such award by the county court Judge does not preclude the high court from entertaining the objection that the engineer had no jurisdiction to make the award; nor is such an objection one for the determination of the county court Judge alone. Murray v. Dawson, 17 C. P. 588, distinguished. (2) In the absence of a resolution of the municipal council such as is provided for by s. 6 (b) of the Ditches and Watercourses Act, R. S. O. 1887 c. 220, the question whether the engineer has jurisdiction to make an award depends upon whether, before filing the requisition, the owner filing it has obtained the assent in writing of a majority of the owners affected or interested, as provided by s. 6 (a); if he has obtained such assent, the engineer is, immediately upon such filing, clothed with jurisdiction; and the absence of the notice (form D.) required by s. 6 would not deprive him of such jurisdiction, but would form only a ground of appeal against his award. (3) The assent of the municipal corporation as one of the land owners interested may be shewn by resolutions passed by the council directing the engineer to proceed with the work. (4) The term "owner" as used in the Act means the assessed owner; and a tenant at will may be an owner affected or interested within the meaning of the Act. (5) The decision of the county court Judge as to matters over which the engineer has jurisdiction cannot be reviewed by the court; and whether the plaintiffs were benefited by the proposed work was a matter to be determined by the engineer and the subject of appeal to the county court Judge. (6) The mere publication by the engineer, within a year after the affirmance of an award, of a notice that he would let the work to be done upon the land of one of the persons affected by the award, and that such letting would take place after the expiry of a year from such affirmance, does not afford any ground for an action of trespass. Held, by the court of appeal, reversing the decision of the Queen's bench division, that the word "owner" as used in the Ditches and Watercourses Act, R. S. O. 1887 c. 220, means the actual owner and not the assessed owner; and a tenant at will of land affected, assessed as owner, is not an owner affected or interested within the meaning of the Act. Held, by the supreme court of Canada, affirming the judgment of the court of appeal, that "owner" in s. 6 (a) does not mean the assessed owner; that the holder of any real or substantial interest is an "owner affected or interested;" and that a mere tenant at will can neither file the requisition nor be included in the majority required. Quære, whether, if the person filing the requisition is not an owner within the meaning of that term, the proceedings are valid if there is a majority without him. *York* v. *Township of Osgoode*, 24 O. R. 12, 21 A. R. 168; *Township of Osgoode* v. *York*, 24 S. C. R. 282.

——— *Engineer—Initiating Party—Owner.*]—A lessee of land with an option to purchase the fee is not an owner who can initiate proceedings for construction of a ditch under the Ontario Ditches and Watercourses Act, 1894. Township of Osgoode v. York, 24 S. C. R. 282, followed. If the initiating party is not really an owner, the filing of a declaration of ownership under the Act will not confer jurisdiction. Section 24 of the Act, which provides that an award thereunder, after expiration of the time for appealing to the Judge, or after it is affirmed

on appeal, shall be binding notwithstanding any defects in form or substance either in the award or any of the proceedings, does not validate an award or proceedings, where the party initiating the latter is not an owner. Judgment in 25 A. R. 488 reversed, *Township of McKillop* v. *Township of Logan*, 29 S. C. R. 702.

——— *Engineer—Jurisdiction—Omissions—Directory Statute — Waiver.*] — The land owner who initiated the proceedings under the Ditches and Watercourses Act, 57 Vict. c. 55 (O.), upon which the township engineer acted in making an award, had not filed a declaration of ownership pursuant to s. 7, although he was in fact the owner of the land mentioned in the notice as belonging to him, and had not caused a "friendly meeting" to be held pursuant to s. 8, before filing his requisition. The plaintiff, whose lands were affected by the award, contended that the filing of the declaration and the holding of the meeting were acts essential to the jurisdiction of the engineer attaching:—Held, that the provisions of ss. 7 and 8 should be treated as directory only. Held, also, following Moore v. Gamgee, 25 Q. B. D. 244, that the plaintiff's objections were such as could be waived, and had been waived by her appearing before the engineer and contesting the right of the initiating land owner to have the ditch made on her land and at her expense, without objecting to the engineer's jurisdiction. Held, also, that s. 24 of the Act applied so as to validate what was done by the engineer, in spite of the omissions. *Maisonneuve* v. *Township of Roxborough*, 30 O. R. 127.

——— *Evidence — Copy — Justification — Nominal Damages.*] — In trespass defendant justified cutting the ditch complained of under an award of fence-viewers, &c. The jury found for defendant on this issue, and on the general issue that there was no damage:—Held, that, as a right was involved, the plaintiff was entitled to a verdict on the general issue for nominal damages. The township clerk produced a copy, which he swore was a true copy, of the fence-viewers' award, the original being in his custody:—Held, that such copy was admissible in evidence under C. S. U. C. c. 32, s. 6, these awards being made by a statutable public officer acting in a judicial capacity, and being such as might affect a large portion of the public, and even municipalities. Semble, that if the copy had been one delivered by the fence-viewers under the statute, it might have been received without proving it to be a true copy. *Warren* v. *Desjopes*, 33 U. C. R. 59.

——— *Non-completion of Work — Remedy — Costs of Action.*] — Where an award has been made under the Ditches and Watercourses Act, 1883, the only remedy for the non-completion of the work in accordance with the award is that provided by s. 13 of the Act. Murray v. Dawson, 17 C. P. 588, followed. O'Byrne v. Campbell, 15 O. R. 339, distinguished. No other or greater costs were allowed to the defendants than if they had successfully demurred instead of defending and going down to trial. *Hepburn* v. *Township of Orford*, 19 O. R. 585.

——— *Non-compliance with — Remedy — Enforcement—Purchaser.*]—No action lies to recover damages because of failure to comply with an award made under the Ditches and Watercourses Act; the remedy, if any, being under the Act itself. The purchaser of land from an owner who was a party to proceedings under the Act in respect of that land is entitled to enforce the award. *Dalton* v. *Township of Ashfield*, 26 A. R. 365.

——— *Owner — Municipal Corporation — Compensation.*]—A municipal corporation is an "owner," within the meaning of the Ditches and Watercourses Act, in respect of highways under its jurisdiction, and as such may initiate proceedings under that Act. Where it has, pursuant to an award in proceedings initiated by it under that Act, constructed, without negligence, a drain from a highway to a river through an adjoining owner's land, it is not liable to make compensation under the Municipal Act to that adjoining proprietor in case his land has been injuriously affected by the drain. *In re McLellan and Township of Chinguacousy*, 27 A. R. 355.

——— *Owner not Benefited.*]—The Act respecting ditches and watercourses, 38 Vict. c. 26 (O.), is only applicable where lands belonging to each of the adjoining owners is benefited by the work. Where therefore fence-viewers awarded that R. should pay for and maintain a portion of a drain and watercourse, which was only of benefit in draining McK.'s land, the award was set aside. *Riddell* v. *McKay*, 13 C. L. J. 92.

**Engineer**—*Completion of Work by—Time—Amount for which Owners Liable—Collector's Roll.*]—By s. 28 of 57 Vict. c. 55 (R. S. O. 1887 c. 220, s. 15), the Ditches and Watercourses Act, it is provided that "the engineer, at the expiration of the time limited by the award for the completion of the ditch, shall inspect the same, if required in writing so to do by any of the owners interested, . . . and may let the work . . . to the lowest bidder," &c:—Held, that even the lapse of two years did not debar the engineer from acting under the above section, where it was plainly made to appear that the drain was not made, within the time or after the time, of the proper dimensions, by the person who had the first option to do the work. Held, also, that the amount the several owners are liable for may be placed upon the collector's roll under 57 Vict. c. 55, s. 30 (R. S. O. 1887 c. 220, s. 18), on the authorization of the reeve of the municipality. *Rose* v. *Village of Morrisburg*, 28 O. R. 245.

——— *Duty to Inspect—Breach—Action — Damages.*] — After the time fixed by an award under the Ditches and Watercourses Act, 1883, for the completion of certain drainage work by neighbouring land owners, the plaintiff, who was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work, with the object of having it completed according to the award; but, as the plaintiff alleged, the defendant neglected to inspect the work or cause it to be completed according to the award, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, &c.:—Held, that the provisions of s. 13 of the above Act as to the inspection by the engineer are imperative, and an action would lie for breach of his duty; but, even if the evidence had shewn such a

breach, the damages claimed were not proximate, necessary, or natural results thereof. The other provisions of s. 13 are merely permissive, and no action would lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance. Those who, by the terms of the award, ought to have done the work were the persons proximately responsible for the damages. *O'Byrne* v. *Campbell*, 15 O. R. 339.

——— *Notice—Mandamus.*]—An owner of land, desiring to construct a drain on his own land and to continue it through that of an adjoining owner, served him with the notice provided by the Ditches and Watercourses Act, R. S. O. 1887 c. 220, s. 5, as amended by 52 Vict. c. 39, s. 2 (O.), to settle the proportions to be constructed by each, and, on their failing to agree, served the clerk of the municipality with the notice provided for by such Act requiring the engineer to appoint a day to attend and make his award. The clerk immediately forwarded the notice to the engineer, who was absent, and who declined to attend:—Held, that a mandamus would not lie against the municipal corporation to compel their engineer to act in the premises. *Dagenais* v. *Town of Trenton*, 24 O. R. 343.

**Joint Interest** — *Fence-viewers — Discretion—Demand.*]—To constitute a "joint interest," within the meaning of s. 7, C. S. U. C. c. 57, it is not necessary that the lands occupied should be contiguous lots. The question whether such interest exists is to be determined entirely by the fence-viewers, and their discretion cannot be reviewed if fairly and reasonably exercised. Semble, the absence of a demand under s. 15 may be waived by the subsequent conduct of the parties. *In re Roberts and Holland*, 5 P. R. 288.

**Obstructing Ditch** — *Remedy.*] — Held, that the evidence stated in this case failed to establish a natural watercourse, and that the plaintiff's only remedy for obstructing it was under C. S. U. C. c. 57. *Murray* v. *Dawson*, 19 C. P. 314.

**Railway Company**—*Application of Act.*] —Held, that the defendants, a railway company, were not subject to the provisions of the Ditches and Watercourses Act, R. S. O. 1877 c. 199. *Miller* v. *Grand Trunk R. W. Co.*, 45 U. C. R. 222.

——— *Application of Act—Award.*]—An award under the Ditches and Watercourses Act directed that a drain should be built by the initiating owner a certain distance along a highway of the defendants, then by the defendants along the highway to a point opposite the land of a railway company, then by another land owner, and then by the railway company along the highway, or across the highway through their own land, as far as might be necessary to give a proper outlet. The drain was built by contract under the Act as far as the point opposite the railway company's land, but the railway company, whose railway had been declared to be a work for the general advantage of Canada, refused to recognize the award or do the work directed. The defendants then built a culvert across the highway and brought the water to the railway company's land, and the railway company thereupon built an embankment to keep it back, the result being that it overflowed from the highway ditches and caused damage to the plaintiff:—Held, that there was no jurisdiction under the Ditches and Watercourses Act as far as the railway company were concerned; that the award was therefore no protection to the defendants; that the damage resulted from the construction of the culvert; and that the defendants were liable therefor. *McCrimmon* v. *Township of Yarmouth*, 27 A. R. 636.

*See McGillivray* v. *Mullin*, 27 U. C. R. 62.

*See*, also, FENCES, III.

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V. DIVERSION OF WATERCOURSES.

**Cause of**—*Pleading—Amendment.*]—The declaration charged the diversion of the water complained of to be the direct act of the defendant, whereas it was caused by a freshet forcing a new channel through a ditch wrongfully cut by him:—Held, that an amendment, if necessary, would have been allowed. *McLean* v. *Crosson*, 33 U. C. R. 448.

**Negligence**—*Outlet — Compensation.*] — Damage to land from an overflow of water caused by negligently diverting the water from its natural course without providing a sufficient outlet, is not the subject of compensation under the Municipal Act, 1883. *Stalker* v. *Township of Dunwich*, 15 O. R. 342.

**Railway Company**—*Purchaser — Notice — Registration — Prescription — Compensation.*]—Where the defendants in 1871, without authority, diverted a watercourse on certain land, and afterwards made compensation therefor to the then owner of the land, the plaintiff's predecessor in title: — Held, that the equitable easement thereby created in favour of the defendants was not valid against the registered deed of the plaintiff, a bonâ fide purchaser for value without actual notice; the defendants having shewn no prescriptive right to divert the watercourse; and the diversion being wrongful as against the plaintiff. Knapp v. Great Western R. W. Co., 6 C. P. 187, L'Esperance v. Great Western R. W. Co., 14 U. C. R. 173, Wallace v. Grand Trunk R. W. Co., 16 U. C. R. 551, and Partridge v. Great Western R. W. Co., 8 C. P. 97, distinguished. The plaintiff, having failed to prove actual damage, was allowed nominal damages for the wrong; and, instead of granting a mandatory injunction to compel the restoration of the watercourse, the court directed a reference to ascertain the compensation to which the plaintiff would be entitled as upon an authorized diversion of the watercourse under 51 Vict. c. 29, s. 90 (b) (D.) *Tolton* v. *Canadian Pacific R. W. Co.*, 22 O. R. 204.

——— *Remedy against—Damages—Compensation.*]—By s. 90 (b) of the Railway Act of Canada, 51 Vict. c. 29, a railway company have power to divert any watercourse, subject to the provisions of the Act; but, in order to entitle themselves to insist upon the arbitration clauses of the Act, they must, having regard to ss. 123, 144, 145, 146, and 147, shew upon their registered plans their intention to divert. The defendants built an embankment which entirely cut off the plaintiff's access to the water of a stream by diverting it from his farm:—Held, by the Queen's bench

division, that the diversion, not the damage sustained therefrom, gave him his cause of action: and the proper mode of estimating the damages was to treat the diversion as permanent and to consider its effect upon the value of the farm. *McGillivray* v. *Great Western R. W. Co.*, 25 U. C. R. 69, distinguished. Held, by the court of appeal, affirming the above, that where a watercourse has been diverted by a railway company in constructing their line, without filing maps or giving notice, the land owner injuriously affected has a right of action, and is not limited to an arbitration. For such diversion the land owner, in the absence of an undertaking by the company to restore the watercourse to its original condition, is entitled to have the damages assessed as for a permanent injury. The mode of computing damages to be allowed in lieu of an injunction, considered. *Arthur* v. *Grand Trunk R. W. Co.*, 25 O. R. 37, 22 A. R. 89.

**Statutory Authority**—*Crossing Railway Lands—Injunction.*] — Where the effect of British Columbia legislation was to authorize the respondents to irrigate their soil by the compulsory diversion of water from any adjacent stream or lake by conveying it over lands which did not belong to them, and to run the surplus water after irrigation through adjacent lands by means of flumes, ditches, or drains, all subject to provisions for compensation, and the respondents brought water upon their land in such manner as to be the substantial cause of damage to the appellants' line of railway by causing a slide of their land: — Held, reversing the judgment in 6 B. C. Rep. 6, that, in the absence of provisions shewing an intention on the part of the legislature to take away the appellants' right to protect their property from invasion, they were entitled to an injunction to prevent the respondents' user of the water in disregard of their common law obligation to do no damage to the appellants' lands. *Canadian Pacific R. W. Co.* v. *Parke*, [1899] A. C. 535.

——— *Rights of Riparian Owners — Notice.*]—The British Columbia Land Ordinance, 1865, contains the following provisions: 44. "Every person lawfully occupying and bonâ fide cultivating lands, may divert any occupied water from the natural channel of any stream, lake, or river adjacent to or passing through such land, for agricultural and other purposes, upon obtaining the written authority of the stipendiary magistrate of the district for the purpose, and recording the same with him, after due notice, as hereinafter mentioned, specifying the name of the applicant, the quantity sought to be diverted, the place of diversion, the object thereof, and all such other particulars as such magistrate may require." 45. "Previous to such authority being given, the applicant shall post up in a conspicuous place on each person's land through which it is proposed that the water should pass, and on the district court house, notices in writing, stating his intention to enter such land, and through and over the same to take and carry such water, specifying all particulars relating thereto, including direction, quantity, purpose, and term." In an action by a grantee of water under this ordinance for interference with the use of the same: — Held, that the ordinance was not passed for the benefit of riparian owners only, but any cultivator of land could obtain a grant of water thereunder. Held, further, that the water of a stream, &c., may be occupied under the ordinance, even though there may be a riparian proprietor upon a part of it. Held, also, that the provisions of s. 45 are merely directory, but, even if imperative, a grantee of water under the ordinance, who has used the water granted to him for several years, would not be required, in an action for damages caused by interference with such user, to prove that he gave the notices required by that section, as it would be presumed that the same were given before recording the grant. *Martley* v. *Carson*, 20 S. C. R. 634.

*See Tucker* v. *Paren*, 8 C. P. 63; *Malcolm* v. *Hunter*, 6 O. R. 102; *Rogers* v. *Dickson*, 10 C. P. 481.

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## VI. Drainage.

### 1. *Surface Water.*

**General Rule.**]—The right of drainage of surface water does not exist jure naturæ, and the principles applicable to streams of running water do not extend to the flow of surface water. *Crewson* v. *Grand Trunk R. W. Co.*, 27 U. C. R. 68.

**Obstruction of Ditch** — *Remedy—Easement.*]—The plaintiff owned land south of and higher than defendant's land, and the surface water in the spring and fall drained off in a channel of no definite width from the upper part of his lot to the lower, and thence to defendant's land into a pond, from which no exit was proved, and which, with the rest of the low land, was usually dry from April to November. The plaintiff had dug a ditch to facilitate the drainage through his own land, and defendant, three or four years ago, had allowed him to plough a furrow in his land with the same object. This the defendant afterwards obstructed, and the plaintiff sued:—Held, that there was no right of action, for he was not a riparian proprietor, there was no proof of any easement, and no natural drainage at the spot obstructed until the ditch was dug there. Semble, that the plaintiff's proper remedy was under the Act respecting line fences and watercourses, C. S. U. C. c. 57. *McGillivray* v. *Millin*, 27 U. C. R. 62.

**Obstruction of "Stream"**—*Remedy—Easement.*] — The plaintiff alleged that he was possessed of land through which a stream was accustomed to flow, and away from which the surface water was accustomed to escape, and that defendants negligently constructed an embankment on their railway across said land, by not providing sufficient openings to allow the water to escape. The jury found that "there was a stream of water, and it was obstructed by the railway." There was a creek on the plaintiff's land, which clearly had not been interfered with; and the only obstruction shewn was of such a stream as a general flow of surface water would present on a gradual slope of land:—Held, that the word "stream" in the finding must be taken to mean such water; and that, as the plaintiff shewed no right to the land on both sides of the embankment, nor any easement over the land on the other side, he had no right of action. *Crewson* v. *Grand Trunk R. W. Co.*, 27 U. C. R. 68.

**Overflow** —*Culvert — Municipal Corporations—Land Owner.*] — The defendants the corporations of two townships, without being bound to do so, built a culvert under the highway between the townships, to which the other defendant, the owner of lands adjoining one side of the highway, in order to carry off the surface water of his lands, built a drain, and subsequently a "gangway" of stones for the convenience of access to the highway, which had the effect of damming the water on his land. He afterwards made an opening in the "gangway," and the water, suddenly rushing through the culvert, flooded the plaintiff's land on the other side of the highway, which was also connected with the culvert by a receiving drain, through which he had theretofore permitted the water in its ordinary course to flow:—Held, that the defendants the corporations were not, but that the other defendant was, liable for the damage sustained by the plaintiff. *Bryce* v. *Loutit*, 21 A. R. 109.

**Raising Grade of Street**—*Flooding adjacent Land.*] — B., residing on Lippincott street, Toronto, had his premises flooded by surface water flowing into his cellar after a storm. The flooding was greater owing to the raising of the grade of Lippincott street by the defendants block-paving it:—Held, that right of drainage does not exist jure naturæ; that the defendants were not liable for the damage claimed, as they had only exercised a legal power vested in them by statute to raise the grade of the street, and block-pave it; they had been guilty of no negligence, and were not bound to provide drainage for surface water. *Baggs* v. *City of Toronto*, 23 C. L. J. 7.

**Right of Drainage across Highway** — *Municipal Corporation — Discretion.*] — There had for many years been a culvert across a highway adjoining the plaintiff's land, through which the surface water from his land had been accustomed to pass, but the pathmaster closed it up and made the road-bed solid, by which the flow of surface water from the plaintiff's land was impeded, and the land remained longer wet than it would otherwise have been. The corporation by resolution approved of the pathmaster's action: — Held, that the plaintiff had no cause of action, for there was no right of drainage across the highway for the surface water, and the corporation could not be liable for not exercising their discretionary powers with regard to drainage of lands. *Darby* v. *Township of Crowland*, 38 U. C. R. 358.

**Right to Discharge on Lands of Lower Level.**] — The doctrine of dominant and servient tenement does not apply between adjoining lands of different levels so as to give the owner of the land of higher level the legal right as an incident of his estate to have surface water falling on his land discharged over the land of lower level although it would naturally find its way there. The owner of the land of lower level may fill up the low places on his land or build walls thereon although by so doing he keeps back the surface water to the injury of the owner of the land of higher level. *Ostrom* v. *Sills*, 24 A. R. 526.

O. and S. were adjoining proprietors of land in a village, that of O. being situate on a higher level than the other. In 1875 improvements were made to a drain discharging upon the premises of S., and a culvert was made connecting with it. In 1887 S. erected a building on his land and cut off the wall of the culvert which projected over the line of the street, which resulted in the flow of water through it being stopped and backed up on the land of O., who brought an action against S. for the damage caused thereby:—Held, affirming the judgment in 24 A. R. 526, that S., having a right to cut off the part of the culvert which projected over his land, was not liable to O. for the damage so caused, the remedy of the latter, if he had any, being against the municipality for not properly maintaining the drain. *Ostrom* v. *Sills*, 28 S. C. R. 485.

*See*, also, *post* XX.

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*2. Other Cases.*

**Construction of Works**—*Absence of By-law—Trespass.*]—The defendants constructed a number of drains in their town, discharging into a creek running through the lands of the plaintiff, which drains conducted a quantity of brine or salt and refuse from salt manufactories in the neighbourhood into the creek and rendered the water filthy and unfit for drinking, and also corroded the machinery in the plaintiff's woollen factory. And the defendants, having passed a by-law to deepen the creek, threw down the plaintiff's fences, entered upon his land, and threw up earth from the bed of the creek and left it there:—Held, that the drains not being constructed under a by-law, the plaintiff was entitled to maintain an action for his injury sustained, and for an injunction, and was not compelled to sue those who had discharged the offensive matter into the drains, nor to seek his remedy under the arbitration clauses of the Municipal Act, nor to resort to mandamus to compel better drainage. Held, also, that damages for the trespass on the plaintiff's land could be recovered by action, as the corporate powers under the by-law for deepening the creek might have been exercised without the commission of the trespass; and this, too, notwithstanding that the work was done under and by means of a contractor, who, however, was not an independent contractor, but worked under the superintendence of the council. *VanEgmond* v. *Town of Scaforth*, 6 O. R. 599.

A drain of the defendants for carrying off the surface waters of a street ran along the street and across it, and then through private property until it reached a creek. On the street there was a screw factory, the proprietors of which, by defendants' permission, connected a drain from their works with the defendants' drain, which had the effect of carrying noxious matter from the factory into the creek; but, on complaint, the proprietors used an old cellar as a reservoir for the noxious matter, which, it was alleged, filtered through from the cellar into the drain and so into the creek. The drain, without the infiltration into it from the cellar, from which it was twenty-six feet distant, conveyed nothing injurious into the creek. The plaintiff, a riparian proprietor on the creek, having a factory there, claimed that by reason of such fouling he was prevented from using the water of the creek for domestic purposes or for his factory, and brought this action against the defendants therefor:—Held, that defendants were not liable; but

that the liability, if any, was on the screw factory. VanEgmond v. Town of Seaforth, 6 O. R. 599, distinguished. *Gray* v. *Town of Dundas*, 11 O. R. 317, 13 A. R. 588.

——— *Increase in Flow of Water—Remedy—By-law—Necessity for Quashing.*]—Where M. brought action for an injunction against a municipal corporation for that, by reason of certain drainage works constructed by them, the defendants had caused an increased quantity of water to flow into a creek running through his lands, which were situate in an adjoining township, and which had consequently been flooded and damaged, partly from the access of water sent into the creek, and partly from the increased velocity imparted to the flow of water into the creek:—Held, that M. was entitled to an injunction restraining the increased flow of water into the creek, and also the increased velocity, and to a reference as to damages, and that he was not bound to proceed by way of arbitration under 46 Vict. c. 18, ss. 590, 591 (O.), but was at liberty to seek relief in the ordinary way by action. Held, also, that the fact that the by-law under which the drainage work was done had not been quashed, did not prevent the plaintiff from bringing this action. *Malott* v. *Township of Mersea*, 9 O. R. 611.

**Cultivation of Land**—*Outlet—Overflow.*]—While the owner of land has an undoubted right to drain it in the ordinary course of husbandry, he must take care that any water collected by his drains is carried to a sufficient outlet, and if the water is drained into a pond which is not large enough to hold the additional volume of water thus brought into it, he is liable in damages to a person whose land is flooded by water overflowing from such pond. *Young* v. *Tucker*, 26 A. R. 162.

**Drains through Adjoining Property.**]—See *Wheeler* v. *Black*, 14 S. C. R. 242.

**Liability of Municipalities for Injuries Caused by Drains and Sewers.**]—See MUNICIPAL CORPORATIONS, XII., XVI.

**Natural Drainage by Stream**—*Culvert—Overflow.*]—Many years before the defendant municipality was laid out, a culvert was constructed by Z. on private property for the benefit of a railway company whose lands adjoined the stream in question. By reason of the culvert, the water brought down by the stream was not carried off, but overflowed the plaintiff's land. The stream was the natural drain for the surrounding country, but the defendants used it to a small extent for the drainage of the town. It was found that the flooding would not have been occasioned by the water brought down through the defendants' user of the stream, but that water brought down from the area drained, apart from the defendants' user, would have alone caused the damage:—Held, that the defendants were not liable. *Law* v. *Town of Niagara Falls*, *Bamfield* v. *Town of Niagara Falls*, 6 O. R. 467.

**Public Drainage Work**—*Authority—Trespass.*] — Declaration for trespass to plaintiff's land, and throwing down the fences, hauling earth, and stopping up the watercourses thereon. Plea, that before the commission of the alleged grievances the commissioner of public works for Ontario, under and in pursuance of 32 Vict. c. 28 (O.), had taken possession of said land, fences, and watercourses, the same being in his judgment necessary for the construction of a certain drain, being a public work within said Act, and thereupon said commissioner directed defendants to construct a drain to and past this land; and defendants in the construction of said drain entered upon said land so taken possession of, and in the necessary prosecution of said work threw down said fences, and deposited the earth from said ditch on the plaintiff's land, and filled up the watercourses thereon, the same being necessary for the construction of said drain, which are the alleged trespasses:—Held, on demurrer, a good plea; for it must be taken to mean that the commissioner had lawfully taken possession in accordance with the Act, having complied with all requisite preliminaries. *Bury* v. *Britton*, 32 U. C. R. 547.

*See*, also, *ante* IV.

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## VII. FLOATING TIMBER.

**Improvements**—*Floatable "Stream"—User—Remuneration.*]—A. having erected a slide on a small river, not before such erection capable of being used for running timber:—Held, that this was not a stream within C. S. U. C. c. 48, and that he was entitled to recover a reasonable remuneration from defendant for the use of the slide in floating timber. *Boale* v. *Dickson*, 13 C. P. 337. Overruled in *Caldwell* v. *McLaren*, 9 App. Cas. 392, *post*.

——— *Floatable "Stream"—User—Obstruction.*]—Plaintiff placed a quantity of timber in a creek for transport during the spring freshets to Quebec. Defendant, who was the lessee of the Crown of certain timber limits within which the creek was, obstructed the latter with fallen trees, &c., which prevented plaintiff getting his timber to Quebec. In an action for this damage the jury found that the creek, in its natural state, and even if improved and relieved of the rubbish and other deposit therein, would not admit of the passage during these freshets of logs and timber, and that it was only the artificial means adopted by defendant that rendered it available for such purposes:—Held, that defendant was not liable; for, according to Boale v. Dickson, 13 C. P. 337, the creek was not a "stream" within C. S. U. C. c. 48, s. 15; the evidence did not shew plaintiff to be a riparian proprietor; and it was not a navigable river, within the law of England or of this country. Held, also, that even if plaintiff had the common law right to the flow of the stream, in its natural state, that did not entitle him to use it to pass timber and logs down; and that the fact that it had so far been rendered navigable by artificial means, was a further and conclusive reason that no right in the nature of public juris could arise in relation thereto for such a purpose. *Whelan* v. *McLachlan*, 16 C. P. 102.

——— *Floatable "Stream"—User—Remuneration—Freshets.*]—Held, that the right conferred to float timber and logs down streams by 12 Vict. c. 87, s. 5 (C.), is not

limited to such streams as in their natural state, without improvements, during freshets, permit said logs, timber, &c., to be floated down them, but extends to the user without compensation of all improvements upon such streams, even when such streams have been rendered floatable thereby. Boale v. Dickson, 13 C. P. 357, overruled. Such right is only conferred by the statute during freshets; quære, as to the rights at other seasons of the year of the parties, that is, of the lumberers on the one side, and the owners of the improvements and the bed of the stream whereon they have been effected, on the other. Judgment of the supreme court, 8 S. C. R. 435, reversed. *Caldwell* v. *McLaren*, 9 App. Cas. 392. See, also, *S. C.*, 6 A. R. 456.

——— *Floatable "Stream"—User—Tolls—Bed of Stream.*]—The plaintiff had erected dams, slides, and other improvements for facilitating the passage of saw logs and timber down a stream, floatable in a state of nature. Some of these slides were situated in the bed of the stream, others were built entirely on the plaintiff's land on one side of the stream, the water of which was dammed back so as to flow in part through the artificial channel thus constructed. The defendants, in driving their logs and timber down the stream, used all the slides and improvements. In an action for tolls for such user:—Held, following Caldwell v. McLaren, 9 App. Cas. 352, that as to all slides and improvements constructed in the bed of the stream, plaintiff could not recover; but, as to all such improvements outside the channel, and upon plaintiff's land, that a recovery by the plaintiff was proper. Held, also, that the absence of aprons of the proper statutable dimensions upon plaintiff's dams across the river afforded defendants no ground for claiming the right to use without compensation plaintiff's improvements not in the bed of the stream. Boale v. Sherman, 13 C. P. 357, remarked upon. *Mackey* v. *Sherman*, 8 O. R. 28.

——— *Tolls — Mill Dams.*] — It is only when improvements in a stream are made for the express purpose of facilitating the floating of saw logs, lumber, and timber, that tolls can be charged for their use under the Rivers and Streams Act. A mill dam is not such an improvement, and the right of the lumberman, conferred by R. S. O. 1887 c. 118, to float saw logs, lumber, and timber over it is unaffected by that Act. *In re Little Bob River Dam*, 23 A. R. 177.

**Obstruction** — *Bridge—Injury to—Justification—Pleading.*] — The plea in this case justified injury done to a bridge on a navigable river by the floating down of timber:—Held, on demurrer, plea bad, for not disclosing such a state of facts as to constitute the bridge a nuisance, or to shew that the acts complained of were really inevitable on the part of the defendant, in consequence of the improper construction of the bridge, or by reason of a superior agency operating against the defendant, and for not alleging that the defendant was acting with due and reasonable care and diligence in the navigation of his timber. Semble, that had the plea stated that the damage was occasioned by reason of the bridge having been so improperly built as in effect to be a nuisance to the free navigation of the river, and that the damage was not caused by the negligence or improper conduct of the defendant, and could not have been avoided, it would have constituted a good defence. C. S. U. C. c. 48 observed upon. *Township of Thurlow* v. *Bogart*, 15 C. P. 9. See, also, *S. C.*, *ib.* 601.

——— *Injury to Dam — Pleading.*] — A plea justifying an injury done to a dam in floating logs down the stream, must expressly aver that there was no gate, lock, or opening, &c., in the dam through which the timber could pass. The mention of freshets in the statute, s. 8, was only in order to shew that streams shall be clear, even though they can only be used to float timber, &c., in times of freshet. *Shipman* v. *Clothier*, 8 U. C. R. 592.

——— *Removal of.*] — Quære, whether 12 Vict. c. 87 (C. S. U. C. c. 48) gives a right to persons having occasion to float timber down a stream not navigable, to remove obstructions placed in it by the proprietor of the land through which it runs. *Shipman* v. *Clothier*, 8 U. C. R. 592.

Semble, that it does. The statutes upon the subject of mill dams reviewed. *Little* v. *Ince*, 3 C. P. 528.

——— *Removal of — Conversion of Materials.*]—To pleas justifying the removal of a mill dam in order to float down logs, plaintiff replied that, after the removing, &c., by the defendants, they converted and disposed of the materials of the dam to their own use:—Held, that such wrongful conversion was an abuse of the authority in law under which defendants acted, such as to render them trespassers ab initio. *Little* v. *Ince*, 3 C. P. 528.

——— *Removal of—Excess.*]—In an action for cutting away a portion of the plaintiff's dam to enable defendants to pass their logs, there being no evidence of excess, the court refused to set aside a verdict for defendants. *Little* v. *Ince*, 4 C. P. 95.

——— *Removal of—Justification—Pleading—"Stream."*]—The first count of the declaration alleged that plaintiff was possessed of certain land through which the river Mississippi flowed, on which he had made improvements, both above and below his said lot, as also of a dam erected on said lot across the stream, with a slide and other works, whereby, and by means of the water of said river pressed back by said dam, he was enabled and accustomed to float his timber down said stream and through his lot; and that defendants cut and broke through and destroyed said dam, whereby, &c. The second count alleged that the plaintiff was possessed of the land, &c., and that the said river where it passed through the plaintiff's land had so great a fall and was so shallow and obstructed as not to be navigable; and that he was also possessed of a dam across said stream for improving the stream for the descent of timber, furnished with a sufficient apron for the passage thereover of the said timber; and that defendants cut down, &c., the said dam, and prevented plaintiff from using the slide for the passage of his timber, whereby, &c. The fourth count was in trespass q. c. f. to the said land covered with water and for cutting down the said dam, to the plaintiff's damage, and preventing his using the slide for the passage of his timber past certain rapids and falls below said dam, whereby, &c. Third plea, to first

count, that defendants were lumberers, and possessed of a large quantity of timber which they were desirous of and were floating down to market, as they had a lawful right to do, when they were obstructed by said dam, wrongfully placed in said river by the plaintiff; and because they could not otherwise float down the said timber they cut away, &c., said dam, as they lawfully might, which are the grievances complained of. Fourth plea, to second count, setting up that the dam was not furnished with a good and sufficient apron for the passage thereover of the timber, according to the statute, which dam wrongfully obstructed and hindered defendants from floating their timber to market, and they therefore lawfully cut it away, &c. Fifth plea, to fourth count, that said river where it crossed the plaintiff's land was a stream down which, in a state of nature during freshets, timber might be floated, and defendants, being lumberers, were lawfully engaged in floating their timber down said stream to market, and the plaintiffs wrongfully placed said dam across the river, which obstructed defendants, who thereupon cut it away, &c., as they lawfully might, &c.:—Held, pleas bad: the third and fourth pleas in not alleging that the river was a navigable river or a stream within ss. 15 and 16 of C. S. U. C. c. 48, or setting out the facts on which defendants' alleged right arose; and the fifth plea because, although supplying the defect in the others, by alleging that it was a stream within the above sections of the statute, yet it omitted to allege that the dam was not furnished with a sufficient apron as required by the statute. *McLaren* v. *Buck*, 26 C. P. 539.

——— *Special Damage—Action.*]—Declaration (under C. S. U. C. c. 48, s. 15), that defendant, during the spring freshets of 1869, placed obstructions in a certain stream, and thereby prevented the plaintiff from using the stream during said freshets for floating down rafts and craft, whereby the plaintiff lost the sale of a large quantity of sawn lumber, &c.:—Held, bad, on demurrer, for not shewing any peculiar injury to the plaintiff more than to others, by the obstruction complained of. *Pierce* v. *Hall*, 29 U. C. R. 472.

——— *Special Damage—Action—Summary Removal.*]—An action will lie against a mill owner for neglecting to make an apron, &c., in his mill dam, as required by the Act, and thus obstructing the descent of saw logs, to the special damage of a particular individual, although the Act imposes a daily penalty for such neglect. Persons owning logs so obstructed may summarily remove the obstruction so far as necessary to enable them to enjoy their right. *Little* v. *Ince*, 3 C. P. 528.

**Public Easement** — *Interference with Fishing Rights.*] — Held, that, although the public may have in a river, such as the one in question, an easement or right to float rafts or logs down and a right of passage up and down in Canada, &c., wherever the water is sufficiently high to be so used, such right is not inconsistent with an exclusive right of fishing or with the right of the owners of property opposite their respective lands, ad medium filum aquæ. *Regina* v. *Robertson*, 6 S. C. R. 52.

**Rivers and Streams Act**—*Obstruction.*]—By R. S. O. 1887 c. 120, s. 1, all persons are prohibited from preventing the passage of saw logs and other timber down a river, creek, or stream, by felling trees or placing any other obstruction in or across the same:—Held, reversing the judgment in 29 O. R. 206, that placing a dam on a river or stream by which the supply of water therein was diminished so as to interfere with the passage of logs, was an obstruction under this Act. *Farquharson* v. *Imperial Oil Co.*, 30 S. C. R. 188.

**Saw Logs**—*Breaking Plaintiff's Boom by Undue Pressure of Defendant's Logs—Loss of Plaintiff's Logs—Action therefor—Confusion of Property—Measure of Damages.*]—See *Auger* v. *Cook*, 39 U. C. R. 537. See, also, *Brace* v. *Union Forwarding Co.*, 32 U. C. R. 43.

**Saw Logs Driving Act**—*Breaking Jam—Arbitration—Damages.*]—When logs being floated down a stream are unreasonably detained by reason of others being massed in front of them, the owner is entitled to an arbitration under the Saw Logs Driving Act to determine the amount of his damages for such detention, and is not restricted to the remedy provided by s. 3 of that Act, namely, removing the obstruction. Judgment in 26 A. R. 19 reversed. *Cockburn* v. *Imperial Lumber Co.*, 30 S. C. R. 80.

*See Crandell* v. *Mooney*, 23 C. P. 212; *Queddy River Driving Boom Co.* v. *Davidson*, 10 S. C. R. 222.

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## VIII. Forming Boundaries.

**Crown Grant**—"*Along the Bank.*"]—The plaintiff's patent described his land as commencing at a post "on the bank of Burlington Bay," and then going north 72°, west 20 chains, more or less, "along the bank," to within one chain of the next lot:—Quære, whether this description included an inlet in the bay, or whether it made plaintiff's boundary follow the bank in all its windings, though the distance given would then be erroneous. Semble, that it did. *Gage* v. *Bates*, 7 C. P. 116.

——— *Construction—Evidence.*]—In actions in which the King is a party, in the construction of grants from the Crown, where there is an ambiguity in respect of the premises, as, for instance, what is to be considered the bank of a river, other grants from the Crown are admissible to assist in the construction. *Clark* v. *Bonnycastle*, 3 O. S. 528.

——— *Point of Commencement.*]—A point of commencement "in front on lake Erie, at the south-east angle of the lot," means the south-east angle as it stood at the time the grant issued, and not a point shifting with the encroachment of the lake. *Iler* v. *Nolan*, 21 U. C. R. 309.

——— *Top of Bank—Subsequent Patent—Effect of.*]—On the 9th February, 1852, a patent issued to J. F., under whom the plaintiff claimed, for a mill site, described by metes and bounds, by which, after going "one chain seventy links, more or less, to the top of the bank of the river," it proceeded "then southeasterly, along the top of the bank, to the limit between park lots five and four; then southerly to the southerly limit of the town

plot, or park lot one, keeping in all places at such a distance inland from the river as will allow of thirteen feet head of water being raised at the mill," &c. It then crossed the river "to a point to which the water will be backed by being raised thirteen feet, as before mentioned, at the mill, and then ran northwardly, eastwardly, and north-westwardly" (being the general directions of the river) "keeping always, as on the other side of the river, at such a distance inland therefrom as ensures to the mill owner the privilege of raising thirteen feet head water as aforesaid, to the place of beginning." A well defined bank of the river, about thirty feet above the water, extended from where the line first mentioned struck the top of the bank to the limit between lots four and five, and then the bank died away into flat:—Held, that under this patent the limit of the land granted was the top of the bank as far as the limit between park lots four and five, not the line formed by the thirteen feet head of water. On the 14th February, 1852, a patent issued to J. F. (presumably the same person as the patentee of the mill site) for park lots four and five. The description of these lots by metes and bounds was in part, "commencing where a post had been planted in the north-west angle of park lot number five, then north eighty-two degrees forty-five minutes east, nine chains thirty links, more or less, to the water's edge of the mill dam in the mill site block, in the said town aforesaid" by thirteen feet head of water being raised at the mill, then southerly following the water's edge thus formed," &c:—Held, that the first patent could not be controlled by the second; and the latter being to the first patentee, he thus acquired the whole land in dispute, and there was no reason why the description in his own deed, which was according to the first patent, should be qualified by the second. *Harrison* v. *Frost*, 34 U. C. R. 110.

**Deed**—*Tax Sale—Part of Lot—Winding River.*]—The lot in question, fronting to the north, was bounded on the south by the river Thames. The sheriff, while 6 Geo. IV. c. 7 was in force, sold 120 acres of the lot for taxes:—Held, that according to the statute the rear line of the tract should correspond with the rear of the whole lot, following the windings of the river. *McIntyre* v. *Great Western R. W. Co.*, 17 U. C. R. 118.

——— *Top of Bank—Possession.*]—A deed of certain land described it as the east portion of lots 1 and 2 on the north side of the Grand river, and one of the metes and bounds was "to where a post has been planted at the top of the bank of the Grand river (but no post appeared to have been planted); thence along the top of the bank of the Grand river," &c. By a clause in the deed the grantee was allowed the use of whatever water he might require from the Grand river opposite the said land for any works then or to be erected on the said land, so as in such use nothing was done to impede or injure the owners or occupiers of certain mill property in the full enjoyment of the water power appertaining thereto, &c.. And in an agreement previously entered into, and in pursuance of which the deed was executed, there was a clause to the same effect. It appeared that the top of the bank was not now discernible, having been cut away by the defendant. There was contradictory evidence as to twenty years' possession by defendant, and the Judge at the trial found there was none:—Held, that the deed only conveyed the land to the top of the bank, and not ad medium filum aquæ, the clause in the deed and agreement supporting such a construction. (2) That the finding on the question of possession should not be interfered with. *Robertson* v. *Watson*, 27 C. P. 579.

——— "*Extending to the River*"—*Right to Raise Dam.*]—Persons claiming under the patentee conveyed to the defendants a portion of the land granted by such patent "extending to the river," reserving the right to the grantors "to raise the dam one foot, and overflow accordingly:"—Held, that the words of such conveyance purported to convey to the centre of the bed of the river; and that after the reservation of the right to raise the dam in the river, the grantors could not be heard to say that they had not the right to convey to the centre of the river. *Kirchhoffer* v. *Stanbury*, 25 Gr. 413.

——— *Water's Edge.*]—A grant of land to within one chain of a river, means to within one chain of the edge of the river, not of the top of the bank. *Stanton* v. *Windeat*, 1 U. C. R. 30.

P., owning lands on both sides of a stream not navigable, conveyed a piece on the south side, described as extending "to the water's edge of the creek, then keeping along the water's edge of said creek with the stream until," &c., reserving the road fifteen feet wide along the bank:—Held, to pass the land to the centre of the stream. *Kains* v. *Turville*, 32 U. C. R. 17.

**Dower**—*Assignment of—Description—Sufficiency.*]—An assignment of dower by the sheriff must be by metes and bounds. Where two lots fronted on a river, and were therefore irregular in shape, and the sheriff assigned the east third of one and the west third of the other, making no survey and giving no further description, the assignment was held insufficient. *Fisher* v. *Grace*, 28 U. C. R. 312.

**High Water Mark.**]—High water mark is the limit of the highest ordinary state of the river, or its average height in its ordinary state after the spring flood has abated, not the highest limit reached in the year. *Plumb* v. *McGannon*, 32 U. C. R. 8.

*See Parker* v. *Elliott*, 1 C. P. 470, 491; *Village of New Hamburg* v. *County of Waterloo*, 22 O. R. 193, 20 A. R. 1, 22 S. C. R. 296.

———*Deed—Description—Evidence to Explain.*]—Trespass, to try the title to lands lying adjacent to the river Humber, and occasionally overflowed during freshets. The defendant's deed gave him the bed of the river, and two rods beyond "high water mark" on both sides of it. The evidence was conflicting as to the position of posts mentioned in the deed, and defendant contended that he was entitled to two rods beyond the highest point to which the water of the river ever rose, including the lands in question. A bond containing the agreement between the parties, in pursuance of which the conveyance appeared to have been made, defined "high water mark" to be "where the water has already or may hereafter be flowed for mill convenience or other machinery:"—Held, that

the language of the deed was explained by the bond, and that high water mark was the line to which the water "was flowed" for the purposes therein mentioned. *Grahame* v. *Brown*, 12 C. P. 418.

**Low Water Mark**—*Deed—Proviso—Possession.*]—In ejectment defendant claimed under two deeds to P. and N. respectively. In the deed to P. the land was described as "commencing on the verge of the river Moira at low water mark;" and then, after describing the first two courses, the third course was stated to be "to the water's edge of the said river at low water mark," and it concluded, "and thence down the winding of the said river to the place of beginning:"—Held, that the particular limitation must be construed specifically as stated, so that the land must be deemed to extend merely to the low water mark, and not ad medium filum aquæ. In the deed to N., which was of the land adjoining, the description was: "Commencing at the north-west corner of P.'s lot," i. e., the point at which the third course of P.'s grant terminated, namely, the water's edge of the river Moira at low water mark; and from that starting point, after describing the first two courses, the third course was, "to the water's edge of a small inlet or bay;" and, after describing the fourth course, namely, "and thence along the water's edge to the place of beginning," there was added the following proviso: "with the privilege of extending any building or buildings fifteen feet from the water's edge, providing the same does not obstruct or diminish the width of a small inlet or bay in the rear of said lot intended for bringing saw logs therein:"—Held, that the effect of the proviso was to limit the boundary of the lot strictly to the water's edge of the small inlet or bay. A claim of possession set up by defendant to the land in question was decided against him except as to fifteen feet thereof, which on the evidence defendant was held entitled to. *Colman* v. *Robertson*, 30 C. P. 609.

*See Wood* v. *Esson*, 9 S. C. R. 239, *post* XI.

**Municipal Corporation** — *Limits of City—Mid-stream.*]—The limits of the city of London were defined by the proclamation setting it apart as all the lands comprised in the old and new surveys in the town of London, together with the lands adjoining thereto, lying between the said surveys of the river Thames, producing the northern boundary line of the new survey until it intersects the north branch; and the eastern boundary line until it intersects the east branch of the river:—Held, that the city limits extended to the middle of the river. Where two properties or municipalities are divided by a river or highway, the limit of each is primâ facie the centre of the river or road. *In re McDonough*, 30 U. C. R. 288.

——— *Township Front.*]—The three easterly lots only of one concession in a township (Smith, in the county of Peterborough) were bounded in front by a river, and the line had been run in the original survey, in front of such concession up to though not past these lots, but the township itself fronted upon another township:—Held, not a township bounded in front by a river, within C. S. U. C. c. 93, s. 27. *Johnson* v. *Hunter*, 25 U. C. R. 348.

——— *Townships of Gloucester and Nepean—City of Ottawa—Rideau River.*]—See *Regina* v. *County of Carleton*, 1 O. R. 277.

**Survey**—*"General Course of River."*]—Quære, how a boundary line following "the general course of the river" for a given distance is to be ascertained, and whether it is properly done by drawing a straight line from the starting point to a point on the river at that distance. *White* v. *Dunlop*, 27 U. C. R. 237.

——— *Main Shore—Point of Land.*]—In an action of trespass defendant claimed as part of lot 16 in the broken front of Escott, that part of Cary's point in the river St. Lawrence which would be included within the side lines of the lot, if projected from the main shore across a small bay to and across the point to the river in front of it. In the original plan of the township the line across the point from west to east, shewing an intention to include it in the broken front, was continued only as far east as lot 14, though the point extended far enough to cover the fronts of lots 15 and 16. In scaling the front on the river, posts appeared to have been put down on the main land, but none could be traced on the point. The jury found that these posts were intended to mark the width of lots, not the front angles of lots in the broken front, and that the front of lot 16 was upon the main shore, and not on the river in front of the point:—Held, that upon the evidence the verdict was right, as no part of the point appeared to be included in the lot. *Thomson* v. *Sherwood*, 21 U. C. R. 174.

——— *Point of Commencement—Intersection of Road by Stream.*]—Where land is described as commencing at the intersection of a road allowance by a stream, and the boundary lines at once diverge from the stream:—Quære, where is the point of commencement—in the middle of the stream or on the bank—and what are the owner's rights as regards the water? This question was discussed but not decided, as the plaintiff failed to shew that any part of his land came to the stream. *Hamilton* v. *Gould*, 24 U. C. R. 58

*See ante* I.

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IX. Grand River Navigation Company.

**Act of Incorporation** — *Erection of Dams—Overflowing Lands.*] — See *Kerby* v. *Grand River Navigation Co.*, 11 U. C. R. 334.

**Consequential Injuries.**] — See *Young* v. *Grand River Navigation Co.*, 12 U. C. R. 75.

**Obstructions.**] — See *Phelps* v. *Grand River Navigation Co.*, 12 U. C. R. 245.

**Powers** — *Reasonable Exercise.*] — See *Moore* v. *Grand River Navigation Co.*, 13 Gr. 560.

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X. Harbours.

*See*, also, Harbours, Canals, and Docks.

1. *Generally.*

**Accretion Occasioned by Harbour Works.**]—See *Standly* v. *Perry*, 3 S. C. R. 356, 2 A. R. 195.

**Carriage of Goods**—*Contract—Liability for Harbour Dues.*]—A., having entered into an engagement with B. to carry goods from Liverpool to Hamilton, for a certain sum per ton of 40 cubic feet (as per agreement set out in this case), transhipped them at Montreal, a port on the line of route, where harbour dues were charged, and sent them by rail from there. Upon an action brought for harbour dues thus charged and paid by A.:—Held, that the contract being to deliver the goods at so much per ton, B. was entitled to have them delivered at that price free of all expense. *Edmonstone* v. *Young*, 12 C. P. 437.

**Public Harbour**—*Bed of—Property in.*]—The soil and bed of the foreshore in public harbours is vested in the Dominion government. *Holman* v. *Green*, 6 S. C. R. 707.

——— *Bed of—Property in—Interference with Navigation—Wharf—Fisheries.*] — The beds of public harbours not granted before confederation are the property of the Dominion of Canada. Holman v. Green, 6 S. C. R. 707, followed. The beds of all other waters not so granted belong to the respective Provinces in which they are situate, without any distinction between the various classes of waters. The beds of all waters are subject to the jurisdiction and control of the Dominion parliament as far as required for creating future harbours, erecting beacons, or other public works for the benefit of Canada under the British North America Act, c. 92, item 10, and for the administration of the fisheries. R. S. C. c. 92, "An Act respecting certain works constructed in or over navigable rivers," is intra vires of the Dominion parliament. The Dominion parliament has power to declare what shall be deemed an interference with navigation and to require its sanction to any work in navigable waters. A Province may grant land extending into a lake or river for the purpose of there being built thereon a wharf, warehouse, or the like, and the grantee on obtaining the sanction of the Dominion may build thereon subject to compliance with R. S. C. c. 92. Where the provisions of magna charta are not in force, as in Quebec, the Crown in right of the Province may grant exclusive rights of fishing in tidal waters, except in tidal public harbours, in which, as in public harbours, the Crown in right of the Dominion, may grant the beds and fishing rights. *In re Provincial Fisheries*, 26 S. C. R. 444.

——— *Property in.*]—Held, that the locus in quo, a small bay in Lake Simcoe, at which there was a wharf where, with the permission of the owner, vessels used to call, but no mooring ground and little shelter except from wind off the land, was not a public harbour within the meaning of the British North America Act, and that the plaintiff's grant from the Province was valid. *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*, 26 A. R. 411.

*See Clendinning* v. *Turner*, 9 O. R. 34, and *Wood* v. *Esson*, 9 S. C. R. 239, *post* XI.; *Warin* v. *London and Canadian L. and A. Co.*, 7 O. R. 706, 12 A. R. 327, 14 S. C. R. 232.

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2. *Harbour Companies.*

(a) *Liability for Obstructions.*

**Approach to Harbour**—*Receipt of Tolls—Representation as to Safety.*]—Defendants, incorporated under C. S. C. c. 50, constructed two piers running out into Lake Erie, and had for some time collected tolls upon vessels, though it was said that the harbour was not finished, and that it was intended to carry the piers further out. The plaintiff's vessel, bound for another port, met with an accident, and, having attempted in consequence to enter this harbour, was wrecked upon a sand-bar about 200 feet outside of the piers, and the cargo was lost. It appeared that this sand-bar was of a shifting nature, disappearing and forming at different times, but defendants, some weeks before the accident, had begun to remove it, and had not gone on with the work. The jury having found that the loss was caused by defendants' negligence:—Held, that defendants were liable, and a verdict for the value of plaintiff's cargo was upheld. By beginning to receive tolls, the defendants must be taken to assert that their harbour is capable of receiving and sheltering vessels of such size as it is fitted for. This includes the approach to the harbour; and if afterwards an obstruction renders it, within their knowledge, unsafe to attempt an entrance, they are bound either to remove the obstruction, or to close the harbour, by giving notice to the public that it cannot be safely approached. *Webb* v. *Port Bruce Harbour Co.*, 19 U. C. R. 615, 623.

——— *Natural Public Harbour—Obstruction on Private Property.*]—Held, that the defendants, in whom the harbour of Toronto is vested by 13 & 14 Vict. c. 80, were not liable to the plaintiff for an injury caused to his vessel by running against an old sunken pier, at a point north of the windmill line, in the line of Church street produced, which street does not extend to the water; for such pier was not within the limits of the harbour as vested in defendants, and they had no power against the owner of the soil to remove it. *Hood* v. *Commissioners of Harbour of Toronto*, 34 U. C. R. 87.

The above decision was affirmed on appeal. Semble, that the harbour was not by the statutes vested in the commissioners, but only the works constructed for its improvement. This case distinguished from Mersey Docks and Harbour Board Trustees v. Gibbs, L. R. 4 H. L. 93, and others cited, on the ground that here the harbour was a natural one open to the public as of right, not an artificial work erected by the defendants, and which they invited the public to use on payment of tolls. Held, also, that under the statute there was no duty imposed upon the defendants to employ the funds placed under their control, and the tolls which they were authorized to impose, in removing the obstruction complained of, which existed before their incorporation, but that a discretion was vested in them, not to be controlled by a jury. Semble, the court being empowered to draw inferences of fact, that there was no sufficient evidence to shew knowledge by the defendants that the place in question was dangerous to vessels. Such power to draw inferences of fact, when given by consent, is not confined to the court below, but extends to the court of appeal. *S. C.*, 37 U. C. R. 72.

**Closing of Harbour** — *Public Notice — Removal of Light—Loss of Vessel—Damages —Insurance.*]—Defendants, on the 5th November, 1866, resolved to close their harbour upon and after that day, to discontinue the receipt of tolls, and to remove the light which was placed on the western pier as a guide to

the entrance; this determination having been come to in consequence of the water between the piers and on the bar outside them having become so shallow as to endanger the "larger class of vessels," which were in the habit of entering the harbour, and because the stormy weather had prevented their dredging it out. A printed notice of this resolve was accordingly on that day put up at Port Burwell, and also sent to different collectors of customs, both in the United States and in Upper Canada, for publication in several newspapers, in which it was inserted. One of the notices was put up in the custom house in Buffalo, and was also published in a newspaper there on the 9th November. The plaintiff arrived in his vessel, from a port west of and beyond Port Burwell, on the 7th November, having seen defendants' light on his way down, and on the 10th November he cleared again from Buffalo on his return trip, and on the morning of the 11th November, in his endeavour to enter defendants' harbour, in consequence of stress of weather, the vessel struck on the western pier and was lost, the immediate cause of the striking against the pier being, as appeared, the absence of the light, the presence of which would have enabled the vessel, which was of light draft, to enter. Up to the time of the accident neither plaintiff nor any one on board had any actual notice of the removal of the light:—Held, reversing the judgment in 17 C. P. 574, (1) that defendants had authority under the circumstances to close the harbour and remove the light. (2) That the notice of closing was sufficient, and that the plaintiff was not entitled to actual personal notice of the fact. (3) That defendants were not, therefore, liable to the plaintiff for the loss of his vessel, and that they were entitled to a verdict on the plea of not guilty. *Sweeney v. Port Burwell Harbour Co.*, 19 C. P. 376.

In the common pleas it was held, in the preceding case, that in addition to the value of his vessel, the plaintiff was entitled to recover a further sum expended by him in good faith, and with reasonable expectation of success, in attempting to raise the vessel to repair her. That an insurance company, which had a risk upon the vessel, was not entitled to recover, in the plaintiff's name, moneys expended by it in a similar attempt. Semble, that a plea of not guilty put in issue the negligence only, and not the duty alleged. Remarks upon the extent to which the possession of means of knowledge furnishes evidence of actual knowledge. *S. C.*, 17 C. P. 574.

**Duty** — *Neglect of.*]—Remarks as to the duty of harbour companies to keep the harbour free from obstructions, and their liability for neglect. *Berryman v. Port Burwell Harbour Co.*, 24 U. C. R. 34.

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(b) *Other Cases.*

**Assessment and Taxes.**]—Land covered with the waters of a harbour, is not taxable:—Held, therefore, that the Buffalo and Lake Huron R. W. Co. could not be taxed for the Goderich harbour. *Buffalo and Lake Huron R. W. Co. v. Town of Goderich*, 31 U. C. R. 27.

**Construction of Harbour** — *Injury to Land—Liability.*]—The plaintiff owned land upon a creek running into Lake Erie, at the mouth of which defendants, incorporated by 12 Vict. c. 60, constructed their harbour. A straight cut had been previously made by another company, of which the plaintiff had been secretary, from the creek, at or below his land, to the lake. While defendants were making their harbour, the plaintiff requested them to deepen this cut, which they did, and at his request placed on his land the earth which they had dredged up. Before defendants began their work, the plaintiff had piled along the front of his lot on the stream, but they did not pile along the land lower down, and the water being driven up from the lake by the high winds, spread over this land, and ran thence on to the plaintiff's land, getting behind the piles which he had placed:—Held, that defendants were not liable for this injury. *Burwell v. Port Burwell Harbour Co.*, 20 U. C. R. 341.

**Debentures Issued by Town under 13 & 14 Vict. c. 83, Vesting Harbour in Town** — *Form and Requisites of Debentures.*]—See *Crawford v. Town of Cobourg*, 21 U. C. R. 113.

**Liability as Wharfingers.**]—The Cobourg Harbour Company are not wharfingers, because they have erected piers and wharves according to their charter, and are not therefore responsible for goods left upon their wharves unstored. *Logan v. Cobourg Harbour Co.*, 3 U. C. R. 55.

**Recovery back of Harbour Dues Overcharged.**]—See *Marsh v. Port Hope Harbour Co.*, 6 O. S. 100.

**Salary of Harbour Master** — *Tax — Levy—Detention of Timber.*]—Held, that by a by-law passed under 12 Vict. c. 81, s. 60, s.-s. 7, owners of timber might be made to pay the salary of a harbour master, and their timber detained for non-payment of a tax levied for such salary, and themselves subject to fine and imprisonment. *Bogart v. Town of Belleville*, 6 C. P. 425.

**Tolls**—*Lessee of Harbour—Right to Sue.*]—A harbour and road joint stock company by its charter, 16 Vict. c. 141, had power to levy tolls on goods landed or shipped within certain prescribed limits; and the harbour, roads, wharves, and all the real estate were to be vested in the company and their successors for ever. The company, finding it necessary to mortgage the harbour, tolls, &c., did so under authority of their charter, and the mortgagee foreclosed the security, entered into possession, and leased to the plaintiff, who sued defendant, owner of a wharf within the statutable limits of the harbour, for toll on goods shipped or landed on such wharf:—Held, that the plaintiff could sue only in the corporate name; and a nonsuit was therefore directed. *Whiteside v. Bellchamber*, 22 C. P. 241.

——— *Lien on Shares — Registration of Transfer.*]—In an action against a harbour company for refusing to register a transfer of stock by one S. to the plaintiffs:—Held, that the company had no legal lien on the stock for harbour tolls due by S. to them, and could not therefore on that ground refuse to register the assignment. *McMurrich v. Bond Head Harbour Co.*, 9 U. C. R. 333.

——— *Remedy—Distress—Action.*]—By 3 Vict. c. 33 the plaintiffs were incorporated, and were declared to be capable of contracting and being contracted with, suing and being sued, &c. They were also authorized to construct a harbour, to impose charges for the use thereof, and to demand and recover such charges. It was further enacted that if any person should neglect or refuse to pay the tolls or dues, the plaintiffs might detain the goods on which the tolls or dues were due and payable, until such tolls should be paid:—Held, that the plaintiffs were not confined to the remedy by way of distress, but could also maintain an action. *Bronte Harbour Co.* v. *White*, 23 C. P. 164.

——— *Right to.*]—Under 4 Wm. IV. c. 32, s. 5, persons receiving benefit from the Port Credit Harbour, in its unfinished state, must pay the tolls prescribed. *Port Credit Harbour Co.* v. *Jones*, 5 U. C. R. 144.

——— *Right to—Fitness of Harbour.*]—Where the question was, whether the harbour was in a fit state to shelter vessels, until which time toll could not be exacted according to 2 Wm. IV. c. 15, and the Judge directed the jury that if the harbour were fit to shelter empty vessels, toll could be demanded:—Held, no misdirection. *Jenkins* v. *Port Burwell Harbour Co.*, T. T. 3 & 4 Vict.

**Town Commissioners** — *Corporation.*]—Semble, that "The Commissioners of the Cobourg Town Trust" are a corporation under 22 Vict. c. 72. *McSherry* v. *Cobourg Town Trust Commissioners*, 45 U. C. R. 240.

XI. Navigable Waters.

**Admiralty Jurisdiction** — *Great Lakes —Criminal Offences.*]—The great inland lakes of Canada are within the admiralty jurisdiction, and offences committed on them are as though committed on the high seas; and therefore any magistrate of this Province has authority to inquire into offences committed on said lakes, although in American waters. *Regina* v. *Sharp*, 5 P. R. 135.

**Crown**—*Grant of Fishery.*]—The Crown cannot grant an exclusive right of fishery in navigable waters in this Province. *Moffatt* v. *Roddy*, M. T. 2 Vict.

——— *Grant—High Water Mark—Fishery.*]—In trespass for entering plaintiff's close and building a shanty, &c., and occupying the beach for the purpose of fishing:—Held, that the Crown has the power to grant the beach to high water mark, and that the defendant was a trespasser. The patent having conveyed to plaintiff the land to the waters of lake Ontario:—Held, that no common law right exists in the public to use the beach above high water mark for fishing, when the beach has been conveyed by the Crown to a subject. *Parker* v. *Elliott*, 1 C. P. 470.

A distinction of high or low water can only be drawn where tide exists, and not in the inland waters of this Province. *S. C., ib.* 491, note.

——— *Highway—Grant.*]—The property in question formed part of a lake, though not navigable. The Crown surveyed a part for a road, which was then under water, the effect of which was that the property in question, which lay to the north of this intended road, would, if the road were made, become a mere stagnum pond:—Held, that the Crown had the right to lay out the highway where it did, and that therefore it could grant the portion to the north of it, which would be thus excluded from the lake, and this without the aid of 23 Vict. c. 2, s. 35. *Ross* v. *Village of Portsmouth*, 17 C. P. 195.

**Obstruction** — *Boom — Collision with Steamer.*]—See *Brace* v. *Union Forwarding* Co., 32 U. C. R. 43.

——— *Boom—Peculiar Damage—Action.*]—At the village of Fenelon, on a navigable river of the same name, there is a fall, where a slide has been constructed for the passage of saw logs and timber from the lake above into the river. The defendant, who had charge of a drive of saw logs, stretched a boom across the river below the falls to collect the logs after they had come down the slide. While the boom was so placed, and before the logs had been let into the river, the plaintiff's steamboat, plying between Lindsay and Fenelon, was prevented by it from reaching the latter place:—Held, that for this obstruction defendant was liable to an action; and that the peculiar damage sustained by the plaintiff entitled him to maintain it. Semble, that all persons have an equal right to navigate a navigable river with logs or steamboats, which right must be exercised in such a manner as not unreasonably to impede or delay another in the exercise of the same right. *Crandell* v. *Mooney*, 23 C. P. 212.

The plaintiff was a fisherman living on a small farm fronting on, and about three miles from the mouth of, a navigable stream flowing into Lake Superior. He was in the habit of using a sail boat to go from his house to the lake and thence to Sault Ste. Marie and other points, and was also sometimes employed by neighbours to bring to them in this sail boat supplies and provisions. He also used other boats for fishing purposes. The defendants brought large quantities of timber down the stream and kept it in booms at the mouth so that the whole summer access to the stream by the boat was cut off:—Held, that the plaintiff had sufficient special interest to enable him to maintain an action for damages. *Drake* v. *Sault Ste. Marie Pulp and Paper Co.*, 25 A. R. 251.

——— *Bridge — Canal.*] — See *Town of Dundas* v. *Hamilton and Milton Road Co.*, 17 Gr. 31, 18 Gr. 311, *ante* 111.

——— *Erection of Piers—Information of Intrusion.*]—The property in the soil adjacent to the shore and covered by the waters of the lakes, or of navigable rivers, is in the Crown, subject to the right of the public to pass over the water in boats, and to fish and bathe therein:—Held, therefore, where defendant had encroached on a portion of lake Ontario, not far from his land, but not adjoining it, by the construction therein of certain cribwork and piers, upon which he had built a warehouse, that these, not being natural accretions to his land, but artificial impediments to the waters of the lake or harbour, must be considered to be upon the soil of the Crown,

and liable to be removed therefrom on an information of intrusion. *Attorney-General* v. *Perry*, 15 C. P. 329.

——— *Erection of Wharf—Indictment—Evidence—Misdirection.*]—Where defendants were indicted for obstructing a navigable river by the erection of a wharf, and there was no evidence that the part covered by the wharf had ever been navigated by vessels of any size, but it was shewn only that the prosecutor was prevented by it from landing there with his skiff, and the wharf was proved not to interfere with the navigation:—Held, that the jury were rightly directed that on this evidence the only verdict which could be rendered was not guilty. Such a direction is not so much a direction on the law as a strong observation on the evidence, which may properly be made in a proper case without being open to the charge of misdirection. *Regina* v. *Port Perry and Port Whitby R. W. Co.*, 38 U. C. R. 431.

——— *Erection of Wharf—Harbour—Low Water Mark.*]—E. et al. brought an action of tort against W. for having pulled up piles in the harbour of Halifax below low water mark, driven in by them as supports to an extension of their wharf, built on certain land covered with water in the harbour of Halifax, for which they had obtained a grant from the provincial government of Nova Scotia, in August, 1861. W. pleaded, inter alia, that "he was possessed of a wharf and premises in said harbour, in virtue of which he and his predecessors in title had enjoyed for twenty years and upwards before the action, and had now, the right of having free and uninterrupted access from and to Halifax harbour, to and from the south side of said wharf, with steamers, &c., and because certain piles and timbers, placed by the plaintiffs in said waters, interfered with his right, he (defendant) removed the same." At the trial there was evidence that the erections which E. et al. were making for the extension of their wharf, did obstruct access by steamers and other vessels to W.'s wharf:—Held, that, as the Crown could not, without legislative sanction, grant to E. et al. the right to place at said harbour below low water mark any obstruction or impediment so as to prevent the free and full enjoyment of the right of navigation, and as W. had shewn special injury, he was justified in removing the piles, which was the trespass complained of. *Wood* v. *Esson*, 9 S. C. R. 239.

——— *Information.*]—Where relief would be given at the suit of an individual in respect of an injury by the obstruction of a private watercourse, an information will lie at the instance of the attorney-general for an injury to a navigable stream. *Attorney-General* v. *Harrison*, 12 Gr. 466.

——— *Interest—Right of Action.*]—A person had mills which were partly on a road allowance and partly on a public river, by the waters of which the mills were worked:—Held, that he had not such an interest as entitled him to complain of an obstruction to the river. *Giles* v. *Campbell*, 19 Gr. 226.

——— *Interest—Right of Action—Trespassers.*]—In a suit brought to have boundaries declared, defendants claimed the right to an injunction to restrain the plaintiff from retaining the use of the road along a portion of the shore of Muskoka bay. It appeared that the road in question was of great public utility; that the defendants were not riparian proprietors, there being a road allowance laid out along the shore between their lands and the waters of the bay; and that the defendants had built their mills—one partly in the waters of the bay and partly on the public highway, the other in the navigable waters of the bay:—Held, that the defendants were to be treated as plaintiffs seeking relief by bill, and (following the preceding case) that, being themselves trespassers, they were not entitled to any relief against the plaintiff. *Cockburn* v. *Eager*, 24 Gr. 469.

——— *Refuse from Mill.*]—The Crown, in selling land upon a navigable stream, stipulated that the purchaser should erect on the property a saw mill, as well as a grist mill:—Held, that this did not warrant the purchaser in creating a nuisance in the river by throwing into it the saw dust and refuse of his saw mill, the effect of which was to create obstructions in the river to such an extent as to injure or impede the navigation. *Attorney-General* v. *Harrison*, 12 Gr. 466.

——— *Ship—Narrow Channel—Notice—Pleading.*]—Declaration, that plaintiff's vessel was lying almost loaded at the railway wharf at Toronto near the mouth of the river Don, with a tug to tow it into the harbour, and, before the loading could be finished and the vessel tow d out, defendant's vessel came near the mouth of the river; that the entrance to the dock where the plaintiff's vessel lay was not wide enough to allow plaintiff's vessel to pass out if defendant's vessel entered the mouth of the river before the other vessel went out, of which defendant had notice; and, as defendant was about to enter the river, plaintiff gave him notice that the river was too narrow, that the plaintiff's vessel was nearly loaded, and defendant would be delayed only a short time if he waited until plaintiff's vessel passed out; but defendant wrongfully and injuriously brought his vessel into the Don and kept it there three days after plaintiff's vessel was loaded, and the plaintiff, though ready to proceed with his vessel, was kept there idle, and was put to great loss and expense; and further, that defendant so delayed the plaintiff unnecessarily, and was during said time unable to load his (defendant's) vessel, and such delay was caused solely by the wilful and unnecessary act of defendant and his servants, from which defendant could reap no advantage:—Held, declaration bad, for want of an averment of the plaintiff's right to use the locus in quo, or that it was a navigable stream, and because it failed to shew an unreasonable obstruction of the stream after defendant knew that the plaintiff had his vessel loaded and required him to remove the obstruction to enable him to pass out. *Hall* v. *Ewart*, 33 U. C. R. 491.

**Pollution**—*Indictment—Action.*]—A person throwing noxious matter into lake Ontario, or any other navigable water, is liable both to an indictment and to a private action at the suit of any individual distinctly and peculiarly injured thereby. *Watson* v. *City of Toronto Gas Light and Water Co.*, 4 U. C. R. 158.

**Private Waters**—*Fishing and Shooting Rights—Public Rights.*]—Ownership of land

or water, though not enclosed, gives to the proprietor, under the common law, the sole and exclusive right to fish, fowl, hunt, or shoot within the precincts of that private property, subject to game laws, if any; and this exclusive right is not diminished by the fact that the land may be covered by navigable water. In such case the public can use the water solely for bonâ fide purposes of navigation, and must not unnecessarily disturb or interfere with the private rights of fishing and shooting. Where such waters have become navigable owing to artificial public works, the private right to fishing and fowling of the owner of the soil must be exercised concurrently with the public servitude for passage. *Beatty* v. *Davis*, 29 O. R. 373.

**Trespass**—*Access to Shore—Ice.*] —The defendant, the owner of certain water lots upon the lake front, subject to the usual reservation in favour of the Crown of free passage over all navigable waters thereon, refused to allow the plaintiff to haul ice cut from the lake over such lots, when frozen, to the wharf from which the plaintiff desired to ship the ice for the purposes of his business, unless the plaintiff paid toll, which he refused to do:—Held, that the water over the defendant's lot was a highway, and the plaintiff had the right without payment to cross the lot, whether the water upon it was fluid or frozen; and, having a cause of complaint, and a right of action for his personal loss, he was entitled to come to the court for a declaration of right. Gooderham v. City of Toronto, 21 O. R. 120, 19 A. R. 641, and City of Toronto v. Lorsch, 24 O. R. 227, followed. Held, also, that the defendant was liable for such reasonable damages as flowed directly from the wrong done by his refusal; but, as he had acted without malice and under a bonâ fide mistake as to his rights, and as the plaintiff might have paid the toll under protest, the defendant was not liable for the plaintiff's loss of business consequent on his failure to ship the ice. *Culkerton* v. *Miller*, 26 O. R. 36.

The plaintiff was the owner of a lot bounded by the water's edge of Lake Simcoe, and also of the adjoining lot covered by the waters of that lake, there not being in the patent of either lot any special reservation of right of access to the shore:—Held, that he was entitled to the ice which formed upon the water lot, and had the right to cut and make use of it for his profit; that no other person was entitled to cut and remove the ice except in the bonâ fide and advantageous exercise of the public easement of navigation; and that the defendants were not exercising that easement when they cut channels through the plaintiff's ice in which to float to the shore blocks of ice cut by them beyond the limits of the plaintiff's water lot. Judgment in 29 O. R. 247 reversed. *McDonald* v. *Lake Simcoe Ice and Cold Storage Co.*, 26 A. R. 411.

——— *Access to Shore—Private Property—Destruction of.*]—The usual reservation in a patent of land bounded by navigable water of "free access to the shore for all vessels, boats, and persons," gives a right of access only from the water to the shore, and in this case it was held that a person who had broken down fences and had driven across private property to the shore, could not successfully assert, when charged under R. S. O. 1897 c. 120, s. 1, and the criminal code, s. 511, that he had "acted under a fair and reasonable supposition of right" in so doing. *Regina* v. *Davy*, 27 A. R. 508.

——— *Access to Shore—Public Rights—Private Rights.*]—The plaintiff, owner of a scow, had, without authority, moored it permanently to the shore of a basin artificially created by the excavation of land adjacent to a navigable river, which formed the boundary at that point between Canada and the United States. The soil of the shore and basin had been patented to certain persons, the usual rights of access to the shore and of navigation being reserved. The defendants, licensees of the owners of the shore, with authority to take, and for the purpose of taking, sand from the shores by means of their own scow and a hired tug, placed the tug and scow alongside the plaintiff's scow, and this action was brought for damages caused by fire communicated by the tug to the plaintiff's scow:—Held, reversing the decision in 24 O. R. 500, that the plaintiff in mooring his scow where he did was not a trespasser, at all events as against the defendants, who were mere licensees "to take sand from in front of" the land granted by the Crown. The grant to the shore of the river, reserving free access to the shore for all vessels, boats, and persons, carried the land to the water's edge, and not to the middle of the stream. The effect of the removal of the shore line back from its natural line was to make the water so let in as much publici juris as any other part of the water of the river, and such removal did not take away the right of free access to the shore so removed. *Cram* v. *Ryan*, 25 O. R. 524.

——— *Access to Wharf—Easement—Obstruction — Water Lots — Crown Grant — Prescriptive Right.*]—A. was lessee for years of the west half, which was practically vacant, of water lot 17, Toronto harbour, B. proprietor of the east half of the same lot, on which, erected more than twenty years before action, were a wharf and storehouse, so near the dividing line of the half lots that vessels could not call at the west side of the wharf, where all the business was done, without passing over the half lot of A. and partly occupying the same while lying at the wharf. B. and his successors had also laid up vessels at their wharf in winter, two or three abreast, occupying part of A.'s half lot nearly every year since the erection of the wharf, and, about eighteen years before action, built on the wharf an elevator for receiving and shipping grain at the west side of the wharf. In 1883 A. put up a notice warning persons against trespassing on his half lot, which vessels passing to B.'s lot knocked down. Subsequently, in the same year, A. drove piles into the soil of his own half lot, ostensibly as a foundation for boat houses, and was about to drive others, to the obstruction of the approach to B.'s wharf, when B., to meet this, began moving vessels to and from his wharf, and finally mooring them to his wharf so that they projected into the waters on A.'s lot, thus preventing him from driving more piles. In trespass by the plaintiff, B. claimed, first, an easement by prescription and non-existing grant to the owners of the fee—whose lessee, Taylor, who erected said wharf, was—over A.'s lot to the extent necessary to allow vessels to pass to and from his wharf, and to lie up there; secondly, that the waters covering said water lot were navigable waters, part of Lake Ontario and Toronto harbour, and that the wharf was a construction within the law for the purposes of enabling the har-

bour to be used, and the safe and useful navigation of said waters, and that the act of A. was a wrongful interference and an obstruction of the use of the said navigable waters, which B. was entitled to abate:—Held, that the waters covering said lot seventeen were part of the navigable waters of Lake Ontario, and the same law was applicable thereto as in the case of tidal waters, in the absence of a valid grant the soil being vested in the Crown and subject to the jus publicum of navigation. (2) That the Act 23 Vict. c. 2, s. 35 (R. S. O. 1877 c. 23, s. 47) gives to the Crown authority to grant water lots, and the grant of water lot seventeen by the description "land covered with water" was valid under these enactments, and sufficient to pass to the grantee and his representatives the soil and the jus publicum for navigation and the like in the water, which could be built upon, filled up, or otherwise dealt with, as might be thought proper. (3) That so long as A.'s water was unenclosed or unoccupied any one might pass over or across it without being liable to be treated as a trespasser, and an easement such as that claimed could not therefore be acquired. (4) That the claim to an easement was not founded on an enjoyment nec clam, nec vi, nec precario, and was therefore not as of right, and could not be sustained. (5) That the evidence shewed that the user of the plaintiff's water lot was not as of right, and the finding of the jury was warranted by the evidence. (6) That neither the erection of the wharf nor its long use, nor the erection of the elevator, shewed such a claim of enjoyment as of right as to satisfy the statute. (7) That in any event the claim was of an easement in gross, and therefore invalid. (8) That the verdict upon the evidence should have been against the defendants in any event, because they were not making use of the waters for the purposes of trade and commerce when they anchored the vessels upon the lot. (9) That the patent to the city of Toronto of the water lots, confirmed by the esplanade legislation, gave to the owners of water lots the right to fill in their lots, and turn them into land. *Warin* v. *London and Canadian L. and A. Co.*, 7 O. R. 706, 12 A. R. 327, 14 S. C. R. 232.

**Wharf**—*Right to Use—Soil of Bay—Property in.*]—Held, that a wharf being constructed over the navigable waters of the bay of Toronto, the license of the commissioner of Crown lands for the Province of Ontario, even if he had power to grant it, would not confer the right to impose tolls on vessels landing passengers on the wharf, for the public have a right to reach the shore over the waters of the bay, and C. having been invited, as it appeared, by the proprietors of Hanlan's point to run his vessel there, he had a right to land on the wharf, which prevented his reaching the island at that place. Quære, whether the soil at the bottom of the Toronto bay at the place in question was vested in the Province, or in the city of Toronto under the patent from the Crown of the island. *Clendinning* v. *Turner*, 9 O. R. 34.

**What are Navigable Waters.**]—Held, that upon the evidence in this case the jury were warranted in finding the North Sydenham river to be a public navigable watercourse. *Regina* v. *Meyers*, 3 C. P. 305.

Held, that in this case the declaration and ninth plea taken together, sufficiently shewed that the stream in question (called the Twenty Mile Creek) was a navigable stream, and capable of being used by boats for the purpose of commerce. *Snure* v. *Great Western R. W. Co.*, 13 U. C. R. 376.

The Rouge found to be a navigable river. *Small* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 283.

What is a navigable river considered and defined. *Attorney-General* v. *Harrison*, 12 Gr. 466.

The plaintiff owned a lot in Burlington bay, and he complained of a trespass by defendant in going in a skiff upon the waters of an inlet in the bay and fishing there. The evidence shewed that the water in the inlet varied from five to thirteen feet in depth, and that it was navigable for boats of considerable size:—Held, that the inlet was part of the navigable waters of the bay, and that the plaintiff could not recover. *Gage* v. *Bates*, 7 C. P. 116.

The evidence shewed that the land in dispute at extraordinary periods, when the waters of lake Ontario was pressed up there by strong winds, admitted of scows passing over it, but that the water was then only four or five feet deep, and that at ordinary times it was quite shallow and fordable:—Held, not navigable water. *Ross* v. *Village of Portsmouth*, 17 C. P. 195.

——— *Tide.*]—The common law rule as to the flux and reflux of the tide being necessary to constitute a navigable river, does not apply to our great lakes and rivers. *Gage* v. *Bates*, 7 C. P. 116. See also *Whelan* v. *McLachlan*, 16 C. P. 102; *Parker* v. *Elliott*, 1 C. P. 470.

——— *Tidal River — Grant — Pier — Channel.*]—The river St. Lawrence above tide water is a navigable river, the bed of which is vested in the Crown; and therefore under a grant of lots 31 and 32 in the 1st concession of the Township of Cornwall, described as bounded by the water's edge, no part of the bed of the river passed to the grantee. The statutes and authorities upon the question reviewed. Held, also, that although the possession of a pier built out in the river might entitle the plaintiffs to maintain trespass against a mere wrongdoer for an actual entry upon it, yet it would not draw to it possession of the bed of the river between the pier and the shore. *Dixson* v. *Snetsinger*, 23 C. P. 235.

*See McLaren* v. *Caldwell*, 6 A. R. 456, 9 App. Cas. 392; *Gardiner* v. *Chapman*, 6 O. R. 272; *Ratté* v. *Booth*, 11 O. R. 491, 14 A. R. 419, 15 App. Cas. 188; *In re Provincial Fisheries*, 26 S. C. R. 444; *Hamelin* v. *Bannerman*, [1895] A. C. 237; *Regina* v. *Fowlds*, 4 Ex. C. R. 1.

*See*, also, *ante* VII.; *post* XVII.; CONSTITUTIONAL LAW.

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## XII. PENNING BACK WATER.

(*See*, also, *post* XIV.)

### 1. *Action—By and against Whom Maintainable.*

**Against Crown** — *Obstruction—Appreciable Damage—Evidence.*]—In order to estab-

lish a right to damages as against the Crown for having, as alleged, obstructed the flow of water to the mills of the suppliants, it is incumbent upon the suppliants to shew that less than the natural volume of water forming the stream reaches their mill on account of such alleged obstruction; therefore, where it appeared upon the evidence that certain waters alleged to have been penned back by a dam would never have reached the mills of the suppliants, and the extreme and unprecedented dryness of the season had had an appreciable effect upon the supply of water:—Held, that the evidence did not sustain the petition, which alleged that the suppliants sustained damage by the erection of a dam across the river, above their mill. The redress of a subject suffering damage from such acts, if unauthorized by statute, would be against the subject who committed the wrong, and not against the Crown. *Muskoka Mill Co.* v. *The Queen*, 28 Gr. 563.

**Against Landlord**—*Acts of Tenants.*]—Defendant, owning land on which were a mill dam and two mills, leased each of the mills to a separate tenant, who by means of the dam penned back the water upon the plaintiff's land:—Held, that for this injury defendant was liable. *Breathour* v. *Bolster*, 23 U. C. R. 317.

**Against Municipal Corporation**—*Obstruction—Bridge—Remedy by Arbitration—Parties—Mortgagee.*]—The approaches to a bridge built over a river were supported on trestle work, the water flowing through the trestle work and spreading over the low land until it fell into the river. The municipality subsequently filled in the trestle work and made a solid embankment there whereby the water was penned back, and sent down in a greater body and with greater force in the regular channel, by reason whereof a great part of the bank of the river upon which the plaintiff's factory was erected, was washed away, and was being so washed away from year to year:—Held, that, as the work was done by defendants in such a way as to occasion damage to the plaintiff, whereas it could and should have been done without such effect, this was a matter in which plaintiff must prosecute his rights by action, and was not the subject of compensation under the arbitration clauses of the Municipal Act. The land in respect of which the claim was made was mortgaged:—Held, that the mortgagee was not a necessary party, the proceeding not being for compensation for land taken, but as a defence of and protection to property. As, however, his security might be prejudiced or diminished by the washing away of the land, and he might be able to assert some right to the compensation, there could be no objection to his being joined; but, as the compensation was only some $50, the court would not require him to be made a party. *In re Nickle and Town of Walkerton*, 11 O. R. 433.

**Against Owners of Boom**—*Overflow—Negligence—Statute.*]—In an action for damages caused by overflowage, it appeared that the defendants' boom in a river broke by reason of the heavy floods, whereupon they constructed another boom lower down near a certain bridge, which also broke, and the logs became massed against the bridge, which the jury found, with the excess of rain, caused the injury complained of. They did not find negligence on the part of the defendants, but that they were guilty of a wrongful act in throwing the boom across the river:—Held, that the defendants were entitled to judgment. The use of the boom being lawful by statute, R. S. O. 1887 c. 121, s. 5, and no negligence in its construction being pretended, it was impossible to say that what was thus expressly legalized could be made the ground of an action of tort. *Langstaff* v. *McRae*, 22 O. R. 78.

**Against Persons Constructing Dam.**]—When at the time of making a dam the plaintiff sustains no injury, but afterwards, having built a mill, the dam pens back water upon it; he can only sue those who are continuing the dam at the time of the injury, not those who built it. *McLaren* v. *Cook*, 3 U. C. R. 299.

**By Lessee** — *Obstruction — Damages — Pleading.*]—The first count alleged that the plaintiff was possessed of lands near the river Otonabee, and by reason thereof had a right to the benefit of the water to work the mills on said land, and that defendant, by throwing slabs, &c., into the stream, had wrongfully obstructed his enjoyment. The second count stated that a certain raceway had been constructed from a dam on said stream to the plaintiff's said land, by means whereof so much of the water as was necessary to work the plaintiff's mill did and ought to flow through said raceway, but that defendant wrongfully threw slabs, &c., into the stream above said raceway, which sank and prevented the water from flowing in its accustomed manner through said raceway to the plaintiff's land, and so hindered the plaintiff in his enjoyment of the said stream. It appeared that the plaintiff's land on which the mill stood was not upon the stream, but that between it and the stream, along the raceway, a tract of land intervened belonging to one R., from whom the plaintiff held a lease giving him a right to use the water. Several other persons owned mills above the plaintiff, who were also sued by him at the same assizes, and it was impossible to ascertain how much, if any, of the obstruction was caused by defendant and how much by the others:—Held, that this evidence supported the declaration; that the plaintiff was entitled to recover; and that the uncertainty as to the amount of defendant's liability formed no ground for disturbing the verdict, which was for $40. Held, also, that, as the injury complained of was caused by acts made wrongful by statute (C. S. U. C. c. 47, s. 2), and such as the plaintiff could individually recover for, it was unnecessary in the declaration to refer to the enactment, the action not being for any penalty given by it. *Austin* v. *Snyder*, 21 U. C. R. 269.

The lessee of a mill situated near a river, and driven by water drawn in a channel from it, sued for damages sustained by him by reason of the destruction of the flow of the stream caused by the defendant throwing slabs and other waste stuff into the stream, and thereby obstructing the flow of water into the channel aforesaid. The lessor of the plaintiff was the owner of the land adjoining the stream and also of the land surrounding the pond, used for the working of the mill:—Held, affirming the judgment in 11 C. P. 594, that the lessee had a right to maintain such action, and that the declaration stating the plaintiff to be possessed of land and premises

near to the river, and as such entitled to the use of the stream for the working of his mill, was sufficient. *Dickson* v. *Austin*, 2 E. & A. 375.

**By Locatee before Patent.**]—A locatee of the Crown before patent issued may sue a stranger for an injury done by him to his land by flooding. But where an order in council has been made that no deeds should issue from government for lands in a particular part of the township, without a special reservation to defendant of a right to flood certain portions of that land:—Held, that a locatee of the Crown could not maintain an action for the flooding of a portion of those lands by the defendant, as he would in such a case be in a better position before grant from the Crown than afterwards. *Miller* v. *Purdy*, H. T. 6 Vict.

**By Reversioner**—*Damages.*]—Held, that an action is maintainable by the reversioner of a mill demised to a tenant, for diversion or obstruction by a stranger of water from the mill head, the obstruction being of such a character as to render the sale of the premises less valuable. Quære, whether the damages must be recovered once for all. *Rogers* v. *Dickson*, 10 C. P. 481.

**By Riparian Proprietor**—*Reservation in Patent.—Report of Engineer.*]—The patent from the Crown of a lot of land situate on the bank of a river, reserved free access to the bank for all persons, vessels, &c. There was a quantity of stone on the lot, which the plaintiff desired to quarry, but was prevented by the penning back of the water of the river by the defendant, the owner of a mill thereon below the plaintiff's land:—Held, that the reservation by the Crown in the grant was merely an easement to the public, notwithstanding which the plaintiff was a riparian proprietor, and as such entitled to complain of the injury caused by the penning back of the water. The parties desired the assistance of scientific evidence as to the height of the defendant's dam and the effect of raising it. The court appointed an engineer to inspect and report thereon, reserving the costs until his report should be obtained. *Hawkins* v. *Mahaffy*, 29 Gr. 326.

*See Bryce* v. *Loutit*, 21 A. R. 100; *Nigh* v. *Sourcrine*, 12 U. C. R. 67; *Clarke* v. *Rama Timber Transport Co.*, 9 O. R. 68.

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2. *Action—Damages.*

**Future Damages.**] — In an action for penning back water, the plaintiff's evidence went exclusively to shew injury caused by the giving way of dams and embankments, alleged to have been wrongfully and unskilfully put up by defendants. About two acres of land were washed away, which plaintiff's witnesses valued at from £20 to £30 an acre. The jury assessed the damages at £100:—Held, that the court could not assume that any part of this was for future damages, the Judge having told the jury not to allow for that; and they therefore refused to interfere. *Young* v. *Grand River Navigation Co.*, 13 U. C. R. 506.

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3. *Action—Defence of Leave and License.*

**Easement**—*Possession.*]—Quære, whether long possession of an easement in land, though it may not supply evidence of a grant, may be received in support of a plea of leave and license. *Brown* v. *Street*, 1 U. C. R. 124.

*See Robinson* v. *Fetterly*, 8 U. C. R. 346; *Beaver* v. *Reed*, 9 U. C. R. 152; *Canada Co.* v. *Pettis*, 9 U. C. R. 669; *Malcolm* v. *Hunter*, 6 O. R. 102.

*See*, also, *post* XVI.

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4. *Action—Evidence.*

**Proof of Injury.**]—The description of injury complained of by the erection of a mill dam, must be substantially proved as laid in some one count. *McNab* v. *Adamson*, 6 U. C. R. 100.

**Proof of Misconstruction of Dam.**]—Held, that the omission to provide necessary waste gates to facilitate the passage of the surplus water in freshets or floods is evidence of misconstruction, or improper or careless construction of a mill dam. *Mills* v. *Dixon*, 4 C. P. 222.

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5. *Action—Pleading.*

**Plea**—*Argumentative Traverse.*] — Plea, held bad as an argumentative traverse of the plaintiff's alleged right to have the water flow unobstructed along a certain raceway. *Harris* v. *Fraser*, 12 U. C. R. 402.

——— *Justification—Lease.*]—Declaration for overflowing plaintiff's land, by maintaining a dam on a stream running through it, and thus penning back the water. Plea, that one K. had purchased from the Crown, and paid part of the purchase money, and got his receipt therefor from the Crown lands agent, and thereby was the owner of the land mentioned in the declaration, and (before he conveyed to the plaintiff, who claims under him) by indenture demised to defendant and one H. the part of said land then liable to be overflowed by the mill pond of defendant and H. by the dam then erected, to hold so long as the land should be thenceforth occupied and overflowed as a mill pond; and that defendant has ever since kept the water penned back, and has occupied said land as a mill pond, and has kept the dam then erected of the same height as it then was, but no higher, which are the trespasses complained of:—Held, on demurrer, a good plea; that the term set out in the lease pleaded was sufficiently certain; and K.'s estate to enable him to make the lease was sufficiently pleaded. *Kerr* v. *Bearinger*, 29 U. C. R. 340.

——— "*Not Guilty*"—*Erection of Dam—Continuance—Verdict.*]—Case for overflowing plaintiff's land by penning back the water of a stream running through it, and thence over defendant's land. The second count charged that one H. wrongfully erected a dam across the stream on defendant's land, which occasioned it to overflow the plaintiff's land, and that defendant wrongfully kept up the said dam, whereby the water had been injuriously penned back upon plaintiff's land. The third count stated that one H. had erected a dam ten feet high on defendant's close (not alleging this to be a wrongful act); that one T. wrongfully raised and increased in height and width the dam built by H., by means whereof

the water was penned back on and overflowed the plaintiff's land; and that defendant had wrongfully kept up and maintained the dam so wrongfully increased by T. Defendant pleaded not guilty to the whole declaration, and to the second count a prescriptive right for the use of a certain mill on his lot. The jury found for defendant: — Held, that on these pleadings the defendant was entitled to retain his verdict on both counts, for the plea of not guilty put in issue the erection of a dam by H., charged in the second count, as well as the continuance of it by defendant; and the gist of the action, and the substantial point involved in both counts, was not the erection of the dam, but the wrongful penning back of the water, which was decided in the defendant's favour by the verdict on the third count. *Nigh* v. *Sowerwine*, 12 U. C. R. 67.

——— *Statutory Right to Maintain Dam —Easement — Duplicity.*] — Declaration in case for wrongfully keeping up certain dams, and for wrongfully increasing the height of certain dams, and thereby penning back the water of the Grand river and causing it to flow against the plaintiff's mills and over his premises. Seventh plea, that the works complained of were necessarily required for the purposes of navigation of the said Grand river, and were, within the limits of that river, under the control of defendants, and that the plaintiff's mills were first built after the Act incorporating the defendants came into effect —wherefore the defendants, under the powers given to them by the Act, lawfully kept up the said dams, &c.:—Held, on demurrer, plea good, for the Act of incorporation authorizes defendants to do the acts complained of and justified. The eighth plea was held bad, for duplicity, in setting up first an easement by prescription, and, secondly, a statutory right. *Kerby* v. *Grand River Navigation Co.*, 11 U. C. R. 334.

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6. *Injunction and other Equitable Relief.*

**Award**—*Enforcement—Decree—Costs.*] — The plaintiff and defendant owned adjoining lots, through which a stream flowed freely in its course until defendant threw logs and refuse wood into it, which had the effect of damming back the water on the plaintiff's land, whereupon the plaintiff began an action at law, which action, with all matters in difference between the parties, was referred to arbitration, when the arbitrators decided that defendant should remove all the timber across the creek and pay one-half the costs of the action at law. Defendant having refused to obey the award, the plaintiff filed a bill for the purpose of compelling obedience thereto. The court, under the circumstances, made the decree as asked, and ordered the defendant to pay the costs of the suit. *Hodder* v. *Turvey*, 20 Gr. 63.

**Cause of Injury**—*Onus—Damages—Action at Law.*]—The court refused to recognize the existence of such a rule as that the first action at law, which action, with all matters brought simply to try the right, not to obtain substantial damages, if any such have been sustained. Where the owner of a mill files a bill against another mill owner to restrain the latter from backing water, he must establish affirmatively that certain alterations in the stream, effected principally by digging out the bed of the mill-race, and made by the plaintiff himself, have not caused the injury complained of. Where it is doubtful whether such is not the case, the court will refuse to interfere by injunction. *Wadsworth* v. *McDougall*, 24 Gr. 1.

**Inquiry as to Cause of Injury**—*Alterations in Works.*]—Where it appeared that defendants had backed water on plaintiffs' mills and overflowed their land, but all the backwater or overflow was not occasioned by defendants, and it was not clear on the evidence what proportion was, or what alterations in their works were necessary to prevent the injury occasioned by defendants, the court directed an inquiry by an engineer named by the court, under the general orders. *Dickson* v. *Burnham*, 14 Gr. 594.

—Held, after receiving his report, that it was sufficient for the court to declare the rights of the parties, and to enjoin any further backing or overflowing by the defendants; and that the court should not proceed to define the alterations in their works which defendants should make. *S. C.*, 17 Gr. 261.

**Joint Owners of Mill Dam**—*Prescription — Right of One.*] — One of two joint owners of a mill dam, each having a mill on the opposite sides of the river by which the dam was formed, was entitled to a prescriptive right to the supply of water as furnished by the dam all the way across the river, and to dam back the water on to the plaintiff's land, but the other owner was not. In an action to restrain both owners from backing the water to the detriment of the plaintiff:—Held, that the dam as a piece of property was an entire thing, and that the plaintiff was not entitled to an injunction restraining the use of the water, his remedy being in damages against the owner not entitled to the easement. *Stothard* v. *Hilliard*, 19 O. R. 542.

**Mill Privilege**—*Injury to.*]—The plaintiff and defendant were owners of mills on the same stream, the defendant's being lower down than, and erected before, that of the plaintiff. By the erection of the dam of the defendant, it was alleged that plaintiff's mill privilege was affected injuriously; and, although it was shewn that the plaintiff, in order to work his mill, was compelled to dam back the water so as to overflow lands higher up, the property of the defendant, the title to which he had obtained after the commencement of this suit, the court held that the plaintiff was entitled to an injunction against the defendant, restraining him from damming the water back upon the plaintiff's property. *Graham* v. *Burr*, 4 Gr. 1.

**Mill Site** — *Inquiry.*] — A mill owner dammed back a river so as to overflow the lot next above him, the owner of which filed a bill for an injunction, on the ground, amongst others, that he was prevented from building a mill on his land. It being doubtful whether or not he had a mill site upon his property, an inquiry was directed on that point. *Burr* v. *Graham*, 5 Gr. 491.

**Use of Stop-logs.**]—In 1814 a mill site was conveyed to the defendant, with the privilege of keeping the dam thereon at all times hereafter at its present head or height, but no higher; and in 1849 the defendant erected a new dam lower down the stream. This new dam was of the same height as the old dam; but the defendant placed on the dam movable stop-logs to enable him to make use of the surplus water, which

would otherwise flow over the dam. By experiments it was shewn that if these stop-logs were not removed, when the defendant's mill was not working, but in that case only, the water would be raised on the lands of the plaintiff to the extent of about one and a-half inches. The defendant, however, always had removed the logs when his mill was not working:—Held, that under these circumstances the plaintiff was not entitled to an absolute injunction against the use of the stop-logs. *Beamish* v. *Barrett*, 16 Gr. 318.

*See*, also, INJUNCTION.

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7. *Other Cases.*

**Costs**—*Scale of—Title to Land.*]—In an action brought against a road company for having so constructed their road as to obstruct a flow of water from plaintiff's lands, the plea of not guilty by statute held not to bring the title to the land in question under the County Courts or Division Courts Act, so as to entitle the plaintiff to tax superior court costs without a Judge's order. *Overholt* v. *Paris and Dundas Road Co.*, 7 C. P. 295.

**Indictment**—*Overflowing Highway—Conviction.*]—Defendant, being indicted for overflowing a highway with water by means of a mill dam maintained by him, objected that there was no highway, and could be no conviction, because the road overflowed, which was an original allowance, had been in some places enclosed and cultivated. It was used, however, at other points, and those who had enclosed it were anxious that it should be opened and travelled, which they said was impossible owing to the overflow. The overflow, too, was at other parts than those so enclosed:—Held, that a conviction was right. *Regina* v. *Lees*, 29 U. C. R. 221.

**Overflow**—*Cause of—Finding of Jury—New Trial—Canal—Compensation.*]—The defendants were incorporated by 31 Vict. c. 66 (O.), with power to take and appropriate a slip of land 200 feet wide, and to construct and maintain a canal from Black river to lake St. John, and thence to lake Couchiching, with the full use and enjoyment of the waters of said river, and the tributary streams and lake St. John, for floating or moving logs; and to execute thereon all necessary works, but so as not to impair and injuriously affect the enjoyment of the present channels thereof; and to construct and keep in repair, subject to such provision, all locks, bridges, and erections necessary for said works; the price or the compensation for the lands taken in case of dispute, or for any lands flooded or injuriously affected by the company's works, to be settled by arbitration. The defendants under their statutory powers erected a canal, and at the point of commencement constructed two piers extending into the river; and in the St. John's creek, which flowed from lake St. John to Black river below the canal, a dam was erected. A break occurred in the bank of the Black river on the canal side beyond the piers, whereby large quantities of water from Black river flowed into the canal, and thus into lake St. John. Owing to the formation of Black river below the junction of St. John's creek therewith, the water in the creek at high water during freshets was backed up into lake St. John, and overflowed the plaintiff's and other lands at the head of the lake. The plaintiff contended that either by the break in the river bank whereby more water was brought down than usual, or by the dam preventing the water from flowing away, it remained longer than it otherwise would have done, and thus caused the damage complained of. Special questions were not submitted to the jury, and there was no finding by them as to whether the cause of damage, if any, was the dam or the break in the river bank. The jury found for the plaintiff:—Held, that there must be a new trial to ascertain whether the damage, if any, was caused by such dam or by the break in the river bank; and, if by the latter, was it the result of negligence or by vis major? Quære, whether there was any liability cognizable in a court of law attachable on the defendants; and whether the compensation clause applied, the plaintiff's land not having been flooded under any right so to do claimed by the company. *Clarke* v. *Rama Timber Transport Co.*, 9 O. R. 68.

**Right to Pen back**—*Preventing Injury.*]—Where the owner of land is threatened with damage by water used for irrigation purposes coming from a higher level, he has a right to protect himself against such injury by all lawful means, without regard to any damage that may result to land of his neighbour for the measures he adopts. *McBryan* v. *Canadian Pacific R. W. Co.* 29 S. C. R. 359.

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XIII. POLLUTION OF WATER.

[*See* R. S. O. 1877 c. 174, s. 460; R. S. O. 1897 c. 223, s. 562.]

**Nuisance**—*Injunction—Interlocutory Order.*]—Although the fact that a nuisance has commenced will raise a presumption that the same will continue, still, where it was alleged that the nuisance complained of was caused by the discharge of refuse matter from the manufactories of the defendants, and it was shewn that no refuse matter had been discharged by them for upwards of a year, they having closed down their manufactories during that period, and that, if the nuisance was increasing at all, it was not through the act of the defendants, the court refused an interlocutory injunction restraining the further continuance of such nuisance. P. granted permission to W., an adjoining owner, to dig a drain partly on his land, for the purpose of draining a pit on the lands of W., which had been in use for some years, and which it was alleged had created a nuisance:—Held, that P., after having granted the permission and lying by so long, was not in a position to obtain an interlocutory injunction restraining such nuisance, unless he could shew that the nuisance had increased of late beyond what it formerly was. *Swan* v. *Adams*, 23 Gr. 220.

——— *Injunction—Public Building.*]—By 32 Vict. c. 28 (O.), all the public buildings and works are placed under the control and management of the commissioner of public works, but the Act negatives any authority of that officer to "cause expenditure not previously sanctioned by the legislature, except for such repairs and alterations as the immediate necessities of the public service may demand." The London Lunatic Asylum was erected under the provisions of an Act of the legislature,

and the drains of it were constructed in such a manner as to discharge into a stream crossing the land of the plaintiff, thereby causing a serious nuisance to the plaintiff. To remedy this it was alleged that the only effectual means was to carry the sewage to the river Thames, at an estimated cost of $30,000:—Held, that the commissioner of public works could not be restrained by injunction from allowing the nuisance to continue. *Hiscox* v. *Lander*, 24 Gr. 250.

——— *Injunction—Tannery.*]—W. acquired a lot adjoining a small stream at Côtedes-Neiges, Montreal, and, finding the water polluted from certain noxious substances thrown into the stream, brought an action in damages against C., the owner of a tannery situated fifteen arpents higher up the stream, and asked for an injunction. At the trial it was proved that C. and his predecessors had, from time immemorial, carried on the business of tanning leather there, using the water for tanning purposes, to the knowledge of all the inhabitants, without complaint on their part; that it was the principal industry of the village; that the stream was partly used as a drain by the other proprietors of the land adjoining the stream, and manure and filth were thrown in, but that every precaution was taken by C. to prevent any solid matter from falling into the creek. W. only acquired the property since C. had been using the stream for the purpose of his tannery, and there was no evidence that the property had depreciated in value by the use C. made of the stream:—Held, that W., under the circumstances, was not entitled to an injunction to restrain C. from using the stream as he did. *Weir* v. *Claude*, 16 S. C. R. 575.

## XIV. Prescriptive Rights.

### 1. *Generally.*

**Right to Continuance of Artificial Stream**—*Owner of Servient Tenement.*] — The owner of a servient tenement who takes water by an artificial stream from the dominant tenement, created by the owner of the latter for his own convenience for the purpose of discharging surplus water upon the servient tenement, acquires no right to insist upon the continuance of the flow, which may be terminated by the owner of the dominant tenement; and the fact that the burden has been imposed for over forty years does not alter the character of the easement and convert the dominant into a servient tenement. The owner of a servient tenement taking water under such circumstances is not "a person claiming right thereto" within R. S. O. 1887 c. 111, s. 35. Enor v. Barwell, 2 Giff. 410, distinguished. *Oliver* v. *Lockie*, 26 O. R. 28.

——— *Riparian Rights.*] — About the end of the eighteenth century an artificial channel or water-race was built across a lot subsequently acquired by the plaintiffs, for the purpose of carrying water from a stream above the plaintiffs' land to a mill below, the water being diverted into the channel by means of a dam. The channel and the banks on either side of it never formed part of the plaintiffs' land, having been excepted therefrom, so that their land was not contiguous to the water. The defendants diverted the water, and the plaintiffs were thereby deprived of the use of the same for watering their cattle:—Held, that the plaintiffs were not riparian proprietors and could not claim any right by prescription to the use of the water. *Buchanan* v. *Ingersoll Waterworks Co.*, 30 O. R. 456.

**Right to Divert Watercourse** — *Permission — Change in User — Onus.*]—Where one brought action to restrain the diversion of the water which supplied his mill, from the channel in which it had flowed for more than twenty years, and it appeared that the channel was an artificial cut, diverting the water from its natural outlet, and had been made originally at the instance, and by permission, of the then owner of the creek in which the water naturally flowed, partly for the benefit of the owner, who had, however, on many occasions blocked up the cut, so as to turn the water to its natural outlet:—Held, that such an occupation would not give a statutory right to the licensee, and that the onus was on the plaintiff to make out his right, and shew that there had been a change in the mode of user, after the permission. *Malcolm* v. *Hunter*, 6 O. R. 102.

**Right to Foul Stream.**] — Semble, that the right to foul the stream could not be acquired by the defendants by a user of twenty years. *Van Egmond* v. *Town of Scaforth*, 6 O. R. 599.

**Right to Maintain Dam** — *Overflow—Justification—Title by Possession.*]—Where a proprietor, for the purpose of improving the value of a waterpower, has built a dam over a watercourse running through his property, and has not constructed any mill or manufactory in connection with the dam, he cannot, in an action for damages brought by a riparian proprietor whose land has been overflowed by reason of the construction of the dam, justify under the provisions of C. S. L. C. c. 51. Nor can he acquire by prescription a right to maintain the dam in question; arts. 503, 549, C. C.; nor can he claim title by possession to the land overflowed without proving the requirements of art. 2193, C. C. *Jones* v. *Fisher*, 17 S. C. R. 515.

**Right to Obstruct Watercourse** — *Period next before Action — Presumption of Grant—Enjoyment of Easement—Evidence.*] —Case for obstruction of a watercourse. The declaration stated that the plaintiffs were lawfully possessed of a certain close, together with a woollen mill and manufactory, upon a certain watercourse, and were entitled to have the said watercourse flow in its usual and proper course to their mill, to supply the same with water; and they complained that defendant had wrongfully penned back the water, and prevented it from so running in its natural course to their close and mill. Defendant's third plea denied the right of the plaintiffs to the natural flow of the stream:—Held, that this plea only put in issue the alleged natural right of the plaintiffs, by reason of their possession, as alleged in the declaration; and that no evidence was admissible under it to shew that such general right had been lost by reason of any conflicting right acquired on any special ground by defendant. The sixth plea was a plea of prescription, setting forth that more than 20 years before the suit—viz., in 1820 and until 1838—there was a saw mill on the stream;

that in 1838 it was removed, and a clover mill erected in its place, which was removed in 1846, and within a year a grist mill was put up; that the occupiers of these several mills, for 20 years before this suit, enjoyed the right without interruption of keeping back the water so far as it was necessary to enable the occupiers, for the time being, of said mills to make full use of the said water, for beneficially using said mills; and that for this purpose it was not at any time necessary for the occupiers thereof to, nor did the defendants, keep or continue, set up or close, any mill dams, &c., across said stream, to obstruct the water more than had theretofore, during the existence of said mills so destroyed and removed, been necessary for beneficially working and using the same; that before and at the times when, &c., defendant was the occupier of the grist mill last aforesaid, and in order to make use of the water for working the same, it became necessary for him to, and he did, keep up and close said mill dam, and thereby necessarily obstructed the water so far only as was necessary to enable him beneficially to use his mill—quæ sunt eadem, &c. As to this plea:—Held, that it must be considered as a plea of prescriptive right under 10 & 11 Vict. c. 5; and therefore that the enjoyment must be for 20 years next before the suit. How the enjoyment for 20 years, not carried up to the time of the action, might have availed as a foundation for presuming a grant, independently of the statute, could not be considered under the pleadings; though, semble, that the evidence given would have been insufficient for that purpose. (2) That whether a year did or did not elapse after the saw mill was removed before the clover mill was worked by water, was immaterial; for the interruption intended by the statute is an adverse interference with the enjoyment, not a voluntary abstaining from user by defendant. (3) That the only question under the evidence was, whether the enjoyment of the alleged easement, shewn between 1839 and 1846, was sufficient to support the plea; that, with regard to this, the point to be considered was, to what extent had defendant enjoyed the privilege of obstructing the water for 20 years; not to what height the dam had been kept up, i. e. to what extent he had prepared means for such obstruction. (4) That the evidence in this case—which shewed that while the clover mill was in existence (from 1839 to 1846) the stream was used only for one or two months in the year, at a time when the water was high, and when, for all that appeared, such user occasioned no injury or detention—would not support the defence of prescriptive right to the extent pleaded. *McKechnie* v. *McKeyes*, 10 U. C. R. 37.

**Right to Overflow Adjoining Land**—*Incidental Entry—Extent of Easement.*]—Defendant, and those under whom he claimed, had the right to overflow the adjoining lands to an extent not exceeding ten acres, for supplying their mill, which right had been exercised to a certain extent for twenty years or more. In trespass for entering the adjoining close:—Held, that, having the right to overflow a part of plaintiff's close, defendant had, as incident to that right, authority to enter and repair breaches in the natural state of the soil of the dam, but not to add thereto so as to cause additional flow. Held, also, that the extent to which such right could be maintained was that to which it was exercised during twenty years after it accrued, and that a partial overflowing would not keep alive the right to extend the overflow at any time to the full extent of ten acres. *Ruttan* v. *Winans*, 5 C. P. 379.

**Right to Pen back Water**—*Evidence—Verdict.*]—In an action against the occupier of a mill for damages to the plaintiff's close occasioned by back water from defendant's dam, where the defence relied upon was a prescriptive right to back water for 20 years before action, there being contradictory evidence as to such right, and the case having been tried by a special jury and the trial having lasted for two days, the court refused to disturb a verdict for the plaintiff. *Holme* v. *Turner*, 5 C. P. 116.

——— *Exercise against Crown.*]—A defendant, having for more than 20 years next before the action penned back water upon the land above him, by means of a dam erected on his own land, is protected by C. S. U. C. c. 88, 10 & 11 Vict. c. 5, although the land flooded belonged to the Crown during the greater part of that period. *Bowlby* v. *Woodley*, 8 U. C. R. 318.

——— *Extent of Easement—Actual Exercise of Right.*]—A., when no one else had a mill lower down the stream, made a dam across the river where it issued from a pond or lake, and kept back the water for a mill which he had erected below the dam. Afterwards B. built a mill lower down the stream, which for twenty years or more obtained sufficient water by the escape from A.'s dam. As A. had also a saw mill below B.'s mill, B. had rarely to complain of the water being retained by A.'s dam, and made therefore no objection to A.'s obstruction of the water by his dam for twenty years. After forty years and more had elapsed, A.'s saw mill passed into other hands, and A.'s mill from decay stopped working. A., therefore, having no object in allowing the water to escape from his dam, kept it penned back, and thus prevented B. from working his mill below. Upon this, B. at once sued A. for obstructing the flow of water to his mill by the erection of his dam. A. pleaded an easement and contended that, as he had had the unrestricted control of the dam for twenty years, he might whenever he pleased prevent any water escaping to B.'s mill:—Held, that the only easement acquired by A., under these facts, was the qualified one of penning back the water for his own mill, so as not to interfere with B.'s use of the waste water as he had enjoyed it for his (B.'s) mill during the twenty years the dam had been erected by A. and acquiesced in by B.—in other words, that A. could not set up a more extended right than he had actually been enjoying with B.'s consent for twenty years. Held, also, that the fact of B. having paid A. a sum of money for one year or more to be allowed to enter upon A.'s land and let down the water to his (B.'s) mill, was no concession by B. of any exclusive right on the part of A. to pen back the water at his dam as he pleased. *Buell* v. *Read*, 5 U. C. R. 546.

A right acquired by twenty years' uninterrupted user to pen back a stream in certain quantities for a mill, will be strictly confined to the right as actually exercised; and any subsequent excess beyond the twenty years' enjoyment, if injurious to others, will render the party liable to an action. *McNab* v. *Adamson*, 6 U. C. R. 100.

Where a right to interfere with the natural course of a stream is attempted to be set up by prescription, the exercise of such right to the full extent claimed must be shewn throughout the period for which the right is claimed, and not that the right had accrued within the time allowed by the Act, but had not been exercised till of late. *Hunt* v. *Hespeler*, 6 C. P. 269; *McKechnie* v. *McKeyes*, 10 U. C. R. 37.

———*Height of Dam—Excess.*] — Action on the case, for damming back water on plaintiff's land:—Held, that upon the pleadings the issue was not whether a dam which had been two feet high was made by the defendant three feet high, or being made by others of that height within twenty years was wrongfully continued by him, but whether the prescriptive right, whatever it might be proved to be, had been exceeded within twenty years to plaintiff's prejudice. *McNab* v. *Adamson*, 8 U. C. R. 119.

**Right to Use Bracket Boards.**]—The use of bracket boards on a mill dam is such an easement as the Statute of Limitations will protect. *Campbell* v. *Young*, 18 Gr. 97.

——— *Construction of Crown Patent.*]—A Crown patent, issued in 1852, conveyed to the plaintiff M. B. a tract of land "containing by admeasurement sixty acres, be the same more or less," and otherwise known as lot nine in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the S. river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats, and persons." The lot actually contained 200 acres, but the dry part was only sixty acres. At and before the issue of the patent, there was a certain mill dam on the S. river, which raised the water of the river and flooded a portion of lot nine; the plaintiffs did not object to the flooding of lot nine by the dam, but brought this action to restrain the defendants from still further flooding the lot to the extent of about four acres, by the use of bracket boards upon the dam, which raised the water about a foot:—Held, reversing the judgment in 13 O. R. 692, that the defendants had no prescriptive right to overflow the plaintiffs' lands by means of the bracket boards. The two Judges composing a divisional court did not agree as to the construction of the patent. *Brady* v. *Sadler*, 16 O. R. 49.

*See Brown* v. *Street*, 1 U. C. R. 124, *ante* XII. 3; *Waria* v. *London and Canadian L. and A. Co.*, 7 O. R. 706; *Wood* v. *Esson*, 9 S. C. R. 239; *Rattè* v. *Booth*, 10 O. R. 351, 11 O. R. 491, 14 A. R. 419, 15 App. Cas. 188; *Stothard* v. *Hilliard*, 19 O. R. 542; *Ellis* v. *Clemens*, 21 O. R. 227, 22 O. R. 216.

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2. *Pleading.*

**Declaration**—*Form of—Excess of Right—Possession.*]—Defendant had built a mill and run it for upwards of twenty years, damming the water back a certain height by means of a log, some slabs, and earth. Within twenty years the plaintiff built a mill lower down the river. Shortly before action defendant erected an earthen dam three or four feet higher than the first. The complaint made was, that defendant, in erecting the last dam, had pressed back the water to a greater extent than his twenty years' use of the former dam entitled him to do; the plaintiff admitting that he was entitled to a certain height of water by virtue of a user of twenty years and upwards. The declaration was framed according to the form in the C. L. P. Act:—Held, that the plaintiff should have founded his right upon the possession of the land, and not of the mill. *Tucker* v. *Paren*, 7 C. P. 269.

**Plea of Prescription.**] — To an action for penning back water, a plea of prescription was held bad, (1) for claiming the right by user for twenty years before action brought, instead of next before; (2) as claiming only a right to erec, a dam of a certain height, without applying such defence to the injury complained of, or admitting the injury. *Haley* v. *Ennis*, 10 U. C. R. 404. Followed as to the first point in *Buel* v. *Ford*, 10 C. P. 206.

Action for throwing the water back upon plaintiff's mill by the erection of a dam lower down the stream for the use of defendant's mill. Plea, that defendant and the occupiers of his mill had had, "and actually enjoyed as of right and without interruption for the full period of twenty years next before the commencement of the suit," a certain right of erecting and continuing a certain mill dam and divers boards on his, defendant's, premises, in all of the height of eight feet:—Held, sufficient, on demurrer, without alleging more particularly that defendant exercised the right, the term "enjoyed" under 10 & 11 Vict. c. 5 bearing the sense of actually exercising the rights therein referred to; and that it was not necessary to deny that the water had been backed more than eight feet in height. *Smith* v. *Wallbridge*, 6 C. P. 324.

Declaration for maintaining a dam across the Grand river, below plaintiff's land, and thereby penning back the water thereon. Plea, that the dam was erected on a close occupied by defendant, to supply certain mills on said close with water, and had in it certain sluices or gates to let off or keep back the water, as might be required for said mills; that defendant and other occupiers of said mills had enjoyed as of right, and without interruption, for twenty years before this suit, the right of keeping up said dam and of closing the gates therein as often as occasion might require for such purpose, and the right of then damming back the water on such occasions, and of causing the same to overflow a portion of plaintiff's land, doing no unnecessary damage in the use of such right; and that the injuries complained of were thus caused:—Held, on demurrer, plea good. *Beckhtel* v. *Street*, 20 U. C. R. 15.

Plea, that defendant and the owners and occupiers of a mill and land were possessed of land and a mill on a stream above the plaintiff's mill, &c., and were entitled to and exercised during all that time the right to erect and keep dams, &c., and in accordance with such right did erect dams, &c.:—Semble, that the plea was bad for omitting the words "as of right." *Buel* v. *Ford*, 10 C. P. 206.

**Replication Traversing Enjoyment.**]—In case for overflowing plaintiff's land, defendant pleaded the enjoyment of a right for twenty years. The replication simply traversed the enjoyment:—Held, that the plaintiff could not shew a life estate outstanding,

as tenant by the curtesy, but must, by s. 5 of 10 & 11 Vict. c. 5, reply that fact specially. *Stuart v. Spence*, 10 U. C. R. 486.

*See McKechnie v. McKeyes*, 10 U. C. R. 37; *McNab v. Adamson*, 8 U. C. R. 119.

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XV. Removal of Obstructions by Municipalities.

**Results of Clearing Stream**—*Overflow—Liability.*] — In 1859 the defendants, assuming to act under the Municipal Act of 1858, C. S. U. C. c. 54, s. 277, passed a by-law requiring persons to clear out all obstructions in streams across their lots; and providing that the council, in their discretion, might do the work and levy the cost thereof by special rate on the lands; and imposing penalties, &c. Defendants cleared a stream on and above the plaintiff's land, and assessed him as a non-resident for $75, the amount expended on his lot, which he paid. They did not, however, clear the stream on the lot below, nor compel the occupant to do so, whereby in times of freshet increased quantities of water were brought down and dammed back on plaintiff's land, injuring his crops, instead of lying, as before, in the woods above and gradually evaporating and passing away, without doing him any injury:—Held, that no action would lie against defendants, either for not clearing out the stream themselves, or for not compelling the owners to do so; and, therefore, that they were not liable to the plaintiff for the damage sustained by him. *Dunard v. Township of Chatham*, 24 C. P. 590.

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XVI. Rights Derived from Grant, Agreement, or License.

**Agreement**—*Right to Pen back Water—Acquiescence — Pleading — Res Judicata.*]—Declaration for penning back water upon the plaintiff's land. Plea, on equitable grounds, that when A., the plaintiff's ancestor, owned the land, S. owned adjoining land, on which, being desirous of building a mill to be driven by the water of the stream in question, it was necessary for such purpose, by means of a dam built upon S.'s land, to pen back the stream, and slightly to overflow the ancestor's land; that A. had full knowledge of the premises, and consented and agreed with S. that S. should build the dam to the height specified and agreed between them, and should so pen back and obstruct the stream; that S., relying on such consent and agreement, and upon acquiescence of A., built the mill and raised the dam to the agreed height, and no higher, and in so doing expended large sums of money, and A. consented to his so doing; that S. worked the mill by water raised and penned back by the dam, and S. and those claiming under him always worked the mill and maintained the dam with the consent of A. and of the plaintiff, and all others claiming under A.; that S. devised in fee "the mill and dam and lands on which they were built," to his son, who granted the same to defendant, who worked the mill and maintained the dam at a height no greater than the height agreed between his ancestor and S.:—Held, plea good. The plaintiff replied that a former action had been brought by her against the defendant for a similar penning back of the water; that defendant had filed his bill to restrain that action, and had in that bill alleged the same matters now alleged in the plea, which bill was dismissed. Rejoinder, that the court of chancery gave no judgment in respect of matters alleged in the plea, but dismissed the bill in respect of other matters:—Held, rejoinder good. *Dean v. Gray*, 22 C. P. 202.

——— *Right to Pen back Water — Consideration—Specific Performance.*] — A bill was filed by the owner of a mill, alleging an oral agreement with the proprietor of land adjoining, for the right to pen back the water of a stream running through his land, and which was used for driving the mill of the plaintiff, in consideration of which he was to open up a road across his farm for the use and convenience of such land owner; but no writing was ever drawn up evidencing the agreement. The owner of the land subsequently sold and conveyed this estate, and his vendee instituted proceedings against the mill owner for damages by reason of the penning back the water, which had the effect of overflowing a considerable portion of his land. The evidence in the cause being positive, as to the agreement to permit the penning back of the water, and the road across the farm of the plaintiff having been used by the proprietor of the land and his vendee, the court decreed a specific performance of the parol agreement, but under the circumstances without costs. *Nicol v. Thackerbury*, 10 Gr. 109.

——— *Right to Pen back Water—Extent of.*]—C. contemplated the erection of a saw mill on land which he owned, but he required the privilege of backing water on the lands of four other persons having lands further up the stream. From three of these persons he obtained, through the agency of the fourth of them (E.), the right, by deed, of backing the water to whatever extent would be occasioned by a dam nine feet high. The fourth (E.) orally gave the same right. C. thereupon erected a dam seven feet six inches high, but finding this insufficient he some years afterwards desired to raise it further:—Held, that E.'s agreement was not binding to any greater extent than C. had taken advantage of in erecting his original dam. *Hendry v. English*, 18 Gr. 119.

——— *Use of Water—Breach—Damages.*] —The vendor and vendee of a mill and water power (the vendor using the same water for another mill) disagreed in their construction of the contract of sale, as to who had the first right to use the water, there not being enough water for both during the greater part of the year. The court was of opinion that the vendee had the better right to the first use of it, and that the vendor, by using the water and depriving the vendee of the use thereof, committed a breach of the agreement, and was liable in damages, the amount of which the master was directed to ascertain. *Bishop v. Merkley*, 8 Gr. 335.

——— *Use of Water—Excess—Pleading.*] —Declaration, that the Grand River Navigation Company, having acquired the right by statute for that purpose, demised to W., of whom plaintiff is assignee, certain land in B., together with a sufficient supply of the surplus water to be taken from the said company for four run of stone; that the plaintiff is occupant of a mill on the premises, which he

could, if not interfered with, and has been accustomed hitherto to, run with the surplus water so granted; but the defendant has on divers occasions wrongfully and injuriously diverted from plaintiff's mill large quantities of said surplus water, &c., whereby, &c. Plea, that at the time of the committing of the alleged grievances defendant was, and now is, lessee of part of said company's reserve lands, and had a right under said company to use enough of the surplus water from the said canal to propel two run of stones in a mill on said land; that defendant had in his mill the same kind of wheels which plaintiff now has in his; and it was agreed between them, in consequence of the scarcity of water, that defendant should put in his mill wheels of the best and most improved principles, or Leffel wheels, and that the plaintiff, in consideration thereof, would, in a reasonable time, put in his mill similar wheels, in order to save water and facilitate the working of said mills; that defendant accordingly put said wheels in his said mill, at great expense, but plaintiff did not put in similar wheels, although a reasonable time elapsed; and that after putting in the said wheels defendant took sufficient and no more than enough water to run his two run of stones, and after taking such water for said purpose there was sufficient surplus water for plaintiff to run his four run of stones with water wheels constructed according to the said agreement; but the plaintiff's wheels were inferior, and used a large quantity of water in excess of what he would have needed for wheels according to the agreement; and the breach in the declaration alleged was caused solely by plaintiff's non-performance of said agreement:—Held, plea bad, for want of an averment that defendant used less or no more water with his new wheels than he was entitled to use with his old wheels under his lease. *Watts* v. *Robson*, 33 U. C. R. 570.

——— *Water Privilege — Land — Specific Performance.*]—R. gave a bond to convey to B. a water privilege on lot 17, and to convey also so much land as he might require for the purpose of making a raceway or for erecting buildings on the said lot, at the rate of £10 per acre:—Held, that the selection of such land must be made during the lifetime of both obligor and obligee. Quære, whether a bill would lie for the specific performance of such a contract. *Burnham* v. *Ramsay*, 32 U. C. R. 491.

——— *Water Privilege—Representation.*]—Plaintiff declared on the common counts, and on a special agreement by defendant to sell to plaintiff certain land, together with two mills and a head of water, for the purpose of working said mills, of twelve feet, and to convey the same to the plaintiff at defendant's expense. Defendant, on the 4th April, wrote to the plaintiff, "There is about twelve feet of a fall of water, and it might be raised to twenty feet if required." And in answer to a letter from the plaintiff asking for some explanation, he again wrote, on the 3rd May, "The twelve feet fall is at the oat mill, and can be raised to twenty feet, or any height required." It was proved that the whole fall to be had upon the property was less than eight feet:—Held, that the contract was proved as to the head of water; for, though in his first letter the fall was said to be "about twelve feet," it was described in the second as "the twelve feet fall," and in both it was said that it could be easily raised to twenty feet. *Clarke* v. *McKay*, 32 U. C. R. 583.

——— *Water Privilege—Representation—Guarantee—Rescission.*]—The owner of a mill property wrote to an intending purchaser: "I will sell the mill as it now stands, at Glenmorris, with all rights and privileges belonging to it, as sold me; and I will guarantee to give a head of five feet, by laying out about £30, but as it is there is four feet, and there is water enough to run ten run of stones if necessary:—Held, that these representations amounted to express guarantees, upon the several points embraced in them; and it being shewn that a head of five feet of water could not be obtained except by an outlay of a large sum of money, and that raising the water to that height would dam back the water on the lands of parties higher up the stream and divert water to which the riparian proprietor on the other side of the stream was entitled, the court ordered the agreement to be rescinded, and the vendor to pay the costs of the suit and the amount expended in repairing the premises by the vendee, who was to account for rents and profits during his possession. *Gale* v. *Hubert*, 6 Gr. 312.

——— *Water Privilege—Specific Performance—Decree.*] — A vendor agreed that the purchaser should have sufficient water to drive a saw mill and the machinery. In a suit by the vendor against the purchaser, the court decreed a specific performance of the contract, treating the water and the use of the dams and booms as sold with the land, the decree to provide for this, with liberty to the parties to apply from time to time. *Hincks* v. *McKay*, 14 Gr. 233.

**Conveyance of Land**—*Bed of River—Severance — Diversion of Tail-race — Width of.*]—The owner of the banks and bed of a river (not a navigable one) may sever them and deal with them as with any other real estate. The owner of the banks of such a river made a tail-race through his land drawing water for the purposes of his mill from the river, which he by means of this tail-race returned to the river at a point lower down the stream, but where the bed of the river was owned by him. Subsequently the owner conveyed the land through which the tail-race ran:—Held, that such tail-race could not be diverted, but that the owner of the bed of the river was entitled to have the water in the tail-race discharged into the river at the point where it originally was discharged. Such a proprietor made a conveyance of a portion of the property to a manufacturing company, reserving the "free use of two watercourses over the said parcel of land for conveying away the water from his grist mill . . . one of the said watercourses entering the said parcel of land on the side next the grist mill . . . and the other watercourse running along the south end of said factory and passing under the flume, and being twenty feet in width . . . with the exception of the space occupied by piers, or abutments, for supporting the flume, which, however, must not be so built as to obstruct the free passage of the water as aforesaid." It appeared that at the time of the conveyance the watercourse in question at one point was of the width of twelve feet only:—Held, that this did not entitle a party claiming by mesne conveyance from such proprietor to have such watercourse

of the width of twenty feet throughout its entire length. *Elliott* v. *Baird*, *Baird* v. *Elliott*, 26 Gr. 549.

——— *Covenant to Supply Water—Maintenance of Dam—Discharge of Obligation.*]—On a sale of a mill site the vendor covenanted to secure to the vendee sufficient water for certain manufacturing purposes. The deed did not state how the water was to be supplied; but a dam then standing afforded the necessary supply, and it did not appear that the covenantor had any other way of securing it:—Held, that he or any one claiming under him was not entitled to a decree for the removal of this dam without supplying sufficient water in some other way. Held, also, that the grantee, his heirs and assigns, were entitled to use the water for other purposes, provided no more was used than the specified manufactures had required and used. After the conveyance, other persons, unconnected with either party, erected mills above the dam, and used part of the water:—Held, that this did not relieve the grantor, or those claiming under him by subsequent deeds, from the obligation to supply his first grantee with water, so far as the maintenance of the dam was a discharge of this obligation. *Rosamund* v. *Forgie*, 18 Gr. 370.

——— *Erection of Dam—Overflow of Vendor's Lands.*]—The Canada Company, through their agent in Canada, contracted by letter to sell certain lands upon condition, amongst others, of the vendee building a saw mill. The vendee proceeded, with the knowledge of the agent, to erect a saw mill and construct a dam across a river, the effect of which was to overflow a large tract of the company's land. Subsequently the company conveyed the lands contracted for, which were situate on both sides of the river, reserving the bed of the river and about thirty feet on either bank, the title to the bed being then in the Crown. Afterwards the company, having obtained a patent for the bed of the river, proceeded at law against the persons owning the mill for damage done by the overflowing, and recovered a verdict for £500; and other actions were also brought for the same injury. The court decreed a perpetual injunction restraining the actions, and a conveyance of the bed of the river and the portions on either side which had been reserved, and ordered the company to pay the costs. *Brewster* v. *Canada Co.*, 4 Gr. 445.

——— *Privilege of Overflowing Adjoining Land—Mistake in Agreement—Acquiescence.*]—Divers lands having been devised to three sisters, P., A., and L., they in 1840 agreed to a partition, by which, amongst other things, P. was to have a certain lot 45, with the privilege of overflowing 46; and A. was to have 46, subject to that privilege. Conveyances were signed to carry out the partition, but, the matter being transacted without professional advice, A. and L., who were married women, did not execute so as to pass any estate. All entered into possession of their several lands, and in 1841 P. executed to her son a voluntary conveyance of 45, with the privilege, and A. and her husband conveyed 46 to their son. The error in regard to the execution of the partition deed having been afterwards discovered, P., with A. and her husband and L.'s heirs (L. being dead), in 1849 joined in a conveyance of all the lands to a trustee, in order to carry into effect the previous partition; but by an oversight this new deed omitted to mention P.'s right of overflowing 46. A.'s son and P.'s son were active in getting this new deed executed, but were not parties to it. Immediately after its execution, A. and her husband executed to their son a new deed of 46. No new deed was executed to P.'s son. He, thereafter, with the knowledge and acquiescence of A.'s son, built a mill on lot 45, and placed his dam where it necessarily caused the overflowing of 46. He afterwards mortgaged 45, with his supposed privilege of overflowing 46; and the mortgaged property was sold at the mortgagee's suit, the two cousins alleging for the first time that the mortgagor had no right in respect of 46; the right was considered doubtful at the time, but the purchaser completed his purchase:—Held, in a subsequent suit, by the purchaser against the mortgagor and his cousin, who owned 46, that the plaintiff had a right to overflow 46. *Boyle* v. *Arnold*, 16 Gr. 501.

**Conveyance of Mill Premises**—*Dam—Entry—Parol License—Rights of Mortgagee.*]—One J. S., being owner of the east half of one and the west half of an adjoining lot, by deed, under the Act respecting Short Forms, conveyed to G. S. in fee the west half, without express mention of any easements, &c. There were then on the west half a saw mill and factory, which then and for some years, during unity of title to both lots, were driven by a river, which was dammed back to form a pond on both lots, by a dam and embankment extending on to both. There was on the west half a grist mill, ready for the reception of machinery, and the embankment was partly cut through to carry the water therefrom to another pond partly begun, from which the grist mill was to be supplied. After the conveyance, G. S. finished the cut through the embankment, carried the water required from one pond to the other by a flume, and thus worked the grist mill, which could not otherwise have been worked. By this he diverted the water from the first pond and from the east half, more than before the conveyance. Such diversion and working of the mill were with the parol license of J. S. The cutting, flume, and grist mill pond, were all on the west half, and the water was returned from the mill to the river below the east half:—Held, that, as by the statute the deed included all easements, &c., used or enjoyed with the lands granted, there was an express grant of the right or easement to maintain the dam and to enter for purposes of repair on the east half, and to dam back thereon for the purpose of the saw mill and factory, to the same extent as before the conveyance. But, held, that no right or easement passed in respect of the grist mill; and also, that the parol license was revocable; but that the plaintiffs, the mortgagees of G. S., would be entitled in equity to restrain J. S. and those claiming under him from interfering with the right claimed respecting the grist mill. *Edinburgh Life Assurance Co.* v. *Barnhart*, 17 C. P. 63.

——— *Repurchase — Extinguishment of Easement—Mortgage.*]—The owner of a mill property, with the right to use all the water of the stream on which the mill was, sold a portion of the land, and by a separate instrument bound himself to permit his vendee to use a certain quantity of the water to drive machinery to be erected on such portion.

Afterwards, finding that the quantity of water which the vendee withdrew from the stream impaired the effective working of his mill, he repurchased the lot and easement, receiving a conveyance thereof, and giving back a mortgage to secure part of the purchase money (these instruments, however, were never registered), and afterwards, the purchase money having been satisfied, procured his vendee to make a deed direct to R., who had purchased the lot and easement, with notice, however, of all the facts. On a bill filed by a person who had obtained title to the mill and premises under a mortgage executed by the owner before the repurchase of the lot and easement:—Held, that neither the original owner nor R. was entitled to use the water, the easement having become extinguished on its repurchase, and the whole water having passed to the mortgagee. *Gooderham* v. *Routledge*, 10 Gr. 398.

——— *Retention of Water—Overflow.*]—The owner of land on both sides of a stream sold and conveyed a mill property situate thereon, to a purchaser, and another portion of the land to another person:—Held, that the proprietor claiming under such conveyance had a right to retain the water in the mill pond at the same height that it was at the time of the sale, although the effect of so retaining it might be, in the case of a sudden and temporary rise of the river, to overflow more land of the other riparian proprietor than had been usually overflowed before, and that in case the water in the stream should sink so as to leave uncovered land which had been usually overflowed at the time of the purchase, the present owner of the mill would be entitled to raise his dam so as to obviate the effect of the diminution of the water. *Hickman* v. *Lawson*, 7 Gr. 494.

——— *Right to Water—Easement—Reservation.*]—T., being owner of 275 acres of land, caused a mill dam and race to be constructed and a mill to be erected thereon. For 30 or 40 years this mill, or others built on its site run by water power only, had existed, and were run by the water passing from a natural stream through the race. T. sold to W. the whole property, taking back a mortgage for part of the purchase money, on that part of the land through which the race ran, and on which the mill dam was situated, excepting, however, the mill site. It was shewn that the mill could not be supplied with water power otherwise than by the race running through the mortgaged premises. T. afterwards assigned the mortgage to the plaintiff, and W. mortgaged the mill and mill site to D.:—Held, that the right to use the dam and mill race was a necessary, continuous, and permanent easement, and could not be destroyed by the plaintiff, although the servient parcel had been first conveyed without any express reservation of such easement. *Young* v. *Wilson*, 21 Gr. 144, 611.

——— *Use of Water—Restrictive Covenant.*]—Plaintiff conveyed land to M., with the privilege of drawing off from the mill race on the adjoining land of the plaintiff a certain quantity of water for purposes specified, leaving always sufficient to supply the mill on the plaintiff's land. And by the same indenture M. covenanted for himself, his heirs, executors, administrators, or assigns, to restrict themselves to the use of the water for the purposes mentioned, and not take such water unless there should be enough without it to supply the plaintiff's mill:—Held, a covenant running with the land, on which the plaintiff might sue M.'s assignees. *Warren* v. *Munroe*, 15 U. C. R. 557.

——— *Use of Water—Restrictive Proviso.*]—M. conveyed to W. certain premises "together with the privilege of using the water in the pond for the purpose of manufacturing cloth and otherwise howsoever, when and at all times when water is and remains in said pond sufficient for the driving and running the machinery of a grist mill, the property of the grantor, and the fulling and carding machine hereby sold to said W." M. covenanted that W. might use the water for said purpose "when and at all times when water is and remains in said pond sufficient for the driving and running the machinery of a grist mill, the property of said M., and the said fulling and carding machine hereby sold to said W. Provided always, that when and whenever there is a scarcity of water in the said mill pond, the said W. shall be at liberty to use only so much of the water in the said pond as shall be sufficient to turn one water wheel:"—Held, that M. was entitled to sufficient water to drive his mill before defendant could use any; and that defendant was not by the proviso entitled at all events to enough to turn one water wheel. *Cruske* v. *Huffman*, 27 U. C. R. 116.

**Crown Grant** — *Reservation—Dam—Obstruction—Riparian Owner.*]—A grant from the Crown was made "exclusive of the waters of the river Trent, which are hereby reserved together with the free access to the shores thereof for all vessels, boats, and persons:"—Semble, that this would operate as a reservation of the bed of the river, though the waters only are reserved; and therefore that the erection of a dam in that river by persons claiming under the patentee, without authority, was an intrusion on the rights of the Crown. Although a conveyance describing land as "extending to a river" extends to the centre of the bed of the stream, this does not confer on the grantee the right to use it as land uncovered by water may ordinarily be used. Therefore, where the grantee under such a conveyance constructs a wall extending into the bed of the stream, the onus of shewing that such erection is not an injurious obstruction is cast upon the party making it. The grantee in a patent reserving the waters of a river running through the lands granted, has no right to file a bill complaining of an obstruction created in the river by other persons, the patentee in such case not having conferred on him the ordinary rights of a riparian proprietor. And where under such circumstances a bill was dismissed, it was without prejudice to a new bill being filed in the event of the Crown making a grant free from such reservation; and the defendants being clearly in the wrong, although the parties complaining had not any right to sue, the court in refusing the relief did so without costs. *Kirchhoffer* v. *Stanbury*, 25 Gr. 413.

**Lease of Mill Premises**—*Water Power—Eviction—Abandonment—Implied Covenant.*]—To an action for breach of covenants in a lease, in the non-payment of rent, and leaving the premises in an improper state of repair, defendant pleaded, on equitable grounds, setting out the demise, whereby the plaintiff demised to defendant certain land and premises on which a mill was erected,

"together with the water wheel in said building and the right to draw water from the mill pond adjoining the above described premises for driving the said water wheel and machinery driven thereby," &c. The plea then averred that one D., claiming by title paramount, having proved such title by an action brought therefor, hindered and prevented defendant from using the said water so demised, whereby the demised premises were rendered useless and of no value to defendant, who delivered up possession to the plaintiff of the said premises and water rights in a perfect state of repair, and defendant had not used said premises during any portion of the time for which the rent sued for accrued due, and delivered them up as aforesaid before said time commenced. The plea then prayed that the action might be restrained, and the plaintiff ordered to pay the costs thereof, and that the demise should be delivered up to be cancelled:—Held, plea bad, as a legal defence, because the right to use the water was no part of the demised premises, but merely an easement thereof; and, even if it were, an eviction in respect of it would not authorize the tenant to abandon the residue of the premises; and as an equitable plea, because no case was shewn for a total abandonment of the contract, for defendant having paid rent for some years could not replace matters as before the lease, and he had a remedy by action on the plaintiff's implied covenant to supply the water power. *Coleman* v. *Reddick*, 25 C. P. 579.

**License**—*Diversion of Stream—Res Judicata—Action against Tenant—Pleading.*]—To a declaration for diverting water from the plaintiff's mill and premises and using it to work defendant's sash factory, defendant pleaded, on equitable grounds, that while one R. F. C. owned the mill, defendant's father, T. C., owned certain lands higher up the river, and erected a saw mill, which was afterwards changed into a sash factory, and opened a sluice-way in the dam, and cut the bank of the canal to said saw mill and factory, and used enough of the water to work the same, which are the grievances now complained of; that all this was done with the knowledge and consent of said R. F. C., through whom plaintiff claims; and defendant acquired the saw mill, &c., as they were used by T. C., and the alleged grievances are a user by defendant as they were so used by T. C. The plaintiff replied by way of estoppel a judgment recovered by one D., through whom the plaintiff claimed title, in an action against R. & T., then the defendant's tenants in occupation of the sash and blind factory, in which D. sued for a similar diversion of water to that sued for in this action. The replication, after setting out the pleadings in that action, and the judgment recovered for $50 damages, alleged that it was defended by R. & T. at the instigation and for the benefit of the now defendant, as their landlord, who employed the attorney and counsel, and paid the costs, and was the actual defendant, R. & T. being only the nominal defendants; and that the issues therein disposed of were substantially the same as those raised here, and the wrongs now complained of are a continuation of the wrongs for which D. then recovered judgment:—Held, bad, for such judgment could form no estoppel, the defendant not being a party to the record in that action, nor capable of being substituted as such for his tenants, as in ejectment. *Diamond* v. *Coleman*, 38 U. C. R. 632.

Where to an action for diverting the water of a certain river from plaintiff's mill, defendant pleaded by way of estoppel, that long before the grievances complained of, R. F. C., the then owner in fee and possessor of plaintiff's mill, with the consent of J. C., the then owner of certain land higher up the river, erected thereon the defendant's mill, and used the water as in the declaration alleged, and that the alleged grievance is the user by defendant of the water, as used and recognized and acquiesced in by said R. F. C., wherefore, &c.:—Held, plea bad, for it did not shew how plaintiff's claim was barred, nor what right or title either plaintiff or defendant acquired in their respective mills, nor why R. F. C. erected the mill on T. C.'s lands, nor what interest he acquired in the mill erected thereon or the water used therefor. *S. C.*, 25 C. P. 236.

**License to Make Raceway**—*Proviso—Injury—Remedy.*]—Where the plaintiffs, who had built mills on a stream, by indenture granted a license to the defendant to make a raceway over their lands for a mill to be built by the defendant further down the stream, provided that the water was not thrown back thereby, nor any injury or damage occasioned to the plaintiffs' mills; and after the defendant's mill had been erected, by an accumulation of ice on the by-wash, the water was forced back on the plaintiffs' mill:—Held, that the plaintiffs might maintain an action for such an injury, and that case, and not covenant on the indenture, was the proper form of remedy. *Eastwood* v. *Hellwell*, 4 O. S. 38.

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## XVII. Riparian Owners.

**Right in Navigable Stream**—*Jus Publicum—Contact with Stream.*]—There is no distinction in principle between riparian rights on the banks of navigable or tidal and on those of non-navigable rivers. In the former case, however, there must be no interference with the public right of navigation, and in order to give rise to riparian rights the land must be in actual daily contact with the stream, laterally or vertically. Lyon v. Fishmongers Co., 1 App. Cas. 662, followed and held to be applicable to every country in which the same general law of riparian rights prevails unless excluded by some positive rule or binding authority of the lex loci. *North Shore R. W. Co.* v. *Pion*, 14 App. Cas. 612. See *S. C., sub nom. Pion* v. *North Shore R. W. Co.*, 14 S. C. R. 677.

*See*, also, *Bigaouette* v. *North Shore R. W. Co.*, 17 S. C. R. 363.

**Right of Access to Canal**—*Obstruction—Navigable Water—Injunction.*]—C., the owner of two lots of land, divided in one place by G.'s land, and in another by a bay formed by the waters of the Rideau canal, which washed the shores of all these lots, began to construct a bridge between his two lots for easier access between them, which bridge would have the effect of cutting off G.'s land from the canal, and of making the water between the bridge and G.'s land stagnant. In an action by G. against C. for an injunction to compel him to desist from the work, and remove that part already constructed:—Held, that G. had the rights of an ordinary riparian owner; that the stream being a navigable one made no

difference, except that those rights are subject to the public right of navigation; that those rights had been injuriously affected by the defendant; that the plaintiff shewed that an injury would result to him if the work was completed, and that he might in good time bring his action to prevent the wrong; that, even if the bay was not part of the Rideau canal itself, so as to give him the rights of an owner and occupant of lands adjoining the canal under 8 Geo. IV. c. 1, s. 15, he was entitled to use it as a means of access to the canal; and that on the evidence the plaintiff was entitled to his injunction. *Gardiner* v. *Chapman*, 6 O. R. 272.

**Right of Crown to Improve Navigation**—*Compensation.*]—The public easement of passage in a navigable stream is so far in derogation of the rights of riparian owners as to enable the Crown to make any use of the water or bed of the stream which the legislature deems expedient for improving the navigation thereof. Defendants, who were prosecuting a milling business on certain waters forming part of the Trent Valley canal, asserted a claim against the Crown for a quantity of land taken for the improvement of the navigation of such waters, and also claimed a large sum for damages alleged to have been sustained by them (1) as riparian owners by reason of the taking of the land on both sides of a head-race preventing any future enlargement of the width of such head-race, and (2) from the fact that they would not be able in the future to use to the full extent all the power which the mill pond contained, because they could not cut raceways from the pond into the river through the expropriated part:—Held, that, while the defendants were entitled to compensation for the quantity of land taken by the Crown, they could not recover for any injury to the remaining land arising from the utilization of the waters of the stream for the purpose of improving the navigation. Semble, that where no particular estate was sought to be expropriated in a notice and tender to claimants under s. 10 of 50 & 51 Vict. c. 17 (repealed by 52 Vict. c. 13), it is to be presumed that the Crown intended to take whatever estate, &c., claimants had in the lands expropriated. *The Queen* v. *Fowlds*, 4 Ex. C. R. 1.

**Right of Crown to Interfere**—*Ownership of Soil.*]—An averment that the soil of a stream is vested in the Crown, does not import that the Crown has any power to interfere with the rights of riparian proprietors. *Attorney-General* v. *McLaughlin*, 1 Gr. 34.

**Right of Patentee with Reservation of Water**—*Obstruction.*]—The grantee in a patent reserving the waters of a river running through the lands granted, has no right to file a bill complaining of an obstruction created in the river by other parties; the patentee in such case not having conferred on him the ordinary rights of a riparian proprietor. *Kirchoffer* v. *Stanbury*, 25 Gr. 413.

**Right to Divert Water** — *Artificial Channel—Natural Flow of Water.*]—The plaintiff claimed title under a deed from T. C. to R. F. C. made in 1845, granting a certain piece of land in the town of Belleville, described, being part of lot 3 in the first concession of Thurlow, situate on the west bank of the river Moira, "with an equal right to or privilege of the water from the dam conveyed through the canal to the premises aforesaid, he, the said R. F. C., being at all times at an equal expense in altering, repairing, and amending the dam aforesaid, with the others who participate in the benefit thereof," together with all houses, mills, &c., thereon erected. It was admitted that T. C. then owned lot 3, which included the river Moira and the banks on either side, and that he built the dam and made the canal in question before 1845. By this dam the water of the river was turned into the canal, at the foot of which the plaintiff's mill conveyed by said deed was situate. Defendants had a factory, also on the canal, above the plaintiff's mill, and they diverted the water from the canal, to the injury of the plaintiff's mill:—Held, that the plaintiff, having his land on the canal, had as appurtenant to his mill the rights of a riparian proprietor; that the law applicable to natural streams was applicable also to the canal, which was a natural flow of water, though in an artificial channel; and a verdict for the plaintiff was sustained. Semble, that the right to the water given by the deed was an equal right with those who then participated in the benefit of the water from the dam; but quære, as to the meaning of the deed in that respect. *Diamond* v. *Reddick*, 36 U. C. R. 391.

——— *Restoration—Unreasonable User—Prescription—Damages.*]—Held, that the use by riparian proprietors of the waters of streams through whose lands they flow must be a reasonable use, and the proprietors so using the waters must restore them to their natural channel before they reach the lands of the proprietors below them. The defendant, in restoring the water of a stream used by him to its natural channel, did so at such times and in such a manner, that the water froze as it was being restored, and formed a solid mass of ice, completely filling the natural channel, so that the water coming down flowed away from the channel and over the plaintiff's land, and injured it. The evidence shewed that the cause of the water freezing as it did was the times at which and the manner in which the defendant so restored it, and was the natural result thereof; and it appeared that the defendant had been remonstrated with by the plaintiff and the consequences of his action pointed out to him:—Held, that the defendant's use of the water was unreasonable; and, as there was no proof to sanction a prescriptive right to restore the water at the times and in the manner indicated, he was liable to the plaintiff for the injury so caused; his conduct being wrongful, his persistence in it was malicious; and the injury to the plaintiff was an invasion of his rights, and imported damage, whether there was any actual damage or not. Held, also, that even if there was a cause, for which the defendant was not responsible, concurrent with the wrongful acts complained of, and contributing to the injury sustained by the plaintiff, the defendant would still be answerable for the injury sustained by such wrongful acts for such damages, or such portion thereof, as were caused by the wrongful acts complained of. *Ellis* v. *Clemens*, 21 O. R. 227, 22 O. R. 216.

**Right to Divert Water by Sluices**—*Interference with Natural Flow—Drowning Land.*]—The plaintiff and defendant were riparian proprietors on the river Humber,

which in the neighbourhood of their lands ran in curves, forming what were termed "oxbows." Across one of these oxbows, the land of which belonged to defendant, defendant several years before, during low water, caused the sod to be removed a spade deep and thirteen inches wide. When the freshet came it made a new channel in the line of the trench thus cut, and deprived the plaintiff of the flow of the river along a portion of her land, and by directing the flow of the river against it washed half an acre of her land away, which was valued at $70 per acre. The jury found for plaintiff, and $500 damages:—Held, that defendant was clearly liable; for the plaintiff was entitled to the natural flow of the stream, which defendent by his act had interfered with; that the maxim sic utere tuo, &c., applied; and that it was no answer that the river would have forced its way through sooner or later. Semble, that if defendant had made the cut in the usual course of husbandry, and for the purpose of cultivation, he would still have been bound to take precautions to prevent the stream from forcing its way through, and thus injuring his neighbour. *McLean* v. *Crossen*, 33 U. C. R. 448.

——— *Necessity — Justification — Pleading.*]—A., a riparian proprietor, pens the water back upon the land of another proprietor, B., above; upon which B. sues A. and recovers damages; B. then digs sluices close to the stream, which divert the water in large quantities (much greater than that penned back by A.'s dam), from the natural bed of the stream and past A.'s mill. A. sues B., and B. justifies the diversion, contending that his sluices became necessary to remove the injury caused by A.'s dam. A. obtained a verdict:—Held, that such justification was no defence under any state of pleading—certainly not under the general issue, which was the only plea. *Adamson* v. *McNabb*, 6 U. C. R. 113.

*See*, also, *Adamson* v. *McNabb*, 5 U. C. R. 348.

**Right to Let down Water**—*Increase of Natural Flow.*]—The plaintiff, in an action for injury done to his mill dam, proved that defendants owned a mill pond and dam about half a mile higher up the stream, and that he left his gate open twelve or fifteen inches the night the accident happened. Defendant proved that the plaintiff's gates were all closed, and the splash boards up at the time, and after the accident. It also appeared that there had been heavy rains for some days previous:—Held, that the opening of defendant's gates (unless they admitted a larger quantity than would naturally flow down the stream) would not render him liable for an accident to plaintiff's dam; and that it was plaintiff's duty to guard against any natural flow of the stream; and further, that unless the defendants let the water flow faster than was supplied by natural causes, he was not liable for damages resulting from such flow. *Wescoast* v. *Ernst*, 8 C. P. 456.

**Right to Maintain Dam**—*Easement—Abandonment.*]—When two properties belonging to the same owner are sold at the same time, and each purchaser has notice of the sale to the other, the right to any continuous easement passes with the sale as an absolute legal right. But the easement must have been enjoyed by the former owner at the time of the sale. Therefore, one purchaser could not claim the right to use a dam on his land in such a way as to cause the water to flow back on the other property, where such right, if it had ever been enjoyed by the former owner, had been abandoned years before the sale. *Hart* v. *McMullen*, 30 S. C. R. 245.

——— *Injunction.*]—Certain riparian owners filed a bill against another riparian owner to restrain him from maintaining a dam. Other persons were interested in maintaining the dam, whom the plaintiffs did not prove any title to interfere with; and one of the plaintiffs had sold a mill site to the defendant on oral representations which implied that he was to have the benefit of the dam. The court held, that if the plaintiffs had any claim against the defendant, the proper course was to leave them to their legal remedy against him; and the bill was dismissed with costs. *Rosamund* v. *Forgie*, 18 Gr. 370.

**Right to Natural Flow of Water**—*Boundary.*] — Besides lands the title to which was derived from a common grantor, the appellant was proprietor of another piece of land, called block A., situated on the opposite side of the river Maitland, the boundary of said block on the river side being high water mark:—Held, that the lateral or riparian contact of the land with the water would suffice to entitle the appellant to object to any unauthorized interference with the flow of the river in its natural state. *Attrill* v. *Platt*, 10 S. C. R. 425.

——— *Purity — Obstruction — Navigable Stream.*]—J. A. was the patentee of a certain water lot on a navigable river. The description in the patent covered the lot and two chains distant from the shore, but a reservation was contained therein "of the free uses, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found in or under or be flowing through or upon any part of the said parcel of land hereby granted." The water lot was subsequently conveyed to the plaintiff, but the description in the deed to him only went to the water's edge:—Held, that the plaintiff was a riparian owner, and as such was at liberty to construct and move to his bank a floating wharf and boathouse, the same not being an obstruction to the navigation, and was entitled to maintain an action for damages in respect thereof caused by any unauthorized interference with the flow and purity of the stream. *Booth* v. *Ratté*, 15 App. Cas. 188.

*See*, also, *S. C., sub. nom. Ratté* v. *Booth*, 10 O. R. 351, 11 O. R. 491, 14 A. R. 419.

——— *Qualification—Rights of Others.*]—A riparian proprietor has not the absolute right to the natural and unobstructed flow of the water of a stream over his lands, but his right is a qualified one, and subject to the lawful and reasonable user of the waters by a mill owner above him on the same stream, and this although the user above him may be at times for an extraordinary purpose. *Dickson* v. *Carnegie*, 1 O. R. 110.

**Right to Obstruct Flow of Water**—*Boundaries.*]—Under a conveyance of land, on a stream not navigable, described as running from, &c., "south, &c., to the northern side of the . . river, . . then northeasterly along the bank of the said river, with

the stream to the centre of the said lot:"—Semble, that the grantee was bound by the bank of the river, and had not any right to extend the boundaries to and along the middle or thread of the stream; but that, whether he had or had not such right, he could not erect any structure in the stream that could or might affect prejudicially the flow of the water as regards other riparian proprietors. *McArthur* v. *Gillies*, 29 Gr. 223.

**Right to Obstruct Stream** — *Dam.*]—See *Farquharson* v. *Imperial Oil Co.*, 29 O. R. 206, 30 S. C. R. 188.

**Right to Pen back Water**—*Artificial Channel.*]—The plaintiffs owned land on the river Humber, on which there was a mill, the water from which flowed through an artificial channel of about 700 feet into the river. Defendant having built a dam by which the water was penned back in this channel, so as to obstruct the working of plaintiffs' mill and the natural flow of the stream:—Held, that the plaintiffs were entitled to maintain an action therefor. *Wadsworth* v. *McDougall*, 30 U. C. R. 369.

——— *Grant — Prescription.*] — A proprietor of land on a stream has a right to the water flowing past him in its natural course, undiminished in quantity and quality; and nothing short of a grant or twenty years' use (which presumes a grant) of the water, in a particular way and for a special purpose, can entitle some one proprietor on a stream, in violation of this right of all, injuriously to divert or pen back the water from or upon proprietors living above or below him on the stream. *McLaren* v. *Cook*, 3 U. C. R. 299.

——— *Injury—Extraordinary Freshets.*]—A riparian proprietor has the same right to prevent others from backing water on his land, as he has to prevent them from taking possession of any other vacant property he has, and making use of it against his will. The works of a riparian proprietor should be sufficient to prevent damage to other riparian proprietors, not in ordinary floods only, but also in the periodical or occasional freshets to which the river is subject. But this rule does not in equity apply to extraordinary freshets which cannot be guarded against, or cannot be so by means consistent with the reasonable use of the stream. *Dickson* v. *Burnham*, 14 Gr. 594.

——— *Occupation—Pleading.*]—The declaration stated that the plaintiff was possessed of a saw mill and premises near a certain creek, and of a close and tail race leading from the mill to the stream; yet defendants wrongfully and injuriously placed a dam, &c., across part of said stream, below the tail race, and continued and wrongfully raised the said dam, and unlawfully penned back the stream upon the tail race, premises, and mill of the plaintiff. The second count alleged that by such dam, &c., defendant caused the water to flow up the tail race, so as to impede the water wheel of plaintiff's mill, and prevent its working, thereby causing him injury. It appeared that the plaintiff owned a saw mill, and had an excavated tail race, which emptied into the creek, the mill itself being driven by another stream, and he owned the strip of land between the mill and creek, through which the tail race was excavated. Defendants owned a mill and dam upon the same creek, lower down, and by raising their dam had caused the water to flow back upon plaintiff's mill, and prevented its working. For this the plaintiff claimed damages:—Held, that the plaintiff, by reason of the occupation of his mill, and use of the stream, previous to the erection of defendants' mill, was entitled to the flow of the creek, and that the pleading sufficiently stated his cause of action. The verdict was therefore upheld. *Watson* v. *Perine*, 13 C. P. 229.

**Right to Restore Stream to Proper Channel.**]—When, owing to an extraordinary flood, a stream suddenly changes its course and washes away part of the land of a riparian proprietor, he is entitled, at any time before a prescriptive right, or right by estoppel, to keep the stream in its new channel is acquired against him, to fill in the places washed away and to turn the stream back to its original channel. *County of York* v. *Rolls*, 27 A. R. 72.

**Right to Sell Artificial Water Power** —*Navigable River.*]—A riparian proprietor, notwithstanding that the river is navigable, can acquire an interest in its water power, as derived from a reservoir artificially formed by a dam across its channel, and sell the same along with and as appurtenant to his land. Even if such sale should not be effectual against the public, the vendor cannot himself impeach it on that ground:—Held, in this case, that, as the vendor of a specified amount of water power had not reserved to himself a right to supply, either pari passu with or preferably to the purchaser, the latter was entitled to damages in respect of any loss incurred by the vendor's use of the water in diminution of the amount sold. *Hamelin* v. *Bannerman*, [1895] A. C. 237.

**Right to Soil of Stream**—*Deed—Construction.*]—Where a river flowed diagonally through a certain lot of land, and the owner of the lot granted the part thereof lying N. or E. of the said river to one person, and the part lying S. or W. of the said river to another person:—Held, that this would carry the ownership of the soil to the mid-thread of the river to the respective parties, no evidence of intention inconsistent therewith appearing upon the instruments. *Re Trent Valley Canal*, 12 O. R. 153.

**Right to Use and Improve Water Privilege.**]—The owner of land abutting on the chain reserved by the Crown for a public highway along the Kaministiquia river, who is also the licensee of the interest of the Crown in such reserve, is a riparian proprietor; and, as such, he is the owner, within R. S. O. 1887 c. 119, of a water privilege which adjoins that part of the reserve lying between his land and the river:—Held, however, that, proposing to place a dam at the upper end of such water privilege, such a riparian proprietor, not being the owner or legal occupant of any water privilege above it, was not a person desiring to use or improve his water privilege, and was, therefore, not entitled to an order to exercise the powers mentioned in the Act. *Re Jenison*, 28 O. R. 136.

**Right to Use of Water** — *Exclusive Rights.*]—Where a riparian owner of lands on a lower level had been permitted by the

plaintiffs, for a number of years, to take water power necessary to operate his mill through a flume he had constructed along the river bank partly upon the plaintiffs' land connecting with the plaintiffs' mill race, subject to the contribution of half the expense of keeping their mill race and dam in repair, and these facts had been recognized in deeds and written agreements to which the plaintiffs and their auteurs had been parties, the plaintiffs could not longer claim exclusive rights to the enjoyment of such river improvements or require the demolition of the flume notwithstanding that they were absolute owners of the strip of land upon which the mill race and a portion of the flume had been constructed. City of Quebec v. North Shore R. W. Co., 27 S. C. R. 102, and Commune de Berthier v. Denis, 27 S. C. R. 147, referred to. *Lafrance* v. *Lafontaine*, 30 S. C. R. 20.

*See Whelan* v. *McLachlan*, 16 C. P. 102; *Hickman* v. *Lawson*, 7 Gr. 494; *McGillivray* v. *Millin*, 27 U. C. R. 62; *Warin* v. *London and Canadian L. and A. Co.*, 7 O. R. 706, 12 A. R. 327, 14 S. C. R. 232; *Kirchoffer* v. *Stanbury*, 25 Gr. 413; *Hawkins* v. *Mahaffy*, 29 Gr. 326; *Gray* v. *Town of Dundas*, 11 O. R. 317; *Wood* v. *Esson*, 9 S. C. R. 239; *Martley* v. *Carson*, 20 S. C. R. 634; *In re Provincial Fisheries*, 26 S. C. R. 444; [1898] A. C. 700.

## XVIII. What Constitutes a Watercourse.

**Natural Flow** — *Defined Channel.*] — A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character. *Beer* v. *Stroud*, 19 O. R. 10.

**Surface Water** — *Defined Channel.*] — That cannot be called a defined channel or watercourse which has no visible banks or margins within which the water can be confined; and an occupant or owner of land has no right to drain into his neighbour's land the surface water from his own land not flowing in a defined channel. The rule of the civil law that the lower of two adjoining estates owes a servitude to the upper to receive all the natural drainage, has not been adopted in this Province. McGillivray v. Millin, 27 U. C. R. 62, Crewson v. Grand Trunk R. W. Co., ib. 68, Darby v. Crowland, 38 U. C. R. 338, and Beer v. Stroud, 19 O. R. 10, considered. *Williams* v. *Richards*, 23 O. R. 651.

——— *Permanent Source—Visible Cause.*] —The alleged watercourse was a gully or depression created by the action of the water. The defendants disputed that any water ran along it except melted snow and rain water flowing over the surface merely. The plaintiff contended that there was a constant stream of water, only, if ever, ceasing in the very dry summer weather: — Held, that if water precipitated from the clouds in the form of rain or snow forms for itself a visible course or channel and is of sufficient volume to be serviceable to the persons through or along whose lands it flows, it is a watercourse, and for its diversion an action will lie. Beer v. Stroud, 19 O. R. 10, considered. *Arthur* v. *Grand Trunk R. W. Co.*, 25 O. R. 37, 22 A. R. 89.

*See Murray* v. *Dawson*, 19 C. P. 314.

*See ante* VI. 1.

## XIX. Miscellaneous Cases.

**Agreement** — *Construction — Drowned Land.*]—Defendant gave a bond to the plaintiff in $1,000, reciting that he had that day purchased certain land known as the mill property in the village of P., and fully described in a deed made by one J., and conditioned to convey to the plaintiff all the land in said deed over two and a half acres, being a strip on the western portion of the property, as soon as said land could be surveyed. The deed to J. included over four acres, part of which at the eastern end was covered with water:—Held, that defendant was clearly not entitled to retain two and a half acres of dry land, in addition to that covered with water, but only two and a half acres of the whole. *Greer* v. *Johnston*, 32 U. C. R. 77.

**Dam**—*Nuisance—Abatement — Damages.*] —A person who takes upon himself to abate a nuisance—for instance, a mill dam—may be called upon to pay damage for any injury done to the plaintiff's property beyond what was necessary for removing the public inconvenience. *Truesdale* v. *McDonald*, Tay. 121.

**Grant of Land.**]—A grant of land will carry land covered with water. *Ross* v. *Village of Portsmouth*, 17 C. P. 195.

**Partition or Sale**—*Mill Privilege.*]— The plaintiff filed her bill for a partition of 200 acres of land on the river Ottawa and a water mill privilege appurtenant thereto. The property in question had been acquired by her and one A. H. as tenants in common, and A. H. had subsequently conveyed an undivided one-fifth of his portion to the four other defendants. The evidence shewed that in order to divide the water privilege very complicated structures would have to be made at heavy expense, and a large sum of money expended annually in maintaining them. It also appeared that the difficulties in carrying out the scheme would be very great:—Held, that it was the duty of the court to consider the interests of all the defendants, and a partition could not be decreed without injuring them; but that, even if the case were decided without reference to the interests of the defendants other than A. H., partition was under the circumstances rightly refused; and a sale of the water privilege, together with a sufficient quantity of land for the purpose, was ordered. *Blasdell* v. *Baldwin*, 3 A. R. 6.

**River**—*What is.*]—See *McHardy* v. *Township of Ellice*, 37 U. C. R. 580, 1 A. R. 628.

**Unnavigable Waters**—*Water Rights—Destruction—Compensation.*]—The owner of land through which unnavigable water flows in its natural course is proprietor of the latter by right of accession; it is at his exclusive disposition during the interval it crosses his property, and he is entitled to be indemnified for the destruction of any water power which

has been or may be derivable therefrom. *Lefebvre* v. *The Queen*, 1 Ex. C. R. 121.

**Water Privileges Act**—*Occupied Mill Privilege — Interference.*]—There can be no interference whatever, under the Act respecting Water Privileges, R. S. O. 1887 c. 119, with an occupied mill privilege, even though the authorized works would not affect the mode in which the occupied mill privilege has, up to the time of the application, been used. An order made under the Act must state specifically the height of the authorized dam. *In re Burnham*, 22 A. R. 40.

*See* as to costs, *S. C.*, 16 P. R. 390.

*See* DEED, III. 4 (a)—EASEMENT—NUISANCE, II., III.

## WATERCOURSE.

*See* RAILWAY, VII. 3—WATER AND WATERCOURSES.

## WATERWORKS.

*See* MUNICIPAL CORPORATIONS, XXX. — WATERWORKS COMPANIES AND COMMISSIONERS.

## WATERWORKS COMPANIES AND COMMISSIONERS.

**Agreement with Contractor** — *Work Done—Benefit of Municipality—Liability.*]—The plaintiff, under a contract with the water commissioners of the city, a body distinct from the defendants, was to do certain excavation for them, and to remove the material to a distance of not more that 300 feet. The engineer of the commissioners, having first received the approval of the chairman of the board of works, directed the plaintiff to break up this excavation, a good deal of it being rock, and to deposit it in thin layers on the arches of and approaches to a bridge within 300 feet. The work so done, in breaking up and spreading the stone, amounting to $558, was a benefit, and was necessary to complete the bridge according to its original plan, but there was no order of council or minute of the board of works authorizing it: — Held, that defendants were not liable. *Gibson* v. *City of Ottawa*, 42 U. C. R. 172.

**Agreement with Municipality**—*Supply of Water.*]—Held, that under the agreement between the Kingston Waterworks Company and the corporation of the city, the company were not bound to supply water gratuitously to the city for any purpose at more than twenty hydrants. *City of Kingston* v. *City of Kingston Waterworks Co.*, 19 U. C. R. 490.

**Cesser of Powers of Commissioners**—*Transfer of Liabilities—Substitution.*]—39 Vict. c. 64 (O.) extended the time for the completion of the waterworks to the 31st December, 1877, and declared that the powers and duties of the defendants should cease and be determined after that date, if previously thereto the assent of the ratepayers should be obtained; and that the waterworks should thenceforth be controlled by a committee appointed by the corporation of the city of Toronto. It did not, however, expressly transfer the liabilities of the defendants to the city. This action was commenced against the defendants on the 8th December, 1877, and subsequently a by-law was passed in accordance with the above provision:—Held, that the writ was properly issued against the defendants; that the transfer of the liabilities of the defendants followed as a legal effect from the transfer of their rights; and that under the A. J. Act the city could be substituted as defendants. *Trotter* v. *Toronto Waterworks Commission*, 7 P. R. 316.

**Expropriation of Lands**—*Compensation—Arbitration—Damages—Interest.*] — By 35 Vict. c. 80, s. 4 (O.), the water commissioners of Ottawa, thereby incorporated, were authorized and empowered to enter into and upon any lands, and to survey, set out, and ascertain such parts thereof as they might require for the purpose of the waterworks, and also to divert and appropriate any spring or stream of water thereon; and to contract with the owners or occupiers of said lands, and those having an interest or right in the said water, for the purchase thereof, or of any part thereof, or of any privilege that may be required for the purpose of the commissioners; and in case of any disagreement between them and the owners or occupiers of such lands, or any persons having an interest in the said water, or the natural flow thereof, or any such privilege as aforesaid, respecting the amount of purchase or value thereof, or as to the damages such appropriation shall cause to them, or otherwise, the same shall be decided by three arbitrators, to be appointed as there provided:—Held, that the words "such appropriation" applied to the taking of land as well as a diversion or appropriation of water, and that the arbitrators had power to give damages in all cases of appropriation where the value of the land taken would not be adequate compensation, as in this case. Held, also, that they were authorized to award interest on the compensation money from the time when the commissioners entered upon and appropriated the land. The award was also objected to as excessive, but was upheld, there being evidence to justify the amount awarded, and no ground for imputing partiality or legal misconduct to the arbitrators. *Re Collins and Ottawa Water Commissioners*, 42 U. C. R. 378.

**Limitation of Actions**—*Substitution of Municipality as Defendants—Notice of Action—Non-repair.*]—In an action against the city of Toronto for the non-repair of certain main pipes laid down in one of the streets for waterworks purposes, whereby the plaintiff's premises were injured, it appeared that the action was originally commenced against the waterworks commission, and that the present defendants were substituted therefor by Judge's order, but with all the rights and privileges of the original defendants:—Held, that, if the action should have been brought against the present defendants in the first place, then by the terms of the said order the action must be deemed to have been commenced against them on the making thereof, at which date it appeared that more than a year had elapsed from the cause of action aris-

ing, so that the action would be barred under s. 35 of 35 Vict. c. 79 (O.); but that, if the action was properly commenced against the waterworks commission, then the defendants, being entitled by the terms of the said order to avail themselves of every defence the commission could have had, could set up the want of notice under s. 28 of 35 Vict. c. 79 (O.), and C. S. U. C. c. 126, s. 10; so that in either event the plaintiff could not recover. *Trotter* v. *City of Toronto*, 29 C. P. 365.

In an action against the city of Toronto for the non-repair of certain main pipes laid down in one of the streets for waterworks purposes, whereby the plaintiff's premises were injured, the defendants pleaded that the original defendants were the waterworks commissioners of the said city, for whom and with all the rights thereof, by Judge's order, the defendants were substituted; that the said waterworks were constructed, and the grievances complained of committed, after the passing of C. S. U. C. c. 126, and 35 Vict. c. 79 (O.), and by virtue of such last mentioned Act and in execution of the duties thereby imposed on the said commission; and said grievances were occasioned by reason of the improper construction of said waterworks in the first place, and not by any neglect of the said defendants; and that no notice in writing of the action was given either to the water commissioners or to the defendants, as required by C. S. U. C. c. 126, s. 10:—Held, plea good. 35 Vict. c. 79, s. 28, provides that "the commissioners and their officers shall have the like protection in the exercise of their respective offices, and in the execution of their duties, as justices of the peace now have:"—Held, that this protected the commissioners when sued as such, and not merely as individuals. Held, also, that the laying of service pipes, or the neglect in keeping or management thereof, would come within the statutable protection. *Trotter* v. *City of Toronto*, 28 C. P. 574.

**Negligence**—*Protection by Statute—Act of Incorporation—Limitation of Actions.*]—Action by an administratrix against defendants for an alleged breach of their statutory powers in digging and opening a drain in one of the highways of the city of Ottawa, and leaving it at night uncovered, without any fencing, guard, or light, whereby the deceased, passing along the street at night, was injured, and in consequence died. Defendants pleaded the general issue by statute, 35 Vict. c. 80, s. 28 (O.), their Act of incorporation, which gave them the same protection as justices:—Held, that they were entitled so to plead, for the act complained of was something done by them—i. e., digging the drain without protecting it properly—not a mere omission. Held, also, that the administratrix was limited to six months from the cause of action accruing within which to sue, that being the period limited by the defendants' charter, 35 Vict. c. 80, s. 35 (O.), for, although under C. S. C. c. 78, s. 4, the administratrix is allowed twelve months after the death of the deceased to bring her action, this does not apply where there is a special provision, as here, for a more limited period. *Cairns* v. *Ottawa Water Commissioners*, 25 C. P. 551.

——— *Public Work—Liability of Municipality—Agency of Commissioners.*] — The water commissioners of the city of Toronto, incorporated under 35 Vict. c. 79 (O.), in order to drain off an old reservoir belonging to the city, but not in use or connected with the waterworks they were constructing under the powers conferred upon them by the said Act, dug a drain along a street in the city, but so negligently filled it up that it caved in, whereby the plaintiff was injured. The plaintiff having sued the defendants for such injury:—Held, that under the above and subsequent Acts defendants were liable, for the water commissioners were acting merely as their agents, and defendants were responsible for non-repair of the street; and, even if the work in question was beyond the powers of the commissioners, this would not avail the defendants, as a public street had been opened up, and the work done in a public manner so as to give the defendants full notice thereof. *Ridgway* v. *City of Toronto*, 28 C. P. 579.

*See*, also, *Re Platt and City of Toronto*, 33 U. C. R. 53.

*See* MUNICIPAL CORPORATIONS.

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I. BRIDGES.

(*See* FERRY.)

1. *Generally.*

**Bridge Company**—*Lease of Bridge—Liability for Injury — Drawbridge — Guard to Approach.*]—Defendants were incorporated to build a drawbridge over a river, and authorized to take tolls, and their charter empowered them to let and farm the tolls. They leased the tolls accordingly, and the lessee covenanted to open and close the drawbridge, and cause it to be properly attended to. The plaintiff's horses while going down a hill ran away and threw out the driver, and then ran on the bridge. The draw had just been opened to let a vessel pass, and there being no bar or gate to close the bridge, the horses went over the opening into the water and were drowned. There had been gates there to close the bridge while the draw was open, but they had been broken about two months previously, and the new gates which had been made were not up. The jury found that gates would have prevented the accident, and that there was no negligence on the driver's part:—Held, that the plaintiff's right of action, if any, was against the lessee, and that defendants were not liable. Semble, that the plaintiff was not entitled to recover at all, for defendants would have done enough if they had had persons stationed to give warning when the draw was open, and they were not bound to have gates to stop runaway horses. *Price* v. *Caiaraqui Bridge Co.*, 35 U. C. R. 314.

**Injury to Bridge by Floating Timber** —*Justification—Pleading — Nuisance.*]—Declaration for removing and destroying a bridge belonging to the plaintiffs. Plea, that the river Moira, where, &c., and when, &c., was a navigable river and public highway for the conveyance of timber, &c., to the bay of Quinte, and has been and still is used for such purposes; that in navigating such timber, &c., it was necessary to navigate same in the river, where it is crossed by the bridge; that defendant with others was engaged in conveying timber, &c., down the river to the Bay of Quinte; that the free navigation of the river for the passage of timber, &c., at the time when, &c., was obstructed and hindered by the bridge, in consequence whereof the timber, &c., of defendant, with those of other persons, in the course of such navigation came against the bridge, thereby causing the alleged injury and damage to the same, which were unavoidable and could not have been prevented by due and reasonable care and diligence of defendant: — Held, on demurrer, plea bad, for not disclosing such a state of facts as to constitute the bridge a nuisance, or to shew that the acts complained of were really inevitable on the part of defendant in consequence of the improper construction of the bridge, or by reason of a superior agency operating against defendant; and for not alleging that defendant was acting with due and reasonable care and diligence in the navigation of his timber. Semble, that had the plea stated that the damage was occasioned by reason of the bridge having been so improperly built as in effect to be a nuisance to the free navigation of the river, and that the damage was not caused by the negligence or improper conduct of defendant, and could not have been avoided, it would have constituted a good defence. C. S. U. C. c. 48, observed upon. *Township of Thurlow* v. *Bogart*, 15 C. P. 9; see *S. C., ib.* 601.

**Injury to Riparian Owner** — *Penning back Water—Evidence—Negligence.*] — The declaration charged that the defendants, the municipal corporation of a town, penned back the water of a stream in the town, on which the plaintiff had a tannery, so that it flooded his land, &c. The obstruction complained of was a bridge along a street in the town, where there had been a bridge for about 30 years. One D., who owned land on the stream below the bridge, had a wheel in the stream, and owners above him cut away and sent down the ice in the spring, which formed a jam opposite D.'s land, and filled the stream thence up to and under the bridge. The weight of evidence tended to shew that but for this obstruction the plaintiff would not have been injured. It was left to the jury to say whether the injury complained of was caused by the bridge, or by the ice-jam, irrespective of the bridge, and they found for the plaintiff:— Held, a misdirection; that they should have been told that if the damage was caused by persons sending ice down, which lodged against the bridge, and not by the ordinary action of the ice, defendants were not liable. And semble, that upon the declaration and evidence the plaintiff could not recover, for it was the defendants' duty to build the bridge there, and no negligence was charged. *Patterson* v. *Town of Peterborough*, 28 U. C. R. 505.

**Insufficiency** — *Injury to Traveller — Temporary Structure.*]—Under a contract made between defendants and the government for the performance of certain work on the Welland canal, a government work, it being necessary to cut away the public highway, the specifications, in accordance with 31 Vict. c. 12, s. 29 (D.), provided that before such highway was cut away or disturbed, the defendants should provide another and satisfactory means for the public travel, and were to be held legally liable for keeping the crossing so that it could be safely used. The defendants, under these powers, erected a temporary bridge, being allowed by the government $800 therefor, of which they did not expend more than one-half, although they paid something besides for the approach to the bridge. In an action by the plaintiffs for the alleged insufficiency of the bridge for its intended purpose, in consequence of which the plaintiffs were injured, the jury were directed that the defendants were only required to erect a temporary bridge of the nature which a municipality would need to make while a permanent bridge was being repaired:—Held, that the direction was insufficient; that the jury should have been told that, although a temporary bridge need not be constructed in the same manner and with the same care and finish or materials as a permanent bridge, yet equally therewith it must be constructed and maintained so as to be a safe and strong roadway for the public travel; and they should be asked whether the bridge in question was of this character. *McColl* v. *Higgins*, 30 C. P. 43.

**Non-repair**—*Action for — Approaches — Different Municipalities.*]—Section 530 of the Municipal Act, 46 Vict. c. 18 (O.), provides that "the approaches for 100 feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or municipalities, shall be kept up and maintained by the local municipalities in which they are situate." The action was brought under Lord Campbell's Act. The deceased met with the accident which caused his death at the intersection of two roads, both alleged to be out of repair, and both lying within the boundaries of the defendant township, but one of them leading to a bridge under the jurisdiction of the city of Ottawa and the county of Carleton, the approaches to which, therefore, under the above section, should have been kept up and maintained by the city and county. The point where the accident occurred was within 100 feet from the end of the bridge, but it was not shewn that there was any artificial structure to enable the public to pass from the road on to the bridge and from the bridge on to the road which would cover the point where the accident occurred:—Held, that the word "approaches" in the section means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road on to the bridge and from the bridge on to the road, and does not include the highway to the distance of 100 feet from each end of the bridge, at all events unless the artificial structures extended so far. (2) That in any case s. 530 does not relieve the local municipality from its statutory liability to repair, but merely gives to such municipality the right to enforce the provisions against the municipality or municipalities owning the bridge. *Travers* v. *Township of Gloucester*, 15 O. R. 214.

——— *Action for — Evidence of Assumption of Bridge — Tramway.*] — The appellant

corporation having, under 55 Vict. c. 33 (B. C.) de facto taken over the care and control of a certain bridge:—Held, that their acts with regard to it were primâ facie competent corporate acts. It would lie on the corporation to shew clearly that any acts done by their officers under their direction were ultra vires and illegal, and that conclusion could not be reached merely by reason of their not having passed a by-law under 55 Vict. c. 33 actually vesting the bridge in them. In an action to recover damages from them for a fatal accident caused by the breaking down of the said bridge over which a tramcar containing the deceased was running: — Held, that the finding of the jury that an act done by their officer had materially weakened the beam which afterwards broke, amply justified a verdict against them; and that the liability, if any, of the tram company for passing an extraordinarily heavy weight over it, not having been before the jury, could not be raised in appeal. *City of Victoria* v. *Patterson*, *City of Victoria* v. *Lang*, [1899] A. C. 615.

——— *Action for—Injury to Traveller.*]—In an action against defendants for damage sustained by the plaintiff through the breaking down of a bridge some six feet wide, built on three sleepers over a culvert on a road in defendants' township, over which the plaintiff was attempting to drive with a buggy and a pair of horses, it appeared, from an examination after the accident, that the centre sleeper to two-thirds of its diameter and on the outside was rotten, and that its condition was either not ascertained by the persons whose duty it was to repair the bridge, or if ascertained it was not repaired, and that the bridge broke down in consequence of this centre sleeper giving way by the mere entry of the plaintiff's horses, without the buggy, upon the side of the bridge. The jury having found for the plaintiff, their verdict was upheld. *Macdonald* v. *Township of South Dorchester*, 20 C. P. 249.

——— *Action for — Liability — Non-feasance.*] — Public corporations to which an obligation to keep public roads and bridges in repair has been transferred, are not liable to an action in respect of mere non-feasance, unless the legislature has shewn an intention to impose such liability upon them. In an action for damages for injuries caused by the neglect of the appellant municipality to repair a bridge:—Held, that by the County Incorporations Act, 1879, under which it was incorporated, there was no indication of an intention to impose the liability sought to be enforced. Sanitary Commissioners of Gibraltar v. Orfila, 15 App. Cas. 400, followed. The Bathurst Case, 4 App. Cas. 256, distinguished. *Municipality of Pictou* v. *Geldert*, [1893] A. C. 524.

——— *Action for — Railway Bridge — Approaches.*]—A railway company, with the sanction of a township municipality, erected an overhead bridge across a highway, and afterwards, without the consent of the municipality, raised the same so as to cause the approaches thereto to be at a greater incline than prescribed by the Railway Act, 1888, 51 Vict. c. 29 (D.) An accumulation of snow resulted from this, against which the plaintiff's cutter was upset, and she sustained injuries for which she brought this action:—Held, that the accumulation of snow amounted to a want of repair under s. 531 of the Municipal Act, 55 Vict. c. 42 (O.), for which the municipality was liable. Held, also, that the railway company was also liable for a misfeasance in raising the bridge and approaches so as to be at a greater incline than prescribed by s. 186 of the Railway Act, 1888, thus causing the obstruction by means of which the accident happened. *Fairbanks* v. *Township of Yarmouth*, 24 A. R. 273.

——— *Action for—Railway Bridge — Liability.*]—Notwithstanding any liability which may be cast by statute upon a railway company to maintain and repair a bridge and its approaches by means of which a highway is carried over their railway, such highway is still a public highway, and as such comes within the provisions of the Municipal Act, R. S. O. 1887 c. 184, s. 521, requiring every public road, street, bridge, and highway to be kept in repair by the municipal corporation, who are not absolved from liability for default, if any, of the railway company. *Mead* v. *Township of Etobicoke*, 18 O. R. 438.

——— *Action for—Time Limit — Approaches.*]—An action to recover damages sustained by reason of the neglect of a municipal corporation to keep in repair the approaches to a bridge, where the bridge and approaches are under the jurisdiction of one municipality only, must be brought within three months after the damages have been sustained. Section 530 of R. S. O. 1887 c. 184 applies only to cases where one municipality has jurisdiction over a bridge and another has jurisdiction over the adjacent approaches. *Johnston* v. *Township of Nelson*, 17 A. R. 16.

——— *Indictment for — Abandonment by Bridge Company—Assumption by County.*]—A bridge had been built in 1857, by a joint stock company formed under 16 Vict. c. 190, at the village of York, about half way between Caledonia and Cayuga, over the Grand river, which separates the two townships of Seneca and Oneida in the county of Haldimand. In 1862 it was destroyed by a storm, rebuilt in 1863, and kept in repair since by tolls collected upon it. In 1873 it became out of repair and dangerous, and the secretary of the company wrote to the county council that the company abandoned the bridge. The county having been indicted for not repairing it:—Held, that they were not liable: for (1) by the statute then in force, 35 Vict. c. 33, s. 9, the abandonment by the company could only be by by-law; and (2) there having been no bridge there before, there was nothing for the county council to resume, and they had refused to assume this bridge, which had become a public highway by dedication, tolls having been imposed upon it. Semble, that a bridge like this, the only work owned by the company, may be abandoned as well as a road. Quære, whether the county could not be obliged to establish a bridge across the river at some convenient place between Caledonia and Cayuga, there being none for that distance, about eleven miles. *Regina* v. *County of Haldimand*, 38 U. C. R. 396.

——— *Indictment for — Assumption by Municipality — Evidence of.*] — Where a bridge connecting two highways was dedicated to the public and in public use for a number of years, forming part of a thoroughfare on which houses had been built, for which it was the only direct

mode of communication to the south, and for nine or ten years had been repaired by the municipality out of the public funds, although no by-law had been passed establishing or assuming it:—Held, that the municipality were bound to keep it in a proper state of repair. Held, also, that s. 339 of the Municipal Act of 1866 does not take away the common law liability. Semble, that said section only declares the intention of the legislature that the mere laying out of a road or the building of a bridge by private owners, should not by itself impose a criminal or civil liability on the municipality, or on the public represented by them. *Regina* v. *Village of Yorkville*, 22 C. P. 431.

——— *Indictment for—Evidence.*]—On an indictment for not repairing a bridge:—Held, that evidence of the state of the bridge a few days before the trial was admissible, not as proof of that fact, but as confirming the other witnesses, who swore to its state at the time laid in the indictment, and as shewing such state by inference. *Regina* v. *Desjardins Canal Co.*, 27 U. C. R. 374.

——— *Indictment for—Findings of Jury—Suspension of Judgment.*]—Defendants having been indicted for not repairing a bridge, it appeared at the trial that the bridge was not on the actual line of the road allowance, but upon land procured from a neighbour for that purpose, but it had been built by defendants as part of the road, and used for ten or twelve years until its injury by a flood in April, 1874. Defendants were indicted in June following, and contended that a bridge might be dispensed with at that place; that they had not had a reasonable time before the indictment to determine what they should do; and that it was in their discretion whether to build it or not. The jury found that the bridge was a convenience to the public or a portion of the public; that defendants had had a reasonable time to exercise their discretion; and that the private prosecutor, who had applied to them to repair it, had reason to conclude that they would not act; and found defendants guilty:—Held, that these were proper questions for the jury, and the verdict was upheld; but it was directed that no proceedings should be taken on it until defendants could shew cause why judgment should not be given against them. *Regina* v. *Township of McGillivray*, 38 U. C. R. 91.

——— *Indictment for—Mandamus.*] — As to whether indictment or mandamus is the appropriate remedy to compel a municipality to repair an existing bridge or erect a new one. See *In re Townships of Moulton and Canborough and County of Haldimand*, 12 A. R. 503.

——— *Petition of Right — Government Bridge—Injury to Person—Negligence of Servants of Crown—Climatic Conditions.*]—Under an agreement between a city corporation and the Dominion government, the latter undertook to maintain an addition to a bridge built by the city corporation and forming part of a public highway in the city. On the 23rd February, 1898, the sidewalk on the addition was in a slippery state, and the suppliant in passing over it fell and was injured. She filed a petition of right against the Crown for damages, under 50 & 51 Vict. c. 16, s. 16 (c). It was the duty of certain employees of the Crown to go and see that the bridge was in a safe condition for pedestrians, every morning between six and seven o'clock:—Held, that the suppliant, upon whom the burden of proof of negligence rested, had not shewn that these employees had failed in their duty on the morning of the accident. (2) In this climate it is not possible in winter to have the sidewalks of the highways always in a safe condition to walk upon; and negligence in that respect, when it is actionable, consists in allowing them to remain an unreasonable time in an unsafe condition. *Davies* v. *The Queen*, 6 Ex. C. R. 344. See also, *McHugh* v. *The Queen*, *ib.* 374, *ante* PETITION OF RIGHT.

**Road Company**—*Right to Build Bridge—Canal.*]—An Act of parliament provided that it should be lawful for a canal company to cut a channel across a certain highway, and to erect, keep, and maintain a safe and commodious bridge across the canal. The bridge was erected and having become unsafe through the default of the canal company, an incorporated road company, which had acquired the road, made several endeavours to get the bridge repaired, but all of them having failed through the insolvency of the canal company, the road company at length commenced the erection of a fixed bridge, which would impede the navigation of the canal:—Held, reversing the decision in 17 Gr. 31, that they had no right to do so, and a permanent injunction was granted. *Town of Dundas* v. *Hamilton and Milton Road Co.*, 18 Gr. 311.

*See Prouse* v. *Glenny*, 13 C. P. 560; *Corporation of Wellington* v. *Wilson*, 16 C. P. 124; *Toms* v. *Corporation of Whitby*, 35 U. C. R. 195, 37 U. C. R. 100; *Attorney-General* v. *International Bridge Co.*, 27 Gr. 37, 6 A. R. 537; *Sanson* v. *Northern R. W. Co.*, 29 Gr. 459; *Steinhoff* v. *Corporation of Kent*, 14 A. R. 12; *Re Peck and Township of Amelíasburg*, 17 O. R. 54; *Re Cummings and County of Carleton*, 25 O. R. 607, 26 O. R. 1; *Township of Morris* v. *County of Huron*, 26 O. R. 689, 27 O. R. 341, *Boswell* v. *Township of Yarmouth*, 4 A. R. 353; *Pratt* v. *City of Stratford*, 14 O. R. 260, 16 A. R. 5.

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2. *County Jurisdiction and Liability.*

**Destruction of Bridge** — *Action for—Title—Pleading.*]—The first count of the declaration alleged that the defendants wrongfully destroyed a bridge belonging to the plaintiffs, to wit, the bridge across the Grand river on the line of road between the townships of A. and G., in the county of W. The second count alleged that there was and had been a public highway between these townships, being the road allowance between them; and in order that the road might be travelled upon, the plaintiffs, in discharge of their duty, caused a bridge to be erected across the Grand river, where it crossed the road, yet defendants wrongfully cut down, &c., said bridge; and by means thereof it became the duty of the plaintiffs to rebuild the same; and in performance of such duty they have expended divers large sums of money, &c.:—Held, on demurrer, that, by s. 339 of the Municipal Act, the plaintiffs had exclusive jurisdiction over the bridge in question, not a mere naked power; and having jurisdiction, the common law (irrespective of the statute)

would impose upon them the duty of repairing it; and that they could therefore maintain the action, although s. 336, which vests the soil and freehold of all the highways in cities, towns, villages, and townships in their respective municipalities, does not mention counties. (2) That the allegation in the first count, that the bridge belonged to the plaintiffs, was truly made. (3) That the plaintiffs might have become the absolute proprietors of the bridge by purchase from a road company, and there was nothing to shew that they did not claim by such title, and that their title was sufficiently shewn in the pleadings. *County of Wellington* v. *Wilson*, 14 C. P. 299.

The corporation of a county can maintain an action for the damage to or destruction of a bridge within its limits. *County of Wellington* v. *Wilson*, 16 C. P. 124.

**Duty to Erect**—*Boundary between Townships.*]—Quære, whether s. 341, s.-s. 12, of the Municipal Act of 1866, 29 & 30 Vict. c. 51, which makes it the duty of county councils "to erect and maintain bridges over rivers forming township or county boundary lines," applies where the river only separates two townships in the same county, but does not form a county boundary. *Re Kinnear and County of Haldimand*, 30 U. C. R. 398.

**Duty to Erect and Maintain**—*Boundary between Townships—"River."*]—Section 535 of the Municipal Act, R. S. O. 1887 c. 184, provides that "it shall be the duty of councils to erect and maintain bridges over rivers forming and crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county." The question in this action was whether the bridges over Doty's Creek, Kettle Creek, and Caddy's Creek, each of which is a stream crossing a boundary line between two township municipalities, were "bridges over rivers" within the meaning of the enactment. At Doty's Creek the span of the bridge was sixty-seven feet; at Kettle Creek, thirty-one feet nine inches; and at Caddy's Creek, nine feet. The evidence shewed that at Caddy's Creek a culvert would have been sufficient, while to cross the two other creeks bridges were necessary:—Held, that the bridges over Doty's and Kettle creeks were "bridges over rivers" within the meaning and intention of the statute, and that the duty of erecting and maintaining them rested upon the county council, but that the bridge over Caddy's Creek was not such a bridge. McHardy v. Township of Ellice, 1 A. R. 628, applied, notwithstanding changes in the statute, and followed. *Township of North Dorchester* v. *County of Middlesex*, 16 O. R. 658.

——— *Bridge Connecting Main Highway—Width of River.*]—Under ss. 532 and 534 of the Municipal Act, R. S. O. 1887 c. 184, county councils are directed to build and maintain "all bridges crossing streams or rivers over 100 feet in width . . . connecting any main highway:"—Held, by the Queen's bench division, that, upon the proper construction of these sections, the county council is, by the former provision, given exclusive jurisdiction over all bridges, by whomsoever built, crossing streams or rivers over 100 feet in width, within the limits of any incorporated village in the county, and connecting any main highway leading through the county; and is, by the latter provision, compellable to build such bridges only where necessary to connect any main public highway leading through the county. Held, also, that the place at which the width of a stream or river is to be ascertained is the place at which the bridge crosses; and the width is to be determined by the width of the natural channel of such stream or river, taking it in its highest ordinary state. The court of appeal was divided in opinion. Held, by the supreme court of Canada, reversing the decisions below, that the width of a river at the level attained after heavy rain and freshets each year should be taken into consideration in determining the liability under the Act; the width at ordinary high water mark is not the test of such liability. *Village of New Hamburg* v. *County of Waterloo*, 22 O. R. 193, 20 A. R. 1, 22 S. C. R. 296.

**Duty to Repair** — *Boundary between Townships—Remedy.*] — An appeal from an order dismissing an application under 46 Vict. c. 18, s. 535 (O.), for a mandamus to compel the repair by the county of Haldimand of an existing bridge or the construction of a new one over the Oswego creek, where it crosses the boundary line between the townships of Moulton and Haldimand, by reason of the Judges of the court of appeal being divided in opinion as to the nature of the duty and the proper remedy, whether by indictment or mandamus, and also as to the sufficiency of the demand, was dismissed. But held, per curiam, that the county corporation were liable for the non-repair. *In re Townships of Moulton and Canborough and County of Haldimand*, 12 A. R. 503.

——— *Boundary between Townships — "River."*] — A stream called Black Creek, from 30 to 40 feet in width, with clearly defined banks, crosses the road forming the boundary line between the townships of Ellice and Downie, and is crossed by a bridge on that road. The plaintiff sustained injuries through the approach to this bridge being out of repair, and sued the townships therefor. Section 413 of the Municipal Act enacts that it shall be the duty of county councils to maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county; and s. 416 provides that in case a road lies wholly or partly between adjoining townships, &c., the councils of the municipalities between which it lies shall have joint jurisdiction over the same, and the said road shall include a bridge forming part of the road:—Held, reversing the judgment in 37 U. C. R. 580, that Black Creek is a river, within the meaning of s. 413; and that the county corporation therefore, and not the defendants, were liable. *McHardy* v. *Township of Ellice*, 1 A. R. 628. See *S. C.*, 39 U. C. R. 546.

——— *Unnecessary Bridge—Non-assumption — Expenditure.*] — The leading road through the county of Wellington, running north and south, crossed the Grand river in the village of Fergus by the Tower street bridge, less than one hundred feet in width, which was built in 1834, and by that bridge only, till 1850, when another bridge, more than one hundred feet wide, was built by a private owner of property in the village over the river at St. David street, about three hundred yards from Tower street. After that the travel along the leading road was divided

between the two bridges. The county never by by-law assumed either bridge, but had granted money to aid in keeping up both:—Held, that the county was not bound to repair the St. David street bridge, under 37 Vict. c. 16, ss. 17, 18 (O.), as being a bridge "necessary to connect a public highway leading through the county." *Regina* v. *County of Wellington*, 39 U. C. R. 194.

*See Re Jamieson and County of Lanark*, 38 U. C. R. 647.

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3. *Joint Jurisdiction and Liability of City and County or of Two Counties.*

**Maintenance of Bridge between Counties**—*Deviation from Boundary.*]—The road forming the division line between the counties of Brant and Waterloo deviated from the allowance about five miles before reaching the Grand river, and ran wholly within the county of Brant till it intersected the river, where a bridge was built nearly a mile south of the line, and the road then continued on the other side of the river until it again struck the boundary. This road and bridge had been in use nearly thirty years—the actual division line never having been opened throughout. On motion to set aside an award, made as to the duties and liabilities of the respective counties with regard to the bridge:—Held, that the bridge, being wholly in the county of Brant, and off the division line, was not within 22 Vict. c. 99, s. 314 (see R. S. O. 1877 c. 174, s. 498); but that, as the arbitrators, therefore, had no jurisdiction, and the award was not made under the Act, the court could not set it aside. Quære, whether under the statute the arbitrators have power to award when, and at what cost, the bridge shall be built, and to compel the respective counties to contribute, or whether it is intended merely that the two municipalities are to concur in the regulations as to tolls or otherwise. Semble, that the statute applies only where the deviation has been made to obtain a good line of road, not in order to suit the convenience of either county. *In re County of Brant and County of Waterloo*, 19 U. C. R. 450.

By R. S. O. 1887 c. 184, s. 535, s.-s. 2, it is the duty of the councils of adjoining counties to erect and maintain bridges over rivers forming or crossing the boundary line between the two counties; and it is declared that a road which lies wholly or partly between two municipalities, shall be regarded as a boundary line, although it may deviate so that in some place or places it is wholly within one of the municipalities. The boundary line between the counties of Victoria and Peterborough, in part of its course, formerly passed between the 10th concession of the township of Verulam in the former, and the 10th concession of the township of Harvey in the latter county, the lots in the latter concession from one to fifteen being a range of broken lots forming a narrow strip of land fronting on the west side of Pigeon Lake. By 42 Vict. c. 47 (O.), these lots were detached from the township of Harvey and annexed to the township of Verulam, from and after the 1st March, 1880, for all municipal, judicial, electoral, and school purposes, and for the purpose of registration of titles, as fully as if the same had always formed part of that township; and the remainder of the township of Harvey was entirely separated from the parts so detached for all purposes whatsoever:—Held, that by force of this Act and of the Territorial Act, R. S. O. 1887 c. 5, s. 10, Verulam had become a township bordering on a lake, and that the boundary line between these two townships, and consequently the county boundary line, in front of the range of lots so detached, was in the middle of Pigeon Lake, and no longer on the road allowance between such lots and the lots in the 10th concession of Verulam. Held, also, reversing the judgment in 15 O. R. 446, that the road on the former county boundary line, or on what might have been previously considered a deviation therefrom, was not a deviation within the meaning of s. 535, from the road on the boundary line between the counties to the north of the range of lots transferred to the township of Verulam; and, therefore, that the duty of maintaining a bridge over a river crossing the road on the former boundary line or deviation therefrom, and which was wholly in the county of Victoria, was cast upon that county alone; and that the adjoining county of Peterborough was not liable therefor. The term "deviation" is used in the same sense in ss. 535 (2) and 538. Its meaning considered, and In re County of Brant and County of Waterloo, 19 U. C. R. 450, approved. *County of Victoria* v. *County of Peterborough*, 15 A. R. 617. Affirmed by the supreme court, *Cassels' Dig.* 558.

**Non-repair**—*Action for—Condition when Handed over by Crown—Notice—Liability.*]—The counties of Simcoe and Ontario are connected by a drawbridge between the two over a water channel, called "The Narrows," on Lake Simcoe. By s. 327 of C. S. U. C. c. 54, where a bridge lies wholly or partly between two counties, the councils of such municipalities shall have joint jurisdiction over it. The bridge in question here having been left open, the plaintiff, who was passing along the highway, fell into "The Narrows," and was injured:—Held, that defendants were liable to plaintiff at common law in a civil action, although the property and freehold in the bridge were not vested in them. Held, also, that defendants were bound to maintain the bridge in the same state of repair that they would have been if it had been built by themselves, and not merely in the same condition it was when they received it from the Crown. Semble, that if the accident complained of had occurred within so short a period after the transfer of the bridge to defendants that they had not had time to ascertain its defects, they would not, having had no voice in its construction or in its transfer, have been liable to plaintiff. Quære, whether the commissioner of public works, if furnished with funds to repair the bridge, would not have been liable to indictment, if, with full knowledge of its dangerous condition, he had wilfully neglected to repair it. Section 341, C. S. U. C. c. 54, does not limit the responsibility of counties to the same kind of responsibility to which magistrates in quarter sessions are subjected, that is, to criminal responsibility merely; the object of the statute is to transfer from the magistrates to the county councils all their powers, &c., and on the completion of such transfer, the councils are to hold the property affected in like manner, and subject to their general duties and liabilities respecting other property belonging to them. *Harold* v. *County of Simcoe*, 16 C. P. 43.

Held, affirming the judgment in 16 C. P. 43, that defendants were liable for the damage

sustained; that the bridge was within s. 327; that the word "between" must be construed in its popular sense; and that where a bridge is constructed over navigable waters, and connects two opposite shores lying in different counties, such bridge is between such two counties, and they are jointly answerable for its maintenance, even though the counties, as respectively containing the townships between the shores of which the current flows, reach to the middle of the water and are divided only by the invisible, untraceable line called medium filum aquæ. *S. C.*, 18 C. P. 9.

——— *Action for — City and County — Boundary—Liability.*] — In case against the municipality of the county of Wentworth and the corporation of the city of Hamilton, for not repairing a bridge alleged to be lying between the county and city, it appeared that the bridge crossed the Desjardins canal, the waters of which, by statute, are navigable waters, and are not within either the city or the county; that on each side of the canal there was a marsh; that the dry land on the one side was part of the township of West Flamborough, and on the other, part of the city of Hamilton, and that the canal divided the two:—Held, a bridge lying between the city and county, within s. 39 of 12 Vict. s. 81. *Woods* v. *County of Wentworth*, 6 C. P. 101.

——— *Indictment for—City and County—Boundary — Liability.*] — The township of Gloucester and the city of Ottawa, which was part of the township of Nepean, are on the easterly and westerly sides respectively of the river Rideau, and both within the county of Carleton. In the river at this point is situate Cumming's Island, and a bridge extending from the Ottawa side to the island, and from the opposite side of the island to the Gloucester shore. A line drawn down the middle of the river equi-distant from the banks, without regard to any islands, would leave the greater part of Cumming's Island on the Gloucester side, but the channel between the island and Gloucester is the more navigable, while the larger amount of water passes through the other channel:—Held, that a line so drawn properly ascertained the limit between the adjoining municipalities, for the words "middle of the main channel," used in 14 & 15 Vict. c. 5, s. 11, and R. S. O. 1877 c. 5, s. 10, have their common law signification of the middle of the stream, and therefore the island formed part of the township of Gloucester, and that part of the bridge from the island to the latter township was wholly within that township. The county was found guilty on an indictment for not keeping the bridge in repair, which had been removed into the high court, but the indictment described the bridge as being in the townships of Gloucester and Nepean:—Held, that, by 12 Vict. c. 81, s. 201, schedule B. 4, the easterly limit of Ottawa is the middle of the river, and is coincident with the westerly limit of Gloucester, and that no part of the township of Nepean lies between Ottawa and the river, and the bridge was therefore wrongly described as being in the two townships. Held, also, that, though this could have been amended at the trial, it could not be amended on a motion for a new trial; and a new trial was ordered. Held, also, that under R. S. O. 1877 c. 174, s. 495, the duty of maintaining the bridge was cast upon the city and county. *Regina* v. *County of Carleton*, 1 O. R. 277.

*See Traversy* v. *Township of Gloucester*, 15 O. R. 214.

II. Commissioners of Turnpike Trusts.

**Demise** — *Promissory Note—Illegality.*]—Commissioners of a turnpike trust, appointed under a statute limiting their powers with respect to demises and to the collection and appropriation of rent when due, made a demise beyond the scope of such powers; the tenant was put into possession and enjoyed his term; the commissioners, at the expiration of the term, took a promissory note from the tenant for the rent:—Held, that they could not recover upon such note, because the promise to pay the note arose upon the illegal demise; and because the commissioners had no power, though the demise were legal, to give time for payment of rent already due. *Ireland* v. *Guess*, 3 U. C. R. 220.

**Lease of Tolls**—*Statute.*]—Held, that the plaintiff, as clerk to the commissioners, could not be permitted to recover on a lease of tolls substantially different from the one which the commissioners were expressly directed by the statute to make. *Ireland* v. *Noble*, 3 U. C. R. 235.

**Personal Liability.**] — Commissioners appointed under an Act of parliament employing persons to make a macadamized road are not personally responsible. *New* v. *Burn*, T. T. 3 & 4 Vict.

**Pleading** — *Declaration.*]—A declaration by the commissioners of a trust, under 3 Vict. c. 53, must shew that the demand accrued to them in the course of their business as commissioners. *Cumming* v. *Guess*, 2 U. C. R. 125.

**Statutory Proceedings** — *Informality—Quashing.*] — Where proceedings have been taken and damages awarded under 4 & 5 Vict. c. 63, and a mandamus issued enjoining payment, the court will not quash the proceedings for mere informality; it must see that substantial justice has not been done. *Regina ex rel. Denison* v. *Commissioners of Turnpike Trust*, 1 U. C. R. 193.

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III. Highways—Creation of.

1. *Allowances in Original Plan or Survey.*

[*See* R. S. O. 1877 c. 174, s. 486; R. S. O. 1897 c. 225, s. 598; R. S. O. 1877 c. 146, ss. 49, 50, 67; R. S. O. 1897 c. 181, ss. 20, 21, 39.]

**Continuance** — *New Deviating Road.*]—The original public allowances made in the first survey of a township continue to be public highways, notwithstanding that a new road deviating therefrom may have been opened under 50 Geo. III. c. 1, or may have been confirmed as a highway by reason of statute labour or public money applied upon it. *Spalding* v. *Rogers*, 1 U. C. R. 269.

**Non-user** — *Evidence — Plan—Copy.*]—Land marked out in the original plan of a township as an allowance for a road, does not lose that character because it has never been used as a road for forty years; and a copy of the plan certified by the surveyor-general is admissible to prove such allowance, although it does not appear by whom, nor from what materials, the plan was compiled. *Badgeley* v. *Bender*, 3 O. S. 221.

——— *Plan—Work on Ground.*]—Under C. S. U. C. c. 54, s. 313 (R. S. O. 1877 c. 174, s. 486), streets laid out in the original plan of a town by the Crown surveyor are public highways, though not staked out upon the ground, and never opened or used. *Regina* v. *Great Western R. W. Co.*, 21 U. C. R. 555.

**Omission to Provide for Road**—*Effect, as to Adjacent Land.*]—An original government survey of part of a township, made no mention of roads, and apparently the surveyor intended the roads to be taken out of the land adjacent, which was then wild. The surveyor who afterwards surveyed the adjoining land treated the road allowance as included within the original survey, whereby the plaintiff's lot would be diminished one chain in breadth. The jury having found for defendants, the court ordered a new trial, considering such verdict against the weight of evidence. *Stock* v. *Ward*, 7 C. P. 127.

——— *Subsequent Plan — Work on Ground.*]—One R., in 1829, first surveyed part of the township of Plympton fronting on lake Huron, and his plan returned shewed the lots fronting on the lake with an oblique line in rear, following the general course of the lake, but no allowance for road. Afterwards a plan of the whole township was compiled in the Crown land office, from surveys of three separate portions of it, made by different surveyors. The descriptions of the lots were made from this plan, all the lots having been granted after it had been completed, and the distances in the descriptions contained in the deeds were according to the scale on which the plan was compiled. This plan shewed a road in rear of the front lots, and made their depth greater than in R.'s plan. There was no proof of any work on the ground shewing that R. had ever run out or posted the rear line as it appeared on his plan:—Held, that it was competent for the government to make such allowance for road, not being inconsistent with any work on the ground. *Hagarty* v. *Britton*, 30 U. C. R. 321.

**Overflow by Mill Dam**—*Non-user—Enclosure—Indictment.*] — Defendant, being indicted for overflowing a highway with water by means of a mill dam maintained by him, objected that there was no highway, and could be no conviction because the overflowed road, which was an original allowance, had been in some places enclosed and cultivated. It was used, however, at other points, and those who had enclosed it were anxious that it should be opened and travelled, which they said was impossible owing to the overflow. The overflow, too, was at other parts than those so enclosed:—Held, that a conviction was right. *Regina* v. *Lees*, 29 U. C. R. 221.

**Proof of Laying out**—*Plan—Work on Ground.*]—The question being whether there was a highway between lots 20 and 21 in a township, which the plaintiff denied, it appeared that the practice of surveyors in laying out a road allowance was to plant a post on each side of it, marked on the side nearest the road with the letter R., and on the opposite side with the number of the lot, and to plant in the centre of the road a third post marked R. on two or on all four sides. Stakes thus marked were found between 19 and 20, but none between 20 and 21, and it was sworn that an original post had been seen there 24 years before, and until within three or four years, marked 20 and 21, thus far shewing that there was no road allowance between those lots. On the other hand, the registered map of the township, the map in the Crown lands department, and the field notes of the surveyor who made the original survey, shewed such allowance. The plaintiff and defendant both claimed under grants from the Crown of separate parts of lot 21, described as commencing on the northern limit of such allowance, and without it the defendant would have no access to his land. The jury were told that the work on the ground must govern, but that under C. S. U. C. c. 54, s. 313, the fact of the government surveyor having laid out this road in his plan of the original survey would make it a highway, unless there was evidence of his work on the ground clearly inconsistent with such plan. The jury having found for defendant:—Held, that the direction was right, but that the verdict was contrary to evidence, and a new trial was granted on payment of costs. Regina v. Great Western R. W. Co., 21 U. C. R. 555, remarked upon. *Carrick* v. *Johnston*, 26 U. C. R. 69.

——— *Plan—Work on Ground—Adoption by Crown.*]—In 1826 the original town plot of London was surveyed under instructions from the Crown, and the plan of such survey, with the field notes, shewed that two of the streets, for obstructing portions of which defendant was indicted, were extended to within four rods of the river Thames, which runs through that town. The overseer of highways for 1829, 1830, and 1831, stated that he had traced the streets in question all through; that the posts were there; that he opened the streets by the posts; that there was a road reserved of four rods along the river bank; that one of the streets ran down to the river, and the posts were then four rods from the river, when he opened that street. In 1832 one R. was duly instructed to survey a mill site in the town and to lay off for the purchaser such ground as might be necessary, and he thereupon ran a line which crossed these two streets, as designated upon the original plan, and cut off portions of several town lots laid out upon this plan. In 1839 a mill site was sold by the Crown land agent to one B. (under whom defendant claimed), not according to R.'s survey, but according to a small plan obtained from the original surveyor, and the patent, which issued in 1846, appeared to grant the land designated on this plan, making no reservation of streets, but including the extensions to the river of the streets in question, as laid out upon the original plan. Previously, also, to this sale, lots had been sold on these streets by the proper authorities; the streets had been worked and improved, and one in particular was open to the river, and the other as far as where the obstruction stood:—Held, affirming the judgment in 16 C. P. 145, that the evidence conclusively established that the streets in question had been laid out in the original survey of the town to within four rods of the river, and that this space was left open for public use; that the existence of these streets as public highways was shewn by the work on the ground at the original survey, and by the adoption, on the part of the the Crown, of that work, as exhibited on the plan thereof returned, which adoption was established by the disposition of lands according to that plan of survey; that thereby these streets became public highways; and, although prior to such adoption the Crown would not have been bound by

either plan of survey, after such adoption there was no power of making such an alteration as would be necessary to establish the defence set up. *Regina* v. *Hunt*, 17 C. P. 443.

**Subsequent Crown Grant.**]—Where in the original plan of a township a highway was laid out, which was subsequently granted by the Crown to several individuals, and occupied by them and others claiming from them for upwards of thirty years, and never had been used as a highway:—Held, that an indictment for a nuisance for stopping it up, claiming it as a highway, could not be sustained. *Rex* v. *Allan*, 3 O. S. 90.

Where in an original survey an allowance for road had been made between certain lots, and afterwards, before 1810, patents were issued making the allowance between other lots:—Held, that the grants must prevail, and that the plaintiffs, to whom one of the former lots belonged, could recover for a trespass on that part of his lot claimed as an allowance for road. *Field* v. *Kemp*, 3 O. S. 374.

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2. *By Quarter Sessions.*

**Report of Surveyor**—*Confirmation—Conflict with Verdict of Jury.*]—Justices in quarter sessions cannot decline confirming the unopposed report of a surveyor of highways recommending the alteration or opening of a new road, on the ground that the proposed road had been finally rejected by the verdict of a jury on a former occasion, if upon inspection the alteration and line of road rejected by the jury and the object of the pending proceeding do not seem to be identical. *Rex* v. *Justices of the Home District*, T. T. 11 Geo. IV.

——— *Confirmation — Presumption—Dedication—Work on Ground.*]—A road was surveyed in 1834, and the surveyor's report was made to the quarter sessions in that year. The records were, however, lost or destroyed, and there was no evidence that the road had been adopted by the sessions under the Act then in force, nor was there a record of any order directing it to be opened. It was, however, actually opened before 1853, with the assent of the owners of the land, and was used for several years, and statute labour was done upon it:—Held, that the maxim "Omnia præsumuntur rite esse acta" applied, and that the due adoption of the road by the quarter sessions should be presumed. Held, also, that the evidence of dedication was sufficient. Held, also, that the expression "laying out" and "opening" a road are used in 50 Geo. III. c. 1 in an equivalent sense, and that actual work on the ground is not required before the road becomes a public highway. *Palmatier* v. *McKibbon*, 21 A. R. 441.

———*Confirmation—Proof of—Minute of Proceedings.*]—On an application for a mandamus to open a highway, alleged to have been established by the sessions in 1839, under 50 Geo. III. c. 1, a surveyor's report, dated 5th July, 1839, that he had laid out the road, was produced from the custody of the clerk of the peace, on which was an indorsement, not dated: "Allowed. Isaac Fraser, chairman, quarter sessions, M. D.;" but that report bore no date of filing or entry, and there was no entry in the minutes of the July or October sessions of any order referring to this report:—Held, that the application must fail, for want of proof that the report was filed or presented to the sessions next after its date, or the road ordered to be opened. Semble, that if there had been a minute in the proceedings of the then next sessions, that the report was presented and the road ordered to be opened, the court would presume that the sessions had done all that was necessary to warrant such an entry or minute. Semble, that a minute of the allowance of the report, omitting to shew that the road was ordered to be opened, would not be sufficient. *Re Lawrence and Township of Thurlow*, 33 U. C. R. 223.

——— *Confirmation — Time—User—Dedication.*]—The report of the surveyor under 50 Geo. III. c. 1, was dated 3rd July, 1837, and the notices given stated that it would be laid before the quarter sessions on the 11th. So far as appeared, however, nothing was done at the July court, but the report was confirmed at the October sessions following:—Held, that the highway had not been legally established, the power of confirmation being confined to the sessions next after the report; and that the fact of user was immaterial, the presumption of dedication being rebutted by the proof of the origin of the road. *Regina* v. *Great Western R. W. Co.*, 32 U. C. R. 506.

——— *Requisites of — Establishment of Road—Prosecution for Obstructing.*]—An indictment for obstructing a highway established under 50 Geo. III. c. 1, by the quarter sessions, cannot be supported when the highway has not been established in the manner marked out by the statute, as when the report to the magistrates in quarter sessions by the surveyor of roads does not express the exact width or direction of the road. Semble, that all the steps necessary before a highway can be legally established under the Act must be proved by the prosecutor. *Rex* v. *Sanderson*, 3 O. S. 103.

**Straightening Road** — *Encroachment — Justification.*]—Held, that the defendants proceeding to straighten a highway, acting as trustees of the said highway, under a by-law of the municipal council, passed in 1848, and under proceedings in sessions in 1823, and in so doing encroaching on plaintiff's possession, were not entitled to the protection of 50 Geo. III. c. 1; nor could they give the special matter in evidence under the general issue. *Joy* v. *McKinn*, 1 C. P. 13.

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3. *By Statute Labour or Public Money.*

**Crown Lands Commissioner** — *Moneys Expended by.*]—The commissioner of Crown lands has no authority to open roads on lands granted by the Crown, and any money expended under his authority, is not public money within C. S. U. C. c. 54, s. 313; and the roads so opened do not, therefore, become public highways under that Act. *Regina* v. *Hall*, 17 C. P. 282.

**Roads Passing through Indian Lands.**]—Section 12 of 50 Geo. III. c. 1 does

not mean that every bye-road or short cut used by the Indians across the plains or flats, is to be established as a permanent highway; it only means that roads which under that Act are to become legal highways should be so where they pass through Indian lands, as in other parts of their course, although they might not be (as to such portion of them) original allowances, nor have had any public money or statute labour laid out on them. *Byrnes* v. *Bown*, 8 U. C. R. 181.

**Substitute for Original Allowance**—*Subsequent Opening of Original — "Usually Performed."*]—For more than twenty years there had been travelled roads through the Humber plains, in the township of Etobicoke, not laid out by any proper authority, but used by the public at pleasure, owing to the original allowances not having been opened. They were irregular in their direction, and varied at times in their course. One such road crossed defendant's land. It was proved that during two years statute labour had been performed upon it, and that it had been travelled for nearly fifty years. When the regular allowances were opened defendant obstructed this road, and it appeared that other similar roads in the neighbourhood had been closed in the same manner:—Held, that it was not a highway under C. S. U. C. c. 54, s. 313, for it could not be said that statute labour had been "usually performed" upon it; and, as it was in fact only a substitute for the regular allowance, it might fairly be treated as "altered," within the spirit of that clause, when the allowance was opened. *Regina* v. *Plunkett*, 21 U. C. R. 536.

**Sufficiency of Statute Labour**—"*Usually Performed.*"]—It appeared that statute labour had been performed on parts of a road, but only to a very limited extent, and not from time to time, so as to shew that it was a road "whereon the statute labour hath been usually performed:"—Held, not sufficient to establish the road as a public highway under 22 Vict. c. 54. *Regina* v. *Hall*, 17 C. P. 282.

**Sufficiency of Statute Labour and Expenditure**—*Period of Time.*]—A road and public bridge having been constructed many years ago, and public money and statute labour having been expended thereon from time to time for 15 years:—Held, under C. S. U. C. c. 54, s. 313, that it must be deemed a public highway. *Prouse* v. *Glenny*, 13 C. P. 560.

Upon a road, not a regular road allowance, but formed of land given by the owners thereof for their general convenience, statute labour had been performed for some time under the regular pathmaster, and the public funds expended:—Held, that the road must be considered to be under the charge of the municipality, so as to render them liable for its state of repair. *Gilchrist* v. *Township of Cardon*, 26 C. P. 1.

*See Regina* v. *Gordon*, 6 C. P. 213; *Regina* v. *Rankin*, 16 U. C. R. 304; *Regina* v. *Village of Yorkville*, 22 C. P. 431; *Palmatier* v. *McKibbon*, 21 A. R. 441; *Rowe* v. *Sinclair*, 26 C. P. 233; *St Vincent* v. *Greenfield*, 15 A. R. 567.

4. *Dedication.*

*See*, also, MUNICIPAL CORPORATIONS, XI.

(a) *By Plan.*

[*See* R. S. O. 1877 c. 146, s. 67; R. S. O. 1897 c. 181, s. 39.]

**Sale of Lots**—*Evidence—Rebuttal.*]—A man laying out village lots with streets to bound the lots, and selling according to such a plan:—Held, bound by this dedication of the streets, unless rebutted by other evidence. *O'Brien* v. *Village of Trenton*, 6 C. P. 350.

——— *Registration of Plan.*]—The registration of a plan of a subdivision of a town lot and sales made in accordance with it, does not constitute a dedication of the lands thereon to the public. *In re Morton and City of St. Thomas*, 6 A. R. 323.

Under the Municipal and Surveyors Acts, by the filing of a plan, and the sale of lots according to it, abutting on a street, the property in the street becomes vested in the municipality, although they may have done no corporate act by which they have become liable to repair. *Roche* v. *Ryan*, 22 O. R. 107.

——— *Registration of Plan—Public Square—Easement — Custom.*] — The owner of a township lot, having some mineral springs upon it, subdivided it into village lots and streets, according to a plan which he registered in 1839, and by which he sold and conveyed lots. On this plan was represented a square called "Richmond square," in which the springs were situate. Until 1877 no charge was made for the water to those who came to drink it, but it was charged for by the gallon when carried away, and was sent to different parts of the country for sale:—Held, that this shewed no intention to dedicate the square or the springs to the public, so as to give any right of entry, or to drink the water without charge. Held, also, that there was no right by custom to drink the water. The court (composed of two Judges) was divided upon the question whether a highway leading to the springs and established by the quarter sessions in 1829, had been legally closed by by-law. *Grand Hotel Co.* v. *Cross*, 44 U. C. R. 153.

——— *Registration of Plan — Rights of Owners of Abutting Lands.*]—A piece of land about twenty acres in extent, fenced in, had been owned and occupied as a field by the plaintiffs and their predecessors in title for 25 years. Before that it had, with other land lying immediately to the north, on which streets had been laid out and opened up, one of them forming the boundary between the north and south portions, been surveyed and laid out on a registered plan into lots and streets, and some lots had been sold by the then owners partly from the land vested in the plaintiffs, and partly from the land to the north. Subsequently the plaintiffs acquired by purchase or lease all the lands to the south of the dividing street, and sought to restrain the defendants from opening up the streets through these lands:—Held, reversing the decisions in 21 O. R. 120 and 19 A. R. 641, that the right vested in a municipal corporation by 46 Vict. c. 18 (O.) to convert into a public highway a road laid out by a private person on his property, can be exercised only in respect to private roads, to the use

of which the owners of property abutting thereon were entitled. *Gooderham* v. *City of Toronto*, 25 S. C. R. 246.

——— *Registration of Plan — Statutory Regulations—User.*]—The owners of two adjoining lots agreed between themselves to give twenty feet of each lot to form a street, and a plan of subdivision of the lots shewing a street of this width was filed by them, the consent of the municipality being given by resolution. The line fence was then taken down and one owner fenced his land so as to leave twenty feet of the lot open to the public; but the other fenced his so as to leave forty feet. Without any by-law or further resolution the municipality did some grading on the sixty feet, and the sixty feet were used by the public for the purpose of a highway: —Held, that the giving of forty feet by the one owner did not relieve the other owner from his obligation to give twenty feet, and that he could not, after its acceptance by the expenditure of public money upon it and its use by the public, retract the dedication of the twenty foot strip. Judgment in 31 O. R. 499 affirmed. *Pedlow* v. *Town of Renfrew*, 27 A. R. 611.

——— *Registration of Plan—User—Adoption.*]—A street or road laid out upon a registered plan of a township lot, where, although houses are clustered, there is not an incorporated village, continues to be a private street or road, although the owner should sell a lot fronting on it, until the township council adopts it as a public highway, or until the public, by travelling upon it, has accepted the dedication offered by the proprietor. R. S. O. 1887 c. 152, s. 62, only applies to cities, towns, or incorporated villages. A person who purchases lots according to such a plan, abutting upon streets laid out thereon, acquires, as against the person who laid out the plot and sold him the land, a private right to use those streets, subject to the right of the public to make them highways, in which case the private right becomes extinguished. The right so to use a private road does not necessarily mean a right over every part of the roadway, but only to such a width as may be necessary for the reasonable enjoyment of it. *Sklitzsky* v. *Cranston*, 22 O. R. 589.

——— *Subsequent Closing.*]—Where a person has sold lots according to a plan on which a lane is laid out in their rear, he cannot afterwards shut up such lane; and the fact that he had previously conveyed portions of the land comprised in the lane, would only affect so much as he had thus precluded himself from giving up to the public. *Regina* v. *Boulton*, 15 U. C. R. 272.

——— *Subsequent Closing—Purchaser's Interest.*]—The mere fact of the owner of lands selling them in lots according to a plan shewing streets and lanes adjoining the several lots, does not bind him to continue such streets and lanes unless a purchaser is materially inconvenienced by the closing of any of them. *Carey* v. *City of Toronto*, 11 A. R. 416, 14 S. C. R. 172.

——— *Subsequent Closing — Registered Plans.*]—C. owned township lot 32, and H. lot 31 adjoining it on the east. In 1856 H. laid out part of 31 into village lots, according to a registered plan, which shewed streets called First, Second, Third, and Fourth streets, &c., running from east to west across the block, to the east limit of lot 32. In 1858 C. laid out the east part of lot 32 by a plan, also registered, by which a street called Augusta street ran north and south along the east side of 32, and from it streets ran westerly numbered 1, 2, 3, 4, &c., corresponding to and a continuation of First, Second, Third, and Fourth streets on H.'s block, Augusta street only intervening. Village lots had been sold on street 4 in C.'s block, but none on Fourth street on H.'s land, and the closing this last mentioned street would not shut out a purchaser of any lot from access to the nearest highway:—Held, that, under 24 Vict. c. 49, the owner of H.'s block might by a new survey and plan close up Fourth street on his land; for the laying out a street in continuation of it by C. did not make all one street, so as to render the proviso in that statute applicable. *Regina* v. *Rubidge*, 25 U. C. R. 299.

——— *Subsequent Diversion.*] — Where building lots have been sold according to a plan, the part of the property laid off as roads cannot afterwards be diverted to other purposes. *Rossin* v. *Walker*, 6 Gr. 619.

But such sale does not bind the vendor to make such roads. *Cheney* v. *Cameron*, 6 Gr. 623.

**Variance between Plans**—*Registration —User.*]—The main evidence to establish the continuation of a street in a village to the water's edge, was a map, alleged to be the original map by which the village was laid out about forty years before, but not authenticated by any signature or date; and for upwards of twenty years before suit another plan, duly registered, had been in general use, not shewing the continuation; and no user was proved for the purpose of a highway. The court held, that they were not bound by s. 41 of 12 Vict. c. 81, to declare the street so marked a public highway. *O'Brien* v. *Village of Trenton*, 7 C. P. 246.

(b) *Other Cases.*

**Acquiescence of Tenant of Crown**—*Subsequent Patent.*]—A tenant for years cannot dedicate so as to bind the reversioner. Semble, that where the reversion comes at once to the tenant, without any interval of time, his acquiescence in the dedication while a tenant will not bind him, in the absence of evidence of acquiescence in the dedication on the part of his landlord. Where therefore a tenant under the Crown had been convicted upon an indictment for taking exclusive possession of the road after he had obtained his patent, the court refused to give judgment until evidence had been given to shew the Crown a consenting party to the dedication. *Regina* v. *Wismer*, 6 U. C. R. 293.

**By Crown**—*Obstruction—Lessee.*]—Held, upon the facts, that the defendant, being the lessee of the ordnance department, had no right to obstruct the road leading to the Niagara Falls ferry, which was shewn to have been dedicated by the Crown for a highway; and that he was guilty of a nuisance in so doing. *Regina* v. *Davis*, *Regina* v. *Fralick*, 11 U. C. R. 340.

**Dedication of Lands to Various Public Uses.**]—See MUNICIPAL CORPORATIONS, XI.

**Deed**—*Description — Declaration — Plan —Estoppel.*]—Held, that the evidence in this case was sufficient to warrant the conclusion that the land in question in this suit, claimed as part of lot 25 on the east side of Queen street, in the town of Paisley, was laid out by the Crown on the original plan or survey as a street, and as such was dedicated to the public; and that, even if the description in the patent from the Crown subsequently issued to the plaintiff was sufficient to include the land in question, the reservation in the patent of all the streets within the "above described parcel of land," would have the effect of excluding it. Held, also, that the fact of the plaintiff, in a deed by him to one O., of the said lot 25, in his description of the metes and bounds of the lot, describing the northern limit of it, which adjoined the land in question, as running along the edge of a street, amounted to a declaration by the plaintiff of a dedication of the land in question as a street, either by the Crown before the issue of the patent to plaintiff, or by plaintiff himself; and that, at all events, coupling the description in the deed with the plan of survey, and with evidence given to shew that in consequence of the land being broken, the only accessible way of communication between the two streets between which lot 25 was situated, was on this piece of land, and the fact of its user as a highway, and statute labour expended on it, there was clear evidence of such dedication. Held, also, that the plaintiff was estopped in equity, if not at law also, from denying the dedication. *Rowe* v. *Sinclair*, 26 C. P. 233.

——— *Express Dedication — Subsequent Conveyance.*]—Where A. has expressly dedicated by deed certain lands for the purpose of a public road, which the public have adopted by user, A.'s subsequent conveyance of the land cannot control the prior dedication. *Mallock* v. *Anderson*, 4 U. C. R. 481.

**Laying out before Patent**—*Easement.*]—Persons in possession of Crown lands before patent issued cannot dedicate any portion of the same; persons in possession, however, may so far bind themselves by their acts as that when a patent shall issue to them the lands granted would be bound by any right or easement to which their sanction has been obtained. *Rae* v. *Trim*, 27 Gr. 374.

——— *Subsequent Acts of Owner—Public User—Municipal By-law.*]—In trespass q. c. f. it appeared that in 1858 one G., a surveyor, under whom the plaintiff claimed, obtained a patent for the land in question, which he previously claimed to own. In 1857 he got up and presented to the municipal council a petition to open a road through the lot, as a continuation of R. street in the village of Collingwood. A by-law was passed accordingly in November, 1857, and G. ran the line for the road, which was afterwards made; $200 being expended by the council, but not on G.'s land, it not being required there. The road was used by the public as early as 1857, without objection by G., though he at one time placed a gate to keep cattle out of his farm, the road being unfenced. The road as used deviated at one point on G.'s land from the line of R. street, owing to a ravine:—Held, that G. had no power to dedicate before he obtained the patent, but that his subsequent acts amounted to a dedication. Semble, that the by-law was sufficient, for it shewed that the extended road was to be in projection of R. street, the course of which could be readily ascertained; and that it did not require registration under 36 Vict. c. 48, s. 445, having been passed before that Act. *Beveridge* v. *Creelman*, 42 U. C. R. 29.

**Laying out** — *Intention — Question for Jury—Reservation of Right.*]—One H. owned a block of land fronting on Elizabeth street, in Toronto, and running back to the centre of the block between Elizabeth and Teraulay streets. In laying out this land, he ran a street or lane of forty feet from Elizabeth street to the limit of his own property, which was not then enclosed. A short time after, and about seventeen years before action, M., the owner of the adjoining land to the east, fronting on Teraulay street, erected a fence to enclose his own land running across the head of this lane. H. had nothing to do with the putting up of this fence, and there was no concert between him and M. as to the plan of survey, or the laying out of their respective properties. G., owning land bought from M. abutting on the head of the lane, threw down the fence, so as to make a thoroughfare to his own premises. Defendants, occupying lots on the lane purchased from H., and contending that G. had no right to convert the lane into a thoroughfare to his own lot, re-erected the fence a few inches west of the line of that pulled down; and thereupon G. procured them to be indicted for nuisance in obstructing a public highway. A verdict of guilty was directed, subject to the opinion of the court:—Held, that the jury should have been directed to find whether the lane, when first laid out, was dedicated by H. to the public as a highway generally, or whether, with reference to 13 & 14 Vict. c. 45, s. 1, there was an express reservation of any right by him. *Regina* v. *Spence*, 11 U. C. R. 31.

——— *Plan—Evidence—Expenditure.*]—A., owning a large tract of land, laid out a plot for a town at the mouth of the river B., upon the map of which town a road was marked off leading along the edge of the river to its mouth. The road was made originally at the expense of A., but afterwards repaired and improved by statute labour and public money, and holes filled up in the part upon which the obstruction complained of was erected:—Held, that there was sufficient evidence of dedication. *Regina* v. *Gordon*, 6 C. P. 213.

——— *Public User—Variance from Plan.*]—In order to widen a street in the city of St. Catharines, the plaintiff and other owners of the land on each side of the street agreed to give the corporation a strip of land bordering thereon, not exceeding five feet in depth. The street some forty years before had been dedicated by the then owner of the land to the public, and a plan thereof made, by which the plaintiff appeared to be some seven feet on the street, but as the street was actually laid out on the ground and used by the public, the seven feet was included within the owner's fence and had continued so ever since. The corporation asserted that this seven feet was part of the street, and that they were therefore entitled to take from

the plaintiff under the agreement five feet in rear of the seven feet:—Held, in ejectment, that this seven feet could not, under the circumstances, be deemed to be part of the street, not having been used or accepted by the public as such, and that the corporation under the agreement could only take the five feet bordering on the street as it then existed. *Hastings* v. *City of St. Catharines*, 43 U. C. R. 334.

——— *Subsequent Acts of Owners—Width of Street—Encroachment.*]—The proprietors of a park lot adjoining the city of Toronto laid off lots on a street, which was only partly opened up on the ground, giving to each lot a depth of 120 feet from the eastern boundary of such park lot. Some years afterwards the street was opened to its full length, when it was discovered that, as the fences were then placed thereon, some of the lots on the part last opened up would not have the depth stipulated for; and an information was thereupon filed, on the relation of an owner of one of these lots, to compel the removal of the fences. On a survey being made pursuant to the statute, and also as ascertained by producing the lines of that part of the street which had been opened and in use for 30 years, it was shewn that the fence did not encroach on the street, and that any apparent reduction there might be in the depth of the lots must have been caused by the removal of the boundary fence between the park lot in question and the adjoining one. Under these circumstances the court dismissed the information with costs. In such a case the owners had done some grading on a part of the property, intending it as a continuation of a street which had been already opened up and travelled for upwards of 30 years:—Held, that this was not such an act as amounted to dedication of the street in such a manner as bound the owner to its exact position, and, even if it could be so treated, it did not extend to that portion of the street which was not actually opened up and used. *Attorney-General* v. *Boulton*, 21 Gr. 598.

**Limited User**—*Indefinite Road.*]—Where defendant was convicted of having obstructed a highway, on evidence which did not shew that the alleged highway had been established by a plan filed or signed by the owners of the adjoining lots, or by the general user of the public, or that any clearly defined portion of land had been marked off and used; but there appeared to have been merely an open space not bounded by posts or fences, over which the owners of the adjoining land had been in the habit of passing in the carriage of goods, wood, &c., to the rear of the premises:—Held, not sufficient evidence of dedication to support the conviction. *Regina* v. *Ouellette*, 15 C. P. 260.

**Permissive User**—*Subsequent Opening of Regular Allowances—Crown Grant—Rectory.*]—Roads had been travelled for more than 20 years through the Humber plains, not laid out by any proper authority, but used by the public instead of the original allowances, which had not been opened. When the regular allowances were opened defendant obstructed one of these roads, which crossed his land. On the 31st March, 1835, 700 acres, including defendant's lot, "with allowances for roads as left by the survey of deputy surveyor Hawkins, and all other roads now travelled," were granted to trustees for Christ Church, Mimico, and subsequently transferred by them to the rector, under whom defendant held:—Held, that the road could not be considered a highway, for the evidence shewed, not a perpetual dedication, but at most a permission to use until the proper allowance was opened, when, if not before, the defendant had a right to close it. (2) That nothing in the patent constituted a highway. (3) That no right by dedication could have been gained by the public while the fee remained in the Crown, and the permission of the rector for the time being, or his tenants, could not bind his successors. *Regina* v. *Plunkett*, 21 U. C. R. 536.

**Public User**—*Evidence against Public Right—Gate.*]—The placing a gate across a travelled road, after the public have enjoyed it for upwards of twenty years, can never abolish a highway. Semble, that a gate being kept across a road is not in any case conclusive as to the road being a public one; a right may have been reserved to put it there to prevent cattle straying. *Johnston* v. *Boyle*, 8 U. C. R. 142.

——— *Evidence of—Acceptance.*]—In order to establish the existence of a public highway by dedication it must appear that there was not only an intention on the part of the owner to dedicate the land for the purposes of a highway but also that the public accepted such dedication by user thereof as a public highway. In a case where the evidence as to user was conflicting, and the jury found that there had been no public user of the way in question, the trial Judge disregarded this finding and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the full court:—Held, that, as such decision did not take into account the necessity of establishing public user of the locus, it could not stand. *Moore* v. *Woodstock Woollen Mills Co.*, 29 S. C. R. 627.

——— *Evidence of Dedication—Severance of Road by Inlet.*]—Uninterrupted user by the public, for seventy years, of a roadway along the edge of an unoccupied and unenclosed farm bordering on a lake, upon a sandy beach formed there by the waters of the lake, and the course of which roadway was slightly varied from time to time by the rise and fall of the waters of the lake, is sufficient evidence of dedication of a right of way, and the breaking through of a small inland lake, by which the road was cut across and a navigable channel created, was held not to deprive it of its character of a highway. *Frank* v. *Township of Harwich*, 18 O. R. 344.

——— *Evidence of Intention.*]—In a new country like Canada, user of a road by the public is not to be too readily regarded as evidence of an intention on the part of the owner to dedicate it. *Dunlop* v. *Township of York*, 16 Gr. 216.

——— *Evidence—Prescription.*]—Prior to the construction of the St. Charles Branch of the Intercolonial Railway, the claimant was in possession of property in the village of Lauzon, in the county of Lévis, P. Q., which was divided into 41 lots, with a street laid out through them. A plan of the lots shewing the location of the street had been recorded in the registry office for the county of Lévis. In the construction of the railway the Crown

diverted this street, purchasing for that purpose one of the 41 lots in the claimant's property. Although the municipal corporation had never taken any steps to declare the said street a public way, it was used as such, was open at both ends, and formed a means of communication between two other streets in the village, and work had been done and repairs made thereon under the direction of the rural inspector of roads. The municipal council had also, at one time, passed a resolution for the construction of a sidewalk on the street, but nothing was done thereunder. Upon the hearing of the claim it was contended on behalf of the claimant that the street in question, at the time of the expropriation, was not a highway or public road within the meaning of the Government Railways Act, 1881, 44 Vict. c. 25, but was her private property, and that she was entitled to compensation for its expropriation. The Crown's contention was that, at the date of expropriation, the street was a highway or public road within the meaning of the Government Railways Act, 1881, 44 Vict. c. 25, and that the Crown had satisfied the provisions of s. 5, s.-s. 8, and s. 49 thereof, by substituting a convenient road in lieu of the portion of street so diverted, and that the claimant was therefore not entitled to compensation:—Held, that the question was one of dedication rather than of prescription; that the evidence shewed that the claimant had dedicated the street to the public; and that it was not necessary for the Crown to prove user by the public for any particular time. (2) That the law of the Province of Quebec, relating to the doctrine of dedication or destination is the same as the law of England. Semble, that 18 Vict. c. 100, s. 41, s. s. 9 (C.), is a temporary provision having reference to roads in existence on 1st July, 1855, which had been left open and used as such by the public without contestation during a period of ten years or upwards. Myrand v. Légaré, 6 Q. L. R. 120, and Guy v. City of Montreal, 25 L. C. J. 132, referred to. *Bourget* v. *The Queen*, 2 Ex. C. R. 1.

——— *Expenditure.*]—Held, that upon the evidence of user and expenditure of public money set out in this case, there was nothing to shew a dedication by the owner of the land. *Regina* v. *Rankin*, 16 U. C. R. 304.

——— *Intention—Evidence.*]—The corporation of East Whitby by by-law closed up an old travelled road, whereby the applicant was shut out from ingress to his lands except by a short road leading to the original road allowance, which was now for the first time opened. For some years prior to 1844 the short road was used as a private road for the convenience of persons going to one F.'s place, mills, brewery,and distillery. In 1844 F. conveyed the land on each side of it to his son and son-in-law, but no mention of it was made in the deeds. The wife of the purchaser from the son-in-law, while speaking to F. at one time about the title, as to which some dispute arose, complained that the old travelled road might be closed up. F. replied that they would still have the short road leading to the road allowance, which would still be opened if the old travelled road were closed:—Held, that the latter statement, in connection with the facts of the former user of the road, and of its not having been disposed of when F. disposed of the lands on each side thereof, sufficiently shewed the intention to dedicate the short road to the public; that the applicant had therefore another convenient way to his lands; and that the by-law should not be quashed; but, under the circumstances, no costs were given. *Re Adams and Township of East Whitby*, 2 O. R. 473.

——— *Intention—Evidence of—Deed.*]—Where, in or prior to 1822, a lane or alley was laid out by the owner, connecting with two public highways, and used by the public ever since, without any interruption from the owner during his lifetime, a period of forty years:—Held, that this, apart from other evidence, was sufficient evidence to go to the jury of an intention by the owner to dedicate the lane in question to the public. Held, also, that a deed, executed by the owner, of a lot abutting on the lane, in which the limits of the lane were given, might be referred to to ascertain its true width. Held, also, that the public were entitled to the whole width of the lane; that evidence of enjoyment by them of the part in dispute was not essential; and that an obstruction by a person who knew he was obstructing a street already laid out, could not afford any evidence to displace the intention of dedication by the owner. *Regina* v. *Donaldson*, 24 C. P. 148.

——— *Intention—Question for Jury.*]—A dedication takes effect from the intention of the person making it, and the merely opening or widening a street for the convenience or benefit of the person doing it and permitting the public to use it, will not constitute a dedication. The question of dedication or no dedication must be left as a question of fact for the jury. *Belford* v. *Haynes*, 7 U. C. R. 464.

——— *Land Adjoining Street—Dedication after Conveyance.*]—D., being owner in fee of the land in question, on the 17th November, 1825, conveyed in fee to F., a married woman. It continued to be fenced in with other land belonging to D. until 1841, when he removed the fence, throwing this land into Brock street, in the city of Toronto, on which it abutted, and it continued from that time to be used as part of the street. F. died in 1841, whether before or after the removal of the fence was not certain, leaving her husband and eldest son, who was then of age. The husband died in 1864, and the son in that year brought ejectment against the corporation of the city:—Held, that he was entitled to recover, for the dedication by D., being after the conveyance by him, could pass no title to defendants. Whether the public generally, not these defendants in particular, had acquired a right of way over the land, was a question not affected by this decision. *Fitzgibbon* v. *City of Toronto*, 25 U. C. R. 137.

——— *Market Square—Trust—Buildings.*]—A block of land in the city of Hamilton was conveyed to the corporation for the purposes of a public market, a strip across the entire northerly side of which had been used for over twenty years as a passage-way or sidewalk, but this strip was not separated from the rest of the block except by a kind of ditch, the earth from which mainly formed the sidewalk and raised it above the level of the rest of the block. This sidewalk had been recently narrowed and planked like the ordinary sidewalks of the city. A public market building had been erected on the southerly part of the block, and used as such for about

thirty years. Defendant and others, who owned the land adjoining the sidewalk on the north, had erected buildings thereon fronting or facing on the sidewalk and nearest block, which buildings were generally occupied as taverns, and to some of which there was no access except across the sidewalks. The city authorities, for some unexplained reasons, had erected a close board fence on the extreme northerly boundary of the sidewalk from street to street, thus effectually obstructing the doors and windows of said buildings, and cutting off all access to one or more of them. Defendant, being one of those injuriously affected by the board fence, cut it away, contending that he had a right to enter upon the sidewalk from any part of his land adjoining it, as long, at any rate, as it was permitted to be used as a public way either for carriages or foot passengers; and, being sued in trespass for cutting away the fence, he pleaded several pleas, alleging the locus in quo, in some, to be a carriage-way, and in others a foot-way, relying on the public user for over twenty years:—Held, that a city corporation to whom land had been conveyed for the purposes of a public market, being in the position of trustees, were incapable of dedicating any part of the land to the purposes of a highway, or of diverting it in any respect from its original purpose of a public market, and therefore no such dedication could be presumed from any length of user they might permit or had permitted; and that, acting on behalf of the public, from the nature of their trust, they necessarily retained such a power of control as would justify the erection of a fence. *City of Hamilton* v. *Morrison*, 18 C. P. 228.

——— *Patent—Evidence of Dedication.*]—A highway, of which the origin was not clear, had been travelled for forty years across the plaintiff's lot, the patent for which was issued in 1836. The municipality in 1866 passed a by-law shutting up this road, but no conveyance was ever made to the plaintiff. They afterwards threw down a fence with which he had enclosed the old road, and took away gravel from it. The plaintiff having brought trespass:—Held, that he could not recover, for the user for thirty years after the patent would be conclusive evidence of a dedication as against the owner, and such dedication was equivalent to a laying out by him, so that the road, under C. S. U. C. c. 54, s. 336, was vested in the municipality. *Mytton* v. *Duck*, 26 U. C. R. 61.

——— *Presumption —Crown—North-West Territories.*]—The user of old travelled roads or trails over the waste lands of the Crown in the North-West Territories of Canada, prior to the Dominion government survey thereof, does not give rise to a presumption that the lands over which they passed were dedicated as public highways. The land over which an old travelled trail had formerly passed, leading to the Hudson Bay trading post at Edmonton, N.W.T., had been enclosed by the owner, divided into town lots, and assessed and taxed as private property by the municipality; and a new street substituted therefor, as shewn upon registered plans of subdivision and laid out upon the ground, had been adopted as a boundary in the descriptions of lands abutting thereon in the grants thereof by letters patent from the Crown:—Held, that, under the circumstances, there could be no presumption of dedication of the lands over which the old trail passed as a public highway, either by the Crown or by the private owner, notwithstanding long user of the same by settlers in that district prior to the Dominion government survey of the Edmonton settlement. *Heminck* v. *Town of Edmonton*, 28 S. C. R. 501.

*See Brown* v. *Town of Edmonton*, 23 S. C. R. 308; *S. C.*, 28 S. C. R. 510 n.

——— *Substitution of New Road.*]—Where, in trespass qu. cl. fr., it appeared that the land had been used for some years as a public road, although it was wholly on plaintiff's land, the public allowance not having been found suitable, and afterwards, by order of the sessions, a new road was laid out, also on the plaintiff's land, but nearer to the public allowance, and the plaintiff then stopped up the first road, but defendants cut down some trees which had been used to block it up, and dug up the soil:—Held, that the plaintiff was entitled to maintain trespass against them. *Borrowman* v. *Mitchell*, 2 U. C. R. 155.

**Statute Authorizing Expropriation**—*Presumption—Evidence.*]—K. brought an action for trespass to his land in laying pipes to carry water to a public institution. The land had been used as a public highway for many years, and there was an old statute authorizing its expropriation for public purposes, but the records of the municipality which would contain the proceedings on such expropriation, if any had been taken, were lost:—Held, that, in the absence of any evidence of dedication of the road, it must be presumed that the proceedings under the statute were rightly taken, and K. could not recover. *Dickson* v. *Kearney*, 14 S. C. R. 743.

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### 5. *Title to Lands Used as Highways.*

**County Corporation**—*Bridge—Jurisdiction.*]—The corporation of a county can maintain an action for the damage to or destruction of a bridge within its limits. Probable reason why the legislature, while it conferred upon counties exclusive jurisdiction over county roads and bridges, did not also vest in them the soil or absolute property thereof. *County of Wellington* v. *Wilson*, 16 C. P. 124.

**Crown Patent**—*Toll Bridge and Road—Intra Vires.*]—The patent in this case granted a certain public toll bridge, with a planked and macadamized toll road, together with all toll gates on said road or bridge, "and now vested in us, and the tolls arising from said bridge and road, on certain conditions contained," &c.:—Held, that the patent was not ultra vires, but passed the soil and freehold and the right and franchise of taking tolls thereon and in respect thereof. *Regina* v. *Mills*, 17 C. P. 654.

**District Council**—*Crown.*]—The soil and freehold of roads laid out by district councils, under 4 & 5 Vict. c. 10, does not vest in the Crown. *Cæsar* v. *Norton*, 9 U. C. R. 109.

**Private Owner**—*Dedication—Municipality.*]—Held, that the user of the road in question for thirty years after the patent would be conclusive evidence of a dedication as against the owner, and such dedication was equivalent to a laying out by him, so that the road, under C. S. U. C. c. 54, s. 336, was vested in the municipality. *Mytton* v. *Duck*, 26 U. C. R. 61.

**Town Corporation**—*Crown—Ejectment.*]—In ejectment it appeared that the land had been surveyed by the government, and laid out as streets, in 1852, in their plan filed in the registry office, and that the plaintiffs had afterwards been incorporated as a town, including these streets within their limits. The land was vested in the plaintiffs:—Held, that the freehold remained in the Crown; but that the plaintiffs at all events could not maintain ejectment. *Town of Sarnia* v. *Great Western R. W. Co.*, 21 U. C. R. 59.

*See Regina* v. *Brown*, 13 C. P. 356; *County of Wellington* v. *Wilson*, 14 C. P. 269.

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IV. HIGHWAYS—DUTIES, POWERS, AND LIABILITIES OF MUNICIPAL CORPORATIONS.

1. *Abandonment of Highway.*

**Purchase** — *By-law Authorizing—Subsequent By-law Divesting.*]—A road ran between several townships in the defendants' county, and was constructed by a joint stock company. In 1866 the defendants purchased the right of the road company in the road at a sheriff's sale under an execution against the company, and received a deed from the sheriff. A by-law had been passed authorizing the purchase, but through inadvertence was not signed or sealed, but the purchase was recognized in subsequent by-laws, and the defendants took possession of and exercised exclusive jurisdiction over the road, expended some $2,500 in its repair, and continued to deal with it as their own property until 8th June, 1881, when they passed a by-law divesting themselves of the road, after which the defendants ceased to exercise any control over it:—Held, that the defendants were not liable for the non-repair of the road. Whether or not it had been legally acquired, the divesting by-law was intra vires and effective. *Regina* v. *County of Perth*, 6 O. R. 195.

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2. *Assessment and Expenditure for Roads.*

**By-law**—*Discretion of Commissioners.*]—Held, that a by-law passed by the Peterborough municipal council under 12 Vict. c. 81, s. 41, appropriating £600 from the county funds to be expended on certain roads within the said county in such a manner as may be deemed most proper by the commissioners appointed for that purpose, &c., was illegal, as exceeding the authority given to the council, and must be quashed. *In re Conger and County of Peterborough*, 8 U. C. R. 349.

——— *Stock in Road Company—Publication — Imposition of Rate.*]—A municipality proposed to take £7,500 in a road company, and published a by-law (No. 6) to authorize a loan for that sum, containing the usual recitals, &c. When the by-law came on for discussion a clause was added, reducing the sum to £5,000 and directing the rates to be altered accordingly, but the other provisions to remain the same; and it passed thus amended in June, 1854. In December following another by-law was passed (No. 8) providing for the issuing of debentures authorized by No. 6, and directing a rate to be levied for the interest thereon, but making distinct provisions for meeting the principal out of the profits of the stock to be taken, and from other funds. This by-law did not repeal No. 6, but the enactments in it shewed clearly that the rates imposed by that by-law were meant to be dispensed with:—Held, that this last by-law was bad, for it must be considered as a new and independent by-law, and not as a mere supplement to No. 6; and it should therefore have been published before passing. By-law No. 6 was held bad, though not moved against, for it was not published beforehand as it ultimately passed. *In re Bryant and Municipality of Pittsburg*, 13 U. C. R. 347.

——— *Stock in Road Company — Imposition of Rate.*]—By-laws for contracting a debt for taking stock in and constructing a road having been passed by the district of Gore before 12 Vict. c. 81:—Held, that it was not necessary that such by-laws should impose a special rate as required by that Act. *County of Wellington* v. *Township of Wilmot*, 17 U. C. R. 82.

——— *Watering Street — Special Rate — Portion of Street.*]—Sub section 2 of s. 340 of the Municipal Act, 1866, authorizes a by-law to water a portion of a street only. Such by-law need not name a day when it shall take effect. Where such a by-law provided that a special rate should be levied, to be estimated on the contract price for such watering, without naming the sum to be raised, but the work had been done, the court refused, in their discretion, to quash the by-law. Where the by-law ordered a special rate on a portion of a street to pay for watering "said street":—Held, that "said street" referred to only said portion of that street. *Re Platt and City of Toronto*, 33 U. C. R. 53.

**By-law of County**—*Grant to Townships—Discretion as to Expenditure.*]—A county council by by-law granted moneys to different municipalities in the county, to assist said municipalities "in preserving, improving, and repairing roads and bridges therein," and to be expended by such municipalities "where required, as they may deem expedient for the benefit of the public of said county." It was alleged that these moneys were a portion of surplus funds derived from various sources, not required for the current year's expenditure, and it appeared that similar grants had been made in previous years:—Held, that the by-law was ultra vires, and must be quashed. *In re Strachan and County of Frontenac*, 41 U. C. R. 175.

**By-law of Township** — *Joint Work — Special Rate — Interest — Day for Taking Effect—Notice—Title.*]—The corporation of the township of A. passed a by-law under the Municipal Act of 1873, s. 439, s.-s. 2 (now R. S. O. 1877 c. 174, s. 514), providing that an arrangement should be entered into by the council with two other townships for executing, at their joint expense and for their joint benefit, the work upon a gravel road through the township of A. It recited that $3,000 would be required to defray the expenses of the township in the work; that it was intended to borrow that sum on debentures of $100 each, to be issued as the work progressed, and payable by instalments of $600 in each year, with interest at seven per cent.; and that it would require to raise annually by special rate $642 for paying said debt and interest:—Held, that the by-law shewed clearly that the interest was to be raised

annually on the $600, not on the $3,000. Held, also, following, but not agreeing with, Township of North Gwillimbury v. Moore, 15 C. P. 445, that the corporation were authorized to allow a higher rate of interest than seven per cent. Remarks as to the necessity of legislation on this subject. The by-law did not name a day when it should take effect; and no notices were given as required by ss. 424 and 425 in case of a by-law for opening or altering a road, but the notices were under s. 231, s.-s. 2, as of a money by-law to be voted on:—Held, that both these objections were fatal. Held, that the municipal council in such cases must acquire the title to the road before raising the money; and semble, that the arrangement with the other municipalities must also be first completed. *In re Nichol and Township of Alnwick*, 41 U. C. R. 577.

**District Council** — *Repair — Method of Taxation.*] — The district councils had no power to impose a tax for repairing the roads and bridges generally, nor to confine such tax to unoccupied lands only, nor to impose a tax of so much per acre, instead of an assessment of so much in the pound on the assessed value. *Doe d. McGill* v. *Langton*, 9 U. C. R. 91.

*See In re Rose and Counties of Stormont, Dundas, and Glengarry*, 22 U. C. R. 531.

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3. *Assessment of Roads.*

**Interest of Lessees** — *Personal Property — Non-residents.*] — The gravel road in the county of Elgin, forming part of the London and Port Stanley road, was granted by the Crown to the county, and by them leased for a term of years to the appellants, who were not residents of the village of St. Thomas:—Held, under C. S. U. C. c. 55, that the interest of the appellants in the road, being a chattel interest, could only be assessed as personal property. (2) That, as the appellants did not reside in the village, they could not be assessed by the municipal council of that village in respect to their interest in the road. *In re Hepburn and Court of Revision of St. Thomas*, 7 L. J. 46.

**Public Highway**—*Exemption — Assessment in Name of Officer.*] — The Proof Line Gravel Road Company were incorporated under the Joint Stock Companies Act, C. S. U. C. c. 49, and constructed their road on a public highway or road allowance in the township of Biddulph. The township assessor assessed the property in the road against James Hamilton, as secretary of the company:—Held, that the assessment was illegal, because, although the road was vested in the company by s. 60 of the Joint Stock Companies Act, it was, nevertheless, a public highway, and therefore exempt from taxation by 22 Vict. c. 96, s. 9, s.-s. 6. (2) That in any event the assessment should have been in the name of the company, and not in that of one of its officers. *In re Hamilton and Court of Revision of Biddulph*, 13 C. L. J. 18.

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4. *Assumption of Roads.*

**By By-law of County**—*Township Road —Liability for Repair—Remedy over.*]—Action by plaintiff for damages for the loss of his horse, which was killed by falling into a ditch dug by the township, on a road therein, under a drainage by-law. The township council had passed a by-law for opening and establishing this road, and shortly afterwards the county council had passed a by-law "assuming the road as a road of the said county for the purpose of expending thereon the county appropriation, and for such purpose only." The money of the county was expended from year to year on the said road. The county by-law was proposed or seconded by the township reeve, and its validity, although never assented to by by-law, was never disputed by the township:—Held, that by their by-law the county had assumed the road as a county road, and there was no power in the statute authorizing them to limit the assumption in the manner proposed; and that under the circumstances the county could not set up the absence of a township by-law assenting to the assumption. Sections 533 and 566, s.-s. 5, of R. S. O. 1877 c. 184, relied on by the county, were held not applicable to this case. Held, also, that the county, under s. 531, s.-s. 1, were bound to keep the road in repair, and were liable to plaintiff, but under s. s. 4 they were entitled to judgment over against the township. *Balzer* v. *Township of Gosfield South*, 17 O. R. 700.

**By Corporate Acts**—*Public User—Evidence—Repair—Remedy.*] — In an action to compel a municipal corporation to maintain and repair a street laid out by private persons, it appeared that such street was not established as a highway by by-law nor assumed for public user by any corporate act of the municipal corporation; but it was contended that the performance of statute labour thereon with the consent of the pathmaster, and on one occasion with the consent of the councillor for the ward and of the reeve, was evidence that it was otherwise assumed for public user:—Held, that acts shewing such an assumption must be corporate acts, clear and unequivocal, and such as clearly and unequivocally indicate the intention of the corporation to assume the road; and the acts relied upon in this case could not bind the corporation nor work such an assumption. Held, also, following Hislop v. McGillivray, 15 A. R. 687, that, even if the street had been assumed for public user, the plaintiff's only remedy was by indictment, and the action was not maintainable. *Hubert* v. *Township of Yarmouth*, 18 O. R. 458.

*See St. Vincent* v. *Greenfield*, 12 O. R. 297, 15 A. R. 567; *Stede* v. *County of York*, 15 A. R. 666; *Township of Ancaster* v. *Durrand*, 32 C. P. 563; *Smith* v. *Township of Ancaster*, 27 O. R. 276.

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5. *By-laws.*

(a) *Description of Roads in.*

**Insufficiency**—*Marks on Ground—User.*] —Where the road established by a by-law was not sufficiently described, but it appeared that it was clearly defined and marked by fences on each side, and had been travelled for eight years, the court refused to quash the by-law. *Hodgson* v. *Counties of York, Peel, and Ontario*, 13 U. C. R. 268.

**Uncertainty**—*Minutiæ—Expenses.*] — A by-law for closing an old road need not de-

scribe the course, &c., minutely, and it is not bad for directing that the parties applying to have the road closed shall pay the expenses. *Fisher* v. *Township of Vaughan*, 10 U. C. R. 492.

——— *Point of Commencement — Width.*] —A by-law to alter an old road described the point of commencement of the new road as being about eight chains south of N. W. corner:—Held, not so uncertain as to warrant the court in setting aside the by-law; but held, that the by-law was bad for not assigning any width to the new road. *In re Smith and Township of Euphemia*, 8 U. C. R. 222.

A by-law was in these terms: "Be it enacted, &c., that the new survey made by H., commencing at the Pine Hill road on lot 37, lake road east, running south-westerly, south of the old lake road, until it strikes the old lake road on lot 52," be established and constituted a public road: "And be it further enacted that the said road shall be four rods in width;"—Held, that the road was not sufficiently defined. *McIntyre* v. *Township of Bosanquet*, 11 U. C. R. 460.

A by-law described a new road to be opened as "Commencing on the Green Bay line of road on lot 25, and crossing part of lot 22, and lots 23, 24, and 26 in the sixth concession of Bedford, until it intersects the old travelled road, and continuing on to Bob's lake in the said township of Bedford: the said road to be thirty feet wide:"—Held, bad for uncertainty. *In re Thompson and Townships of Bedford, Olden, Oso, and Palmerston*, 21 U. C. R. 545.

——— *Report of Surveyor—Width.*]—Under 4 & 5 Vict. c. 10, a by-law was passed by the district council, establishing as a public road "the road laid out by J. E., surveyor, between, &c., as appears by his report, bearing date," &c.; but it did not refer to the report as annexed, neither was the line of road set out nor the width stated in the by-law. The by-law was quashed for uncertainty. *In re Brown and County of York*, 8 U. C. R. 596; *Dennis* v. *Hughes*, 8 U. C. R. 444.

(b) *Notices of.*

[*See* R. S. O. 1877 c. 174, s. 506; R. S. O. 1897 c. 223, s. 632.]

**Irregularity** — *Application to Quash — Conduct of Applicant.*] — Where the notices required of a by-law to close a road had not been regularly given, but the applicant knew that the step was in contemplation, and had expressed his intention not to take any part in the matter, the court refused to quash. *Re Ianson and Township of Rcach*, 19 U. C. R. 591.

**Necessity for**—*Opening of Road.*]—Held, under 12 Vict. c. 81, s. 192, that no notice of a by-law to open a road was necessary, the word "opening" being omitted in that section, and that 13 & 14 Vict. c. 64 could not apply to the by-law in this case. *Dennis* v. *Hughes*, 8 U. C. R. 444.

——— *Railway Company — Parties.*] — Quære, as to the power of a municipal council to close up highways and grant them to a railway company without notice. On an application to quash a by-law to that effect, the company should be made a party to the rule. *Re McKinnon and Village of Caledonia*, 33 U. C. R. 502.

**Neglcet to Give Notice to Applicant**—*Effect of — Refusal to Quash.*] — A village corporation passed a by-law to close a street and allow a railway company to appropriate it to build an embankment upon for railway purposes, without any notice to the applicant herein, who had land on the street, or any notice as required by the Municipal Act of 1866, s. 323, s.-ss. 1, 2. The street, however, had been only partly graded, and was scarcely fit for use, no one but the applicant seemed to have any cause of complaint, the injury to him was small, and the railway company had built their works upon the street at a large expense, and made openings for public traffic, and had opened another street in lieu of and as near as possible to the road so taken. Moreover, the council had acted on decisions of the court, and could probably do all that had been done by giving the notices and passing another by-law. The court under these circumstances refused to quash the by-law, but discharged the rule without costs. *Re McKinnon and Village of Caledonia*, 33 U. C. R. 502.

**Number of Notices**—*Knowledge.*] — On motion to quash a by-law to establish a road, it was shewn only that the applicant believed the necessary notices had not been put up, and had not been able to ascertain that they were. The corporation, on the other hand, proved only three notices put up, not six as required, but the applicant was aware of the intended by-law. The court refused to quash. *In re Lafferty and Counties of Wentworth and Halton*, 8 U. C. R. 232. Followed in *Parker* v. *Townships of Pittsburgh and Howe Island*, 8 C. P. 517.

**Posting**—*Affidavit— Negativing.*] — The affidavit of one who swore that he had no recollection of having seen any notice, &c.:—Held, insufficient to shew want of notice of a by-law to close a road. The court will assume that the requisite notice has been given until the contrary is shewn. *Fisher* v. *Township of Vaughan*, 10 U. C. R. 492.

——— *Affidavits.*]—Corporations should be careful to preserve proof of notices, by affidavits of persons who put them up. *In re Lafferty and Counties of Wentworth and Halton*, 8 U. C. R. 232.

6. *Compensation for Exercise of Powers.*

**Lands Injuriously Affected**—*Liability —Railway Company — Agreement—Statute.*] —By a special Act of the legislature of Ontario, 45 Vict. c. 45, provision was made for the construction of a subway or subways as a means of crossing certain railways entering the city of Toronto, part of which had to be constructed within the city, and part within the adjoining municipality of the village of Parkdale, and in consequence of a disagreement between the city and the village as to the terms upon which the undertaking should be proceeded with, the latter united with the railway companies in obtaining an order in council under the Dominion Act 46 Vict. c.

24, authorizing the companies to execute the work, and the latter entered into an agreement with the village authorities that they should construct the same, which they proceeded to do. In an action against the village, brought by the holders of property in the city and village, which was greatly damaged by the mode of executing the work:—Held, by the court of appeal, reversing the judgments in 7 O. R. 270, 8 O. R. 59, that the municipality was not answerable for any damages caused by the works. But on appeal to the supreme court:—Held, that the work was not done by the municipality under the special Act, nor merely as agent for the railway companies, and the municipality was therefore liable as a wrongdoer. The decision was affirmed by the privy council, but no opinion was expressed as to the right of the municipality to recover again against the railway companies, either under the general law of principal and agent or under the express provisions of their agreement with those companies. *West* v. *Village of Parkdale, Carroll* v. *Village of Parkdale*, 12 A. R. 393, 12 S. C. R. 250, 12 App. Cas. 602.

——— *Measure of Damages—Evidence.*]—The defendants having built a subway in front of the plaintiff's property, and in so doing lowered the highway so as to cut off the access thereto, which was previously enjoyed, under the circumstances set out in 7 O. R. 270, 8 O. R. 59, 12 A. R. 393, 12 S. C. R. 250, and 12 App. Cas. 602, it was referred to an official referee to take an account of the damage, if any, sustained by the plaintiffs by reason of the wrongful acts of the defendants, and to fix the compensation proper to be paid in respect thereof. On such reference the referee ruled: (1) that the measure of damages was the difference in value of the property before and after the construction with interest added; (2) that the prospective capabilities or value of the land could not be taken into account except so far as such elements entered into the computation of the then market value, or had regard to what would have been the present value of the property had the subway not been constructed; and (3) that the plaintiffs were not entitled to special damages for injury to their business. On appeal:—Held, that the corporation were liable as wrongdoers, who were not protected from the consequences of their tort by any statutory provision, to make good all damages sustained, for which an action would lie for their unauthorized act, such damages being of a two-fold character, involving injury to the plaintiff's land and to their business. If, in the evidence, one injury could be discriminated from the other, it was competent to recover under both heads. Held, also, that evidence might be received of the present value of the property with a view to throw light on the prospective capabilities of the land at the date of the trespass, but not to form a basis for compensation on its present value; such evidence to be used to aid in fixing compensation for the detriment sustained at the date of the perpetration of the wrong, having regard to the then present and the potential value of the property. *West* v. *Village of Parkdale*, 15 O. R. 319.

——— *Set-off—Benefit.*]—In an arbitration under the arbitration clauses of the Municipal Act a land owner alleged that certain lands had been injuriously affected by the construction of a block pavement:—Held, that in estimating the land owner's compensation the arbitrator should set off against the land owner's claim for damages sustained, the increase in the value of the land arising from the construction of the pavement, in which this land shared in common with all other lands benefited, and not merely such direct and peculiar benefit as accrued to this particular land. Re Ontario and Quebec R. W. Co. and Taylor, 6 O. R. at p. 348, and James v. Ontario and Quebec R. W. Co., 2 O. R. at p. 630, followed. *Re Pryce and City of Toronto*, 16 O. R. 726.

*See Beemer* v. *Village of Grimsby*, 8 O. R. 98, 13 A. R. 225; *Wells* v. *Northern R. W. Co.*, 14 O. R. 594.

*See post* VII. 5.

*See* MUNICIPAL CORPORATIONS, IV., XIII., XVI.

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### 7. *County Roads and Bridges.*

**Bridges.**] — See *ante* I.; *Traversy* v. *Township of Gloucester*, 15 O. R. 214.

**Duty to Construct** — *Mandamus.*] — Semble, that under the facts of this case there was clearly a duty incumbent upon the municipal council, under 12 Vict. c. 81, s. 37, to make the road which they were desired to make. The court, however, granted only a mandamus nisi, in order that any question raised upon the return might be disposed of formally. *In re Township of Augusta and County of Leeds and Grenville*, 12 U. C. R. 522.

**Joint Jurisdiction**—*Road between Two Counties—Award.*]—Semble, that an allowance for road lying between two counties, but not opened, is a road within s. 327 of C. S. U. C. c. 54. (See R. S. O. 1877 c. 174, s. 498.) The award made, as to the duties and liabilities of each county with regard to opening and making such road, directed only that it should be completed by the two corporations by a certain day, with all necessary bridges and culverts, and that each county should expend a specified sum; and, assuming the Act to apply, the court set aside such award as insufficient. *In re County of Waterloo and County of Brant*, 23 U. C. R. 537.

**Jurisdiction**—*Road between Townships—Acceptance and Dedication.*]—A road had for more than fifty years been used as the road between the townships of York and Vaughan, the original road allowance being to the north of it, and this road being in fact wholly within the township of York and part of lot 25. The owner of the lot had been indicted for closing up this road and convicted in 1870; and the corporation of York then passed a by-law to close it, reciting that there was no further necessity for it by reason of the road allowance:—Held, there being in the facts above stated sufficient evidence of dedication and acceptance of this road as a highway, that this was a road dividing different townships, over which the county council only had jurisdiction; and that the by-law therefore was illegal. Such a road need not consist of an original allowance, but may be acquired or added to by purchase or dedication. Quære, whether any one can add to a public allowance for road by dedication, so as to

compel the local authorities to repair it. *In re McBride and Township of York*, 31 U. C. R. 355.

——— *Road between Townships — Deviation.*]—Held, under 12 Vict. c. 81, s. 38, that a road between the townships of East and West Flamborough was within the jurisdiction of the united counties of Wentworth and Halton, though it might deviate in some portions entirely into one township. *Lafferty* v. *Stock*, 3 C. P. 9.

———*Road between Townships—Evidence of Assumption.*]—Section 410 of the Municipal Act of 1873 must be read as modified by ss. 416 and 431, and as meaning that every road dividing different townships shall, when assumed by the county council, be within the exclusive jurisdiction of the county. The only acts in this case done by the county with respect to the road in question, which was a road dividing different townships, was to make five yearly grants for the entire line, which were expended by commissioners appointed for the purpose:—Held, no evidence of an assumption of the road, but the contrary, that being the course directed when the county is doing the work because the townships are not willing to do it themselves. Quære, whether a county can so assume a road as to take the burden of repairing it off another municipality, except by by-law. *O'Connor* v. *Townships of Otonabee and Douro*, 35 U. C. R. 73.

——— *Road through Several Townships.*]—Quære, as to the jurisdiction of a local municipality over a road running within one or more townships or through more than one township. See *Regina* v. *County of Perth*, 6 O. R. 195; *Hewison* v. *Township of Pembroke*, 6 O. R. 170.

**Maintenance of County Road** — *Liability of City.*]—Held, that the legislation and proceedings thereunder, set out in the judgment of the court, relating to the Queenston and Grimsby road and the city of St. Catharines, did not make the city liable to pay to the county of Lincoln any part of the expenditure of the latter in connection with that road. Effect of the withdrawal of city from jurisdiction of county upon roads owned by the county passing through the city, considered. Regina v. Township of Louth, 13 C. P. 615, Regina v. Brown, ib. 356, St. Catharines Road Co. v. Gardner, 21 C. P. 190, specially referred to. Unless specially retained by statute, the withdrawal of a city from the jurisdiction of the county terminates all liability of the former to taxation for county purposes. An agreement by a city withdrawn from the jurisdiction of the county to contribute towards the maintenance and repair of a county road is ultra vires the city corporation. *County of Lincoln* v. *City of St. Catharines*, 21 A. R. 370.

**Purchase of Road from Company**—*By-law—Repair—Imposition on Local Municipalities.*]—A company formed under the Joint Stock Road Companies Act in several townships, including the defendants, subsequently mortgaged their road to the counties of Lincoln and Welland, which counties at a later date took an absolute conveyance, and by by-law assumed it as a county road; they afterwards passed a by-law requiring the respective townships (the defendants being one of them) through which the road passed, to keep the same in repair:—Held, that the road never vested in or became a county road within the statute, but was one acquired and held by the county as assignee of and with all the duties and obligations of the road company which constructed it, and the county could not throw the duty of repairing on the defendants. *Regina* v. *Township of Louth*, 13 C. P. 615.

**Purchase of Roads**—*By-laws—Repair—Local Municipalities.*] — A county council passed two by-laws: (1) Assuming certain roads within a township, and enacting that the undivided one-half of such roads should be kept in repair by the township corporation named. (2) A subsequent by-law directing that $400 should be raised thus, $200 to be assessed and collected out of all the ratable property of the village, and $200, of the township:—Held, that both by-laws were bad, for as to the first, the portion of the road to be kept in repair by each municipality was not sufficiently defined; and as to the second, the county had no power to direct how the money required should be procured by the municipalities. Under C. S. U. C. c. 54, ss. 339, 340, 342, s.-s. 8, the county had no power thus to assume the roads and compel the local municipalities to improve them; that expense should be borne by the county. *In re Rose and Counties of Stormont, Dundas, and Glengarry*, 22 U. C. R. 531.

**Purchase of Township Road**—*Repair—Liability.*]—The corporation of a township having constructed a gravel road, on which they were levying tolls, arranged with the corporation of the county for the assumption by the county of this and other roads as county roads, and removing the tolls therefrom; and by deed conveyed the road to the county, on condition that it should revert to the township again in the event of tolls being imposed. The county gave debentures to the township for the purchase money, took possession of the road, and made repairs thereon; — Held, that the county could not acquire the road under s. 341 of the Municipal Act of 1866, it being already a gravel road, and that they had no power otherwise to purchase it, though the township by C. S. U. C. c. 49, s. 69, were authorized to sell. Held, also, that the road not being vested in the county, they therefore were not liable for neglect to keep it in repair. *Hacking* v. *County of Perth*, 35 U. C. R. 460.

**Transfer of Government Road to County** — *Original Allowance — Part not Opened—Liability for Non-repair.*]—The macadamized toll road known as Yonge street, formerly a provincial public work, was in 1855, by Act of the legislature and order in council, vested in and acquired by the county of York. The order in council described it as "the macadamized toll road running northerly from the liberties of the city of Toronto to the village of St. Albans (Holland Landing), known as Yonge street or the North Toronto road to Holland Landing," &c. One of the conditions of sale was that the road should be kept in thorough repair by the county. The roadway intended for and used by travellers was a macadamized road of the width of thirty feet, and was not in any way out of repair, and was, at the place where an accident occurred, in all respects exactly as it was when transferred by the government to the county. The plaintiff, when turning out of a side road, in order to reach an hotel which stood near the side of Yonge street, drove

along part of the original allowance for road on which the toll road was constructed, but which had never been opened for travel by the defendants, and was used merely as an approach to the hotel. In doing so, the night being dark, the plaintiff missed the way leading to the hotel, ran against some obstruction, and was, with his buggy, thrown down a cutting or embankment into the toll road and was injured:—Held, that there was no evidence of negligence, and that the defendants were not liable. The plaintiff had not been invited to use the travelled way to the hotel as part of the toll road, and the accident had not happened on any part of the toll road, or in consequence of that road being out of repair. *Steele* v. *County of York*, 15 A. R. 666.

*See Churchwardens of St. George's Church* v. *County of Grey*, 21 U. C. R. 265; *In re O'Niel and Counties of York and Peel*, 15 C. P. 249; *Re Falle and Corporation of Tilsonburg*, 23 C. P. 367; *Bennett* v. *County of York*, 43 U. C. R. 542.

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8. *Mineral Rights under Highways.*

**Conveyance** — *Sufficiency — Interference with Travel.*]—The plaintiffs and defendant entered into a joint adventure to form a company to work a mine in land forming part of a township road allowance, the defendant to form the company, and the plaintiffs to vest in the company the title to the mineral rights. The plaintiffs accordingly procured a by-law to be passed by the municipality for the sale of the mineral rights, under s. 442 of the Municipal Act, which authorizes such sale, but with the proviso that the public travel should not be interfered with:—Held, that the conveyance by the municipality of the mineral rights, under s. 442, was sufficient, and that s. 441, providing for stopping up a road allowance, did not apply. *Johns* v. *Beck*, 24 C. P. 219. See the case at length, under MINES AND MINERALS, I.

**Lease**—*Natural Gas—By-law—Public Interest.*]—Mineral gas is a "mineral" within the meaning of s. 565 of the Municipal Act, R. S. O. 1887 c. 184. A lease under that section should be of the right to take the minerals, and not of the highway itself. The lease in this case was of a portion of the highway, "for the purpose of boring for and taking therefrom oil, gas, or other minerals;" the quantity of land was no more than was necessary for the company's purposes, and the rights of the public were fully protected:—Held, that the practical difference here was so small as not to constitute a ground for quashing the by-law. The council before passing the by-law, insisted on an indemnity from the gas company against any costs and damages that might be incurred by reason of the passing of the same:—Held, that, under the circumstances, this could not be deemed to be evidence that it was not passed in the public interest. The plaintiffs, by first sinking a well on the land near the defendants, did not thereby acquire the right to restrain the defendants from using the reservoir lying under the said land. *Ontario Natural Gas Co.* v. *Smart, In re Ontario Natural Gas Co. and Township of Gosfield South*, 19 O. R. 591, 18 A. R. 626.

**Natural Gas**—*Lease of Rights.*]—Natural gas is a mineral within the meaning of the Municipal Act, R. S. O. 1887 c. 184, s. 565, which gives power to the corporation of any county or township to sell or lease mineral rights under highways. Judgment in 19 O. R. 591 affirmed. *Ontario Natural Gas Co.* v. *Gosfield*, 18 A. R. 626.

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9. *Opening or Establishing Roads.*

(a) *Allowances in Original Plans or Surveys.*

**Boundaries**—*Dispute—Declaration.*] — A municipal corporation have no power to declare certain posts planted by a surveyor to be the true boundaries of an original road allowance which they direct to be opened. They may give a description of the boundaries, but ought not to declare such boundaries to be the true boundaries, such being then a matter in dispute. *McMullen* v. *Township of Caradoc*, 22 C. P. 356.

**By-law**—*Discretion.*]—It is discretionary with and not obligatory upon a municipal council to open an original road allowance, and the fact that a by-law has been passed does not create such an obligation; and a mandamus was refused. *Re Wilson* v. *Wainfleet*, 10 P. R. 147.

**Compensation** — *Remedy—Arbitration—Mistake.*]—It was contended that since the passing of 44 Vict. c. 24, ss. 15, 16 (O.), the only remedy for persons claiming an interest in a road allowance was by arbitration to fix compensation:—Held, that the Act only applies to the case where the council have in good faith intended to open a road allowance, but by mistake have not done so on the true line. *Beemer* v. *Village of Grimsby*, 8 O. R. 98, 13 A. R. 225.

**Discretion of Council**—*Refusal to Open —Action to Compel.*]—H. was owner of and resided on a lot in the eighth concession of the township of McG., and under the provisions of C. S. U. C. c. 54 an allowance was granted by the township for a road in front of said lot. This road was, however, never opened, owing to the difficulties caused by the formation of the land, and a by-law was passed authorizing a new road in substitution therefor. Some years afterwards H. brought a suit to compel the township to open the original road, or, in the alternative, to provide him with access to his lot, and also to keep said road in repair and pay damages for injuries caused by the road not having been opened:—Held, affirming the judgments in 15 A. R. 687, 12 O. R. 749, that the provisions of C. S. U. C. c. 54 requiring a township to maintain and keep in repair roads, &c., and prohibiting the closing or alteration of roads, only applied to roads which had been formally opened and used and not to those which a township, in its discretion, has considered it inadvisable to open. Held, also, that the courts of Ontario have no jurisdiction to compel a municipality, at the suit of a private individual, to open an original road allowance and make it fit for public travel. *Hislop* v. *Township of McGillivray*, 17 S. C. R. 479.

**Necessity for Order of Council.**] — Where a government allowance for road had never been used, but had been in plaintiff's possession since 1816, another road parallel to it having been travelled on instead:—Held, under 9 Vict. c. 4, that such allowance could only be opened by order of the municipal coun-

cil, and that a private individual could not justify doing so. *Curry* v. *McLeod*, 12 U. C. R. 545.

**Non-user** — *Prescription — Possession by Private Person.*]—The public cannot release their rights; and there is no extinctive presumption or prescription. Therefore, where an original allowance for road had been taken possession of and occupied by the plaintiff, and those under whom he claimed, for a period of forty years and upwards:—Held, that such lengthened possession afforded no ground for opposing the action of the municipality in resuming possession of the road for the purpose of opening up the same. *Nash* v. *Glover*, 24 Gr. 219.

**Travelled Road Given in Lieu of**— *By-law.*] — The original allowance for road between two concessions had never been opened across seven lots, though it had been to the east and west of those lots, and for more than sixty years had been enclosed with those lots, another line of road having been for the same period travelled in lieu of it, and used as the main highway. The township corporation passed a by-law to open the original road allowance, which the proprietor of one of these lots moved to quash. It was sworn that the travelled road had originally been given by the proprietors of these lots in place of the original allowance without compensation, and two patents were put in, issued in 1803, which apparently included such allowance; while on the part of the corporation it was alleged that such road had been opened by the then proprietors of these lots for their own convenience merely; that it was too narrow, on low ground, and insufficient for the public convenience, for which the original allowance was required; and that the corporation, though frequently applied to, had always refused to convey such allowance to the owners of the lots:—Held, that if the travelled road had been given in lieu of the original allowance as alleged, the owners of the lots who had taken possession of such allowance would have a title to it, under ss. 334, 338, of the Municipal Act, 29 & 30 Vict. c. 51 (O.); that there was evidence which would well warrant a jury in finding that it had been so granted; and that the by-law should therefore be quashed, leaving the question to be determined by action. *Burritt* v. *Township of Marlborough*, 29 U. C. R. 119.

An original allowance being impassable at one point, owing to ravines, &c., the road commissioners, about seventy years before application, laid out the road a little to the north, where it had since been used as the highway. It did not appear that the owners of the lots over which it passed got any compensation for their land thus taken, and they had had possession ever since of the original allowance, which it was alleged had been given to them in lieu of such land. Under these circumstances, the court, following the preceding case, quashed a by-law to open the original allowance. *In re Webster and Township of West Flamborough*, 35 U. C. R. 590.

——— *By-law—Presumption.*]—Where the owners of lands, adjoining original road allowances, laid out roads on their lands which were used as public roads for upwards of eighty years, the original road allowances being all that time in the occupation of the owners of the lands, and used and treated as their own property, and no evidence was adduced to raise a presumption that compensation had been paid to them for the roads so laid out:—Held, affirming the judgment in 8 O. R. 98, that the presumption was that the original road allowances had been taken and used in lieu of the roads laid out by the original owners through their lands, and that a by-law to open up the original road allowance as of right, was invalid. Re Burritt and Township of Marlborough, 29 U. C. R. 119, approved. Cameron v. Wait, 3 A. R. 175, explained. *Beemer* v. *Village of Grimsby*, 13 A. R. 225.

——— *Inconvenience — Notice—By-law—Direction.*]—Upon an application to quash a by-law to open an original road allowance, on the grounds: (1) That a travelled road in lieu of it had been laid out, and no compensation made to the owners of the land taken. (2) Of inconvenience to the applicant and others, if the road were opened. (3) That it would pass through the orchard and close to the house of the applicant, which had remained in their present position for over twenty years. (4) That sufficient notice of intention to pass had not been given. (5) That the by-law did not declare the road opened, but directed that the occupiers of the lots through which the road passed should open it:—Held, that, upon the affidavits, the first four objections failed, and that the case was one within ss. 335 and 336, and not s. 334, of the Municipal Act of 1866. Held, also, that the fact that the occupiers were directed to give up possession and to open the road by a certain date afforded no legal objection to the by-law, but the direction might be treated as a notice that it was the intention of the council to open the road at the time named. *Re McMichael and Township of Townsend*, 33 U. C. R. 158.

*See*, also, *Cameron* v. *Wait*, 3 A. R. 175.

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(b) *New Roads through Crown Lands.*

**By-law**—*Effect of.*]—A by-law passed by a municipal corporation cannot have the effect of taking any lands of the Crown in addition to those appropriated by the Crown for the purpose of highways in order to the opening up of the country. *Rae* v. *Trim*, 27 Gr. 374.

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(c) *New Roads through Private Property.*

**General Statutory Powers.**] — Under 12 Vict. c. 81, s. 31, a municipal corporation have power to open new roads through any person's lands, under restrictions in the statute. *Dennis* v. *Hughes*, 8 U. C. R. 444.

**By-law**—*Description of Land—Notice—Publication.*]—A municipal by-law establishing a public highway is not void for uncertainty when the boundaries of the land so declared are described in the by-law with sufficient precision to enable them to be traced upon the ground, and, if so properly described, it is not necessary when private ground has been taken to distinguish it as such. The fact that one of two parallel courses in a description has by obvious clerical error been incorrectly given in the published notice is not a valid objection to such a by-law. Where there is no newspaper published in the township, weekly or oftener, it is not obligatory to

publish the required statutory notice of the by-law in a paper issued therein semi-monthly. *Re Chambers and Township of Burford*, 25 O. R. 276.

——— *Description of Land — Obstruction —Action to Restrain—Onus—Statute Labour —Expenditure.*]—It is essential to the validity of a by-law to expropriate land for the purpose of establishing and laying out a highway, that the course, boundary, and width of such highway should be capable of being ascertained from the by-law itself or from some document or description referred to by it, which may be treated as incorporated therewith; failing this the by-law is necessarily inoperative and void. In an action by a municipal corporation to restrain the owner of land from obstructing an alleged public highway over his land, the onus of proving the existence of such highway rests on the plaintiffs; and where the road in question, the land for which had not been expropriated, was described as being " a road on the boundary between the 11th and 12th concessions of the said township from the line between lot No. 30 and lot No. 31, to the line between lot No. 35 and lot No. 36," no survey or other description of the road being referred to in the by-law passed for the purpose of opening up the same, and no sufficient evidence having been given of the performance of statute labour on the line of road:—Held, affirming the judgment in 12 O. R. 297, that the plaintiffs had failed in shewing that the road as claimed by them had been duly established as a public highway. Semble, that the land for a road not having been expropriated, the mere expenditure of public money in opening it and the performance of statute labour upon it does not make it a highway. The proposed road was to be only forty feet in width. The authority of the county council in this behalf was not obtained until after the by-law had been passed, and this application to quash it made:—Held, that the consent of the county council, though a condition precedent to the laying out of the road, was not a condition precedent to the passing of the by-law. *St. Vincent* v. *Greenfield*, 15 A. R. 567.

——— *Effect of.*]—Semble, that the mere passing of a by-law should not be considered ipso facto the opening of a road, but merely as authority to open it in a proper manner, and after reasonable time given to all parties. *Dennis* v. *Hughes*, 8 U. C. R. 444.

——— *Effect of—Direction for Opening.*] —Quære, can any individual justify the opening of a new road through private property, under a by-law establishing the road, when the opening is not authorized or directed in the same by-law, or any supplementary one. *Lafferty* v. *Stock*, 3 C. P. 1.

——— *Free Road—Avoidance of Tolls— Agreement with Adjoining Municipality— Submission to Ratepayers.*] — A by-law was passed by the city of Hamilton on the 10th January, 1887, granting $5,000 towards the construction of a free road leading into Hamilton from the east, to be paid when and so soon as the sum of $3,500 should have been contributed by the corporation of the township of Barton, or any other municipality and private subscribers, and actually expended on the work of construction of the said roads, or on the purchase of the right of way therefor. The payment was also made conditional on the construction of the roads in the manner, and on the terms, and subject to the conditions, in the by-law set forth. Among other conditions was one that no moneys should be paid until the council of the township of Barton should have passed a by-law for the assumption of the said roads, and the proper maintenance thereof by the said township, and until an agreement should have been entered into between the corporation of the said township, and the corporation of the city of Hamilton, providing for the maintenance of the said roads in a proper state of repair, and as free roads for all time to come; and it was further provided that, before any moneys were paid, the city was to be satisfied that the eastern free road should provide connection with the present system of township roads to secure free travel from the top of the mountain, &c. No date was fixed for doing the work, or paying the money, and no provision was made for levying the amount during the municipal year, nor was the by-law submitted to the vote of the people:—Held, that the by-law created a future indefinite and contingent liability, and if such a by-law was valid at all it ought to have been submitted to the vote of the ratepayers. The city derived income from certain sources independent of taxes, but this income with the taxes levied left a deficiency which had been met by borrowing money, which was still unpaid, and no appropriation had been made for the payment of the $5,000: —Held, that this did not validate the by-law without submission to the people. Resolutions and a by-law of the township of Barton dependent upon the Hamilton by-law, held invalid as being part of an invalid arrangement attempted to be made under s. 555 of the Municipal Act of 1883. Held, also, that the arrangement, if valid on other grounds, and one for their joint benefit, might be entered into under s. 555 by the municipalities. Held, lastly, that a by-law passed to open a free road, solely for the purpose of enabling the public to avoid travelling upon a toll road, and thus avoid the payment of tolls—the "free road" not being otherwise required for the public convenience—could not be supported; and the by-laws and resolutions were quashed. *In re Carpenter and Township of Barton*, 15 O. R. 55.

——— *Illegal Provisions—Compensation.*] —Held, that a by-law to open a road over plaintiff's land was bad, for referring proprietors to private persons for compensation, which there was no power to do, and because it directed a passage under the road to be made by persons whom they had no means of compelling to do such work. *Dennis* v. *Hughes*, 8 U. C. R. 444.

Held, that a clause "that the petitioners should pay all expenses and costs incurred in establishing the road, and that none of the county funds should be applied for land taken for said road," and referring plaintiff to unnamed petitioners for compensation, was void. Quære, whether such clause had the effect of rendering the by-law void in toto. *Lafferty* v. *Stock*, 3 C. P. 1. See, also, *Black* v. *White*, 18 U. C. R. 362.

——— *Motion to Quash—Delay—Expenditure.*]—Upon an application to quash a by-law establishing a road, where two years had elapsed and money had been expended under it, the objections not being clearly established, the court refused to interfere. *Standley* v. *Townships of Vespra and Sunnidale*, 17 U. C. R. 69.

——— *Motion to Quash — Objections.*]—On motion made in Michaelmas Term to quash a by-law, passed in the May previous, to open a road, on the ground that the road laid out encroached upon plaintiff's garden and outhouse, and also covered the ground upon which his toll house stood, it appeared that the plaintiff was heard in person by the municipal council against the passing of the by-law, and, although he then objected to the opening of the road generally, he did not do so upon these grounds. Under the circumstances of the case, the rule was discharged without costs. *Scarlett* v. *Township of York*, 14 C. P. 161.

——— *Necessity for.*]—Under 4 & 5 Vict. c. 10, a county council could not open a new road except by by-law. *Regina* v. *Rankin*, 16 U. C. R. 304.

Where half lots, under the double-front system of survey, did not correspond or meet in any point, and land was taken by the municipality from the plaintiff's lot, in order to make a road to join the side line road allowances, without the passage of any by-law for the purpose:—Held, that there was no power so to do, and that trespass would lie against the municipality. *Taylor* v. *Township of Verulam*, 21 C. P. 154.

——— *Notice—Condition Precedent—Computation of Time—Conformity to By-law.*]—The Municipal Act, 1883, s. 584, enacts that no council shall pass a by-law for establishing a public highway until written or printed notices of the intended by-law have been posted up one month previously in six of the most public places in the neighbourhood of such road, &c. The defendants on the 29th July, 1887, published notices of their intention to pass a by-law on the 29th August, 1887, to open a road across nine lots in the first concession of the township. On that day the council met and passed a by-law establishing a road across four only of the lots mentioned in the notice. The date of putting up the notice was recited in the by-law, and was admitted by the affidavits filed by the defendants on shewing cause to the motion to quash the by-law. Nothing had been done under the by-law:—Held, reversing the judgment in 15 O. R. 43 on this point, that the giving of the prescribed notice is a condition precedent to the right of the council to pass such a by-law; that the month is to be computed exclusive of the first and last days thereof, and, therefore, that a notice on the 29th July of intention to pass a by-law on the 29th August was insufficient. Authorities as to computation of time in such a case considered. Laplante v. Peterborough, 5 O. R. 634, and Wannamaker v. Green, 10 O. R. 547, approved. Quære, whether the council could pass a by-law to open up or establish a road other than the road as described in the notice. Re Baker and Saltfleet, 31 U. C. R. 386, referred to. *Re Ostrom and Township of Sidney*, 15 A. R. 372.

——— *Opening Road Closed by Order of Judge.*]—On the 13th November, 1883, the Judge of the county court of Halton, in which county the lands mentioned in the report were situate, after hearing the several parties interested in the said lands and the streets thereon, made an order altering and amending the plan thereof by closing up and declaring closed certain streets and parts of streets. Notwithstanding such order, the council of the defendant municipality on the 5th December, 1883, passed a by-law accepting and declaring open some streets so closed, and authorizing and directing the road commissioner to remove all fences and obstructions therefrom; whereupon the plaintiff moved for and obtained an order nisi to quash such by-law, which was made absolute: 7 O. R. 192. On appeal that order was affirmed. Sections 82, 83, 84, 85 of the Registry Act, R. S. O. 1877 c. 111, and ss. 525, 527, of the Municipal Act, 1877, considered. *In re Waldie and Village of Burlington*, 13 A. R. 104.

**Compensation** — *Award — Authority — Resolution of Council.*]—A municipality by by-law opened a road across plaintiff's property, and arbitrators were appointed under 16 Vict. c. 181, one by the council, one by the plaintiff, and a third by the county court Judge, to determine what his compensation should be. Afterwards a resolution was passed by the council, that the arbitrators so chosen should be instructed to take into consideration the damages to the plaintiff's crops and fences, so that all differences might be settled, and they awarded separate sums for opening the road and for damages, respectively. The plaintiff having brought debt on this award, defendants pleaded no award:—Held, that under this plea they could not dispute the arbitrators' authority to award the latter sum; but should have moved to set aside the award, or might have pleaded nunquam indebitati to that sum, which would have brought the submission in issue. Quære, whether the resolution was binding upon the council as a reference. *Hodgson* v. *Township of Whitby*, 17 U. C. R. 230.

——— *Condition Precedent to Entry.*]—Where a by-law has been passed for opening a road over certain lands, the municipality is not bound under R. S. O. 1877 c. 174, s. 456, to make compensation to the owner before entering on the land. *Harding* v. *Township of Cardiff*, 2 O. R. 329.

**Compensation Money**—*Attaching Creditor — Mortgagee.*] — Land mortgaged by the owner was taken by a township council for a road, and the compensation having been ascertained by award, the corporation paid the amount to a creditor of the mortgagor, by whom it had been attached:—Held, that the mortgagee had the prior right; that his mortgage being registered, the corporation had notice of it; and that he was entitled to recover the amount from the corporation with costs. *Dunlop* v. *Township of York*, 16 Gr. 216.

**Consent of Land Owner**—*By-law.*]—Under the facts the court refused to quash a by-law for changing the road, on the ground that the applicant had not given his consent to the road passing through his orchard. *In re Lafferty and Counties of Wentworth and Halton*, 8 U. C. R. 232.

——— *Injunction—Status of Plaintiff.*]—The town council of one of the towns mentioned in the schedule to 12 Vict. c. 81, were about to open a street without the permission required by the statute of certain persons owning houses on the land over which it would pass. The court restrained such opening, upon a bill filed by a person owning land on the line of the intended street, although no house stood upon the land, and his premises were not within the exception in the proviso

to s. 60 of the Act. *Wilson* v. *Town of Port Hope*, 2 Gr. 370.

**Trespass**—*Justification—By-law — Limits—Obstructions.*]—A municipal council passed a by-law to open a road in a certain defined course, and by a subsequent by-law appointed the defendant M. a commissioner to remove all obstructions from the highway so defined. M. cut down some trees of the plaintiffs and removed these and portions of fences. Actions of trespass were brought against M. and the council, but the by-laws had not been quashed:—Held, that the road defined in the by-law was the true road, and could properly be opened as therein defined. Held, also, that, whether the road defined in the by-law was the true road or not, and whether, therefore, a trespass was committed or not, the by-laws, being under certain conditions and requirements within the general competence of the council, and not being quashed, afforded a complete defence to the actions. *Connor* v. *Middagh*, *Hill* v. *Middagh*, 16 A. R. 356.

——— *Justification—By-law — Pleading.*]—Quære, whether a plea justifying under a by-law to open a road used, need allege that notice was given, when such notice is required. Semble, that a plea justifying under a by-law for opening a road, should aver that the road was so laid out as not to run through or encroach upon any dwelling-house, &c., though this need not appear on the face of the by-law. *Dennis* v. *Hughes*, 8 U. C. R. 444.

Defendant justified under a by-law of the county council, passed under the Municipal Council Act of 1849, to open a highway:—Held, on demurrer, pleas bad, as they did not shew a calendar month's notice given previous to the passing of the by-law; but imported the contrary, because the by-law was passed within a month after the Act came into operation. *Lafferty* v. *Stock*, 3 C. P. 1.

Trespass qu. cl. fr. against a municipality. The plea set out the petition of the householders for a road to be opened running across this lot, the survey and report thereon, the by-law confirming the road, that the plaintiff claimed damages for such road passing over his land, and was awarded £2 10s., which he accepted in satisfaction of such damages; and they alleged that the trespasses complained of were necessarily committed in opening and making said road in pursuance of said by-law:—Held, on demurrer, plea not double, and a good defence. *Magrath* v. *Township of Brock*, 13 U. C. R. 629.

In trespass q. c. f., defendants justified in different pleas under a by-law for opening a road through the land in question. The third plea alleged that the locus in quo was by virtue of the by-law a public highway. In the fourth plea it was alleged that the defendants committed the trespasses in opening up the road; and in the fifth and sixth, that they were committed under the authority of said by-law, by one of the defendants, being an overseer of highways, and having jurisdiction over said new road, and by the others under his direction. The plaintiff replied to each plea that the road was established, and ran through an orchard, without his consent, contrary to the statute:—Held, that the objections to the pleas that it was not alleged that the road was laid out by a road surveyor, or did not run through an orchard, were removed by the replications, which averred that it was established, and did run through the orchard. That the replication to the third and fourth pleas was good, for it was not shewn in them that defendants were doing anything under the by-law, or that they had any authority to open the road, and therefore it was no protection, although still in force; but that the replication to the other pleas was bad, for in them defendants were alleged to have acted by virtue of the by-law, and they were therefore protected under 22 Vict. c. 99, s. 201. The third plea was held bad, for not alleging that the council had actually opened the road, the mere passing of the by-law not being sufficient to authorize the trespass. *Black* v. *White*, 18 U. C. R. 362.

*See Crooks* v. *Williams*, 39 U. C. R. 530; *Beveridge* v. *Creelman*, 42 U. C. R. 29; *Goodcrham* v. *City of Toronto*, 21 O. R. 120, 19 A. R. 641, 25 S. C. R. 246.

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10. *Selling and Closing.*

(a) *Closing.*

**By-law** — *Description.*]—A by-law for closing an old road need not describe the course, &c., minutely, and it is not bad for directing that the parties applying to have the road closed shall pay the expenses. *Fisher* v. *Township of Vaughan*, 10 U. C. R. 492.

——— *Motion to Quash—Delay.*]—A rule nisi to quash a by-law to stop up a road was refused, where the relator was aware of the intention to pass it, and allowed two years and three months to elapse before moving; the objections urged being that there was no applicant for such by-law, and no sufficient notice of it published. *In re Drope and Township of Hamilton*, 25 U. C. R. 363.

——— *Necessity for—Resolution—Title.*]—The owner of real estate had for many years permitted a public road to be used across his land, which he subsequently agreed to sell; no by-law had been passed by the municipal council of the locality for closing up this road, although a resolution of the council had been passed for the purpose:—Held, on appeal from the master's report, that under the circumstances he should have reported that a good title was not shewn. *Kronsbien* v. *Gage*, 10 Gr. 572.

——— *Notice — Condition Precedent—Defective Publication.*]—A municipal corporation passed a by-law to close up a highway, but the notices of the intended by-law, required to be given under the Consolidated Municipal Act, 1883, were only published for three successive weeks in a newspaper, instead of four, as required by s. 546 of that Act, and it was not shewn when the six notices required to be posted up were posted, nor what they or the advertisement contained:—Held, in an action for breaking down fences across the road closed up under the by-law, that the notices required to be given were conditions precedent, the due performance of which were essential to the validity of the by-law. *Wannamaker* v. *Green*, 10 O. R. 457.

——— *Notice of Day for Considering.*]—Held, that the notice of intention to pass a

by-law to close a road should state the day on which the municipal council intend considering the by-law. Semble, that the mere fact of the relator having knowledge aliunde was not a sufficient answer to an application by him to quash for want of proper notice of the day on which the by-law was to be considered. *In re Birdsall and Township of Asphodel*, 45 U. C. R. 149.

A by-law closing a street is invalid and may be quashed where the notice of intention to pass it does not fix a day on which it is to be considered by the council; and the statute (55 Vict. c. 42, s. 546, R. S. O. 1897 c. 223, s. 632), is to be read as if it contained a direction to that effect. *Re Campbell and Village of Southampton*, 18 C. L. T. Occ. N. 119.

——— *Road between Townships.*]—A road used for more than fifty years as the road between two townships, though in fact wholly within one of them, the original allowance being to the north of it:—Held, to be a road dividing townships, over which the county only held jurisdiction, and that a by-law of the township in which it was situated, to close it up, was illegal. *Re McBride and Township of York*, 31 U. C. R. 355.

——— *Road through Several Townships.*]—Quære, whether there is any power to close up a road of the nature of the one in this case, running through more than one municipality. *Hewison* v. *Township of Pembroke*, 6 O. R. 170.

——— *Uncertainty.*]—A by-law closing a road across a lot where there is more than one road is void for uncertainty in not shewing which road was meant. *Wannamaker* v. *Green*, 10 O. R. 457.

**Extent of Powers of Council.**]—Held, that the council might stop up the road though it was not in contemplation to substitute another for it. *Johnston* v. *Recsor*, 10 U. C. R. 101.

Municipal councils have authority to close a road, however long in use. *Fisher* v. *Vaughan*, 10 U. C. R. 492.

——— *Condition—Onus.*]—The power of a municipal council to close up a road, under s. 504 of the Municipal Act, whereby any one is excluded from access to his lands, is a conditional one only, and if another convenient road is not already in existence, or is not opened by another by-law passed before the time fixed for closing the road, the by-law closing the road may be quashed. The onus of shewing that another convenient road is open to the applicant is upon the corporation. *Re Adams and Township of East Whitby*, 2 O. R. 473.

——— *Condition—Other Access—Notice—Award—By-law—Motion to Quash—Interest of Applicant—Estoppel.*]—A by-law was passed by the defendant municipality to close up and grant to a railway company a portion of a street, by which alone the applicant had access to a piece of land sold and conveyed to him by the municipality at a tax sale, without providing other convenient access to the land. The land was unpatented, but the applicant had paid all dues to the Crown land department. The by-law was objected to on the ground that it did not provide other convenient access to the land; that a month's notice of the passing of the by-law was not given, the notice having been given on the 28th March, for the 28th April; that it provided for arbitration by the mayor, and by two persons, one appointed by the railway company and one by the applicant, a mode different from that provided by the statute; and that the award was to be made within one month from the date of passing the by-law, instead of one month from the appointment of a third arbitrator:—Held, that all the objections were well taken, and that the by-law was invalid. Held, also, that the applicant had sufficient interest in the land in question to entitle him to apply; and, at any rate, the municipality were estopped by their conveyance from setting that up; that an applicant affected by such by-law is not bound to wait until the road is actually closed before coming to the court. *In re Laplante and Town of Peterborough*, 5 O. R. 634.

**Justification of Obstruction**—*Pleading.*]—To an action for obstructing a highway, defendants pleaded, averring that before the obstruction complained of it had ceased to be a highway, in consequence of certain proceedings taken by the township council, and set out in the plea:—Held, as to matters stated as inducement in such plea, that it was unnecessary to negative the fact of the road passing through ordnance property, or that it was within the limits of any village, town, or city. *Johnston* v. *Recsor*, 10 U. C. R. 101.

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(b) *Sale and Conveyance of old Road Allowance.*

**By-law Abolishing Highway** — *Enclosure.*]—Under 12 Vict. c. 81, a municipal council may convey a highway as soon as it is abolished by their enactment; they need not enclose it so as to prevent persons from passing. *Johnston* v. *Recsor*, 10 U. C. R. 101.

**By-law Authorizing Closing and Selling**—*Notices—Auction—Owner of Adjoining Land.*]—A township corporation passed two by-laws, one, No. 145, providing that certain original allowances for roads described should be closed and sold by auction on a day named, due notice being first given; the other, No. 146, was to close up that portion of the original allowance for road between lot 32 and 33 in the fourth concession, lying north of the centre of the said lots (which forms the northerly boundary of Freeman's land, and south of the lands owned by C. B. and T. K., the applicants), and comprising that portion of the said road allowance dividing the seven acres of land belonging to the heirs of the late M. C., and now occupied by Mrs. J.; and to sell the same to Mrs. J. at a price named:—Held, as to by-law 145, upon the contradictory affidavits set out, that the objection for want of the necessary notices before passing such by-law was not sustained, the applicants having been heard several times in opposition to the by-law, but never having raised this objection. (2) As to both by-laws, that it was not objectionable to provide for selling, as well as for closing up, the allowance. (3) Nor as to by-law 145, that it provided for closing and selling the allowance by public auction, without providing for the rights of the owner

of adjoining lands, for it was shewn that such owner became the purchaser. Semble, that it might be sufficient to offer the old allowance at the auction to the owner of the adjoining land, and on his refusal to proceed with the sale. As to by-law 146, it was objected that it provided for the sale to Mrs. J., while it shewed on the face of it that the adjoining land was owned by others. It appeared that M. C. had died intestate, leaving children under age, and that Mrs. J. was his widow. M. C. was not shewn to have been the owner, except by the statement in the by-law, and Mrs. J. swore that she had owned the land for five years:—Held, that this objection failed. Held, also, that the road closed up by this by-law was sufficiently described. It was objected, also, that the notice of the intended passing of this by-law described it as a by-law for closing up and selling the original allowance between lots 32 and 33, while the by-law as passed was to close up only a small portion of it:—Held, no objection. *In re Baker and Township of Saltfleet*, 31 U. C. R. 386.

**By-law Authorizing Conveyance** — *Notices—New Road—Unpatented Land—Survey.*]—In ejectment for an allowance for road, claiming under a deed from the corporation of the township, the plaintiff proved a by-law, reciting that a public road had been opened through lot 27, in lieu of the original allowance between it and lot 26, and authorizing a conveyance of the said allowance to the plaintiff, being the person through whose land such road had been opened:—Held, necessary for the plaintiff to prove the notices required by 20 Vict. c. 69, s. 8, to authorize the by-law. When the new road was opened, the patent for lot 27 had not issued:—Held, that the plaintiff, not having owned the land when the road was opened through it, was not entitled to the old allowance. The surveyor's report required by 20 Vict. c. 69, s. 5, certified that the road opened answered the purpose of a public highway, not that it was sufficient for the purposes of a public road or highway, as the statute directs:—Semble, not a substantial compliance with the Act. 20 Vict. c. 69 requires such a by-law, before it can have any effect, to be confirmed by the county council within a year from its passing. Before such confirmation 22 Vict. c. 99 repealed that Act, saving all things done thereunder, and by it no confirmation of such a by-law was made requisite:—Semble, that the confirmation of this by-law was not dispensed with. *Winter* v. *Keown*, 22 U. C. R. 341.

——— *Substitute Road.*]—On application to quash a by-law authorizing the conveyance to certain persons of an allowance for road, it appeared that a road intended to be in lieu of it had been laid out in 1833, and constantly used since, but whether it had been legally established or not was doubtful; that conveyances had been actually executed in pursuance of the by-law; and that it had not been confirmed by any county by-law, and was therefore inoperative. The court, under these circumstances, refused to interfere. *In re Choate and Township of Hope*, 16 U. C. R. 424.

**Right of Pre-emption**—*Owner of Adjoining Lands—Mortgagee.*]—A mortgagee of land adjoining a highway is one of the persons in whom the ownership of it is vested for the purposes of s.-s. 9 of s. 550 of the Consolidated Municipal Act, 1892, and as such is entitled to pre-emption thereunder, subject to the right of the mortgagor to redeem it along with the mortgage, or to have it sold to the mortgagor subject to the mortgage, if the mortgagor so prefer. *Broun* v. *Bushey*, 25 O. R. 612.

**Surveyor of Highways**—*Conveyance by—Description — Trespass Road.*]—In ejectment for land described as being formerly a public highway from W. to C., it appeared that before 1835 there had been a trespass road between those places, running across defendant's lot. In that year a road was laid out and sanctioned by the sessions, intended as a substitute for the former one. Defendant then enclosed a portion of the old road, and had possessed it for more than twenty years, but a small piece remained not enclosed, and the plaintiff claimed this under a deed which he received from the surveyor of highways in 1837, purporting to convey to him "the public highway or road from W. to C.," as described by metes and bounds:—Held, that the surveyor had no right to sell the old road, as it was not a public road allowance nor a legal highway, and that the plaintiff, therefore, could not recover. Semble, that the description in the deed to the plaintiff was too uncertain to convey anything. *Clapp* v. *Haight*, 19 U. C. R. 94.

——— *Report of—Allowance by Sessions—Conveyance by Surveyor.*]—In 1812 a report was made by J. M., surveyor of highways, reciting an application of twelve freeholders, as required by 50 Geo. III. c. 1, and stating that he had "examined the situation of the land for a new road in the township of S., leading from lot No. 16 in the third concession, across lots Nos. 17 and 18 in the said third concession, until it intersects the forty feet road between 18 and 19; then following the forty feet road until it intersects the lane in front of T. A.'s house; then across the different lots in the third concession aforesaid, until the said new road intersects the forty feet road between Nos. 30 and 31." This report was afterwards allowed by the sessions, as appeared by a minute indorsed on the report, and signed by the chairman. P., the owner of lot 29, went before the sessions to oppose the change in the road, but withdrew his opposition on being told that he would get the old allowance in lieu of the ground taken from him by the new road. No conveyance was made till 1831, when the surveyor of highways for that year executed a deed to P. for the old allowance, which deed was expressed to be made under 50 Geo. III. c. 1. F., the owner of the adjoining lot in the second concession, having thrown down the fences erected by P. to enclose the old allowance, was sued by him in trespass, and justified on the ground that the locus in quo was a common highway. F. then procured P. to be indicted for obstructing a highway, being this same road allowance:—Held, that the conviction could not be supported, for it was not shewn that any order had been made, or notice given, as required by 9 Vict. c. 8. Held, also, that there was not sufficient in the report, or the evidence given, to authorize the surveyor to convey, as it did not appear that the old allowance had become unnecessary for a public highway; and that the action of trespass could therefore not be maintained. Semble,

that it should also have been stated that the old road was one then in use, for that the surveyor has authority under the statute only to convey land over which there was an actual highway. *Purdy* v. *Farley*, *Regina* v. *Purdy*, 10 U. C. R. 545.

——— *Report of—Allowance by Sessions —New Road—Conveyance in Compensation —By-law—Repeal.*]—The plaintiff claimed in right of his wife, under a deed to her, dated 7th October, 1867, of the south half of lot 9 in the 5th concession of Haldimand, to be entitled to the original allowance for road between lots 8 and 9, by reason of the justices of the quarter sessions having in 1837 laid out a road across the south half in lieu, as was contended, of the original allowance. In proof thereof the report of the then surveyor was produced, dated 15th July, 1837, addressed to the justices, reciting the petition of twelve freeholders for the new road, with his certificate of his having examined and surveyed it and given notice according to law; the road to be 50 feet wide. He also certified as to his having examined the original allowance, and found it impracticable by reason of bad hills and swamps, while the new road was good. On the back of the report was indorsed the minute of the quarter sessions thereupon, namely, "Read and opposed and confirmed this 18th July, 1837," which, with the user, &c., of the road as a highway, was the only evidence of their action in the matter. In March, 1866, a by-law was passed opening up this allowance, and the owner of lot 9 then moved his fence to the limit of the allowance. In November, 1875, a by-law was passed repealing the previous by-law, but without expressing it to be for the purpose of closing up this road allowance. At the time the road was laid out, the quarter sessions had no power to sell an original road allowance or convey it to the person whose land was taken in compensation; and they could only alter a road on condition that the new or substituted road should be of not less width than the one for which it was substituted, while in ordering a new road they had a discretion to lay it out of any width between 40 and 60 feet. The original road allowance in question was 60 feet, while the new road was 40 feet:—Held, in the common pleas, that the plaintiff acquired no right to the original allowance under 50 Geo. III. c. 1, and 4 Geo. IV. c. 10, under which the new road, if legally laid out at all, was laid out, and under which he must be assumed to have received compensation, or to have released or discharged his claim therefor, nor under 20 Vict. c. 69, or the subsequent Municipal Acts identical therewith; or at all events they did not apply to a road opened up by the quarter sessions, not in lieu of the original allowance, but as a new road, which its course and its not being of the same width as the old road was evidence of, or to such road not opened up by the owner himself, but by authority against his will, or by his consent, without any claim for compensation. Quære, whether the owner at the time the new road was opened, was not the only person, if any there was, entitled to a conveyance, and whether his right would pass by a mere conveyance of the lot. Held, also, that it was a condition precedent to the granting of such conveyance that the old road should be useless, whereas the passing a by-law to open it up was evidence to the contrary. Held, also, that the evidence that the owner of lot nine had in 1865 petitioned for the opening up of the old road allowance, was admissible. Held, also, that the by-law passed in November, 1875, repealing the previous by-law, did not operate as a by-law for closing up the allowance. Held, also, that, even if entitled to a conveyance, the plaintiff could not claim without one under the statute. The various statutes upon the subject reviewed. *Cameron* v. *Wait*, 27 C. P. 475.

Held, on appeal, affirming the above judgment, that the plaintiff acquired no right to the original allowance under 50 Geo. III. c. 1, and 4 Geo. IV. c. 10, under which the road was laid out; nor under 20 Vict. c. 69, or the subsequent Municipal Acts identical therewith. *S. C.*, 3 A. R. 175. Affirmed in the supreme court, *Cassels' Dig.* p. 332.

*See Re McKinnon and Township of Caledonia*, 33 U. C. R. 502.

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(c) *Taking away Ingress and Egress.*

**By-law**—*Compensation—Other Convenient Way—Description.*]—Where a by-law passed by a township corporation closed up a public road, whereby the plaintiff was excluded from ingress and egress to and from his land and residence, and did not provide any compensation to the plaintiff or some other convenient road or way, except that the road to one-half its length and width was given to the plaintiff as a private way:—Held, that the by-law was invalid for not awarding compensation, and must be quashed. The by-law did not contain any description of the part given to plaintiff so as to ascertain its extent:—Semble, that for this reason also the by-law was invalid. *In re Annis and Township of Mariposa*, 25 C. P. 133.

——— *Compensation—Other Convenient Way—Provisions of By-law.*]—Held, reversing the judgment in 29 C. P. 216, that s. 504 of R. S. O. 1877 c. 174—providing that no council shall close up any public road, "whereby any person will be excluded from ingress and egress to and from his lands or place of residence over such roads, unless the council, in addition to compensation, also provides for the use of such person some other convenient road or way of access to the said lands or residence"—only applies to cases where the only means or convenient means of access is over the road closed up, and not where there is already another existing way of access, though a less convenient one. It is not a condition precedent under s. 504 that compensation should be provided for in the by-law closing up the road. *In re McArthur and Township of Southwold*, 3 A. R. 295.

——— *Compensation—Other Convenient Way—State of.*]—The absence in a by-law for closing up a road allowance of any provision for compensation and for another convenient road or way, in lieu of the one closed up, is no ground for setting aside the by-law, for the compensation may be in money or some other means outside the by-law, and there may be a convenient road already in existence, or it may be provided by a separate by-law. Where, on such application, the evidence was contradictory as to whether such substituted way was fit for travel or not, the court suggested the issue of a mandamus and the employment of some competent person to inspect and report, by

which the true state of the road might be determined. *In re Thurston and Township of Verulam*, 25 C. P. 539.

——— *Enforcement — Injunction — Legal Validity—Other Convenient Way—Compensation—Delay — Arbitration — Public Interest.*]—Although the court of chancery has power to restrain the enforcement of a by-law of doubtful validity until the applicant has had an opportunity to move in a court of common law to quash it, it has no general jurisdiction to test its legal validity. The omission in a by-law which closes up a road to provide for the lands abutting thereon some other convenient road or way of access, under s. 422 of the Municipal Act of 1873, does not render it void, but only subject to be quashed upon application to one of the superior courts of common law within a year. Where, therefore, a bill was filed three years after the passing of such a by-law, seeking to have it declared invalid, and asking for compensation: — Held, that the court of chancery had no power to interfere. Held, also, that under s. 373 the only mode of fixing the compensation was by arbitration. At the hearing it was agreed that the corporation should keep open two rods of the road at the north-west corner of the plaintiff's land as part of the public road, and that the plaintiff's claim to have the whole road kept open should drop; whereupon a decree was made perpetually enjoining the defendants from closing up the two rods:—Held, that the consent could not give power to make such a decree, for under the statute the corporation could not thus deprive itself of the power to close up such road, if the public interest should so require. *Vandecar* v. *Township of East Oxford*, 3 A. R. 131.

——— *Motion to Quash — Objection — Status of Applicant—Notice—Compensation —Provisions of By-law—Private Interests.*]—On an application to quash a by-law closing up a road:—Held, that it was not open to the applicant to object that the road in question was a private way over one C.'s land, because the applicant himself had treated it as a public highway, and had caused C. to be convicted several times for obstructing it. Held, also, that the evidence shewed that the applicant had due notice of the intention to pass the by-law. Held, also, following In re McArthur and Township of Southwold, 3 A. R. 295, that the deprivation of the use of the road by the applicant, if the by-law had that effect, was a subject for compensation only, which need not be provided for in the by-law. It appeared that the only persons interested in the maintenance or closing of the road were the applicant and C., who was instrumental in having it passed. The township council consisted of five members, of whom C. was one, the concurrent votes of three of whom were necessary to the passage of a by-law. The by-law here received three votes, including C.'s:—Held, that the by-law could not be upheld, for that C.'s interest in its passage, which was apart from that of the public, disentitled him from voting. Held, also, that it was objectionable as being passed to serve private interests, and not bonâ fide in the interests of the public. *In re Vashon and Township of East Hawkesbury*, 30 C. P. 194.

——— *Public Highway by User—Purchaser from Owner.*]—Where a road was laid out over land by the owners thereof, and was so used by the public, without interruption, for 30 or 40 years:—Held, that it had become a public highway, and could not be stopped up by by-law of the municipal council, particularly at the instance of a purchaser from one of such owners of the land, with knowledge, too, on his part, of the existence of the road. Remarks as to the construction and effect of 29 & 30 Vict. c. 51, s. 320, which provides that no council shall close up any highway whereby any person will be excluded from ingress and egress to and from his lands and place of residence over such road. *Moore* v. *Township of Esquesing*, 21 C. P. 277.

**County Road**—*Jurisdiction — Owners of Lands not Abutting.*]—The corporation of the town of Tilsonburg passed a by-law to close up 250 feet of a street within its limits, called Cranberry street, substituting therefor new streets: the street forming part of a road running through different townships in the county into the town:—Held, that the county had not sole jurisdiction over the whole road, but that the town had jurisdiction over the part within its limits, and therefore had power to close it up. Held, also, that s. 320 of the Municipal Act of 1866, 29 & 30 Vict. c. 51, does not apply to persons whose lands do not abut on the portion of the road closed, although they may have lands on another part of it. *Re Falle and Town of Tilsonburg*, 23 C. P. 167.

*See Regina* v. *Moss*, 5 Ex. C. R. 30.

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11. *Timber on Road Allowances.*

**Sale of** — *By-law Authorizing — District Council.*]—A district council had no power under 4 & 5 Vict. c. 10, to pass a by-law authorizing a township council to sell and dispose of trees growing upon the allowances for roads, &c. *Cochran* v. *Hislop*, 3 C. P. 440.

**Trespass**—*Right of Action — By-law.*] — Held, that a township corporation, without having passed any by-law on the subject, could maintain trespass for cutting and carrying away trees upon government allowances for roads; for the power to pass by-laws for preserving or selling such trees gave them also the right to recover from a wrongdoer their value, which right might be exercised without any by-law. *Township of Burleigh* v. *Hales*, 27 U. C. R. 72.

——— *Right of Action — By-law — Licensee of Crown.*]—Licensees of the Crown of timber limits, covering allowances for roads, are not liable to be sued for cutting timber on such road allowances under the authority of the Crown, when no steps have been taken by the municipality to pass a by-law dealing with such timber. *Township of Burleigh* v. *Campbell*, 18 C. P. 457.

Held, affirming the judgment in 20 C. P. 369, that municipal corporations are entitled to the timber and trees growing upon the original road allowances, though, in order to dispose thereof by sale, or to prevent or punish trespassers, a by-law or by-laws must necessarily be passed; and that therefore an action will lie, at their suit, for cutting such timber, against timber licensees of the Crown, even though the licenses were granted before the passing of the by-laws, the licensees at the time of cutting having had notice of the by-law. Held, that the licenses granted to the defendants in this case did not authorize them

to cut and carry away the timber and trees from the road allowances in question. *Township of Barrie* v. *Gillies*, 21 C. P. 213.

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12. *Other Cases.*

**Dissolution of United Counties** — *Moneys Paid for Roads — Recovery from Townships.*]—Held, that, under 14 & 15 Vict. c. 5. s. 6, and 12 Vict. c. 78. s. 15, the county of Wellington might maintain actions against the townships of Wilmot and Wellesley respectively for moneys paid on account of the Guelph and Dundas Road, as well by the united counties of Wellington and Grey before the dissolution as by Wellington afterwards. As to the first mentioned payments, 12 Vict. c. 78. s. 15. must be taken to allow such recovery notwithstanding the technical rule of law against assignment of debts. Held, also, that on the special count any part of the debt actually due for such roads might be recovered, though it had not yet been paid. Quære, whether the county could have enforced payment by levying a rate on these townships. *County of Wellington* v. *Township of Wilmot, County of Wellington* v. *Township of Wellesley*, 17 U. C. R. 82.

**Purchase of Government Roads**—*Debentures—By-law—Submission.*] — A county council has power, under C. S. U. C. c. 54, s. 226, to contract with the government for the purchase, at a price beyond $20,000, of any public works, roads, &c., in Upper Canada, and to issue debentures for the payment thereof in twenty years, without a by-law to authorize the same. Semble, that if it be thought desirable to pass such a by-law, it need not be first submitted to the ratepayers for assent thereto. C. S. C. c. 28, s. 76, specially authorizes the sale to any municipal council by the government of the public roads lying beyond the limits of such municipality. *In re O'Neil and Counties of York and Peel*, 15 C. P. 249.

**Removal of Obstructions**—*Company's Road—By-law—Conviction.*]—Held, that the special rights and privileges conferred on the St. Catharines, Thorold, and Suspension Bridge Road Company, who had constructed their road over what had previously been a highway, under 12 Vict. c. 84, s. 22, did not take away the general powers possessed by the municipalities through which it passed, as to the removal of obstructions. Where, therefore, the defendant was convicted by the police magistrate for the town of Clifton for unlawfully incumbering a street in the said town, being a portion of the road in question, by placing and leaving thereon a cart used by him for taking likenesses, contrary to a by-law of the said town, the conviction was sustained. *Regina* v. *Davis*, 24 C. P. 575.

**Removal of Weeds.**]—Municipal corporations are not "owners" or "occupants" of highways in their municipalities within R. S. O. 1887 c. 202. "An Act to prevent the spread of noxious weeds," &c., nor does the word "land" therein include street or highway. The appointment of an inspector under the Act being discretionary with the council unless petitioned for by the necessary number of ratepayers, and that of an overseer being altogether discretionary, in the absence of such appointments no duty is cast on the council to cut down noxious weeds growing in the streets. *Osborne* v. *City of Kingston*, 23 O. R. 382.

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V. Highways—Obstruction of.

1. *Indictment for.*

**Conviction for Nuisance** — *Assumption of Road by Company.*]—The defendant, having built a row of shops coming up to the highway, erected a platform in front of them upon the highway, and raised about three feet above it, with a flight of steps leading down from one end into the side road which intersected it. The road on which the shops were, had been a public highway for forty years until about fifteen years before the erection of the platform, when it was gravelled by a joint stock road company, who had since kept it in repair and collected tolls. The defendant was convicted on an indictment for thus obstructing the highway, the jury having found that the platform was in fact a nuisance:—Held, that the conviction was right, and that the road being a highway, its assumption by the road company was no answer to the indictment. *Regina* v. *Davis*, 35 U. C. R. 107.

——— *Judgment—Abatement — Fine.*] — Defendants were indicted for a nuisance in obstructing a highway by improper construction of their road in crossing it, and were convicted on a nisi prius record. Nothing having been done to abate the nuisance, the prosecutors moved for judgment on the conviction. No affidavits were filed, nor did any one appear in opposition. Judgment was therefore given sentencing the defendants to pay a fine of £100 to the Queen and to abate the nuisance. *Regina* v. *Grand Trunk R. W. Co.*, 17 U. C. R. 165.

——— *New Trial — Appeal — Evidence.*] —The defendant was convicted at a recorder's court upon an indictment for a nuisance in obstructing a highway. The evidence was contradictory, the result of the verdict being to shew that he and several others, whose houses and enclosures had been standing for several years, were encroaching on a street. A new trial having been refused, the court, on appeal, considering the importance of the case, and that the grounds of the judgment below were not given to them, directed a new trial, contrary to the usual rule, which was affirmed, that such appeals will not be entertained upon questions of evidence. *Regina* v. *McLean*, 22 U. C. R. 443.

**Conviction for Overflow**—*Existence of Highway.*] — Defendant, being indicted for overflowing a highway with water by means of a mill dam maintained by him, objected that there was no highway, and could be no conviction, because the overflowed road, which was an original allowance, had been in some places enclosed and cultivated. It was used, however, at other points, and those who had enclosed it were anxious that it should be opened and travelled, which they said was impossible owing to the overflow. The overflow, too, was at other parts than those so enclosed:—Held, that a conviction was clearly right. *Regina* v. *Lees*, 29 U. C. R. 221.

**Costs**—*Acquittal.*]—See *Regina* v. *Hart*, 45 U. C. R. 1.

——— *Fine — Previous Conviction — Res Judicata.*]—Where a defendant had been convicted of a nuisance in obstructing a certain highway by a fence, and, after removal of such fence by the sheriff under process, replaced it upon the same highway, though not in precisely the same line as before:—Held, that the former conviction was conclusive against defendant as to the existence of the alleged highway, and that he could not again raise the question on this indictment for obstructing the same highway. Where the indictment was removed into a superior court by the prosecutors: — Held, that the defendant was not liable to costs; but the court ordered that one-third of the fine imposed should go to the prosecutors, and suggested that the government might on application order the remaining two-thirds to be paid to them, the whole fine being less than their costs incurred. *Regina* v. *Jackson*, 40 U. C. R. 290.

——— *Fine—Township—Prosecution by.*]—A township municipality prosecuting an indictment for obstructing a highway in the township, which indictment had been removed on the defendant's application into a superior court, and the defendant convicted thereon:—Held, to be "the party aggrieved" within 5 & 6 Wm. & M. c. 11, s. 3; and the defendant, having to pay their costs and his own, amounting to over $400, was fined only $1. *Regina* v. *Cooper*, 40 U. C. R. 294.

——— *Taxation.*]—Upon an application for a rule to tax the costs of proceedings on indictment under 5 & 6 Wm. & M. c. 33, and that they should be allowed to a particular person, the court refused the rule. A side bar rule is granted in England to tax these costs as a matter of course, but this application went further. *Regina* v. *Gordon*, *Regina* v. *Robson*, 8 C. P. 58.

**General Verdict**—*Question Submitted—Interference by Court—Certiorari.*]—On an indictment for nuisance judgment had been arrested, and a second trial had, in order to take the opinion of the jury on a particular question which the court thought material. The jury upon the second trial found a general verdict of acquittal without answering such question, which was submitted to them by the Judge. The indictment had not been removed by certiorari, and it was held, therefore, that the court could not interfere by staying the entry of judgment until a new indictment could be preferred. Semble, that the jury had a right to find generally as they did. *Regina* v. *Spence*, 12 U. C. R. 519.

**Nuisance** — *Lowering Grade—Statute.*]—Where a street ran into a road allowance, but did not cross it, and defendants, being incorporated under 16 Vict. c. 190, for gravelling the road, so far lowered the level, in order to get the grade prescribed by the statute, as to make the approach from this street impassable:—Held, that they were justified in so doing, and not guilty of a nuisance in obstructing the street, or obliged to restore the approach. *Regina* v. *Woodstock and Dereham Plank and Gravel Road Co.*, 18 U. C. R. 49.

**Permitting Embankment in Highway** — *Consent to Original Erection — Removal of Water—Verdict—Leave Reserved.*] — About thirty-five years before indictment one S., with the assent of the then road commissioners, built a dam or embankment eighteen feet wide along the line of road, where there was a valley and creek, being allowed therefor five years' taxes and statute labour. This embankment was used for the purpose of his mill and for the highway. Nothing was said as to who should keep it in repair, and statute labour was afterwards done upon it as elsewhere. The embankment having become too narrow and unsafe, the defendant, the owner, was indicted for putting the embankment on the highway, and permitting it to remain there, as an obstruction: — Held, that the indictment would not lie, for he could not, under the facts stated, be compelled to remove the embankment, though he might be required to remove any water collected on the highway there, and indicted for neglect to do so, or might be liable in a civil action for the injury thus done to the embankment. Quære, whether upon such an indictment tried on the civil side, and a verdict for the Crown, a verdict can be entered for the defendant on leave reserved. The proper course is, to reserve a case under C. S. U. C. c. 112. *Regina* v. *Fitzgerald*, 39 U. C. R. 297.

*See post* 3 (b).

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2. *Removal of Buildings.*

**Building on Road Allowance.**]—See *McNab* v. *Township of Dysart*, 22 A. R. 508.

**By-law** — *Injunction.*] — In an action to restrain the defendants from enforcing a by-law to compel the plaintiff to remove a verandah projecting some distance over one of the streets of a town, it was held, on the evidence, that the verandah had been built after the street had been dedicated and laid out, and that it was therefore an unlawful obstruction; but, as it had been in existence for a great many years and as no special necessity for its removal was made out, the court refused to grant the defendants a manadatory injunction against the plaintiff for its removal, leaving them to enforce their by-law in such way as they should be advised. *Caldwell* v. *Town of Galt*, 27 A. R. 162.

**Existence before Dedication** — *Compensation.*]—The right of the public to the free and unobstructed use of a street cannot be taken away by the existence of an obstruction at the time when the street is dedicated; nor is the occupier of a house which constitutes such obstruction entitled to compensation from the municipality for its removal. *Brown* v. *Town of Edmonton*, 23 S. C. R. 308.

**Petition**—*Evidence.*]—By s. 454 of the charter of the city of Halifax, any person intending to erect a building upon or close to the line of the street, must first cause such line to be located by the city engineer, and obtain a certificate of the location; and, if a building is erected upon or close to the line without such certificate having been obtained, the supreme court, or a Judge thereof, may, on petition of the recorder, cause it to be removed. A petition was presented to a Judge, under this section, asking for the removal of a porch built by R. to his house on one of the streets of the city, which, the petition alleged, was upon the line of the street. A porch had been erected on the same site in 1855 and removed in 1885; while it stood, the portion of the street outside of it, and since its removal the portion up to the house, had been used as a public sidewalk; on the hearing of the petition the original line

of the street could not be proved, but the Judge held that it was close to the line so used by the public, and ordered its removal: —Held, that the evidence would have justified the Judge in holding that the porch was upon the line, but having held that it was close to the line, while the petition only called for its removal as upon it, his order was properly reversed. *City of Halifax* v. *Reeves*, 23 S. C. R. 340.

**Statute**—*Exception—Compensation.*] — A statute confirming a survey of a town provided that houses built before a named date need not be removed though encroaching upon streets as ascertained by such survey, but that this "shall not apply to any fence, steps, platform, sign, porch, or projection attached to any such dwelling house:"—Held, that a verandah of wood, resting on stone pillars, having its own roof, and firmly attached to such a house, was an integral part of the house, and not a porch or projection attached to it, and need not be removed under the Act. Held, also, that the position of the house and verandah did not debar the owner from applying for compensation under the Municipal Act for damage sustained, within s. 448 of that Act, by lowering the grade of the street in front. *Williams* v. *Town of Cornwall*, 32 O. R. 255.

*See* also *post* 3 (b).

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### 3. *Suits and Actions.*

#### (a) *Action at Law—When it Will Lie.*

**By Municipality against Railway Company**—*Special Damage.*] — The plaintiffs, a township municipality, declared that they were proprietors of a certain public road between two concessions of said township, and complained that the defendants, in constructing their railway, so negligently and unskilfully made certain drains as to greatly injure said road and compel them to expend large sums in repairing same: — Held, declaration good, as shewing a special injury to the plaintiffs sufficient to sustain the action; for though as a municipality they were not proprietors of the road, yet it might have been purchased by them from some joint stock company, or otherwise. *Township of Sarnia* v. *Great Western R. W. Co.*, 17 U. C. R. 65.

**By one Private Person against Another**—*Special Damage.*] — To maintain an action for obstructing a public way, the plaintiff must shew some substantial damage peculiar to himself, beyond that suffered by the rest of the public who use the way. The plaintiff here proved no such damage beyond being obliged, in common with every one else who attempted to use the way, to pursue his journey by a less direct road:—Held, following Winterbottom v. Lord Derby, L. R. 2 Ex. 316, that he had no right of action. At the trial defendant raised no objection on the above ground, but denied the existence of the alleged highway, and the jury found in his favour: — Held, that he might, nevertheless, support his verdict on this ground, it being admissible under "not guilty." *Baird* v. *Wilson*, 22 C. P. 491.

**By Private Person against Municipality**—*Special Damage.*]—In an action for obstructing a road, the plaintiff declared that he was possessed of a certain close, and by reason thereof was entitled to a certain way, which he charged the defendants with obstructing. The defendants traversed the right of way set up:—Held, that the plaintiff was bound to shew an easement as alleged, and could not proceed for the obstruction of a public highway: and, even if he could, no special damage was alleged, without which he could not sue as a private individual. *Fisher* v. *Township of Vaughan*, 12 U. C. R. 55.

**By Private Person against Railway Company**—*Special Damage.*]—The plaintiff owned land on Railway and Inchboy streets in the city of Hamilton, the former of which streets ran northwards to Burlington Bay. Defendants owned the land along the shore of the bay and on both sides of Railway street, as far as the damage complained of extended, and in the construction of their depots cut away the end of the street at the shore of the bay, making an embankment and preventing egress to the northwards:—Held, that the plaintiff could not sue for this, for no private injury was proved, and no damage could therefore be claimed. *Jarvis* v. *Great Western R. W. Co.*, 8 C. P. 115.

**Proof of Injury Peculiar to Plaintiff.**] — See *Ward* v. *Great Western R. W. Co.*, 13 U. C. R. 315; *Small* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 283; *Jarvis* v. *Great Western R. W. Co.*, 8 C. P. 115; *Brown* v. *Toronto and Nipissing R. W. Co.*, 26 C. P. 206; *Hamilton and Brock Road Co.* v. *Great Western R. W. Co.*, 17 U. C. R. 567; *Peters* v. *Hall*, 29 U. C. R. 472; *Baird* v. *Wilson*, 22 C. P. 491.

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#### (b) *Injunction.*

**Bill of Complaint** — *Pleading — Sufficiency of Allegations.*]—Where a bill by a municipality, seeking to restrain the defendants from obstructing a highway, in one paragraph alleged that the defendants "have fenced or allowed the same to be fenced," and in another paragraph that they were "in the occupation and possession of the said side line . . . and have prevented and still prevent the inhabitants . . . and the public at large from travelling on and over the said line . . . and have refused and still refuse to open the said line or to allow the plaintiffs to do so," and that the defendants claimed to be entitled to the road:—Held, on demurrer for want of equity, that the allegations taken together were sufficient to entitle the plaintiffs to the relief: although, had the only allegation been that the defendants had "fenced or allowed the same to be fenced," it would not have entitled the plaintiffs to the injunction prayed for. *Township of McKillop* v. *Smith*, 24 Gr. 278.

**Information**—*Pleading — Uncertainty.*] — An information to restrain a nuisance, caused by the erection of a fence on a public highway, alleged that "the defendants or some or one of them" had put up such fence:—Held, bad on demurrer, as being too uncertain an allegation as to who had committed the act complained of. *Attorney-General* v. *Boulton*, 20 Gr. 402.

**Municipal Corporation** — *Private Person—Special Injury to.*]—A municipal corporation, although it has, under the statute,

full powers conferred upon it of opening, making, or stopping up roads, streets, and other communications, is not at liberty to place obstructions thereon whilst retained as roads or streets. Where, therefore, it was shewn that the corporation of the town of Cornwall was constructing a weigh scales on a corner of the principal street in the town, which would have caused a special injury to the plaintiff, who kept a store at such corner, the court, at the instance of the plaintiff, restrained the construction on the ground of nuisance. *Cline* v. *Cornwall*, 21 Gr. 129.

——— *Remedy by Bill.*]—A municipality may file a bill to compel a railway company to put streets and highways improperly traversed by their line of railway in good repair, and will not be restricted to proceedings by indictment or information. *Fenelon Falls* v. *Victoria R. W. Co.*, 20 Gr. 4.

An action for an injunction may be maintained by a municipality to restrain the obstruction of a highway. They are not confined to the remedy by indictment. Fenelon Falls v. Victoria R. W. Co., 20 Gr. 4, approved of. *St. Vincent* v. *Greenfield*, 15 A. R. 567.

——— *Remedy—Declaratory Judgment.*]—A municipal corporation has the right to have it declared, as against a private person, whether or not certain land is a public highway, and whether such person has the right to possess, occupy, and obstruct the same. And in an action brought by the municipal corporation for the purpose, a declaration may be made according to the facts, and the defendant enjoined from possessing or occupying the land so as to obstruct the use of it as a public highway. Fenelon Falls v. Victoria R. W. Co., 29 Gr. 4, followed. Gooderham v. City of Toronto, 21 O. R. 120, 19 A. R. 641, applied and followed. *City of Toronto* v. *Lorsch*, 24 O. R. 227.

**Private Nuisance** — *Railway—Property Owner.*]—A railway company being about to construct their line along a public street, a bill was filed by the owner of property in front of which it would pass, to restrain the construction of the road, on the ground, as alleged, that his property would be thereby greatly depreciated in value from divers causes, and rendered greatly less eligible from the inconvenience and danger occasioned by the cars running immediately in front thereof, and the present traffic be diverted from that part of the road:—Held, that the injury as alleged did not amount to a private nuisance, and therefore the complainant was not entitled to an injunction. Held, also, that, as the injury was not irreparable, the court would not, if otherwise in favour of the plaintiff, have granted the application. *Magee* v. *London and Port Stanley R. W. Co.*, 6 Gr. 170.

**Relief Prayed by Defendant**—*Trespassers.*]—In a suit brought to have boundaries declared, the defendants claimed the right to an injunction to restrain the plaintiff from retaining the use of a road along a portion of the shore of Muskoka bay. It appeared that the road in question was of great public utility and benefit; that the defendants were not riparian proprietors, there being a road allowance laid out along the shore between their lands and the waters of the bay; and that the defendants had built their mills—one partly in the waters of the bay and partly on the public highway, the other in the navigable waters of the bay:—Held, that the defendants were to be treated as plaintiffs seeking relief by bill, and, following Giles v. Campbell, 19 Gr. 226, that being themselves trespassers, they were not entitled to any relief against the plaintiff. *Cockburn* v. *Eager*, 24 Gr. 469.

*See Caldwell* v. *Town of Galt*, 27 A. R. 162.

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(c) *Liability for Obstructions.*

[*See*, also, *post* VII. 6 (b).]

**Municipal Corporation**—*Lease of Market in Street—Covenant against Interference—By-law Authorizing Deposit of Building Materials.*]—See *Reynolds* v. *City of Toronto*, 15 C. P. 276.

——— *Obstruction by Wrongdoer—Injury to Traveller — Contributory Negligence.*]—Municipal corporations are responsible for damages caused to travellers by obstructions placed upon the highway by wrongdoers, of which the corporation have or ought to have knowledge; and the road is out of repair when, by the existence of such obstructions, it is rendered unsafe or inconvenient for travel. In this case telegraph poles, intended for the construction of their line, had been laid by a telegraph company upon the highway, encroaching upon the travelled portion. The plaintiff was being driven by one F. along the road in a sulky in the daytime; they had passed several of the poles safely, but both were at the moment looking at an object off the road, and the sulky running against a pole upset and injured the plaintiff. It was proved that the pathmaster knew of the poles being there. The court being left to draw inferences as a jury:—Held, that the driver was guilty of contributory negligence, and that the plaintiff, therefore, could not recover, although the defendants would otherwise have been liable. *Castor* v. *Township of Uxbridge*, 39 U. C. R. 113.

——— *Obstruction by Wrongdoer—Injury to Traveller—Negligence — Pleading.*]—The first count of a declaration, after averring defendants' duty to keep a street in repair, alleged that they so negligently preserved and kept the same, and so wrongfully, negligently, and improperly permitted a waggon to be and remain thereon for a long time, to wit, for the space of one month, contrary to their duty, that thereby the street became and was unsafe for the liege subjects, &c., to drive, pass, and repass with their horses and carriages, &c., and the plaintiff lawfully passing with his carriage and horses, the horses became frightened by the said waggon and ran away, and the plaintiff was injured, &c. The second count alleged that the defendants wrongfully and negligently permitted a certain waggon to be and remain on the said highway for a long space of time, to wit, for the space of one month, so as to obstruct the same, whereby the plaintiff's horses, while she was lawfully passing along the said street in her carriage, were frightened and ran away, &c.:—Held, both counts bad, in not shewing in what respect the corporation were negligent, or what duty they neglected, for it was not stated whether the waggon was defendants', or that it was allowed to remain an unreasonable time, or that there was not sufficient

room left to pass, or in what way such an object, not of itself likely to frighten horses, caused the injury. *Rounds* v. *Town of Stratford*, 25 C. P. 123. See *S. C.*, 26 C. P. 11.

——— *Obstruction by Wrongdoer—Injury to Traveller—Remedy over.*]—A corporation, through their neglect in permitting a pile of lumber placed upon the highway by defendant to remain there, became subjected to an action by a man whose horse had sustained injury by coming in contact with the lumber, and had damages and costs recovered against them:—Held, that the fact of defendant having so placed the obstruction did not enable the corporation to recover from him such damages and costs; and a nonsuit was entered. *Township of Vespra* v. *Cook*, 26 C. P. 182.

Under their Acts of incorporation the Bell Telephone Company are authorized, with the consent of the municipal council interested, and under the supervision of the engineer of the municipality, or of such other officer as the municipal council may appoint, to erect and maintain poles along the sides of any street, but so as not to interfere with the public right of travelling on and using the street. Under an agreement with the municipal council of the defendants, the company erected a line of poles in one of the streets of the city, one pole being placed in the travelled portion of the street. The defendants had no engineer, and did not appoint any officer to supervise the erection of the poles, but there was some evidence that the work had been done under the supervision of an officer of the defendants known as the "street surveyor," who discharged the duties usually discharged by an engineer of a municipality. The pole was allowed to remain in the street for several years, and the plaintiffs were injured by coming into collision with it, while lawfully using the street:—Held, affirming the judgment in 29 O. R. 518, that the pole was an illegal obstruction in the highway, which was therefore out of repair within the meaning of the Municipal Act, and that the defendants, having neglected to remove it, were liable in damages. Held, also, reversing the judgment on this point, that the pole had not been erected under the supervision of the proper officer, and that the defendants were entitled to indemnity from the Bell Telephone Company. *Atkinson* v. *City of Chatham*, 26 A. R. 521. See *Bell Telephone Co.* v. *City of Chatham*, 31 S. C. R. 61.

**Private Person**—*Incumbering Streets—Ordinance of Municipality Permitting.*]—By 4 Wm. IV. c. 23, the corporation of the city of Toronto are empowered to regulate and prevent the incumbrance of the streets; and a city ordinance, allowing persons building houses to occupy a certain portion of the streets with their building materials, is good; but any person who is building leaving those materials in the streets under that ordinance must provide lights in the night, or he will be responsible for any accident that may occur from his neglect. *Hervey* v. *French*, E. T. 3 Vict.

*See Bonn* v. *Bell Telephone Co.*, 30 O. R. 696; *Fairbanks* v. *Great Western R. W. Co.*, 35 U. C. R. 523.

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4. *Summary Convictions.*

**Continuing Fine.**]—Conviction by a magistrate for obstructing a highway, and order to pay a continuing fine of $5 per week until the removal of such obstruction:—Held, bad. *Regina* v. *Huber*, 15 U. C. R. 589.

**Municipal By-law**—*Vehicle on Sidewalk.*]—The use of a velocipede on a sidewalk, though no one be near it, may be an obstruction, within the provision of a by-law that no person shall by any vehicle incumber or obstruct the sidewalk. *Regina* v. *Plummer*, 30 U. C. R. 41.

A bicycle is a "vehicle," and riding it on the sidewalk is "incumbering" the street within the meaning of s.-s. 27 of s. 496 of the Consolidated Municipal Act, and of a by-law of a municipality passed under it. A certiorari to bring up a conviction under the by-law was refused. Regina v. Plummer, 30 U. C. R. 41, approved. *Regina* v. *Justin*, 24 O. R. 327.

*See Regina* v. *Davis*, 24 C. P. 575.

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VI. Highways — Pathmasters, Commissioners, and Overseers of.

**Authority**—*Liability of Municipality—Statute Labour.*]—In trespass against a municipal corporation for the act of their pathmaster in causing statute labour to be performed on certain land of the plaintiff, alleged by defendants to be an original allowance for road, it appeared that the pathmaster acted under an order written by the clerk, by the direction of the council while in session:—Held, sufficient to hold the corporation liable, and that a by-law was not necessary. *Nevill* v. *Township of Ross*, 22 C. P. 487.

**Disqualification of, as Members of Municipal Councils.**]—See *Regina ex rel. Richmond* v. *Taggart*, 7 L. J. 128; *Regina ex rel. Armor* v. *Coste*, 8 L. J. 290; *Regina ex rel. McMullen* v. *DeLisle*, 8 L. J. 291. See, also, *Regina ex rel. Ferris* v. *Iler*, 15 C. L. J. 158.

**Jurisdiction**—*Excess—Opening Streets—Plan—Action—Time.*]—Defendant, a pathmaster, without any instructions from the municipal council, and in defiance of the plaintiff's warning, threw down the plaintiff's fences and ploughed up his land, in order to open up streets which were laid down on a plan of part of the plaintiff's land, made by a former owner, and found in the registry office; the plan was not marked registered or filed, no sale was shewn to have been made according to it, and the streets had never been opened or used:—Held, that defendant was not acting within his jurisdiction, and was liable to trespass. The act complained of was done on the 5th November, 1874, and the action was commenced on the 5th May, 1875:—Held, in time. *Crooks* v. *Williams*, 39 U. C. R. 530.

**Notice of Action to.**]—See *McFarlane* v. *McDougall*, 3 O. S. 73; *Helliwell* v. *Taylor*, 16 U. C. R. 279.

*See*, also, *post* VII. 6.

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VII. Highways—Repair of.

1. *Generally—Liability to Repair.*

**Bridges.**]—See *ante* I.

**Government Road**—*Board of Works—Divesting of Control.*]—By 9 Vict. c. 38, s. 23, the road in question, for an injury resulting from the non-repair of a portion of which, passing through defendants' incorporated limits, they were sought to be made liable, was placed under the control and management of the board of works, and by 13 & 14 Vict. c. 15, the government had power to divest the board of works of such control by proclamation in the Provincial Gazette, whereupon the road again became under the control and management of the local municipalities in which it was situate. In 1851 the county council by by-law assumed the road under the Municipal Act, and kept it in repair until 1858, when they repealed the by-law. From that time down to the occurrence of the accident which caused the injury complained of, a period of twelve years, the defendants undertook the duty of repairing the road, which was within their limits:—Held, that it was to be presumed that the board of works had been in due form of law divested of all control and management of the road, and that the piece in question had properly passed under the jurisdiction of defendants, and that they were bound to keep it in repair. *Irwin* v. *Village of Bradford*, 22 C. P. 18, 421.

——— *Colonization—Proclamation—Municipality.*]—Held, that a prohibition would not lie in this case, the title to the road upon which the injury complained of arose, not being in question, the road being a colonization road built by the government before the organization of the townships of Medora and Wood as a municipality, and the question arising not being one of title but of liability to keep in repair a road so built. The road in question was a colonization road vested in "the Crown or in a public department or board," which had not been renounced by proclamation, and the municipality were not bound to repair it. *In re Knight* v. *Townships of Medora and Wood*, 11 O. R. 138, 14 A. R. 112.

——— *Transfer to County—Sidewalk Laid by City.*]—C. S. U. C. c. 28, sched. A, declares that the Kingston road east of the river Don shall not be held to be within the city of Toronto or liberties thereof, but shall remain under the control of the commissioner of public works, or of any person to whom it may be transferred by order of the governor in council. The defendants purchased this road from the government, and with their permission, express or implied, the city put down a sidewalk upon it:—Held, that defendants were liable for the state of the road and sidewalk; and a verdict having been rendered in favour of the plaintiffs in consequence of an injury sustained by the female plaintiff in falling on the sidewalk, which was out of repair, the court refused to interfere. *Bennett* v. *County of York*, 43 U. C. R. 542.

——— *Transfer to Town.*]—The road in question, which ran through the town of Whitby, was part of a macadamized road made by the government before 13 & 14 Vict. c. 14, and afterwards transferred to the plaintiffs:—Held, that under 13 & 14 Vict. cc. 14 and 15, the corporation of the town were bound to repair that portion of it within their limits. *Port Whitby, Scugog, Simcoe, and Huron Road Co.* v. *Town of Whitby*, 18 U. C. R. 40. But see *Regina* v. *Brown*, 13 C. P. 356; *St. Catharines Road Co.* v. *Gardner*, 21 C. P. 190.

**Municipal Corporations**—*Addition to Road—Dedication.*]—Quære, whether any one can add to a public allowance by dedication so as to compel the local authorities to repair it. *Re McBride and Township of York*, 31 U. C. R. 355.

——— *County Road — Separated City.*]—Held, that the legislation and proceedings thereunder, set out in the judgment of the court, relating to the Queenston and Grimsby road and the city of St. Catharines, did not make the city liable to pay to the county of Lincoln any part of the expenditure of the latter in connection with that road. Effect of the withdrawal of city from jurisdiction of county, upon roads owned by the county passing through the city, considered. Regina v. Louth, 13 C. P. 615, Regina v. Brown, ib. 356, St. Catharines Road Co. v. Gardner, 21 C. P. 190, specially referred to. Unless specially retained by statute, the withdrawal of a city from the jurisdiction of the county terminates all liability of the former to taxation for county purposes. An agreement by a city withdrawn from the jurisdiction of the county, to contribute towards the maintenance and repair of a county road, is ultra vires the city corporation. *County of Lincoln* v. *City of St. Catharines*, 21 A. R. 370.

——— *Deviation—Danger in Regular Road—Notice.*]—A bridge built by the township of Yarmouth over Kettle Creek, which crosses an original allowance for road, having become unsafe, and being only required by a few persons as the most convenient access to the neighbouring town of St. Thomas, the council removed it, and in place of this route repaired another road leading to that place, which was very little longer. The bridge had been constructed obliquely across the road allowance, so as to cross the stream at right angles, and in order to reach the west end of it conveniently the road was widened by taking in a small piece of adjoining land, which was always used as part of the road, with the consent of the owner, E. After the removal of the bridge it was impossible, owing to the height of the bank, to reach the water on the line of the road, and E. made a new road, running in a southerly direction over his property, from the brow of the bank to the creek, and formed by cutting part of the bank away, by which persons continued to descend to the river where it was fordable, but the use of which the council had never recognized. In driving down this roadway, which was narrow and steep, the wheels of the carriage in which the plaintiffs, B. and his wife, were driving, caught in two pieces of timber used as a support for the roadway next the river, and B.'s wife was thrown down the declivity and injured. The plaintiffs had passed the place on the day previous and were aware of its character, and of the removal of the bridge. The accident did not happen in the deviation from the original road allowance taken in as road for access to the bridge, though in turning off the road to go to the creek they passed over that place:—Held, that defendants were not liable, as they were not bound to keep the road on which the accident happened in repair. Held, also, that while the bridge was used their liability for non-repair was not confined to the original road allowance, but extended to the deviation used in its place as an approach. Held, also, that the doctrine that where a highway is found to be so obstructed as to be dangerous, a traveller may go extra viam, passing as near the original road as pos-

sible, was not applicable under the circumstances, so as to make defendants liable. Held, also, that there was no duty cast on defendants, as regarded the plaintiffs, to put up a notice warning persons not to use the road down the bank, for the plaintiffs knew the place, and must have perceived that it was not a road opened up by defendants. Coggswell v. Inhabitants of Lexington, 4 Cush. 307, and Ireland v. Oswego, 13 Kernan 532, distinguished. *Boswell* v. *Township of Yarmouth*, 4 A. R. 353.

——— *Overseer of Highways.*]—Municipal corporations are liable, under C. S. U. C. c. 54, s. 337, for neglect to repair roads within their jurisdiction; and it is no defence that they have appointed a proper overseer of highways, with means and authority to keep the road in good repair. *Colbeck* v. *Township of Brantford*, 21 U. C. R. 276.

——— *Reasonable Repair.*]—Remarks as to the duty of repairing highways, with reference to the age and population of the township, the nature of the ground, and all the surrounding circumstances; and as to the proper direction to a jury. The only rule that can be given is, that the public are entitled to have such a road as under all the circumstances they may fairly and reasonably demand, and the municipality be called upon to provide. In this case, in an action for non-repair, a verdict for the plaintiff was upheld, upon the facts stated in the report. *O'Connor* v. *Township of Otonabee*, 35 U. C. R. 73.

——— *Restoration of Road.*]—Where in an action brought to compel a municipal corporation to repair a portion of a road which ran along the shore of a lake, it appeared that the road had been completely submerged by the water, so that restoration would be necessary, and no ordinary reparation could suffice: —Held, that the defendants were not required by law to do the work. *McCormick* v. *Township of Pelée*, 20 O. R. 288.

——— *Side Ditch—Railway.*]—A railway crossed a highway, and in the line of the ditch formerly running at the side of the highway, and several feet within the limits of the highway, the railway company constructed an open culvert of square timber about five feet deep and seven feet wide. The plaintiff, walking along the road and crossing the railway, fell into this culvert and was injured:—Quære, whether the corporation were bound to repair this part of the highway. Held, that, if so, that would not relieve the defendants. *Fairbanks* v. *Great Western R. W. Co.*, 35 U. C. R. 523.

*See Gilchrist* v. *Township of Carden*, 26 C. P. 1; *Lewis* v. *City of Toronto*, 39 U. C. R. 343; *Bradley* v. *Brown*, 32 U. C. R. 463; *Lucas* v. *Township of Moore*, 3 A. R. 602; *Hislop* v. *Township of McGillivray*, 15 A. R. 687, 17 S. C. R. 479; *Hubert* v. *Township of Yarmouth*, 18 O. R. 458; *Traversy* v. *Township of Gloucester*, 15 O. R. 214; *Foley* v. *Township of East Flamborough*, 29 O. R. 139, 26 A. R. 43.

*See*, also, *post* 6, 7.

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2. *Appropriation of Material for Repair.*

**Cutting Timber on Adjacent Land.**]—Where defendant justifies that the locus in quo was a highway, the averment must be direct. A plea justifying the cutting down trees on the adjacent land to repair the highway, should mention the number and description of the trees cut down. *Orser* v. *McMichael*, Tay. 356.

**Municipal Corporation** — *By law — Award.*]—Pursuant to a by-law of the town of Ingersoll, permitting that municipality to take gravel from C.'s land for repairing their streets, without mentioning the quantity, the award was made that the corporation should "pay C. thirty-two and one-half cents for every load of gravel or stone they should take for the repairs of their roads, as and for compensation for the injury done, and that the right to take such gravel at this price should extend for five years:"—Held, that the by-law should have defined the quantity of gravel required to be taken, and the award should have fixed the value of such quantity as well as the amount to be paid for the right of entry to take the same away, and therefore that the award was bad. *In re Town of Ingersoll and Carroll*, 1 O. R. 488.

——— *By-law—Injunction.*]—By s. 550, s.-s. 8, of R. S. O. 1887 c. 184, the council of every township is authorized to pass by-laws for searching for and taking such timber, gravel, stone, or other material or materials as may be necessary for keeping in repair any road or highway within the municipality:—Held, that the meaning of this section is, that the council may, as necessity arises for their doing so, exercise the right to take gravel, &c., from any particular parcel or parcels of land, having first declared the necessity to exist and chosen and described the land from which the material is to be taken, by a by-law; and, therefore, a by-law purporting to be passed under this section, which authorized and empowered the pathmasters and other employees of the corporation to enter upon any land within the municipality when necessary to do so, save and except orchards, gardens, and pleasure grounds, and search for and take any timber, gravel, &c., was upon its face illegal, because it purported to confer upon its officers wider and more extensive powers than the statute authorized. Held, also, notwithstanding the provisions of s. 338 of R. S. O. 1887 c. 184, that the plaintiff was entitled without quashing the by-law to an injunction to restrain the defendants from proceeding to enforce the rights they claimed under this by-law, by entering upon his lands. *Rose* v. *Township of West Wawanosh*, 19 O. R. 294.

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3. *Enforcing Repair by Injunction.*

**Municipal Corporation** — *Trespass by Railway Company—Frame of Suit.*]—A municipality may file a bill to compel a railway company to put streets and highways properly traversed by their line of railway in good repair, and will not be restricted to proceeding by indictment or information. A municipal corporation filed a bill seeking to restrain the defendants, a railway company, from trespassing by running their track along one of the streets of the municipality without the consent thereof, thus impeding traffic in contravention of the Railway Act, C. S. C. c. 66, s. 12, s.-s. 1:—Held, that under the Municipal Act there is such power of management, control, &c., given to municipalities, and such a

responsibility cast upon them as to justify them in intervening on behalf of the inhabitants for the preservation of their rights. Semble, but for the language used in Guelph v. Canada Co., 4 Gr. 636, the proper frame of the suit would have been by way of information in the name of the attorney-general with the corporation as relators. *Fenelon Falls* v. *Victoria R. W. Co.*, 29 Gr. 4.

**Public Nuisance** — *Attorney-General — Road Company—Improper Construction.*]—The court has no jurisdiction on the ground of public nuisance to enforce by injunction the ordinary repair of a highway, or to restrain a road company from suffering a road to continue out of repair. Assuming such a jurisdiction, the attorney-general does not seem to be the proper party to sue. The court, however, will restrain a company authorized to construct a plank or macadamized road from constructing or continuing to construct one of poles. Where such a company had already reconstructed part of a road (which was out of repair) with poles, without any objection on the part of the public, and there was contradictory evidence as to the quality of the road so made, but it appeared that by adzing off the upper side of the poles, which the company offered in court to do, the road would be rendered sufficiently smooth, and that to be obliged to take up the poles would ruin the company, an injunction for the removal of the poles was refused. *Attorney-General* v. *Weston Plank Road Co.*, 4 Gr. 211.

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*4. Injury by Municipality Draining Highway to Keep it in Repair.*

(*See* MUNICIPAL CORPORATIONS, XII.)

**By-law**—*Necessity for—Pleading—Justification.*]—Case against a municipal council for overflowing the plaintiff's land. Plea, that the road eastward and westward of the plaintiff's premises was swampy and unsafe: that it was the duty of the defendants to keep the road in repair; and that in performing such duty they committed the grievance complained of, doing no unnecessary damage:—Held, on demurrer, that it was not necessary to aver that the act complained of was done under a by-law, for that would primâ facie be presumed, if essential, but that the plea was bad, as it should have been alleged that the injury was one which the plaintiff was bound to submit to, and that no other course would have relieved the road from the water. *Brown* v. *Municipal Council of Sarnia*, 11 U. C. R. 87.

**Necessary Work** — *Pleading—Inevitable Damage—By law.*] — Plaintiffs sued defendants for wrongfully cutting a ditch in the highway, and thereby overflowing his land. Defendants pleaded that they necessarily made such ditch in order to repair the highway, doing as little damage as might be, and no more than with due care was necessary for the purpose, which were the grievances complained of:—Held, bad, for it alleged a necessity to cut the ditch, but not that the overflow of the plaintiffs' land was inevitable. Semble, that it was bad also for not admitting any damage. Quære, as to the validity of such a defence if properly pleaded. Held, also, that no by-law was necessary to authorize the repair of the highway. *Perdue* v. *Township of Chinguacousy*, 25 U. C. R. 61.

**Negligence** — *Absence of.*]—Defendants, in order to drain a highway, conveyed the surface water along the side of it for some distance by digging drains there, and stopped the work opposite plaintiff's land, which was thus overflowed:—Held, that defendants were liable, even without any allegation of negligence. *Rowe* v. *Township of Rochester*, 29 U. C. R. 590.

——— *Answer to—By law—Award.*]—Declaration, that defendants had dug a ditch in the highway near and extending across plaintiff's land, through which water flowed; and defendants so negligently constructed and continued said ditch, and permitted so much water to run in it, that it overflowed upon plaintiff's land. The plea set out a by-law passed by defendants to construct a drain through plaintiff's land, and an award of compensation, which was duly rendered, and alleged that in cutting the ditch defendants unavoidably injured and threw water on the lot, doing no unnecessary damage:—Held, on demurrer, that the plea was no answer to the declaration, which complained of injury caused by defendants' negligence. *Stonehouse* v. *Township of Enniskillen*, 32 U. C. R. 562.

**Statutable Duty**—*Justification.*]—Held, on demurrer to the pleas in this case, that a municipality cannot, for the purpose of repairing or draining a highway, commit an injury to private property, by collecting and conveying water to it, and justify under their statutable obligation to keep the road in repair. Held, also, that a similar statutable duty of opening the road upon which they grew, was no answer to an action for injury caused to plaintiff's land by the felling of trees, accompanied by the allegation that in so opening the road a portion of the trees, in being felled, necessarily fell upon plaintiff's land, but doing no unnecessary and no material injury, &c. *Rowe* v. *Township of Rochester*, 22 C. P. 319.

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*5. Injury by Municipality Raising or Lowering Road.*

**By-law**—*Necessity for—Absence of Negligence—Procedure—Action or Arbitration.*]—Action for damages sustained by the plaintiff by reason of the defendants lowering the grade of the street in front of her store. The property owners, but not including plaintiff, had petitioned the council for the block-paving of the street as a local improvement under s. 612 of the Municipal Act of 1883. The matter was duly considered, and a by-law passed to ascertain the property to be benefited thereby, and the expense and amount of assessment; and subsequently a further by-law was passed for raising the money required therefor by loan, and for assessing the amount. It was deemed advisable to change the grade, and the street was lowered in front of the plaintiff's premises about four feet. No reference was made in the said by-law as to any alteration in the grade, nor was any by-law passed therefor:—Held, that there was no negligence in the corporation by reason of the lowering of the grade, for the work was undertaken in the interest of the residents, and executed under the advice and direction of a presumably competent engineer, the Judge considering that he could not assume the discretion vested in the corporation of deciding as to the necessity of lowering the grade; but held,

that in order to justify the interference with the grade of the street a by-law therefor was necessary; and in the absence of such by-law the defendants were liable, in an action, for the damages sustained. *Ayers* v. *Town of Windsor*, 14 O. R. 682.

Held, that a municipal corporation can exercise and perform their statutable powers and duties in repairing highways and bridges or erecting a new bridge instead of an old and unsafe one without passing a by-law therefor, and that the plaintiff, whose premises were "injuriously affected" by the level of the street on which they fronted being raised in order to construct a proper approach to a bridge that the defendants were lawfully rebuilding, could not maintain an action against the defendants, but must, in the absence of any negligent construction, proceed under the arbitration clauses of the Municipal Act, R. S. O. 1887 c. 184, notwithstanding the absence of any by-law for the prosecution of the work. Yeomans v. County of Wellington, 4 A. R. 391, followed. McGarvey v. Town of Strathroy, 10 A. R. 636, and Adams v. City of Toronto, 12 O. R. 243, discussed. Van Egmond v. Town of Seaforth, 6 O. R. 610, distinguished. *Pratt* v. *City of Stratford*, 14 O. R. 260, 16 A. R. 5.

——— *Necessity for—Acts of City Commissioner—Pleading.*]—Under the orders of the city commissioner of the city of Toronto, large quantities of rubbish and offal, offensive and injurious to health, were during the summer deposited in a lane adjoining the plaintiff's cottages, by which the lane was raised three or four feet, coming up to the windows, and the filth ran over it into the basement; the well attached to the houses was rendered unfit for use, so that the plaintiff was compelled to dig a new one, and he had also to raise one of the houses, and remove the kitchen to suit the level of the lane; the tenants refused to remain, and he was obliged to lower the rent:—Held, that the defendants were liable for the acts of the commissioner, without any by-law being shewn; but that the expense of raising the house and removing the kitchen could not be recovered. When the facts alleged in the declaration are proved, the plaintiff cannot be nonsuited upon the ground that they disclose no cause of action. Remarks as to the form of the second count in this case. The power given by s. 425, s.-s. 1, of the Municipal Act of 1873, to improve, repair, widen, and alter streets, includes the power, when necessary for these purposes, to level, raise, or lower the streets. *Lewis* v. *City of Toronto*, 39 U. C. R. 343.

——— *Necessity for — Notice of Action—Evidence.*]—Case, for wrongfully, negligently, and carelessly digging and excavating streets in the city of Hamilton, adjoining plaintiff's close, and thereby injuring said close, &c. Plea, "not guilty by statute:"—Held, that a by-law should have been passed by the corporation to sanction the act complained of. (2) When there is no by-law, and the act complained of is done under 13 & 14 Vict. c. 15, the defendants are entitled to notice of action, coming as they do fully within the spirit of the protecting statute. Held, that if the defendants were liable for the tortious acts in the declaration complained of, they were entitled to give the special matter in evidence under the general issue. *Reid* v. *City of Hamilton*, 5 C. P. 269.

——— *Necessity for—Resolution—Statute—Excess.*]—Defendants, a municipal corporation, having by resolution authorized the raising and levelling of a street, and plaintiff's premises having been overflowed thereby, the plaintiff was nonsuited, on the ground that defendants were authorized by statute to do what they had done. The court granted a new trial to ascertain whether in fact the work done constituted a repair of the street within the statute, or exceeded such a repair to the injury of the plaintiff. *Croft* v. *Town of Peterborough*, 5 C. P. 35.

Held, also, that a by-law should have been passed to sanction the act complained of. *S. C., ib.* 141.

**Compensation** — *Award — Motion to Set aside—Damages—Evidence.*] — Upon a reference under the Municipal Act, R. S. O. 1877 c. 174, to determine the compensation to which the applicant was entitled for raising and lowering a street in a town in front of his land:—Held, that the omission of the written statement required by s. 383 of the Act to be put in by arbitrators, is not necessarily a ground for setting aside their award, and it may be afterwards supplied. (2) That the award should not be set aside for not dealing with the question of compensation for injuries sustained by the lowering as well as raising the street, the evidence being hardly directed to this at all, and no appreciable damage clearly shewn; and, if necessary, the court would, under s. 383, amend the award in this respect. (3) That it is competent for arbitrators in such a case to find that no damage has been sustained, and they are not bound to award some or merely nominal damages. This distinction between arbitrations under our Municipal and Railway Acts and the English Lands Clauses Consolidation Act pointed out, and remarks as to the right to enforce such awards summarily. Where the evidence is conflicting as to whether damage or benefit has resulted to the party affected, the court will not interfere with an award merely because it may think the weight of evidence to be against the view taken by the arbitrators. *In re Colquhoun and Town of Berlin*, 44 U. C. R. 631.

——— *Procedure for — Action or Arbitration.*]—The corporation of the city of Toronto, in the exercise of their corporate powers, necessarily raised the sidewalk in front of plaintiff's premises, whereby, as was alleged, such premises were injuriously affected, he having had to raise them to the level of the sidewalk. In an action to recover the expenses occasioned thereby:—Held, on demurrer, that the claim was not the subject of an action, but one for compensation under the arbitration clauses of the Municipal Act, 1883. *Adams* v. *City of Toronto*, 12 O. R. 243.

——— *Procedure for—Action or Arbitration — Negligence.*] — In pursuance of the powers conferred by ss. 551 and 553 of the Municipal Institutions Act, R. S. O. 1877 c. 174, the council of the defendant municipality passed a by-law authorizing the paving of F. street with cedar blocks, which work was proceeded with, but executed in such a manner as to cause water to flow over and rest upon the lands of the plaintiff:—Held (affirming a judgment finding that the work had been negligently performed), that the plain-

tiff was entitled to recover the amount of damages sustained by her, and to enjoin the defendants from further overflowing the land; and that in consequence of such negligence her proper remedy was by action, not by a proceeding under the statute for compensation. *McGarvey* v. *Town of Strathroy*, 10 A. R. 631.

——— *Right to.*]—Owners of land upon a highway have no claim to compensation for anything done by municipal corporations in the proper exercise of their powers, within the line of the road as originally laid out. The applicant owned land, with dwelling houses and a foundry thereon, fronting upon a highway. The council passed a by-law for making, grading, and gravelling this road, and the effect of the work was to raise the road along the applicant's land from five to twelve feet:—Held, that he was not entitled to an arbitration under 12 Vict. c. 81, s. 195, as amended by 16 Vict. c. 181, s. 33, to determine the amount of damage to be paid to him, the injuries not being such as could give him any right to compensation. *Regina* v. *Municipal Council of Perth*, 14 U. C. R. 156.

——— *Right to—Change in Statute—Parties to Arbitration—Mortgagor and Mortgagee.*]—The owners of property abutting upon a public highway:—Held, entitled to compensation from the municipality under the Municipal Act of 1873, 36 Vict. c. 48, s. 373, R. S. O. 1877 c. 174, s. 456, for injury sustained by reason of the municipality having, for the public convenience, raised the highway in such a manner as to cut off the ingress and egress to and from their property abutting upon the highway, which they had formerly enjoyed, and to make a new approach necessary. A mortgagor in possession is a proper party to the arbitration in such a case, and as owner and occupier and interested in the property is entitled to compensation under the Act; and the municipality having gone to arbitration under the statute with the mortgagor, cannot move to set aside the award on the ground that he has mortgaged the property to persons who have not claimed to be parties to the arbitration. Regina v. Municipal Council of Perth, 14 U. C. R. 156, and previous cases distinguished, as decided under the Municipal Act before 36 Vict. c. 48, s. 373, which first gave compensation for lands "injuriously affected." *In re Yeomans and County of Wellington*, 43 U. C. R. 522, 4 A. R. 301.

**Dangerous Approach**—*Personal Injury—Contributory Negligence.*]—The Act of incorporation of the town of Portland, 34 Vict. c. 11 (N. B.), which remained in force when the town was incorporated as a city by 45 Vict. c. 61 (N. B.), empowered the corporation to open, lay out, regulate, repair, amend, and clean the roads, streets, &c.:—Held, that the corporation had authority under this Act to alter the level of a street if the public convenience required it. W. was owner and occupant of a house in Portland, situate several feet back from the street, with steps in front. The corporation caused the street in front of the house to be cut down, in doing which the steps were removed, and the house left some six feet above the road. To get down to the street W. placed two small planks from a platform in front of the house, and his wife, in going down these planks, slipped and fell, receiving severe injuries. She had used the planks before, and knew that it was dangerous to walk up or down them. In an action against the city in consequence of the injuries so received:—Held, that the corporation, having authority to do the work, and it not being shewn that it was negligently or improperly done, were not liable. Held, also, that the wife of W. was guilty of contributory negligence in using the planks as she did, knowing that such use was dangerous. *Williams* v. *City of Portland*, 19 S. C. R. 159.

**Discretion**—*Absence of Negligence—Act of Wrongdoer.*]—The plaintiff sued defendants for allowing dirt and rubbish to be thrown or put upon a lane upon which his premises abutted. It appeared that the damage was occasioned by the filling in and levelling a hollow in the lane by private individuals, by which the plaintiff's fence was pressed inwards:—Held, that the levelling and filling in of streets by defendants was a matter in their own discretion, under C. S. U. C. c. 54, for which they would not be liable in the absence of negligence or malice. (2) That for the mere act of a wrongdoer in throwing rubbish upon a highway, and thereby injuring a private individual, the defendants would not be liable. *Buchanan* v. *Town of Galt*, 12 C. P. 73.

**Liability for Non-feasance** — *Absence of Statute.*]—In the absence of a statute imposing liability for negligence or non-feasance, a municipal corporation are not liable in damages for injury caused to a citizen by reason of a sidewalk having been raised to a higher level than a private way, or having been allowed to get out of repair. Municipality of Pictou v. Geldert, [1893] A. C. 514, and Town of Sydney v. Bourke, [1895] A. C. 433, followed. *City of St. John* v. *Campbell*, 26 S. C. R. 1.

*See Regina* v. *Woodstock and Durham Plank and Gravel Road Co.*, 18 U. C. R. 49; *Quillinan* v. *Canada Southern R. W. Co.*, 6 O. R. 567; *West* v. *Parkdale*, 15 O. R. 319; *Williams* v. *Town of Cornwall*, 32 O. R. 255.

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6. *Non-Repair—Defect in Roadway.*

(a) *Generally.*

**Private Approach**—*Liability of Private Person.*]—A person who, with the knowledge of, and without objection by, a municipal corporation, constructs across a ditch between the sidewalk and crown of the highway an approach therefrom to enable vehicles to pass to and from his property, adjacent to the highway, is liable for injuries sustained, through want of repair of the approach, by a person using it to cross the highway. *Hopkins* v. *Town of Owen Sound*, 27 O. R. 43.

**Side-ditch**—*Want of Guard — Width of Road—Misdirection.*]—The plaintiff's husband lost his life by falling with his horse and sleigh into a ditch or drain, alongside of a highway in the township of Moore, on which deceased was driving at night. The ditch was about 12 feet deep and 32 feet wide, extending about half way into the travelled road, which was thus reduced to 30 feet in width. The road had been in this state for some years, but it appeared to serve the purpose of the neighbourhood as a highway. There was no railing or other guard at the ditch, and nothing to indicate the situation

on a dark night, such as the night in question was. It was alleged that the deceased was under the influence of liquor; but there was no direct evidence as to how he fell into the ditch. The trial Judge told the jury that if defendants were indicted for having the road in the position described they would be directed to find them guilty of having the road out of repair. He also told them that where a ditch became such a deep and dangerous place as this, the corporation were bound to put a guard on it, otherwise as a matter of law, they were guilty of neglect in not guarding it, but he proceeded to say: "It is a matter entirely for you. Was that road in such a reasonable state of repair that it was safe for persons passing and repassing at all times, night and day? If so, you will find a verdict for the defendants:—Held, reversing the judgment in 43 U. C. R. 334, that the remarks above referred to were more than a strong comment on the evidence, and amounted to misdirection, as it was impossible to say as a matter of law that the statutory duty to keep the road in repair had been neglected by the existence and continuance of the ditch or by its being without a guard, that being a deduction of fact to be made by a jury upon a consideration of all the circumstances. Held, also, that the obligation expressed by the words "keep in repair," as used in 36 Vict. c. 48, s. 409 (O.), is satisfied by keeping the road in such a state of repair as is reasonably safe and sufficient for the requirements of the particular locality; and that there was non-direction in the attention of the jury not being called to the duty of modifying the force of the word "repair," by reference to the surrounding conditions. *Lucas* v. *Township of Moore*, 3 A. R. 602.

——— *Want of Guard—Width of Road—Question for Jury—New Trial.*]—In driving along a country road the plaintiffs were injured by their horse and buggy falling into a ditch at the side of the road. It was shewn that the roadway between the ditches was thirty feet wide; that the ditch was of the same character as those along other roads in the county; and that in some places where the ditches were deeper than usual there were guards. There was evidence produced on the part of plaintiffs which, if believed, established facts from which a jury might draw the inference that the ditch, constructed where and as it was, was dangerous, although there was evidence on the part of the defendants to the contrary. The jury found a verdict for the plaintiffs, but the court of common pleas afterwards, upon a rule nisi to enter a nonsuit or for a new trial, granted a nonsuit, holding that their having made a ditch without guards or railings, or without slanting the roadway to the bottom of the ditch so that a person could drive into it without upsetting, was no evidence of neglect on the defendants' part to keep the road in repair:—Held, reversing this judgment (30 C. P. 217), that it was a question of fact for the jury, whether, having regard to all the circumstances, the road was in a state reasonably safe and fit for ordinary travel. As the court below had pronounced no opinion as to whether there should be a new trial or not, the appeal was simply allowed, setting aside the nonsuit, but leaving the question of new trial untouched. *Walton* v. *County of York*, 6 A. R. 181.

**Uneven Surface**—*Drain—Notice to Corporation.*]—After a block pavement had been laid down on Queen street, one of the most travelled streets in the city of Toronto, a drain about two and a-half feet wide was opened out across the street to the street railway track, and then tunnelled under the track. It was filled in with loose earth not rammed down. On Sunday it rained, in consequence of which the earth was washed down and sunk, leaving a very dangerous hole. On Tuesday or Wednesday some residents in the neighbourhood, seeing its dangerous condition, took some cedar posts and placed them lengthwise in the hole. On Thursday night, about nine o'clock, it being very dark and no light at the drain, and the street lamps not being sufficient to shew it, the plaintiff, his wife, and another person, were driving along the road, and on reaching the drain the horse stumbled and fell, whereby the plaintiffs were pitched out of the waggon and injured. The jury found that the accident was caused by the wheels of the waggon coming in contact with the drain. The defendants contended that it was caused by the waggon coming in contact with the posts, and as they had not put them there they were not liable. It was agreed on the argument in the divisional court, that the court might draw inferences of fact as a jury, and give such judgment as in its view the evidence might warrant:—Held, that on the evidence the defendants must be deemed to have had notice of the condition in which the drain was at the time of the accident; and therefore it was immaterial whether the accident was caused by the drain or posts. Semble, that, as the manner in which the drain was filled in made it certain that in the event of rain the earth would sink, the defendants must be assumed to know that some one to protect the public would place posts or other covering over the hole, and were liable for any injury resulting. *Duck* v. *City of Toronto*, 5 O. R. 295.

——— *Intersection with Cross-road — Findings of Jury—Contributory Negligence.*]—Action against defendants as owners of a macadamized road, which it was alleged they allowed to get out of repair at its point of intersection with another road, whereby the plaintiff was thrown out of his waggon, and broke his leg, &c. It appeared that the plaintiff was driving a high load of empty barrels, in a rack unfastened to the waggon, and that on coming to this spot, where the road was lower on one side than the other by 18 inches, so as to carry on the incline of a cross-road, which had deeper ruts on the lower side than on the higher, the plaintiff got on the high side of the load to steady it; the load upset, and the plaintiff was thrown down and broke his leg. Several questions were submitted to the jury; to question (1), whether the injury to the plaintiff happened in consequence of any defect in the road, they answered "by getting into the rut and by the slant of the road." They also declared (2) that the accident did not happen in consequence of the height of the load or of the wind; (3) that it was not prudent for the plaintiff to have driven over the spot in question on the top of the load; (4) that the plaintiff, sitting as he did, contributed to the accident; (5) that it was imprudent not to fasten the rack, and the omission to do so contributed to the accident; (6) that the defendants could not have remedied the defect in the road without going beyond the limits of their road; but (7) that they might by going on the cross-road have remedied at a reasonable outlay the de-

fect in their road:—Held, that the answers of the jury to the first, second, sixth, and seventh questions amounted to a finding that defendants' road was out of repair, and dangerous to the public; that the answers to the third and fourth questions, though shewing some negligence on the plaintiff's part, did not amount to a finding of contributory negligence, so as to prevent his recovery; but that the answer to the fifth question was a finding of contributory negligence, which would bar the action. Held, also, that it is the duty of the owners of a road to keep it in repair at its point of intersection with cross-roads, even although such repairs may interfere with the use of the cross-road. *Bradley* v. *Brown*, 32 U. C. R. 463.

**Want of Guard at Dangerous Place** — *Approach to Drawbridge — Liability of County.*] — The defendants constructed a bridge across a navigable stream having in it a draw or swing to enable vessels to ply on the river. There was not any gate or other protection to guard the approaches to the bridge when swung. A horse belonging to the plaintiff broke away from the person in charge of him, escaped out upon the public road, and ran a distance of about two miles to the bridge, reaching it while the draw was open to allow a vessel to pass, and rushing into the gap was drowned:—Held, that the defendant municipality could not be made answerable for the loss of the horse. Toms v. Township of Whitby, 37 U. C. R. 104, Sherwood v. City of Hamilton, 37 U. C. R. 410, Price v. Cataraqui Bridge Co., 35 U. C. R. 314, considered. *Steinhoff* v. *County of Kent*, 14 A. R. 12.

——— *Nonfeasance — Malfeasance.*] — Where the plaintiff declared for an injury to his horses by falling into a hole made in a highway by water overflowing a mill dam of defendants and tearing up the road, alleging that it was defendants' duty to fill up the hole or fence it round, so as to prevent accident, the declaration was held, insufficient, as it ought to have been framed for the malfeasance in erecting or continuing the dam, &c., and not for the nonfeasance in not filling up or fencing around the hole. *Nellis* v. *Wilkes*, 1 U. C. R. 46.

——— *Open Cellar—Pleading.*]—Declaration by the plaintiff, as administratrix of J. M., that the defendant was possessed of a certain lot on the highway, on which there was a cellar, and that he negligently and wrongfully suffered said cellar to remain open, whereby the said J. M., being an infant under twelve years, and from his youth incapable of exercising and not responsible for the want of ordinary care and caution, and ignorant of the risk, went upon the beams across said cellar, fell in, and was killed. Plea, that the said J. M. improperly and unlawfully went upon said premises, and by his own unlawful conduct and negligence, and not through any default of defendant, slipped and fell in, and received the injuries mentioned:—Held, on demurrer to the plea, declaration good, shewing sufficiently that the cellar was upon the highway; plea bad. *McIntyre* v. *Buchanan*, 14 U. C. R. 581.

——— *Proximate Cause.*]—The plaintiff and his wife sued defendants for injury alleged to have been caused to the wife by their neglect to have a railing or guard along an embankment leading down to a bridge on one of their leading highways in a populous township. It appeared that the wife and her son, about eight years old, were crossing the bridge in a buggy, when the horse shied at some new planks on the bridge, and backed to the end of it, where the hind wheels went over the bank, throwing the wife out and into the water, about fourteen feet below. The jury found, upon the evidence, that the road was not in a sufficiently safe state, and that the wife was guilty of no negligence in the management of the horse:—Held, that it was the duty of the defendants to fence or guard the place in question; that the injury was caused by the want of such protection as the proximate cause, not by the horse becoming frightened and unmanageable; and that defendants therefore were liable. The authorities as to remote and proximate causes of damage reviewed. The damages, $2,500, being in the opinion of the court excessive, a new trial was granted on that ground, on payment of costs, unless the plaintiffs would consent to reduce the verdict to $1,250. *Toms* v. *Township of Whitby*, 35 U. C. R. 195, 37 U. C. R. 100.

The plaintiff, with a waggon and a load of bricks, was coming down a hill on the road, by the side of a precipice. He had stopped to speak to some one, when on starting again the horses ran away, and when they came to an opening in the fence or railing along the road, near the foot of the hill, they bolted through it, and down the precipice. At the trial the plaintiff was nonsuited, on the ground that the proximate cause of the accident was the horses getting beyond the plaintiff's control, not the defect in the fence:—Held, that the mere fact of the horses running away and becoming unmanageable would not prevent the plaintiff from recovering, unless he had been guilty of want of reasonable care or skill, which was a question for the jury; and the nonsuit was therefore set aside. Toms v. Township of Whitby, 35 U. C. R. 226, 37 U. C. R. 100, considered. The decisions in the States of Maine, New Hampshire, and Massachusetts reviewed, and the rule in New Hampshire adopted. The rule is, that where two causes combine to produce the injury, both in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, the corporation are liable, provided the injury would not have been sustained but for the defect in the highway. *Sherwood* v. *City of Hamilton*, 37 U. C. R. 410.

**Work on Road**—*Danger—Knowledge.*]—A municipal corporation are not responsible in damages to a person who is injured in endeavouring to cross in daylight a plainly visible shallow trench, lawfully and necessarily in the street at the time, the person injured being, moreover, familiar with the locality, and knowing that there is close at hand a safe passage way across the trench. *Keachie* v. *City of Toronto*, 22 A. R. 371.

——— *Danger—Railway.*] — The plaintiff fell while attempting to cross a railway track which was lawfully, and without negligence or undue delay, being built across a street in a city:—Held, that neither the railway company nor the city was responsible in damages. Keachie v. City of Toronto, 22 A. R. 371, followed. Judgment in 28 O. R. 229 reversed. *Atkin* v. *City of Hamilton*, 24 A. R. 389.

*See Caswell* v. *St. Mary's and Proof Line Junction Road Co.*, 28 U. C. R. 247; *O'Con-*

*nor* v. *Township of Otonabee*, 35 U. C. R. 73; *Carty* v. *City of London*, 18 O. R. 122; *Adair* v. *City of Kingston*, 27 C. P. 126; *Pearson* v. *County of York*, 41 U. C. R. 378; *Ridgway* v. *City of Toronto*, 28 C. P. 579; *Mair* v. *Township of King and Albion*, 8 A. R. 248; *City of Montreal* v. *Labelle*, 14 S. C. R. 741; *Noverre* v. *City of Toronto*, 27 O. R. 651, 24 A. R. 109; *Steele* v. *County of York*, 15 A. R. 666.

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(b) *Obstructions.*

*See ante* V. 3 (c).

**Generally**—*Liability of Municipality.*]—Municipal corporations are responsible for damage caused to travellers by obstructions placed upon the highway by wrongdoers, of which the corporation have or ought to have knowledge; and the road is out of repair when, by the existence of such obstructions, it is rendered unsafe or inconvenient for travel. *Castor* v. *Township of Uxbridge*, 39 U. C. R. 113.

**Boulder in Road** — *Damages—Remoteness.*]—See *McKelvin* v. *City of London*, 22 O. R. 70.

**Erection at Side of Road**—*Negligence—Damages.*]—A milkstand built on a highway by an adjoining proprietor and projecting slightly over the travelled way is such an obstruction to the highway as to constitute want of repair within the meaning of the Municipal Act; and where such an obstruction was shewn to have existed for three years, and the municipal corporation having jurisdiction over the road in question had taken no steps to have it removed, they were held liable in damages for an accident caused by it. Castor v. Township of Uxbridge, 39 U. C. R. 113, considered and approved. Quantum of damages for death of a child discussed. *Huffman* v. *Township of Bayham*, *Tanner* v. *Township of Bayham*, 26 A. R. 514.

**Improper Use by Contractor**—*Liability of Municipality.*]—A contractor with a municipal corporation for the repair of a highway of theirs, who negligently leaves an obstacle thereon in such a position as to frighten a horse being driven on the highway, thereby causing injury to the driver, is liable in an action for the improper use of the highway, and is not relieved from liability by the fact that the corporation may have otherwise negligently allowed the highway to get out of repair. In such a case the corporation are not liable for the accident caused by the improper use, unless their assent thereto can be shewn. *Howarth* v. *McGugan*, 23 O. R. 396.

**Machinery on Road** — *Frightening Horses — Contributory Negligence.*]—The defendants, for the purpose of sinking a well in one of the public streets of the village, to procure water for public purposes, under the power conferred by s. 489 of the Municipal Act, had erected a derrick in the street without placing a hoarding round it. The plaintiff had driven into the village past the derrick without its appearing to affect the horse, the derrick not then being at work, but on attempting to pass it on her way home, while the derrick was at work and making an unusual noise, the horse took fright and ran away, the plaintiff being thrown out of the carriage, and severely injured. The jury found that the derrick was of a nature to frighten horses, and that the defendants had not taken proper precautions to guard against accidents, and that there was no contributory negligence on the plaintiff's part:—Held, that the defendants were liable for the injury sustained by the plaintiff. *Lawson* v. *Village of Alliston*, 19 O. R. 655.

**Overhanging Tree.**]—The liability to keep in repair extends to overhanging trees liable to fall upon the road and cause damage to passers by. Where, therefore, defendants' servants, in getting materials on land adjoining the road for its repair, felled a tree which in falling lodged against another tree near the road, and, being left there, afterwards fell and killed the plaintiff's wife while passing along the road:—Held, that the defendants were liable. *Gilchrist* v. *Township of Carden*, 26 C. P. 1.

——— *Finding of Jury — Contributory Negligence—Damages.*]—Any thing which exists or is allowed to remain above a highway, interfering with its ordinary and reasonable use, constitutes want of repair and a breach of duty on the part of the municipality having jurisdiction over the highway. A branch of a tree growing by the side of a highway, to the knowledge of the defendants, extended over the line of travel at a height of about eleven feet. The plaintiff, in endeavouring to pass under the branch, on the top of a load of hay, was brushed off by it and injured:—Held, that the jury having found that the highway was out of repair, the defendants were liable. Embler v. Town of Wallkill, 57 Hun 384, specially referred to. The question whether a highway is out of repair is a question for the jury. Derochie v. Town of Cornwall, 21 A. R. 279, followed. It appeared by the evidence that the plaintiff had hauled hay upon this road and past this particular place not long before; that he and another man who was on the load with him, when approaching the branch, observed the situation, but concluded they could pass in safety; that the other man did pass safely under the branch, and the plaintiff, instead of lying close to the hay, put up his feet to raise the limb, which he failed to do:—Held, that the plaintiff was not called upon to do the very best and wisest thing; and upon this evidence the court could not interfere with the finding of the jury that the accident might not have been avoided by the exercise of reasonable care on the part of the plaintiff. Connell v. Town of Prescott, 22 S. C. R. at pp. 162-3, referred to. Held, also, upon the evidence, that the sum assessed as damages, $1,200, was not so excessive as to warrant the court in interfering. *Ferguson* v. *Township of Southwold*, 27 O. R. 66.

**Railway Ties at Side of Road**—*Negligence—Nuisance.*]—A municipal corporation are not responsible for damages resulting from a horse taking fright at railway ties piled, without the authority of the corporation, on the untravelled portion of a highway, but the person piling the ties on the highway is responsible. Maxwell v. Clarke, 4 A. R. 460, followed. Castor v. Uxbridge, 39 U. C. R. 125, considered. *O'Neil* v. *Windham*, 24 A. R. 341.

**Sand Heap on Highway** — *Statute Labour—Pathmaster—Liability for Acts of.*]—In an action against a municipal corpora-

tion for damages in consequence of a carriage having been upset by running against a pile of sand left on the highway, and one of the occupants thrown out and seriously injured, there was no direct evidence as to how the obstruction came to be placed on the highway, but it appeared that statute labour had been performed at the place of the accident immediately before under the direction of the pathmaster, an officer appointed by the corporation under statutory authority. The evidence indicated that the sand was left on the road by a labourer working under directions from the pathmaster or by a ratepayer engaged in the performance of statute labour: —Held, that the action must fail for want of evidence that the injury was caused by some person for whose acts the municipal corporation was responsible. Quære, is the corporation liable for the acts of a statutory officer like the pathmaster, or of a ratepayer in performance of statute labour? *McGregor* v. *Township of Harwich*, 29 S. C. R. 443.

**Stump at Side of Road**—*Runaway Horses—Control.*] — The word "repair," as used in the Municipal Act with reference to a highway, is a relative term, and if the particular road is kept in such a reasonable state of repair that those requiring to use it may, using ordinary care, pass to and fro upon it in safety, the requirement of the law is satisfied. A road need not be kept in such a state of repair as to guard against injury caused by runaway horses, i.e., horses whose riders or drivers have entirely lost control of them, either in spite of ordinary care or by reason of the want of it. And where the driver of a vehicle lost control of his horses, which ran away and caused the injury for which the action was brought by their running the vehicle against a stump in the highway, it was held that the plaintiffs could not recover against the municipality, because, notwithstanding the stump, the road was in a reasonable state of repair for ordinary travel. *Foley* v. *Township of East Flamborough*, 29 O. R. 139.

A highway, in an old and thickly settled district, over which there is much traffic, is out of repair within the meaning of the statute when a large stump is allowed to stand in the highway just at the edge of the travelled way. Semble, where horses are running away without any fault of the driver, and while he is still endeavouring to recover control of them he sustains injury owing to such a defect in the highway, he is entitled to damages. The contributory negligence of the driver of the vehicle in such a case is not an answer to an action for injuries sustained by an occupant thereof, who has in good faith intrusted himself to the driver's care. Judgment in 29 O. R. 139 reversed. *Foley* v. *Township of East Flamborough*, 26 A. R. 43.

**Telephone Pole** — *Notice — Contributory Negligence—Indemnity—Damages.*]—See *Atkinson* v. *City of Chatham*, 29 O. R. 518, 26 A. R. 521.

*See S. C., sub nom. Bell Telephone Co.* v. *City of Chatham*, 31 S. C. R. 61.

**Telephone Wire** — *Proximate Cause — Liability of Municipality.*] — O. was moving a house twenty-five feet high along one of the streets in a city, having obtained the authority of the city engineer to do so, when by reason of its coming in contact with a wire, of the existence of which O. was fully aware, stretched by a telephone company, without any authority from the city, across the street, the wire being nineteen and a-half feet from the ground, though the company's Act of incorporation required it to be at least twenty-two feet, the wire was torn from its fastenings, loosening some bricks, which fell on the plaintiff, severely injuring him:—Held, that no liability attached either to the city or the telephone company, and that O. was alone liable for the damage sustained by the plaintiff. *Howard* v. *City of St. Thomas*, 19 O. R. 719.

**Tiles at Side of Highway**—*Negligence.*] —On the side of a township road where there was a fill of about fourteen feet, with railings on either side, a quantity of tiles, of a large size, and of a light grey colour, were, shortly before the accident, piled by defendants on the side of the highway in a slight hollow behind the railing, for the purpose of repairing the culvert which ran through the fill. Some planks were thrown over them and a board nailed between the two boards forming the railing, so as to further hide the tiles from view: — Held, that this did not constitute evidence of negligence on the defendants' part so as to render them liable for injuries sustained by the plaintiff by reason of the horse which he was driving becoming frightened at the tiles and running away. *Macdonald* v. *Township of Yarmouth*, 29 O. R. 259.

*See McDonald* v. *Dickenson*, 25 O. R. 45, 21 A. R. 485.

**Vehicle on Side of Road**—*Negligence—Pleading.*]—The first count of a declaration, after averring defendants' duty to keep a street in repair, alleged that they so negligently preserved and kept the same, and so wrongfully, negligently, and improperly permitted a waggon to be and remain thereon for a long time, to wit, for the space of one month, contrary to their duty, that thereby the street became and was unsafe for the liege subjects, &c., to drive, pass, and repass, with their horses, carriages, &c., and the plaintiff lawfully passing with his carriage and horses, the horses became frightened by the said waggon and ran away, and the plaintiff was injured, &c. The second count alleged that defendants wrongfully and negligently permitted a certain waggon to be and remain on the said highway for a long space of time, to wit, for the space of one month, so as to obstruct the same, whereby the plaintiff's horses, while she was lawfully passing along the said street in her carriage, were frightened and ran away, &c.: —Held, both counts bad, in not shewing in what respect the corporation were negligent, or what duty they neglected, for it was not stated whether the waggon was defendants', or that it was allowed to remain an unreasonable time, or that there was not sufficient room left to pass, or in what way such an object, not of itself likely to frighten horses, caused the injury. *Rounds* v. *Town of Stratford*, 25 C. P. 123.

The existence of a broken down waggon with a bright red board sticking up in it, on the side of a highway and partly in the ditch, where it had been hauled by the owner, some eight or ten feet from the travelled part, leaving plenty of room to pass, and remaining there for ten days, does not constitute evidence of actionable negligence on the part of the corporation. Where, therefore, after the lapse of such ten days, the plaintiff in passing by with a horse and waggon was thrown out and injured, in consequence of the horse

taking fright at the waggon and board, and shying:—Held, that the corporation were not liable. *Rounds* v. *Town of Stratford*, 26 C. P. 11.

**Wood Piled on Side of Road** — *Liability of Municipality.*] — On one side of a travelled road which defendants were bound to keep in repair, was a declivity, down which a pile of wood, composed of blocks cut in two feet lengths, had been thrown by a person living near the highway. Some of the wood was upon the bed of the road, but a portion, estimated at from twenty-one to twenty-six feet, was free from obstruction, and the road itself was not defective. The plaintiff's horse, in passing, shied at the wood, threw him off, and injured him:—Held, that defendants were not guilty of a breach of the statutory duty imposed upon them by R. S. O. 1877 c. 174, s. 491, to "keep in repair," and they were therefore not liable. *Maxwell* v. *Township of Clarke*, 4 A. R. 460.

——— *Liability of Municipality — Child Playing on Road.*]—A municipality is liable for damages arising through its negligence to children playing upon the highway where there is no general law limiting this liability in that regard and no local law prohibiting their playing on the highway and when their presence is not prejudicial to the ordinary uses of the street for traffic and passage. Judgment in 31 O. R. 180 reversed. *Ricketts* v. *Village of Markdale*, 31 O. R. 610.

*See Ayre* v. *City of Toronto*, 30 C. P. 225; *Rice* v. *Town of Whitby*, 25 A. R. 191; *Preston* v. *Township of Camden*, 14 A. R. 85.

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7. *Non-repair—Defect in Sidewalk or Crossing.*

(a) *Generally.*

**Crossing below Level of Sidewalk**—*Evidence of Negligence.*]—Held, reversing the judgment in 11 O. R. 26, which was affirmed by the court of appeal, that a municipal corporation is under no obligation to construct a street crossing on the same level as the sidewalk, and that a sidewalk at an elevation of four inches above the level of the crossing is not such evidence of negligence in the construction of the crossing as to make the corporation liable in damages for injury to a foot passenger sustained by striking her foot against the curbing while attempting to cross the street. *City of London* v. *Goldsmith*, 16 S. C. R. 231.

**Crossing over Ditch**—*Duty of Municipality.*]—The plaintiff, living in an incorporated village, laid a plank from his door across the ditch to the street, by which he was in the habit of crossing, although the ditch was deep there, and he might, by going down the sidewalk a short distance, have crossed where it was shallow. In crossing by the plank at night he fell off and broke his leg: and he thereupon sued the corporation, alleging that it was their duty to have maintained a proper crossing from his house to the street:—Held, that there was no such duty, and that the action could not be maintained. *McCarthy* v. *Village of Oshawa*, 19 U. C. R. 245.

**Grating beyond Line of Highway.**]—A city corporation are liable for injuries happening to a person while walking, resulting from the defective condition of a part of a sidewalk constructed by them, extending beyond the true line of the street over adjacent private property so as ostensibly to form a portion of the highway, such defect being caused through the owner of the property having placed on such part of the sidewalk a grating covering an area, and having allowed it, to the knowledge of the municipality, to fall into disrepair so close to the highway as to render travel unsafe. *Badams* v. *City of Toronto*, 24 A. R. 8.

**Hinge on Trap Door** — *Liability of Municipality.*] — The plaintiff, while walking along one of the streets of a village, tripped on a hinge which projected about two inches above the level of a trap door in the sidewalk, and in endeavouring to recover himself caught his other foot in a depression in the woodwork, about an inch and a quarter deep, at the opposite corner of the trap door, and fell and injured his leg. It appeared that but for the hinge the accident would not have happened, and it was admitted at the trial that the state of the hinge was no evidence of negligence:—Held, that there was no evidence of negligence on the part of the defendants, and that the plaintiff was properly nonsuited. *Ray* v. *Village of Petrolia*, 24 C. P. 73.

The existence of hinges on a trap door a little more than an inch above the level of the sidewalk in a city, affixed by the owner of the abutting premises for convenience of access to his cellar, and against which the plaintiff, who was well aware of their existence, tripped and injured himself, does not constitute such a want of repair as to render the corporation liable for negligence. *Ewing* v. *City of Toronto*, 29 O. R. 197.

——— *Liability of Owner of House Abutting on Sidewalk.*]—The owner of a house abutting on a highway placed without authority a trap door in the sidewalk in order to obtain an entrance to his cellar, the hinges of the trap door projecting about an inch above the sidewalk. The defendant obtained title from this owner and continued to use the trap door, and the plaintiff, while lawfully using the highway, stumbled against the hinges and was hurt: — Held, that the defendant could not be held to be continuing the nuisance, as she had no title to the highway, and no right, strictly speaking, to remove the trap door constructed by another, and that, as the accident was not caused during or by her user of the trap door, she was not liable. *Ewing* v. *Hewitt*, 27 A. R. 296.

**Hole Covered by Snow** — *Contributory Negligence—Nuisance—Finding of Jury.*]—The plaintiff walking along a sidewalk in the town of Dundas in January, 1875, stepped into a hole, about eighteen inches long and seven inches wide, and broke her leg. The hole was close to her residence, and she was well aware of its existence, but she said she was unable to see it in consequence of its being covered with snow, there having been a light fall the night before. Other witnesses, however, said it was only partly covered, and was quite visible to a person taking ordinary care. The sidewalk had been fully repaired in the fall of 1873, and also in September preceding the trial. The population of the town was about 4,000, and the town covered a large surface; the taxes levied being about $11,000,

more than half of which was spent on the streets and sidewalks. There was also a committee on sidewalks, one of whom stated that he spent more than two-thirds of his time in attending to them. The jury having found for the plaintiff, a new trial was ordered. Semble, that to support an action of this character the want of repair must be such as would render the defendants liable to indictment; that persons using a sidewalk must assume a certain amount of risk; and that the existence of a hole like the one here would not necessarily impose a liability. Quære, whether the question of contributory negligence was for the Judge at the trial or should have been submitted to the jury. Quære, also, whether to form the ground of an action, the sidewalk, intended for extra convenience, must not have become a nuisance ad commune nocumentum. *Boyle* v. *Town of Dundas*, 25 C. P. 420.

On the second trial the jury in answer to questions submitted to them found, in substance, that, though defendants had generally performed their duty as to the repair of the sidewalks, yet in this case the sidewalk was not in a reasonably sufficient state of repair; and that, though plaintiff by watching her steps, &c., might have avoided the hole, yet that she exercised that due care and caution that a person would ordinarily use, under the circumstances:—Held, that on this finding the plaintiff was entitled to recover. *S. C.*, 27 C. P. 129.

**Hole in Sidewalk** — *Improper Use of Highway—Evidence of Negligence.*]—In an action against the town of Portland for damages arising from an injury caused by a defective sidewalk, the evidence of the plaintiff shewed that the accident whereby she was injured happened while she was engaged in washing the window of her dwelling from the outside of her house, and that in taking a step backward, her foot went into a hole in the sidewalk, and she was thrown down and hurt; she also swore that she knew the hole was there. There was no evidence as to the nature and extent of the hole, nor was affirmative evidence given of negligence on the part of any officer of the corporation. The jury awarded the plaintiff $300 damages, and a rule nisi for a new trial was discharged:—Held, that there was no evidence of negligence to justify the verdict of the jury; and that the plaintiff was neither walking nor passing over, travelling upon, nor lawfully using the said street as alleged in the declaration. *Town of Portland* v. *Griffiths*, 11 S. C. R. 333.

**Hole near Sidewalk**—*Evidence of Negligence—Contributory Negligence.*]—A building was being erected on a street in the village of Blenheim. It had a basement several feet deep, the joists of the first floor being about level with the sidewalk. For the purpose of excavating the basement, planks for the distance of twenty feet had been removed from the sidewalk, and the earth taken away so as to form a grade into the basement, planks being laid across the space so made. In the centre of the basement wall, where the doorway was, there was a hole made by the grade into the cellar. During the daytime a plank was laid from the planks across the sidewalk to the first floor, which it was customary to remove at night, and there was no direct evidence that it was not removed on the night in question. On the outside of the sidewalk there was a pile of stones and bricks, and the road was muddy. The plaintiff, who knew of the dangerous character of the place, was at night going along the sidewalk, and while in front of the building met two persons. He then stepped to the right on to the ground next to the building, standing still till the persons had passed by, when, on attempting to proceed himself, he struck against something and fell into the hole made by the grade into the cellar, and was injured:—Held, that the defendants were guilty of negligence; and that there was no evidence of contributory negligence on the plaintiff's part. *Copeland* v. *Village of Blenheim*, 9 O. R. 19.

**Irregularity in Land Adjoining Highway**—*Invitation.*]—Where the plaintiff, instead of taking the way provided for access to and from his premises, left it and proceeded to his destination upon a track belonging to the defendants, which, to his knowledge, was not a street or way completed for use or opened for public travel, no invitation or inducement being held out by the defendants to the public to travel upon it, and on which he, owing to irregularities on its surface, fell and was injured:—Held, that he could not recover damages for his injury. Held, also, that he could not recover upon the alternative allegation that he was obliged to leave the highway, because it was in a dangerous state from snow and ice, and sustained the injury upon the adjoining land. *Novcrre* v. *City of Toronto*, 27 O. R. 651, 24 A. R. 109.

**Obstruction** — *Lighting — Independent Contractors.*] — L. was walking along the sidewalk of a street in Halifax at night, when an electric lamp went out, and in the darkness she fell over a hydrant and was injured. In an action against the city corporation for damages it was shewn that there was a space of seven or eight feet between the hydrant and the inner line of the sidewalk, and that L. was aware of the position of the hydrant and accustomed to walk on said street. The statutes respecting the government of the city did not oblige the council to keep the streets lighted, but authorized them to enter into contracts for that purpose. At the time of this accident the city was lighted by electricity by a company who had contracted with the corporation therefor. Evidence was given to shew that it was not possible to prevent a single lamp or a batch of lamps going out at times:—Held, that the corporation were not liable; being under a statutory duty to light the streets, the relation between them and the contractors was not that of master and servant, or principal and agent, but that of employer and independent contractors, and the corporation were not liable for negligence in the performance of the service; that the position of the hydrant was not in itself evidence of negligence in the corporation; and that L. could have avoided the accident by the exercise of reasonable care. *City of Halifax* v. *Lordly*, 20 S. C. R. 505.

**Opening into Ditch**—*Insecure covering—Jury—Damages—Contributory Negligence.*]—H., a man seventy years of age and feeble, was found at night lying beside an excavation for a drain under the sidewalk in defendants' street, where several boards had been taken up and replaced with a temporary covering of boards laid at right angles to and projecting two inches above the rest of the sidewalk. He afterwards died from the effects of the fall. His administratrix sued the defendants, alleging that deceased fell into the ditch, which was open, and thus received the injury,

while the defendants alleged that the ditch was securely covered, and that deceased had struck his foot against the projecting plank, and fallen:—Held, that, upon the evidence, the finding of the jury that he fell into the ditch owing to the insecure way in which the defendants left the opening, which was the only point left to the jury, was unsatisfactory. The deceased was insolvent at the time of his death, and in failing health, not capable of much labour, but there was evidence that he was able to superintend his business, which was that of an innkeeper, and went to market. The jury having given $4,000, apportioned among his children:—Held, that the damages were excessive. The deceased having passed over the sidewalk half an hour before, when it was light and the state of the sidewalk could be seen:—Held, that there was evidence of contributory negligence on his part. Remarks as to the nature of obstructions which would make defendants liable, and the care required from persons with defective sight, &c. *Hutton* v. *Town of Windsor*, 34 U. C. R. 487.

*See Bennett* v. *County of York*, 43 U. C. R. 542; *Bleakley* v. *Town of Prescott*, 7 O. R. 261, 12 A. R. 637; *Beasley* v. *City of Hamilton*, 9 O. R. 112; *Stillaway* v. *City of Toronto*, 20 O. R. 98; *City of St. John* v. *Christie*, 21 S. C. R. 1.

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(b) *Snow and Ice.*

(*See*, also, *post* 13).

**Municipal Corporation** — *Negligence—By-law.*]—The plaintiff, while walking along one of the sidewalks in the city of Toronto, on a frosty day in the middle of winter, stepped on a piece of ice three feet wide, slipped and fell, and received a severe injury:—Held, not sufficient to render the corporation liable as for neglect to keep the sidewalk in repair, for the mere existence of the piece of ice was no evidence of actionable negligence; and a nonsuit directed at the trial was upheld. Held, also, that the passing of a by-law by the corporation imposing a duty upon others to keep the sidewalks clear of snow and ice, did not create a liability upon themselves. *Ringland* v. *City of Toronto*, 23 C. P. 93.

——— *Negligence — Notice—Contributory Negligence.*]—A sidewalk on one of the streets in the city of Toronto, to the distance of 500 feet, and near the centre of the city, was covered with ice. There was no evidence of any actual notice to the defendants of its existence, but it was proved that the city commissioner, whose duty it was to enforce the city by-laws, one of which required the removal of ice and snow from the sidewalks, had frequently driven up and down the street and past this sidewalk, without taking any steps to enforce the removal of the ice. It did not appear, however, that he ever noticed, or that any complaint had ever been made to him concerning, the condition of the sidewalk. The female plaintiff, while walking over the sidewalk in broad daylight, slipped on the ice and fell, and received a severe injury, but it was proved that she was well aware of the state thereof, as she lived close by, frequently passed over it, and had already passed over it on the day of the accident:—Held, that defendants were not liable. Review of the authorities as to liability for accidents caused by snow or ice. There was no negligence on defendants' part, for there was no proof of notice to them, the mere fact of the commissioner passing along the street being insufficient to raise any presumption of notice; and there was contributory negligence on the plaintiff's part, for she was well aware of the condition of the sidewalk, and need not have used it. Ringland v. City of Toronto, 23 C. P. 93, remarked upon. *Burns* v. *City of Toronto*, 42 U. C. R. 560.

——— *Negligence—Accumulation.*] — The plaintiff, a resident inhabitant of the town of Prescott, whilst proceeding along one of the sidewalks of the town, attempted to cross from one side of such walk to the other over an accumulation of hard beaten snow, where there was a slight declivity in the sidewalk, and in doing so slipped and fell, thereby injuring herself:—Held, reversing the judgment in 7 O. R. 261, that there was no proof of such accumulation of snow as indicated negligence on the part of the defendants, and there being no evidence of negligence in the construction of the sidewalk, the corporation were not liable. *Bleakley* v. *Town of Prescott*, 12 A. R. 637.

——— *Negligence before Incorporation.*]—To an action by plaintiff against defendants for an accident to plaintiff on 11th April, 1886, caused by slipping on a sidewalk of defendants "covered with snow and ice, negligently allowed to accumulate thereon by defendants, and being otherwise defective and negligently out of repair for a long time to the defendants' knowledge, and which it was their duty to keep in repair," defendants pleaded that the village had not at the date of the accident been organized according to the terms of 49 Vict. c. 55 (O.) incorporating said village, and could not have any officers or servants, and could not be and was not guilty of negligence, by reason of anything done or omitted previous to or at the said date of said alleged accident:— Held, a good defence. *Simpson* v. *Village of Huntsville*, 13 O. R. 101.

——— *Negligence — Contributory Negligence.*]—The plaintiff, walking home at night, as he was accustomed to, along the sidewalk provided by the defendants for foot passengers, which the defendants were bound by statute to keep in proper repair, but along the centre of which a ridge of ice had accumulated, and been allowed by them, to the knowledge of the plaintiff, to remain for a couple of months, slipped across the ridge and fell, injuring himself. While stating that he was walking carefully, he admitted that he was aware that it was a dangerous place, and might have been avoided, either by his taking to the travelled road, or by going home another, but longer, way. Numbers of persons were in the habit of using it daily without accident. The Judge at the trial declined to withdraw the case from the jury:—Held, that the plaintiff having the right to use the sidewalk, it was a question for the jury whether under the circumstances of the case he was exercising such care as a prudent person would reasonably exercise in using it, knowing its condition. Knowledge is not per se contributory negligence. *Gordon* v. *City of Belleville*, 15 O. R. 26.

——— *Negligence—Notice.*]—By reason of ice on the sidewalk on Yonge street, in the

city of Toronto, the plaintiff, who was walking along that street about six o'clock in the afternoon, slipped and fell, sustaining damage. The place in question was in front of a lane which ran between two stores, the walls of the stores forming the sides of the lane, which sloped towards the sidewalk; the ice being caused by the water from rain and melting snow running down the lane on to the sidewalk and then freezing. There was ice on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there:—Held, that there was no evidence of negligence on the part of the defendants. *Forward* v. *City of Toronto*, 15 O. R. 370.

At a certain point in a frequented street in the defendants' town, the sidewalk having settled through age and decay formed a depression where water lodged and ice gathered, and the plaintiff slipped upon it and was injured. The place had been in as bad condition as at the time of the mishap for a fortnight:—Held, by the chancery division, that the plaintiff was entitled to recover. Held, by the court of appeal, that allowing, for a fortnight, water to collect and alternately freeze and thaw in a depression in a sidewalk in a frequented street in a town, was non-repair for which the defendants were liable. Held, by the supreme court of Canada, that, as the evidence at the trial of the action shewed that the sidewalk, either from improper construction or from age and long use, had sunk down so as to allow water to accumulate upon it, whereby the ice causing the accident was formed, the defendants were liable. *Derochie* v. *Town of Cornwall*, 23 O. R. 355, 21 A. R. 279; *Town of Cornwall* v. *Derochie*, 24 S. C. R. 301.

——— *Negligence—Accumulation—By-law—Crossing—Difference of Level—Gross Negligence—Notice of Accident.*]—A by-law of the appellants required frontagers to remove snow from the sidewalks. The effect of its being complied with was to allow the snow to remain on the crossings, which therefore became higher than the sidewalks, and, when pressed down by traffic, an incline more or less steep was formed at the ends of the crossings. The respondent slipped and fell on one of these inclines, and being severely injured brought an action for damages against the appellants and obtained a verdict. The Municipal Act of Ontario makes a corporation, if guilty of gross negligence, liable for accidents resulting from snow and ice on sidewalks; notice of action in such case must be given, but may be dispensed with on the trial if the court is of opinion that there was reasonable excuse for the want of it, and that the corporation has not been prejudiced in its defence:—Held, affirming the decision in 23 A. R. 406, that there was sufficient evidence to justify the jury in finding that the appellants had not fulfilled their statutory obligation to keep the streets and sidewalks in repair. Town of Cornwall v. Derochie, 24 S. C. R. 301, followed. Held, also, that it was no excuse that the difference in level between the sidewalk and crossing was due to observance of the by-law; that a crossing may be regarded as part of the adjoining sidewalk for the purpose of the Act; that "gross negligence" in the Act means very great negligence, of which the jury found the appellants guilty; and that an appellate court would not interfere with the discretion of the trial Judge in dispensing with notice of action. *City of Kingston* v. *Drennan*, 27 S. C. R. 46.

———*Negligence—Accumulation — Gross Negligence.*]—"Gross negligence" in s. 606 (2) of the Municipal Act, R. S. O. 1897 c. 223, means at the least "great negligence," and when it is attempted to make a municipal corporation responsible in damages under that sub-section for an accident caused by ice on a sidewalk, it must be shewn that the sidewalk was allowed to remain in a dangerous condition for an unreasonable time. If the sidewalk has been constructed in accordance with the plans of competent engineers and is in good repair, the possibility of an improved or less dangerous plan of construction is not an element to be considered in deciding the question of the municipality's gross negligence. Where there was a sudden change in temperature about six in the morning and ice then formed on the sidewalk in question, it was held that the municipality, in the absence of actual notice of its dangerous condition, were not liable in damages for an accident which happened about eleven o'clock on the same morning. *Ince* v. *City of Toronto*, 27 A. R. 410.

**Owner of Adjacent Building**—*Fall of Snow from Roof—Negligence.*]—There is no duty at common law upon owners or occupiers of houses to remove snow from the roof, and no liability for accidents caused by its falling. The defendants leased land to H., who erected a house upon it under the directions of their architect. The lower storey was occupied by a lessee of H., and the upper storey and garret by the defendants. There was no evidence of any faulty or negligent construction, nor of any by-law of defendants regulating the removal of snow. The plaintiff having been injured while passing along the street by snow falling from the roof:—Held, that defendants were not liable. *Lazarus* v. *City of Toronto*, 19 U. C. R. 9.

In an action for damages sustained by the plaintiff by reason of ice and snow falling from the roof of the defendant's house and injuring him while he was walking on the highway, evidence was given to shew that about half an hour before the accident happened the defendant was notified of the dangerous character of the roof, but took no precautions to guard against accidents, and a by-law of the municipality was proved requiring the citizens to keep their roofs clear of ice and snow:—Held, that there was evidence to go to the jury of negligence in the defendant. A nonsuit entered at the trial was therefore set aside and a new trial granted. Lazarus v. City of Toronto, 19 U. C. R. 9, commented on and distinguished. *Landreville* v. *Gouin*, 6 O. R. 455.

——— *Proximate Cause.*]—The defendants were the owners of a building upon a street. A pipe connected with the eave troughs conducted the water from the roof down the side of the building, and by means of a spout discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the female plaintiff slipped and fell while walking in the street, and injured herself. The jury found that the defendants did not know of the accumulation of ice, and that they ought not reasonably to have known of it:—Held, that the defendants were not liable. The carrying of the water

to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident; and the defendants not having knowingly allowed ice to accumulate were not responsible. *Skelton* v. *Thompson*, 3 O. R. 11.

——— *Tenant—Relief over.*]—See *Organ* v. *City of Toronto*, 24 O. R. 318.

*See Noverre* v. *City of Toronto*, 27 O. R. 651, 24 A. R. 109, *ante* (a).

8. *Non-repair—Indictment for.*

**Acquittal**—*New Trial.*]—Quære, whether it is proper to grant a new trial, where an individual or a corporation has been once acquitted on an indictment, even in cases of misdemeanour. *Regina* v. *Grand Trunk R. W. Co.*, 15 U. C. R. 121.

——— *New Trial—Grounds for.*]—In no case of misdemeanour, after verdict of acquittal, will a new trial be granted, on the ground that the verdict is against evidence or the weight of evidence. In cases of non-feasance, such as non-repair of a highway, a new trial may be ordered on the ground of misdirection, or improper reception or rejection of evidence; but in cases of misfeasance, such as obstruction of a highway, it is doubtful if a new trial should be granted in any case. *Regina* v. *Port Perry and Port Whitby R. W. Co.*, 38 U. C. R. 431.

**Grantee of Crown**—*Liability to Indictment—Agreement—Certificate of Engineer.*]—Grantees of the Crown, of public highways, are indictable for default in repairing such highways, although they are also liable to the Crown for the breach of their covenant to that effect in the patent; and this liability follows the property, so as to make the purchaser of part and mortgagee of the residue also indictable for the same cause, although it has been expressly agreed that the grantor shall and the grantee shall not be bound to repair. Semble, that an agreement by the Crown that the grantee should not be liable to repair, could not, with the grant of the tolls, have relieved them from the public duty of necessary repairs. Held, also, that to maintain the indictment, it was not necessary that the government engineer should first have condemned the road by certificate. *Regina* v. *Mills*, 17 C. P. 654.

**Repair of Bridge**—*Remedy.*]—Where a county council is liable to repair a bridge the proper remedy is indictment, not mandamus. *Re Jamieson and County of Lanark*, 38 U. C. R. 647.

**Road Company**—*Liability to Indictment—Removal by Certiorari.*]—A road company, incorporated under 16 Vict. c. 190 and subsequent Acts (R. S. O. 1877 c. 152), are not subject to indictment for not keeping their road in repair, where the liability to repair is admitted; the special remedies given by the Act must be resorted to. But where the dispute is, whether the part out of repair is part of defendants' road, an indictment will lie. Semble, that the proper mode of objecting to such an indictment is not by demurrer, but by removing the indictment by certiorari, and moving to quash it upon affidavit shewing the facts. *Regina* v. *Ottawa and Gloucester Road Co.*, 42 U. C. R. 478.

9. *Non-repair—Injury by—Contributory Negligence.*

**Question for Judge or Jury.**]—Action for accident caused by neglect to repair a sidewalk:—Quære, whether the question of contributory negligence, upon the evidence, was for the Judge at the trial, or should have been submitted to the jury. The authorities reviewed. *Boyle* v. *Town of Dundas*, 25 C. P. 420.

On the second trial the jury, in answer to questions submitted to them, found, in substance, that, though the defendants had generally performed their duty as to the repair of the sidewalks, yet in this case the sidewalk was not in a reasonably sufficient state of repair; and that, though plaintiff by watching her steps, &c., might have avoided the hole, yet that she exercised that due care and caution which a person would ordinarily use, under the circumstances:—Held, that on this finding the plaintiff was entitled to recover. *S. C.*, 27 C. P. 129.

A portion of a highway which the defendants were bound to keep in repair, had a trench running across it, caused by water escaping from a culvert, and was allowed so to continue out of repair for a month. The deceased, while lawfully travelling along the road which he had passed over the day before, attempted to cross such trench in a waggon, from which he was thrown and killed. In an action for damages, it was alleged by the defendants that deceased was well aware of the defect in the road, if any, and at the time of the accident was intoxicated, and thus contributed to the accident. It was left to the jury to say whether the deceased had so contributed to the accident, that but for want of reasonable care it would not have occurred. The jury answered this in the negative, and rendered a verdict in favour of the plaintiff:—Held, that the question of contributory negligence was one for the jury, and could not have been withdrawn from them. *Maw* v. *Townships of King and Albion*, 8 A. R. 248.

**What Amounts to Contributory Negligence.**] — Telegraph poles, intended for the construction of their line, had been laid by a telegraph company upon the highway, encroaching upon the travelled portion. The plaintiff was being driven by one F. along the road in a sulky in the daytime; they had passed several of the poles safely, but both were at the moment looking at an object off the road, and the sulky running against a pole upset and injured the plaintiff. It was proved that the pathmaster knew of the poles being there. The court being left to draw inferences as a jury:—Held, that the driver was guilty of contributory negligence, and that the plaintiff therefore could not recover, although the defendants would otherwise have been liable. *Castor* v. *Township of Uxbridge*, 39 U. C. R. 113.

In an action for the death of H., caused by falling into an excavation for a drain under the sidewalk, alleged to have been negli-

gently left uncovered by defendants, the deceased having passed over the place half an hour before, when it was light and the state of the sidewalk could be seen:—Held, that there was evidence of contributory negligence on his part. Remarks as to the nature of obstructions which would make defendants liable, and the care required from persons with defective sight, &c. *Hutton* v. *Town of Windsor*, 34 U. C. R. 487.

*See McIntyre* v. *Buchanan*, 14 U. C. R. 581; *Bradley* v. *Brown*, 32 U. C. R. 463; *Price* v. *Cataraqui Bridge Co.*, 35 U. C. R. 314; *Burns* v. *City of Toronto*, 42 U. C. R. 560; *Toms* v. *Township of Whitby*, 35 U. C. R. 195, 37 U. C. R. 100; *Sherwood* v. *City of Hamilton*, 37 U. C. R. 410; *Walton* v. *County of York*, 30 C. P. 217, 6 A. R. 181; *Bliss* v. *Boeckh*, 8 O. R. 451; *Copeland* v. *Village of Blenheim*, 9 O. R. 19; *Town of Portland* v. *Griffiths*, 11 S. C. R. 333; *Gordon* v. *City of Belleville*, 15 O. R. 26; *Lawson* v. *Village of Alliston*, 19 O. R. 655; *Ferguson* v. *Township of Southwold*, 27 O. R. 66; *Atkinson* v. *City of Chatham*, 29 O. R. 518, 26 A. R. 521.

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10. *Non-repair—Injury by—Damages.*

**Excessive Damages.**] — See *Hutton* v. *Town of Windsor*, 34 U. C. R. 487, *ante* 7 (a).

The damages ($2,500) being in the opinion of the court excessive, for injuries to plaintiff's wife, caused by defendants' neglect to protect an embankment on the highway, a new trial was granted on payment of costs, unless the plaintiffs would consent to reduce the verdict to $1,250. *Toms* v. *Township of Whitby*, 35 U. C. R. 195.

**Solatium**—*Pecuniary Loss.*]—In an action for damages brought against the corporation of the city of Montreal by Z. L. et al., the descendant relations of L., who was killed while driving down St. Sulpice street, alleged to have been at the time of the accident in a bad state of repair, by being thrown from the sleigh on which he was seated against the wall of a building, the Judge before whom the case was tried without a jury granted Z. L. et al. $1,000 damages on the ground that they were entitled to said sum by way of solatium for the bereavement suffered on account of the premature death of their father:—Held, that the judgment could not be affirmed on the ground of solatium, and, as the respondents had not filed a cross-appeal to sustain the verdict on the ground that there was sufficient evidence of a pecuniary loss for which compensation could be claimed, Z. L. et al.'s action must be dismissed with costs. *City of Montreal* v. *Labelle*, 14 S. C. R. 741.

*See Ferguson* v. *Township of Southwold*, 27 O. R. 66, *ante* 6 (b); *Huffman* v. *Township of Bayham*, 26 A. R. 514.

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11. *Non-repair—Injury by—Jury Notice.*

**Motion to Strike out.**]—In an action against a railway company and a city corporation to recover damages for injuries sustained by the plaintiffs by being upset upon a street in the city owing to the heaping up of snow upon the side of the roadway, the plaintiffs in their statement of claim alleged that the corporation had permitted this to be done, and had thereby allowed the street to be out of repair and dangerous for travel:—Held, that the action must be treated as one for non-repair of a street within the meaning of s. 5 of the Law Courts Act, 1896; and a jury notice was therefore irregular and should be struck out. It made no difference that the motion to strike out the jury notice was made by the railway company and not by the city corporation, as the latter appeared and supported the motion. *Barber* v. *Toronto R. W. Co.*, 17 P. R. 293.

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12. *Non-repair — Limitation of Actions for.*

**Death by Negligence**—*Period of Limitation.*]—An action under C. S. C. c. 78, by the representatives of a deceased person killed by the neglect of defendants to repair a highway, must, under C. S. U. C. c. 54, s. 337, be brought within three months, notwithstanding the limitation of twelve months allowed by the first-mentioned statute. *Turner* v. *Town of Brantford*, 13 C. P. 109.

Action by an administratrix against defendants for digging and opening a drain in the city of Ottawa, and leaving it at night uncovered, whereby the deceased was injured and died:—Held, that the administratrix was limited to six months from the cause of action accruing within which to sue, that being the period limited by defendants' charter, 35 Vict. c. 80, s. 35 (O.), for, although under C. S. C. c. 78, s. 4, the administratrix is allowed twelve months after the death of the deceased to bring her action, this does not apply where there is a special provision, as here, for a more limited period. *Cairns* v. *Ottawa Water Commissioners*, 25 C. P. 551.

**Injury**—*Commencement of Period.*]—The statute C. S. U. C. c. 54 (R. S. O. 1877 c. 174, s. 491) requires the action to be brought "within three months after the damages have been sustained." The plaintiff's mare fell through a bridge, and died four months afterwards from the injuries then received:—Held, that the statute began to run from the occurrence of the accident, not from the death. *Miller* v. *Township of North Fredericksburg*, 25 U. C. R. 31.

——— *Nonfeasance.*]—Defendants made a hole in the highway in order to ascertain whether repairs were required there, but they did not replace the materials or fill up the hole, nor place a light there; and the plaintiff, crossing the road, fell against the materials so left, and into the hole:—Held, a cause of action within s. 409 of the Municipal Act of 1873, and that the plaintiff suing after three months was barred. *Pearson* v. *County of York*, 41 U. C. R. 378.

——— *Misfeasance.*]—Defendants, for the purpose of repairing their road, placed on the side, heaps of gravel, &c., and took no precautions to prevent accidents therefrom. Plaintiff, driving at night, ran against one of them and upset, and broke his waggon. Defendants pleaded that an action brought therefor was not brought within three months, according to C. S. U. C. c. 54, s. 337:—Held, plea bad, as the cause of action was not the neglect of defendants to keep in repair, but

the positive act of heaping up gravel and neglecting to afford sufficient notice or protection. *Rowe* v. *Counties of Leeds and Grenville*, 13 C. P. 515.

*See Carty* v. *City of London*, 18 O. R. 122.

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13. *Non-repair—Notice of Accident.*

**Absence of** — *Pleading — Objection at Trial.*]—The defence of want of the notice of accident required by s. 13 of the Municipal Amendment Act, 1894, in an action against a municipal corporation for injuries sustained through a defective sidewalk, should be set up in the statement of defence, if the statement of claim is silent on the point, and the Judge can then go into the circumstances, if any, which excuse the want or insufficiency of the notice. And where the objection, in such a case, to the want of notice was not raised until after the evidence was closed, a motion for a nonsuit was refused. *Longbottom* v. *City of Toronto*, 27 O. R. 198.

**Accident at Street Crossing.**]—A street crossing on the line of and joining parts of a sidewalk on opposite sides of the street, is not a sidewalk within the meaning of 57 Vict. c. 50, s. 13 (O.) *Drennan* v. *City of Kingston*, 23 A. R. 406. See *S. C.*, 27 S. C. R. 46.

**Application of Statute**—*Snow and Ice.*]—The latter part of the clause added to s. 531 (1) of the Consolidated Municipal Act, 1892, by 57 Vict. c. 50, s. 13, as amended by 59 Vict. c. 51, s. 20, whereby it is provided that "no action shall be brought to enforce a claim for damages under this sub-section unless notice in writing of the accident and the cause thereof has been served," applies to all cases of non-repair of highways, &c., and is not confined to cases where the non-repair is by reason of the corporation not removing snow or ice from the sidewalks. Drennan v. City of Kingston, 23 A. R. 406, discussed. *Aldis* v. *City of Chatham*, 28 O. R. 525.

**Description of Locality** — *Sufficiency of.*]—A notice of accident to a municipal corporation in respect of a claim arising out of a defective sidewalk is sufficient if it states the cause of the accident together with the name of the street and the particular side of the street and reasonable information as to locality so as to enable the corporation to investigate. It is not necessary to mention the exact locality. *McQuillan* v. *Town of St. Mary's*, 31 O. R. 401.

**Necessity for** — *Joint Liability for Repair.*]—The notice in writing of the accident and the cause thereof, referred to in the Consolidated Municipal Act, 1892, s. 531, s.-s. 1, as amended by 57 Vict. c. 50 s. 13 (O.), and 59 Vict. c. 51, s. 20 (O.), is not necessary when the accident is the result of non-repair of a highway which two or more municipalities are jointly liable to keep in repair. Judgment in 29 O. R. 98 affirmed. *Leizert* v. *Township of Matilda*, 26 A. R. 1.

——— *Joint Liability for Repair — Amendment of Statute—Waiver.*] — The notice of the accident and the cause thereof required by s. 606 (3) of the Municipal Act, R. S. O. 1897 c. 223, to be given within thirty days after the accident, must now, by 62 Vict. (2) c. 26, s. 39 (O.), be given to each of the municipalities where the claim is against two or more as jointly responsible for the repair of the road. Leizert v. Township of Matilda, 26 A. R. 1, is therefore not now applicable. Where notice in writing was given to one township municipality of two sued as jointly liable, and not to the other, but it appeared that the reeve of the latter had been orally notified by the plaintiff and had then promised to write and had written to the reeve of the former, after which both reeves attended with the plaintiff and examined the place of the accident, and the reeve of the latter afterwards wrote to the plaintiff advising him that the township corporation did not recognize his claim because it was considered that the loss arose from the fault of the plaintiff; and all this within thirty days after the accident:—Held, that there was no waiver. *Jones* v. *Township of Stephenson*, 32 O. R. 226.

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14. *Non-repair—Notice or Knowledge of, by Municipal Corporation.*

**Drain**—*Absence of Authority—Continued Danger.*]—In an action against defendants for an accident to the plaintiff by falling into a drain, which had been opened or dug in a street at one of the most frequented places in the city, and which had remained in an unprotected state for a considerable time, the men having been engaged in working at it nearly a month:—Held, that it was no defence that defendants did not make or authorize the drain to be dug, as under the circumstances they must be deemed to have had the fullest notice. *Adair* v. *City of Kingston*, 27 C. P. 126.

**Obstruction**—*Implied Notice — Sanction of Practice.*]—One S., contrary to the city by-laws, deposited on one of the streets of the city of Toronto, to be removed by the city scavenger carts on the following morning, a quantity of ashes and rubbish, so as to cause an obstruction to the street, whereby the plaintiff, while driving along the street a few hours afterwards, at one o'clock in the morning, was injured. It was proved that the defendants had no express notice or knowledge of the obstruction until after the accident, but it was urged that notice must be implied, because defendants had sanctioned the practice of so depositing ashes, &c., by having permitted it without objection on former occasions; but the evidence was held not to substantiate this:—Held, that there was no evidence of negligence on defendants' part; and a nonsuit was entered. *Ayre* v. *City of Toronto*, 30 C. P. 225.

——— *Implied Notice—Lapse of Time.*]—A house which was being moved from one part of a town to another was allowed to stand over night upon one of the streets without a watchman or warning light. The horses attached to a carriage in which the plaintiff was, while being driven past the house that night, took fright and the plaintiff was injured. Some of the town councillors knew that the house was being moved and two of them knew that it had been left standing upon the street for the night:—Held, that, assuming that the house was an obstruction to the highway, there was not sufficient notice or sufficient lapse of time to impose liability upon the corporation. Castor v. Township of Ux-

bridge, 39 U. C. R. 113, Toms v. Township of Whitby, 37 U. C. R. 100, and Maxwell v. Clarke, 4 A. R. 460, referred to. Judgment in 28 O. R. 598 reversed. *Rice* v. *Town of Whitby*, 25 A. R. 191.

**Pleading**—*Want of Notice.*]—The plaintiff claimed damages for injuries received by his stepping upon the covering or lid of a manhole in the sidewalk alleged to be defective, &c., through defendants' negligence. By the first paragraph of the statement of defence defendants denied the correctness of the statements contained in the statement of claim; and by the second paragraph set up that defendants had no notice or knowledge of the defect:—Held, on demurrer to the second paragraph, that the whole statement of defence must be read together; and that the second paragraph taken with the first constituted a good defence, or was immaterial; that it could not embarrass the plaintiff, for, if he proved actionable negligence, he must prove either actual or presumptive notice. *Beasley* v. *City of Hamilton*, 9 O. R. 112.

*See Harold* v. *County of Simcoe*, 16 C. P. 43, 18 C. P. 9; *Rounds* v. *Town of Stratford*, 25 C. P. 123; *S. C.*, 26 C. P. 11; *Burns* v. *City of Toronto*, 42 U. C. R. 560; *Duck* v. *City of Toronto*, 5 O. R. 295; *Atkinson* v. *City of Chatham*, 29 O. R. 518, 26 A. R. 521; *Castor* v. *Township of Uxbridge*, 39 U. C. R. 113; *Gordon* v. *City of Belleville*, 15 O. R. 26; *Forward* v. *City of Toronto*, 15 O. R. 370.

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15. *Non-repair—Relief over.*

**Claim for**—*Amendment—Direct Claim—Order of Addressing Jury.*]—An action for damages for injuries resulting from a defective sidewalk was brought against a city, who under R. S. O. 1887 c. 184, s. 531, s.-s. 4, obtained an order adding O. as a party defendant, and alleged in their defence that O. was responsible for the defects in the sidewalk, and asked a remedy over against him. O. delivered a defence denying the cause of action, and alleging that, if any accident occurred, it was through the neglect of the city. At the trial the jury found that O. had occasioned the accident, and gave damages to the plaintiffs. The plaintiffs then applied for leave to amend their statement of claim by claiming directly against O., which leave was granted, and judgment was entered against O. for the damages awarded:—Held, that the leave to amend was properly granted, and the judgment should be affirmed. Modern procedure endeavours to work out the rights and liabilities of all parties as far as possible in the same action, and, so long as no substantial injustice is done, it is permissible to conform the pleadings to the facts at the close of the case. At the trial the Judge ruled that counsel for O. should address the jury before the counsel for the city, thus giving the latter the reply as against O.:—Held, that this ruling was correct. *Stilliway* v. *City of Toronto*, 20 O. R. 98.

**Flooding Highway**—*Mill Dam.*]—A mill owner, having a license from a township to construct his mill dam in such a way as to flood a part of the highway, constructed it so negligently that it gave way, causing damage to proprietors below:—Held, that the license to dam water back upon the highway was (except in so far as it might be a public nuisance affecting travellers on the road) a lawful thing; and that the damage being caused by the negligence of the mill owner, the township was not liable. Such a case is not within R. S. O. 1887 c. 184, s. 531, s.-s. 4, which gives to a corporation against which is brought an action to recover damages sustained by reason of any obstruction &c., on a highway placed by any person, other than a servant or agent of the corporation, the right to claim relief over against such person. *Ward* v. *Caledon, Algie* v. *Caledon*, 19 A. R. 69.

**Ice on Sidewalk** — *Owner of Adjacent Building—Tenant.*]—In an action against a city municipality in which the plaintiff recovered damages for injuries sustained by her slipping on ice which had formed on the sidewalk by water brought by the down pipe from the roof of an adjacent building, which was allowed to flow over the sidewalk and freeze, there being no mode of conveying it to the gutter, the owner of the building and the tenant thereof were, at the instance of the municipality, made party defendants under s. 531 of the Consolidated Municipal Act. The pipe in its condition at the time of the accident, discharging the water upon the sidewalk, had existed from the commencement of the tenancy. A by-law of the municipality required the occupant of a building, or, if unoccupied, the owner, to remove ice from the front of a building abutting on a street, within a limited time:—Held, that the owner was, but the tenant was not, liable over to the municipality for the damages recovered. *Organ* v. *City of Toronto*, 24 O. R. 318.

**Lands Injuriously Affected**—*Railway.*]—See *Baskerville* v. *City of Ottawa*, 20 A. R. 108.

**Liability of Wrongdoer to Corporation.**]—See *Township of Vespra* v. *Cook*, 26 C. P. 182.

**Obstruction** — *Joint Liability.*] — Subsection 4 of s. 531 of R. S. O. 1887 c. 184 provides that if an action is brought against a municipal corporation to recover damages sustained by reason of an obstruction, excavation, or opening in a public place, made, left, or maintained by another corporation or by any person other than a servant or agent of the municipal corporation, the last mentioned corporation shall have a remedy over against the other corporation or person for any damages which the plaintiff in the action may recover against them. This applies to the case of an obstruction, excavation, or opening, directly and immediately placed on or dug in the highway by the corporation or person against whom the remedy over is given. It does not give a right to one township municipal corporation to recover from an adjoining township municipal corporation damages recovered for an accident caused by non-repair of a road lying between the townships which they were jointly liable to keep in repair. *Township of Sombra* v. *Township of Moore*, 19 A. R. 144.

——— *Wrongdoer.*] — The person who placed on a highway a boulder which caused injury to the plaintiff was added as a defendant under s. 531 of the Municipal Act, R. S. O. 1887 c. 184, and was held liable over to the corporation under s.-s. 4. Township of Vespra v. Cook, 26 C. P. 182, distinguished. Balzer v. Township of Gosfield South, 17 O.

R. 700, followed. *McKelvin* v. *City of London*, 22 O. R. 70.

Where an object is left over night on the highway unlighted and unguarded (in this case, a building in process of removal) which is calculated to frighten horses, and by which a horse is frightened, and an accident results, and where the municipality, though having notice, have taken no precautions to warn travellers, they are liable, in the absence of contributory negligence; but are entitled to be indemnified by the person who placed the obstruction on the highway. *Rice* v. *Town of Whitby*, 28 O. R. 598. See *S. C.*, 25 A. R. 191.

**Snow**—*Street Railway—Evidence — Finding of Jury.*]—See *Toronto R. W. Co.* v. *City of Toronto*, 24 S. C. R. 589.

*See Gilchrist* v. *Township of Carden*, 26 C. P. 1; *Carty* v. *City of London*, 18 O. R. 122; *Balzer* v. *Township of Gosfield South*, 17 O. R. 700.

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16. *Non-repair—Road Companies.*

(*See*, also, *post* VIII.)

**Action by Private Person** — *Special Damage.*] — Road companies owning public highways and entitled to tolls thereon are liable, for accidents arising from want of repair, to actions at the suit of individuals sustaining special injury, as well as to indictment. *Macdonald* v. *Hamilton and Port Dover Plank Road Co.*, 3 C. P. 402.

**Alteration by Railway Company** — *Adoption.*]—Where a railway company altered, at a railway crossing, the grade of a road owned by a road company, and the alterations were subsequently ratified and adopted by the road company collecting tolls:—Held, that by such adoption and acceptance, they were to be treated as responsible for any injury resulting from the omission to fulfil a duty arising out of such altered state of the highway, e.g., to put up a parapet. *Whitmarsh* v. *Grand Trunk R. W. Co.*, 7 C. P. 373.

**Lessee of Toll Gate** — *Snow.*] — A road company are not liable to the lessee of a toll gate for allowing the road to become blocked up by snow, under 16 Vict. c. 190. *Stewart* v. *Woodstock and Huron Plank and Gravel Road Co.*, 15 U. C. R. 427.

——— *Tolls, Decrease in.*]—A road company are not liable to a lessee for neglecting to keep their road in repair, and thus causing a diminution in the tolls. The 34th and two subsequent sections of 16 Vict. c. 190, are intended for the protection of the public, and give no additional rights to a lessee of the road. *Watson* v. *Sarnia Plank Road Co.*, 16 U. C. R. 228.

**Negligence**—*Evidence of — Accumulation of Snow.*]—A snow drift, about two or three rods in length, and two feet in depth, had formed on a gravel road. It had been there two or three weeks, and, owing to the thawing and freezing of the snow, ruts had formed in it, which made it unsafe for waggons. On the 1st March the plaintiff was passing over it in a waggon, when the wheel going down threw him out, and the hind wheel went over his leg and broke it. Defendants afterwards cleared away the snow there. The road was good except for the snow, and there was a heavy snow storm and sleighing after the accident:—Held, that there was evidence of negligence on the part of defendants in not keeping the road in repair, and a verdict for the plaintiff was upheld. *Caswell* v. *St. Mary's and Proof Line Junction Road Co.*, 28 U. C. R. 247.

**Sale to Municipality** — *Title — Indictment for Non-repair.*]—The defendants were indicted for not repairing a public road constructed by a company known as the Paris and Dundas Road Company, which road it was alleged, as to the portions within their municipality, had been duly acquired by the defendants. Upon demurrer to a special plea:—Held, that under s. 68 of C. S. U. C. c. 49, defendants had authority to purchase the whole or any portion of a road which passes through or adjoins their municipality; that the words "any portion" in the statute did not prevent their becoming proprietors of the whole; and that by the foreclosure of the mortgage to defendants in the plea mentioned, the title to the road became vested in defendants. The remedy provided by statute, of suspension of tolls during the non-repair of the road, does not suspend the common law right of indictment for non-repair. Quære, could the municipality be indicted for non-repair during the ownership of the road by a company. *Regina* v. *Town of Paris*, 12 C. P. 445.

**Sale to Private Persons**—*Liability for Non-repair—Remedy.*]—B. and S., having become the purchasers of the St. Catharines T. and S. B. Road Co.'s road, at a sale in chancery, under 22 Vict. c. 43, originally owned by that company, neglected to keep that portion within the incorporated village of T. in repair, on the ground that such portion was vested in the corporation of said village by 22 Vict. c. 54, s. 356, who, by s. 357, were bound to keep it in repair. On motion for a mandamus requiring B. and S. to repair said portion:—Held, that roads of joint stock companies are not public roads or highways within 22 Vict. c. 54, s. 336, and that the portion in question was not vested in the village, but belonged to B. and S., who were therefore bound to keep it in repair. But, following The Queen v. Trustees of Oxford, &c., Turnpike Roads, 12 A. & E. 427, that a mandamus should be refused, the parties being left to their remedy by indictment. *Regina* v. *Brown*, 13 C. P. 356.

**Unfinished Work**—*Accident.*] — A road company are not liable for accidents occasioned by the use of a bridge while it is unfinished, and the road not completed. *Fraser* v. *North Oxford and West Zorra Plank Road Co.*, 15 U. C. R. 291.

*See Lennox* v. *Harrison*, 7 C. P. 496; *Bradley* v. *Brown*, 32 U. C. R. 463; *Regina* v. *County of Haldimand*, 38 U. C. R. 396; *Regina* v. *Ottawa and Gloucester Road Co.*, 42 U. C. R. 478; *Webb* v. *Barton Stoney Creek Consolidated Road Co.*, 26 O. R. 343; *Regina* v. *Greaves*, 46 U. C. R. 200.

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17. *Other Cases.*

**County Court**—*Territorial Jurisdiction—Action for Non-repair.*]—An action against a

municipal corporation for not keeping a road in repair is local. Where such an action had been brought in the county court of a county different from that in which the road was situate, and a verdict for the plaintiff confirmed in term, the court allowed an appeal from such judgment, but made no order, as the court below, having no jurisdiction, could not be ordered to do anything in the case. *Ferguson* v. *Township of Howick*, 25 U. C. R. 547.

**Injury to Adjoining Property.**]—Defendants were repairing a road which crossed plaintiff's raceway by a culvert, and the stones and other materials collected for the work about the culvert were carried into the raceway by a violent storm, and suffered to remain there: — Held, that they were not liable. *Snook* v. *Town of Brantford*, 14 U. C. R. 255.

To a declaration for entering plaintiffs' land in the town of Owen Sound, and depositing earth, &c., thereon, defendants pleaded that the land was in the county of Grey; that there was a highway adjoining it, which was duly constituted a county road under the exclusive jurisdiction of the corporation of the county, with whom the other defendants contracted to gravel it; that defendants, in pursuance of such contract, and by command of the corporation, gravelled it in the proper line, and in so doing unavoidably encroached a little upon and incumbered the plaintiffs' land with earth, &c., doing no unnecessary damage:—Held, on demurrer, no defence, for (1) no by-law was shewn to authorize the work; and (2) the road being within the town, the county could have no jurisdiction over it. *Churchwardens of St. George's Church, Owen Sound* v. *County of Grey*, 21 U. C. R. 265.

**Injury to Road** — *Powers of Lighting Company—Statute.*]—By s. 5 of the respondents' incorporating statute, 55 & 56 Vict. c. 77 (Q.), the company were empowered, on certain conditions (complied with) to lay their wires underground as the same might be necessary, and in so many streets, squares, highways, lanes, and public places as might be deemed necessary for the purpose of supplying electricity and gas:—Held, that the power to open streets, that is, to break up their surface and excavate them, was plainly involved in this provision, and that an injunction obtained by the respondents to restrain the municipality from interfering therewith, was properly granted. *City of Montreal* v. *Standard Light and Power Co.*, [1897] A. C. 527.

**Venue in Action for Non-repair of Road**—*Mode of Taking Advantage of Wrong Venue.*]—See *Brown* v. *County of York*, 8 P. R. 139.

*See* also *Sullivan* v. *Town of Barrie*, 45 U. C. R. 12; *Attorney-General* v. *Keily*, 22 Gr. 458.

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VIII. Highways — Toll Roads and Road and Bridge Companies.

1. *Formation of Company.*

**Corporators**—*Infant—Married Woman—Ratification—Amount of Stock.*]—By R. S. O. 1877 c. 152, five persons are allowed, on taking certain steps, to form themselves into a company for the purpose of either making a road or purchasing one already constructed, without the sanction of any authority, executive or judicial. Such proceeding is wholly the act of the parties, and no conclusive force is afforded by the certificate of registration issued by the registrar under s. 15 of the Act. Therefore, where one W., with his wife and two sons—one a minor—together with another relative, by an instrument in the form required by the statute, executed by them, and duly registered, declared that they had formed a joint stock company (limited) for the purpose of purchasing the roads, franchise, &c., of the Hamilton and Milton Road Company, &c., with a capital stock of $5,000, the whole amount of which was subscribed for by these persons, on which they had paid five per cent. into the hands of the treasurer of the company—another son of W.—and all five of the shareholders were duly chosen directors; and having thus purported to constitute themselves a company, they purchased the roads from the companies holding the same, at the alleged price of $31,000; and subsequently brought action to recover tolls said to be due for the use of the road:—Held, that, by reason of the infancy of one of the subscribers, that company had no legal existence at the time of the registration of their declaration of incorporation, and that no subsequent ratification by him after attaining majority could validate his contract; and quære, whether the contract was signed by more than three persons capable of contracting, as the Married Woman's Property Act, 47 Vict. c. 19 (O.), did not enable married women to bind themselves personally by their general contracts. Held, also, that the amount of the stock subscribed could not be said to be sufficient in the judgment of the shareholders as required by the statute as a condition precedent to the incorporation of a company to purchase a road. *Hamilton and Flamborough Road Co.* v. *Townsend. Hamilton and Flamborough Road Co.* v. *Flatt*, 13 A. R. 534.

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2. *Lease of Tolls.*

**By Municipality**—*Action for Rent—Estoppel—Seal — Pleading.*] — A declaration in covenant stated that, by indenture made between the plaintiffs and defendants, the plaintiffs demised to defendants the tolls authorized by law to be received upon a certain turnpike road for one year; that defendants covenanted to pay a certain rent therefor; and that by virtue of said demise defendants entered and were possessed for said term. Breach, non-payment of the rent: — Held, on demurrer, that defendants were estopped from denying the demise, and were bound by their express covenant to pay the rent; and that the non-execution by the lessors was no defence; and that they were estopped also from alleging the want of a common seal of the plaintiffs to the lease, or from pleading that they had no authority to demise. Held, also, that a plea that the said indenture was not signed by the plaintiffs or by any agent of theirs authorized in writing, was bad. *Counties of Frontenac, Lennox, and Addington* v. *Chestnut*, 9 U. C. R. 365.

——— *By-law Authorizing—Title—Acquiescence.*] — Held, that the plaintiffs had the power to demise to the defendant the right to collect the tolls upon one of the township

roads; that such right should be exercised under a general or special by-law authorizing it; but that this objection was not open to the defendants, the lessee and his sureties, the former having enjoyed the benefit of the demise during the whole term. The toll gate was beyond the limits of the plaintiffs' municipality upon the Barton side of the road, Barton and Ancaster being adjoining townships;—Held, that an objection to the plaintiffs' right to collect tolls thereat could not be maintained, for the plaintiffs might have the title thereto under the General Road Companies Act, R. S. O. 1877 c. 152, s. 63; and there was nothing to shew that the whole road allowance between the two townships was not part of and vested in the plaintiffs; also, under R. S. O. 1877 c. 174, ss. 498, 499, there might have been a by-law of the adjoining municipality giving the plaintiffs the right to erect such toll gate; and even without such by-law the plaintiffs' encroachment may have been acquiesced in. *Township of Ancaster* v. *Durrand*, 32 C. P. 563. Distinguished in *Smith* v. *Township of Ancaster*, 27 O. R. 276, 23 A. R. 596. See, also, *Payne* v. *Caughell*, 28 O. R. 157, 24 A. R. 556.

**By Road Company.**]—See *Campbell* v. *Kingston and Bath Road Co.*, 18 A. R. 286, 20 S. C. R. 605; *Regina* v. *Caister*, 30 U. C. R. 247; *Thornton* v. *Sandwich Street Plank Road Co*, 25 U. C. R. 391.

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### 3. *Liability for Negligence.*

**Lease of Tolls**—*Liability of Lessee—Invitation — Contributory Negligence.*] — C. brought an action against the K. and B. Road Co. for injuries sustained from falling over a chain used to fasten the toll gate on the company's road. On the trial the following facts were proved:—The toll house extended to the edge of the highway, and in front of it was a short board walk. The gate was attached to a post on the opposite side of the road, and was fastened at night by a chain which was usually carried across the board walk and held by a large stone against the house. The board walk was generally used by foot passengers, and C. walking on it at night tripped over the chain and fell, sustaining the injuries for which the action was brought. The toll collector was made a defendant to the action, but did not enter a defence. It was shewn that he had made an agreement with the company to pay a fixed sum for the privilege of collecting tolls for the year, and was not to account for the receipts. The company alleged that he was lessee of the tolls, and that they were not responsible for his acts. The jury found, however, that in using the chain to fasten the gate as he did, he was only following the practice that had existed for some years previously, and doing as he had been directed by the company. The statute under which the company were incorporated contained no express authority for leasing the tolls, but used the term "renter" in one section, and in another spoke of a "lease or contract" for collecting the tolls. The company contended, also, that C. had no right to use the board walk in walking along the highway, and that her being there was contributory negligence on her part which relieved them from liability for the accident:—Held, by the court of appeal, that a company incorporated under the General Road Companies Act, R. S. O. 1887 c. 159, may validly lease a toll gate and the right to collect tolls thereat. Held, by the supreme court of Canada, affirming the decision of the court of appeal, that C. had a right to use the board walk as part of the public highway, and was, moreover, invited by the company to use it, and there was, therefore, no contributory negligence; that whether the toll collector was servant of the company or lessee of the tolls, the company, under the finding of the jury, were liable for his acts. *Campbell* v. *Kingston and Bath Road Co.*, 18 A. R. 286, 20 S. C. R. 605.

**Limitation of Actions**—*Culvert—Guard —"Done in Pursuance of Act."*]—Where the defendants, a road company, incorporated under the General Road Companies Act, R. S. O. 1887 c. 159, s. 99 of which requires them to keep their road in repair, constructed a culvert across it with a post and rail guard at the mouth thereof in such an improper manner that the wheel of the plaintiff's carriage striking the post, he was thrown out of it into the open ditch at the end of the culvert, and injured:—Held, that the construction of the culvert and the guard was a thing "done in pursuance of the Act" within the meaning of s. 145, and that therefore the time for bringing the action was limited to within six months after the date of the accident. *Webb* v. *Barton Stoney Creek Consolidated Road Co.*, 26 O. R. 343.

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### 4. *Non-payment of Tolls.*

#### (a) *Convictions for.*

**Defects and Omissions**—*Demand—Nature of Offence.*]—A conviction for evading payment of toll on the road of the Albion Plank Road Co., incorporated by 9 Vict. c. 88:—Held, bad, in omitting, (1) any statement of the information; (2) the summons and appearance or default of the accused; (3) his plea denying or confessing; (4) the evidence. Also, in not shewing that any toll was claimed, or what toll, or how imposed by reason of the completion of the road or any part of it. Also, because it did not appear therein that the defendant had proceeded on the road with any carriage or animal liable to pay toll, and after turning out of the road had returned to or re-entered it with such carriage or animal beyond a toll gate without paying toll, whereby payment was evaded. *Regina* v. *Haystead*, 7 U. C. R. 9.

**Exemption**—*Illegal Demand.*]—C. S. U. C. c. 49, s. 89, which makes it an offence to "take a greater toll than is authorized by law," does not apply to the case of taking toll from a person who is altogether exempt. If it did, a conviction for such offence should state the ground of exemption, and the fact of such exemption being claimed. Defendant passed through the gate on the 10th January, the collector giving him credit as was usual between them. On the 20th they had a settlement, and this toll was then demanded and paid. Semble, that a conviction for such demand, if illegal, could not be supported. *Regina* v. *Campion*, 28 U. C. R. 259.

——— *Military Duty—Private Vehicle.*]—Defendant in a private carriage refused to pay at a toll gate on the Blackfriars road, near London, on the ground that he was a captain and adjutant of the military train, and therefore exempt. Being brought before

a magistrate he claimed exemption under the Mutiny Act:—Held, that he was properly convicted for wilfully passing the gate without paying; for by the Mutiny Act, 25 Vict. c. 5, s. 72, he was exempt only if on duty, of which there was no evidence; and being in a private vehicle he was expressly excluded from exemption under C. S. U. C. c. 49, s. 91. Held, also, that the conviction could not be quashed on the ground of his being on duty, as the exemption had not been claimed on that account. *Regina* v. *Dawes*, 22 U. C. R., 333.

**Jurisdiction of Magistrate**—*Place of Offence.*]—The city of London extends to the middle of the river Thames, and a conviction by county magistrates for passing the toll gate on the city side of the river was therefore held bad, as the offence was out of their jurisdiction. *In re McDonough*, 30 U. C. R. 288.

**Lawful Toll Gate.**]—It is no objection to a conviction for non-payment of toll, that the toll gate did not appear by the conviction to be lawfully established. *Regina* v. *Dawes*, 22 U. C. R. 333.

**Wilful Passing**—*Demand—Exemption Form—Authority — Corporation — Lease — Jurisdiction.*]—A conviction under C. S. U. C. c. 49, s. 95, stating that defendant wilfully passed a gate without paying and refusing to pay toll:—Held, good. Quære, whether it would be sufficient to allege that he wilfully passed without paying, without in any way shewing a demand. Held, also, that the non-exemption of defendant, if essential to be alleged, was sufficiently stated in the conviction. Held, also, the general form prescribed by C. S. C. c. 103, s. 50, sched. I. 1, being used, that it was not requisite to shew that defendant was summoned or heard, or any evidence given. Held, also, unnecessary to name any time for payment of the fine, as it would then be payable forthwith. It was objected, also: (1) that M., the keeper and lessee of the gate, had no authority to exact toll; (2) that the corporation had been dissolved; (3) that no board of directors had been appointed since 1866; (4) that if legally appointed they could not lease the gate; (5) that the lease to M. had expired; (6) that he could not take advantage of the penal clauses in the Act; (7) that it was not shewn that any tolls had been fixed:—Held, that these objections could not be taken, for where, assuming the fact to be true, the magistrate has jurisdiction, the conviction only can be looked at. Held, also, as to objections 1, 4, and 6, that they were otherwise untenable; and as to Nos. 2, 3, and 5, that the existence of the corporation could not be inquired into on this application to quash the conviction. *Regina* v. *Caister*, 30 U. C. R. 247.

*See Regina* v. *Brown*, 4 U. C. R. 147.

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(b) *Injunction.*

**Jurisdiction**—*Other Remedy—Balance of Convenience.*]—On a motion by a road company for an injunction to restrain the defendant from passing through their toll gates without paying tolls when demanded, it was contended that because there was a statutory remedy for the recovery of a penalty for each offence under s. 129 of R. S. O. 1877 c. 152, the court would not interfere by way of injunction:—Held, that, as the plaintiffs had established a primâ facie case in regard to the rights they claimed, there was jurisdiction to interfere by way of injunction pending the determination of the question at the trial, and an injunction was granted, upon a consideration of the balance of convenience, in favour of the plaintiffs. Letton v. Goodden, L. R. 2 Eq. 130, and Cory v. Yarmouth, &c., R. W. Co., 3 Ha. 593, considered and followed. *Hamilton and Milton Road Co.* v. *Raspberry*, 13 O. R. 466.

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5. *Powers of Municipalities.*

**Assumption of Road**—*By-law—Abortive Sale by Company to Another.*]—The H. and M. Road Co., the owners of a certain road, and in possession thereof as a toll road, levying and collecting tolls thereon, assumed to sell the road to the H. and F. Road Co., who entered into possession thereof. Subsequently it was held by the court of appeal, that the H. and F. Road Co. were not duly incorporated, because, while the Joint Stock Companies Act, R. S. O. 1877 c. 152, requires at least five corporators to enable a company to be incorporated, there were not five here, one of the alleged corporators being a minor. The corporation of the township of East Flamborough thereupon passed a by-law assuming possession of the road:—Held, that the by-law was illegal, and must be quashed; that the effect of the judgment of the court of appeal was to restore to the applicants the franchise they held before the abortive sale took place, the road having been kept alive as a toll road, and repaired as such from time to time, and nothing having transpired to justify the municipal corporation in interfering with the road, or assuming possession and control of it, as the by-law authorized them to do. *In re Hamilton and Milton Road Co. and Township of East Flamborough*, 13 O. R. 128.

**Exemption**—*By-law — Discrimination — Bridge.*]—By agreement made in the year 1869, between a road company and the city of Hamilton, the road company were to extend their road from a point near the Desjardins canal into the limits of the city, and as part of such road should build a bridge over the canal, the city to lend the road company $5,000 for ten years at the nominal rate of interest of one per cent.; and a by-law was passed by the city to give effect to the agreement, the by-law containing a proviso that no toll should be exacted from any persons residing upon or owning property within the limits of the city on passing over said bridge. The road was subsequently extended into Hamilton, and a toll gate erected within the city limits. Litigation afterwards arose between the road company and the city, the Great Western Railway Company, and the Desjardins Canal Company, as to the erection of the bridge, which was continued until 1874, when a settlement was effected by its being agreed by all parties that a fixed stationary bridge should be erected and maintained by the road company free from any toll thereon, which was legalized by 37 Vict. c. 73 (O.) The defendant, passing through the said toll gate, refused to pay toll, on the ground that the by-law was ultra vires:—Held, that the proviso in the by-law was not ultra vires, for the road company could agree

not to exact tolls from any person or body of persons, as there was nothing in the Act of incorporation to prevent their doing so; that the city of Hamilton had paid a substantial sum for the privilege; and there was no discrimination as regarded the residents thereof; and that the proviso only applied to the non-execution of tolls on the bridge, and had nothing to do with the road, and was legalized by 37 Vict. c. 73 (O.):—Held, also, that an objection that the location of the road had not been made prior to the passing of the by-law was not tenable after the road had been located and in use for more than fifteen years. *Hamilton and Flamborough Road Co.* v. *Binkley*, 9 O. R. 621.

**Lease of Tolls.**]—See *ante* 2.

**Prohibition against Making Road**—*Notice.*]—A municipality can prohibit a road company from proceeding with any roads within the limits, the making or improving of which by a road company, formed under 12 Vict. c. 84, was commenced before any opposition made thereto, but without their permission. Notice of such opposition, if duly given before the work is commenced, according to s. 2, has the effect of an interim injunction to restrain the commencing of the road. But, though such notice is not given in time for the purpose, the power of prohibition by the municipal council is not forfeited. *Attorney-General* v. *By-town and Nepean Road Co.*, 2 Gr. 626.

**Raising Money by Tolls**—*By-law—Exemption—Replevin.*]—The general power given to municipal corporations by 22 Vict. c. 99, s. 317, s.-s. 7, to pass by-laws for raising money by toll on any road or bridge, does not repeal but is subject to the exemptions allowed by 16 Vict. c. 190, s. 31:—Held, therefore, that the county council could not impose a toll upon the plaintiff, who passed over less than 100 yards of the road, including the bridge in question. Held, also, that he might replevy goods seized for such toll, although the by-law imposing it continued in force, for 22 Vict. c. 99, s. 201, which prevents actions being brought for any thing done under a by-law until it has been quashed, applies only to suits for the recovery of damages. *Wilson* v. *County of Middlesex*, 18 U. C. R. 348.

**Removal of Obstructions**—*By-law—Application to Toll Road.*]—Held, that the special rights and privileges conferred on the St. Catharines, Thorold, and Suspension Bridge Road Company, who had constructed their road over what had previously been a highway, under 12 Vict. c. 84, s. 22, did not take away the general powers possessed by the municipalities through which it passed, as to the removal of obstructions. Where, therefore, the defendant was convicted by the police magistrate for the town of Clifton of unlawfully incumbering a street in the said town, being a portion of the road in question, by placing and leaving thereon a cart used by him for taking likenesses, contrary to a by-law of the town, the court sustained the conviction. *Regina* v. *Davis*, 24 C. P. 575.

**Sale of Road to Private Person.**]—Under s. 26 of 16 Vict. c. 190, a municipal corporation to which, under 12 Vict. c. 5, s. 12, a toll road has been transferred by the governor in council, has power to sell the road to an individual, who may exact tolls for the use thereof. The right to purchase is not limited to toll road companies. Judgment in 28 O. R. 157 reversed. *Payne* v. *Caughell*, 24 A. R. 556.

**Taking Stock in Company**—*By-law.*]—Held, that s.-s.11 of s. 479 of the Municipal Act, R. S. O. 1887 c. 184, providing that the council of a municipality may pass by-laws for taking stock, &c., in an incorporated company, in respect of any bridge, &c., "under and subject to the respective statutes in that behalf," only authorizes the passing of by-laws to take such stock where in any special or general Act under which a bridge, &c., company is incorporated, a provision is contained authorizing the municipal council to hold such stock, &c. Where, therefore, the Act incorporating a bridge company, did not profess to confer any power on the municipality to take stock, &c., in such company, no power was conferred under the municipal Act to do so; and a by-law passed by the municipal council for such purpose was therefore held bad, and directed to be quashed. *Re Peck and Township of Amcliasburg*, 17 O. R. 54.

**Transfer to Another Municipality**—*By-laws.*]—A township corporation on which has devolved a portion of a public road situate within its territorial limits, relinquished by the minister of public works under s. 52 of 31 Vict. c. 12 (D.), cannot authorize another township corporation to assume control of and keep in repair such portion of the road, nor can the latter township assume the road and lawfully collect tolls thereon; and by-laws passed for such purpose are invalid. Township of Ancaster v. Durrand, 32 C. P. 563, distinguished. *Smith* v. *Township of Ancaster*, 27 O. R. 276. Affirmed, 23 A. R. 596.

*See Regina* v. *Corporation of Louth*, 13 C. P. 615; *Township of Ancaster* v. *Durrand*, 32 C. P. 563; *Wilson* v. *Groves*, 17 U. C. R. 419.

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6. *Powers of Road and Bridge Companies.*

**Erection of Bridge**—*Canal Company—Impeding Navigation.*]—A statute having provided that it should be lawful for a canal company to cut a channel across a certain highway, and to erect, keep, and maintain a safe and commodious bridge across the canal, and the bridge, after being erected, having become unsafe through the default of the canal company, an incorporated road company which had acquired the road, made several endeavours to get the bridge repaired, but all of them having failed, through the insolvency of the canal company, the road company at length commenced the erection of a fixed bridge, which would have the effect of impeding the navigation of the canal:—Held, reversing the decision in 17 Gr. 31, that they had not any right to do so; and a permanent injunction was granted restraining them. *Town of Dundas* v. *Hamilton and Milton Road Co.*, 18 Gr. 311.

**Lowering Level of Road**—*Injury to Approach—Nuisance.*]—Where a street ran into a road allowance, but did not cross it, and defendants, incorporated under 16 Vict. c. 190, for gravelling the road, so far lowered the level in order to get the grade prescribed by the statute, as to make the approach from

this street impassable:—Held, that they were justified in so doing, and not guilty of a nuisance in obstructing the street, or obliged to restore the approach. *Regina* v. *Woodstock and Dereham Plank and Gravel Road Co.*, 18 U. C. R. 49.

**Obtaining Materials for Construction**—*Compensation — Award — Entry on Land.*]—In proceedings under 16 Vict. c. 190, to ascertain the amount to be paid for materials for the construction of a road, the arbitrators cannot confer upon the company a prospective right by awarding an amount as compensation for materials to be taken at a future time. Arbitrators appointed under this Act, awarded damages for materials taken generally, not for the purpose of the road only:—Held, ultra vires. Quære, whether the Act enables road companies to enter upon lands distant two miles from their road, to obtain materials for the construction thereof. *Gillam* v. *Cleghorn*, 7 Gr. 83.

**Parol Contracts.**]—The Grafton Road Company have power, under 10 & 11 Vict. c. 93, s. 35, to make contracts by parol. *Turley* v. *Grafton Road Co.*, 8 U. C. R. 579.

**Payment for Construction**—*Assignment of Tolls.*]—Defendants, being a joint stock road company under C. S. U. C. c. 49, contracted with the plaintiff to build for them four additional miles, an extension of the road originally contemplated, and to pay him by the tolls to be collected there and on three other miles of the road. This mode of payment was not authorized by the Act. The plaintiff having built the road under the circumstances, the defendants accepted it, and levied tolls upon it, and, after handing them over to him for some time, refused to allow him to receive more, or to pay him for the work done:—Held, that they were liable upon the common counts. *Thornton* v. *Sandwich Street Plank Road Co.*, 25 U. C. R. 591.

**Receipt of Commutation for Statute Labour.**]—The plaintiffs were incorporated by 10 & 11 Vict. c. 95, to make a road from the town of Streetsville to different points specified, and had the right to claim the statute labour, by commutation or otherwise, to the extent of one-half concession on each side of their road, and to collect it from the persons liable. The village of Streetsville, incorporated in 1857, was within one-half concession of plaintiffs' road, which ran through it. In 1858 the village council imposed and collected a rate, of which a certain sum was for commutation of statute labour:—Held, that the plaintiffs were entitled to recover from the defendants, as money had and received, so much of this sum as was received in respect of persons or property forming no part of the village of Streetsville mentioned in the plaintiffs' Act of incorporation, but within half a concession on each side of their road. *Streetsville Plank Road Co.* v. *Village of Streetsville*, 19 U. C. R. 62.

**Shareholders** — *Railway.*]—The Buffalo, Brantford, and Goderich R. W. Co. are to be treated as acting under 16 Vict. c. 46, and not under the Joint Stock Road Acts—at all events as regards shareholders who have taken their stock since 16 Vict. was passed. *Buffalo, Brantford, and Goderich R. W. Co.* v. *Park*, 12 U. C. R. 607.

**Taking Possession of Crown Highway**—*Consent.*]—The consent of the governor in council is not necessary to justify a road company, under 12 Vict. c. 84, in taking possession of a public highway, the property of the Crown, for the purpose of making a road over it. *Attorney-General* v. *Bytown and Nepean Road Co.*, 2 Gr. 626.

*See Canada Southern R. W. Co.* v. *International Bridge Co.*, 8 App. Cas. 723, 7 A. R. 226, 28 Gr. 114.

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7. *Rates of Tolls.*

**Intersected Road** — *Mandamus.*]—Section 87 of R. S. O. 1887 c. 159, as extended by s. 157 of that Act, and by 52 Vict. c. 27 (O.), applies not only to toll roads owned or held by private companies, or municipal councils, but also to all toll roads purchased from the late Province of Canada, so that, where one of such roads is intersected by another of them, a person travelling on the latter road shall not be charged for the distance travelled from such intersection to either of the termini of the intersected road, any higher rate of toll than the rate per mile charged by the company for travelling along the entire length of its road from such intersection, but subject to the production of a ticket, which he is entitled to receive from the last toll gate on the intersecting road, as evidence of his having travelled only from such intersection. Mandamus granted to compel the issue of such tickets. *Smith* v. *County of Wentworth*, 26 O. R. 209.

**Transfer of Road**—*Increase of Rates.*]—Where, pursuant to 12 Vict. c. 5, s. 12, the governor in council has transferred to a municipal corporation a toll road upon which certain rates of toll are in force, with the right to alter or vary the rates of toll, it can increase the rates of toll to any sum not exceeding the maximum mentioned in schedule A. to 12 Vict. c. 4, and a subsequent transferee of the municipal corporation can exact payment of the increased rates and is not limited to a toll sufficient to keep the road in repair. *Payne* v. *Caughell*, 24 A. R. 556.

*See Regina* v. *Brown*, 4 U. C. R. 147; *Wilson* v. *Groves*, 17 U. C. R. 419; *Brockville and North Augusta Plank Road Co.* v. *Crozier*, 14 U. C. R. 27.

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8. *Recovery of Tolls Paid.*

**Compulsion**—*Money Had and Received.*]—Semble, that money paid for tolls under compulsion, in order to enjoy a road, may be recovered in an action for money had and received. *Little* v. *Brades and Waterloo Macadamized Road Co.*, 2 C. P. 399.

**Exemption**—*Action—Writ of Summons—Injunction—Notice.*] — Plaintiff sued defendants to recover back certain tolls which he alleged to have been illegally charged: and indorsed on his summons, "N. B.—Take notice, that in default of appearance the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction:"—Held, notice insufficient, according to the form in schedule A. to the C. L. P. Act, 1856, No. 59. Quære,

whether on the facts stated in the case the plaintiff could claim exemption from tolls, and whether an injunction would have been granted during the pendency of this action, brought expressly to test the right. *Ritchey v. Toronto Roads Co.*, 23 U. C. R. 62.

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9. *Right to Tolls.*

**Action for Tolls** — *Defence—Excessive Grade—Resolution of Council.*]— Where defendant made use of the road, with his vehicles, for months, without objection, and the company had allowed the tolls to stand over for settlement periodically:—Held, that he could not object to pay on the ground that the grade of the road was in some places above that fixed by the statute. Held, also, that the tolls in this case had been imposed by resolution, with sufficient formality and certainty. Assumpsit for tolls. Plea, that in a portion of the road the grade exceeded that fixed by the statute, not alleging that it was so made without the consent of the engineer:—Held, no defence. *Brockville and North Augusta Plank Road Co. v. Crozier*, 14 U. C. R. 27.

——— *Defence—Notice of Commencement of Work.*]—Section 3 of 16 Vict. c. 190, enacting that no company shall commence any work until thirty days after notice to the municipality, is directory. A plea justifying under a right to tolls, need not aver the giving of such notice. And semble, that the want of it would be no defence to an action for tolls. *Couse v. Hannan*, 14 C. P. 26.

——— *Proof of Claim—Joint Liability.*]—Action by a joint stock road company, under 12 Vict. c. 84, against stage proprietors, for tolls. The plaintiffs proved that defendants had used the road with their stage coaches, and had paid tolls; that in former negotiations for settling this claim they had acted as recognizing a joint liability; that their advertisements were of a joint concern; and that their horses were employed over the whole route, though among themselves the line was divided into portions, and the fares distributed accordingly:—Held, that defendants' joint liability, and the incorporation of plaintiffs, were sufficiently shewn. *Paris and Dundas Road Co. v. Weekes*, 11 U. C. R. 56.

**Demand** — *Seizure—Pleading.*]—Held, on demurrer to the defence, omitting the allegation of demand and refusal of toll at the gate, under R. S. O. 1877 c. 152, s. 151, and a seizure immediately following thereon, that the demand should have been at the gate, and the seizure should have followed immediately thereupon; and that the statement of defence was therefore bad. *Enrick v. Township of Yarmouth*, 9 O. R. 162.

**Distance between Gates**—*Illegal Exaction—Conviction.*]—When tolls fixed by the commissioners were exacted by a toll gate keeper at a gate not six miles from the one previously passed, the toll gate keeper was held not liable to summary conviction under s. 34 of 3 Vict. c. 53. *Regina v. Brown*, 4 U. C. R. 147.

**Exemption**—*Bridge—Purchase by County —Rate.*]—The Wortley road runs north, and intersects the London and Port Stanley Plank road within less than 100 yards of the eastern end of that road, where it enters the town of London, after crossing Westminster bridge over the Thames, the continuation easterly forming York street. The plaintiff, living on the Wortley road, thus travelled, in going into London, over less than 100 yards of the L. and P. S. road, including bridge. The L. and P. S. road had been purchased by the county of Middlesex from the government:— Held, that under the proviso to s. 31 of 16 Vict. c. 190, he was exempt from toll, and that the county could not impose a charge for passing the bridge alone. Semble, that the county, in this case owning the road, could not impose a higher rate for crossing the bridge under s. 30, which allows that to be done by road companies under the sanction of the council. *Wilson v. Groves*, 17 U. C. R. 419.

——— *Carriers of Mail.*]—Under 12 Vict. c. 84, carriages conveying the mail were not exempted from tolls. *Paris and Dundas Road Co. v. Babcock*, 10 U. C. R. 335.

**Extension of Road** — *Toll Gates—City Limits.*]—The provisions of the General Road Companies Act, R. S. O. 1877 c. 152, respecting the extension of roads, apply to roads which have been constructed and completed, and tolls established thereon. In this case the extensions were new constructions within the city of Hamilton, and, measured separately, were less than two miles, though the distance of the original road and the extensions together much exceeded two miles:—Held, that the defendants were entitled to exact toll therefor. The toll gate had been maintained for nearly nine years on the portions of the road within the city of Hamilton:—Held, that this did not preclude defendants from erecting a gate and taking toll there. *Knott v. Hamilton and Flamborough Road Co.*, 45 U. C. R. 338.

**Portion of Road**—*Check Gate—Principal Gate.*]—Plaintiffs' road ran easterly towards Yonge street till it came to a concession line running north and south, and then along this line to the south 737 yards, where it ended. The main toll gate was placed across their road just before it touched the concession line turning south, and they afterwards put a bar on the north side of their road across the concession line where it entered from the north at which they claimed toll from persons travelling north and south:—Held, under C. S. U. C. c. 49, that such claim was unauthorized, for (among other reasons) such bar was not a check upon any toll gate, and in passing it no gate was avoided. *Yorkville and Vaughan Plank Road Co. v. Baldwin*, 27 U. C. R. 494.

——— *Conveyance by Municipality—Resolution of Company — Registration.*] — The plaintiffs were incorporated as a road company for the purpose of planking or gravelling the road between the point of intersection of Yonge street with Bloor street, on the northern limit of the city of Toronto, and the township of Vaughan, by way of the College avenue gate and a point called "Palin's Corners." In 1853 the village of Yorkville was incorporated, and in September, 1854, that corporation passed a by-law, with a view to bringing the travel through the village, authorizing the conveyance by them to plaintiffs of that part of the Davenport road lying between Yonge street and "Palin's Corners" for the purpose of being planked or gravelled, under certain conditions specified, one of which was that the plaintiffs should levy a

higher rate of tax upon those going south from the corners, than on those going east, i. e., through the village. Articles of agreement were accordingly drawn up between the corporation and plaintiffs, reciting the by-law, and then proceeding to state that the corporation thereby granted to plaintiffs said piece of road, measuring 838 yards, which the plaintiffs thereupon macadamized: — Held, that they could not collect toll on such portion, as no resolution had been passed by plaintiffs for the purpose of constructing the piece of road in question, nor registered under s. 11 of 16 Vict. c. 190, which section was held to apply, though no additional stock was taken. But, held, that the main gate of defendants' road having been altered in accordance with the decision in the preceding case, plaintiffs were entitled to collect toll on that portion of their road running south, from Palin's Corners to Bloor street. *Yorkville and Vaughan Plank Road Co.* v. *Baldwin*, 20 C. P. 312.

——— *Evasion — Principal Gate—Check Gate—Lessee—Authority.*]—The plaintiff, a stage driver, was in the habit of driving passengers over that part of the road of a company incorporated under C. S. U. C. c. 49, and previous Acts, from T. to the terminus of a street railway laid down on the line of the road, being between two principal gates on the road, a distance of nearly three miles, thus using many miles of the road daily. The defendant, who was the lessee and manager of the road, erected a check gate across the road at a point within the space travelled by the plaintiff, and then enforced payment of a toll of five cents each way from the plaintiff, giving a ticket to pass through the principal gate beyond:—Held, that such check gate was legally erected, and the toll was legally demanded; and that the fact that the plaintiff did not intend to pass through a principal gate could make no difference. The road company consisted of four persons, of whom F. and another personally signed an authority to the defendant to erect the gate, and F. signed for the other two under powers of attorney for the management of their affairs, but not specially referring to this road. After action commenced these two ratified F.'s act by indorsement on the back of the authority:—Held, sufficient. *Vanderlip* v. *Smyth*, 32 C. P. 60.

**Repassing on Same Day.**] — A person passing a toll gate more than once on the same day, could not, under 3 Vict. c. 53, be legally charged more than one toll. *O'Hara* v. *Foley*, 3 U. C. R. 216.

——— *Distances.*]—A road company is, under 14 & 15 Vict. c. 122, s. 3, authorized to take tolls at each gate at each time of passing, for any portion of the road, on either side or on both sides of a gate, for a distance of not more than half way, and not exceeding five miles in the whole. *Little* v. *Dundas and Waterloo Road Co.*, 2 C. P. 399.

**Statutory Requirements**—*Condition of Road.*]—Semble, that tolls can be collected on the Vaughan branch of the Albion plank road only when the road is made according to the requisition contained in s. 33 of 9 Vict. c. 58. *Regina* v. *Haystead*, 7 U. C. R. 9.

——— *Condition of Road — Injunction—Attorney-General.*]—Held, that the provisions of the General Road Companies Act, R. S. O. 1887 c. 159, relating to tolls, taken in connection with 53 Vict. c. 42 (O.), apply to a road company incorporated by special Act, so as to prevent the company from demanding tolls after the engineer appointed under 53 Vict. c. 42 (O.) has reported the road to be out of repair, until he further reports that the road has been put in good and efficient repair; and an action will lie at the suit of the attorney-general to restrain such collection. Reversed by the court of appeal, but restored by the supreme court of Canada. *Attorney-General* v. *Vaughan Road Co.*, 21 O. R. 507, 19 A. R. 234, 21 S. C. R. 631.

**Town Limits** — *Construction of Road—Ascertainment.*] — In an action to try the right to tolls:—Held, that defendants, incorporated under 12 Vict. c. 84, to construct their road from the town of Sandwich to the town of Windsor, could not go beyond the entrance of the town of Windsor. (2) That, as no limits had been assigned to the town of Windsor when the defendants were incorporated, the court would look to what the proprietor of land on which a part of what was commonly called Windsor stood had designated Windsor on a plan registered by him and referred to in giving deeds; and to the popular understanding as to what constituted Windsor. (3) That it was immaterial that at a public meeting held in Windsor it had been resolved to make no opposition to the road, for this could not bind the plaintiff. *Dougall* v. *Sandwich and Windsor Plank and Gravel Road Co.*, 12 U. C. R. 59.

——— *Toll Gates.*] — A joint stock road company had begun operations and were in receipt of tolls several years before the town of Clifton was incorporated, within which part of the road ran:—Held, affirming the judgment in 20 C. P. 107, that the company had the right to levy tolls within the town limits, notwithstanding the incorporation, and that some of the toll gates were within the town limits. *St. Catharines, Thorold, and Suspension Bridge Road Co.* v. *Gardner*, 21 C. P. 190.

*See Ritchey* v. *Toronto Roads Co.*, 23 U. C. R. 62; *Payne* v. *Caughell*, 28 O. R. 157, 24 A. R. 556; *Wilson* v. *County of Middlesex*, 18 U. C. R. 348; *Hamilton and Flamborough Road Co.* v. *Townsend*, 13 A. R. 534; *Township of Ancaster* v. *Burrand*, 32 C. P. 563; *Regina* v. *Greaves*, 46 U. C. R. 200.

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10. *Other Cases.*

**Appointment of Engineer** — *Examination of Road—Repair.*]—Under the General Road Companies Act, R. S. O. 1877 c. 152, ss. 102, 104, 109, the first engineer appointed to examine a road alleged to be out of repair, must act throughout the proceeding unless another is appointed under s. 109; but under that section the Judge is the person to be satisfied that the first engineer is unable to make or complete the examination, and his decision on that point cannot be reviewed. The engineer appointed under the Act need possess no official certificate or degree. The second engineer, having been appointed in January to examine and report "as to the present condition of the road," made an examination and so certified, but was unable to report whether the repairs directed by the previous engineer has been performed, as the road was covered with snow. In May following, with-

out any further authority, he again examined and certified that it was in good repair, and the company began again to take tolls:—Held, that he was functus officio after the first examination, and that the tolls therefore were illegally imposed. *Regina* v. *Greaves*, 46 U. C. R. 200.

**Contract for Gravel**—*Seal.*]—To bind a road company by an executory contract to purchase from the plaintiff all the gravel required for a portion of their road for an indefinite and protracted period, would require an agreement under their corporate seal. *Hill* v. *Ingersoll and Port Burwell Gravel Road Co.*, 32 O. R. 194.

**Expropriation of Company's Rights.**]—48 Vict. c. 21 (O.) does not empower the commissioners appointed thereunder to expropriate the rights of a road company, or to close up any part of the road for the purposes of the Niagara Falls Park. *Re Niagara Falls Park, Fuller's Case*, 14 A. R. 65.

**Inferior Court**—*Title to Land.*]—In an action brought against a road company for having so constructed their road as to obstruct a flow of water from plaintiff's lands, the plea of not guilty by statute was held not to bring the title to the land in question under the County Courts or Division Courts Act so as to entitle the plaintiff to tax superior court costs without a Judge's order. *Overholt* v. *Paris and Dundas Road Co.*, 8 C. P. 203.

**Sale of Road by Sheriff.**]—The sale of a road owned by a company, under C. S. U. C. c. 49, by a sheriff under a fi. fa. lands, is valid, and a conveyance by him to the purchaser enables the vendee to bring ejectment; and under s. 70 all the rights of the company pass to the purchaser. *Totten* v. *Halligan*, 13 C. P. 567.

**Servant of Company**—*Negligence—Personal Liability.*]—Defendant, having been employed by a road company to furnish them with stones, by placing them on the road accidentally caused the death of plaintiff's servant and horse:—Held, that he was personally liable under 16 Vict. c. 190, s. 49. *Lennox* v. *Harrison*, 7 C. P. 496.

**Town Limits** — *Toll Gates—Statutes—Retroactivity.*] — A turnpike road company had been in existence for a number of years and had erected toll gates and collected tolls therefor, when an Act was passed by the Quebec legislature, 52 Vict. c. 43, forbidding any such company to place a toll or other gate within the limits of a town or village without the consent of the corporation. Section 2 of said Act provided that "this Act shall have no retroactive effect," which section was repealed in the next session by 54 Vict. c. 36. After 52 Vict. c. 43 was passed, the company shifted one of its toll gates to a point beyond the limits of the village, which limits were subsequently extended so as to bring said gate within them. The corporation took proceedings against the company, contending that the repeal of s. 2 of 52 Vict. c. 43 made that Act retroactive; and that the shifting of the toll gate without the consent of the corporation was a violation of said Act:—Held, that, as a statute is never retroactive unless made so in express terms, s. 2 had no effect, and its repeal could not make it retroactive; that the shifting of the toll gate was not a violation of the Act, which only applied to the erection of new gates, and that the extension of the limits of the village could not affect the pre-existing rights of the company. *Village of St. Joachim de la Pointe Claire* v. *Pointe Claire Turnpike Road Co.*, 24 S. C. R. 486.

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IX. Highways—Miscellaneous Cases.

**Accretions to Highway.**]—The accretions, by the action of the elements, of soil to the lands of a private individual bordering on a navigable lake, belong to the owner; and in the same way accretions to a public highway are taken to be and form part of such highway. *Standly* v. *Perry*, 23 Gr. 507; *S. C.*, 2 A. R. 195, 3 S. C. R. 356.

**Animal Running on Highway.**]—*Vice—Scienter.*]—Declaration, that defendant was possessed of a wild, vicious, and mischievous horse, and it was unsafe and improper to permit the said horse to go or run at large on any public highway, yet defendant wrongfully and negligently permitted and suffered the horse, so being vicious, &c., to go at large on the public highway, where the plaintiff then lawfully was, whereby the horse ran at and jumped upon the plaintiff, and broke his leg:—Held, bad, for knowledge of the animal's vicious nature was not averred, and the allowing it to be at large on the highway was not a breach of any duty due from defendant to plaintiff. *Chase* v. *McDonald*, 25 U. C. R. 129.

**Conveyance of Land** — "*Exception of Continuing*" *a Street across it—Construction of Exception.*]—See *Hebner* v. *Williamson*, 44 U. C. R. 593.

**Crown** — *Public Work — Destruction of Highway for Purposes of Canal.*]—The claimant's lands were situated upon an island connected with the mainland by a highway carried over a structure in waters that were, in law, navigable, but had not been used for the purpose of navigation, being only some five or six feet in depth. The obstruction had been acquiesced in for many years. The Crown had repaid to the land owners on the island money the latter had expended in repairing the highway over this structure, and the municipality had also expended money in repairing the highway where it crossed such waters. By the construction of a public work this highway was flooded and destroyed. The Crown, however, treated it as a public way, and substituted another way for it that mitigated, but did not wholly prevent, the depreciation in value of the claimant's property:—Held, that even if the legislature had not authorized the obstruction in such navigable waters, the claimant was entitled to compensation for the depreciation caused by the construction of the public work, inasmuch as such depreciation did not arise from any proceeding taken by the Crown for the removal of such obstruction. *The Queen* v. *Moss*, 5 Ex. C. R. 30.

**Deed**—*Covenant for Quiet Enjoyment—Breach—Existence of Highway.*]—The plaintiff sued defendant on the covenant for quiet enjoyment in a deed, alleging as a breach that before the conveyance there was and still is a public highway over a portion of the land conveyed:—Held, declaration bad; for the exception in the covenant for title, of any limitation,

proviso, or condition contained in the original grant from the Crown, extends equally to the covenant for quiet enjoyment, and it was not averred that no highway was reserved in the original grant. Semble, a common and public highway is not an incumbrance within the meaning of the covenant for quiet enjoyment. *Moore* v. *Boulton*, 10 U. C. R. 140.

**Division Line.**]—Where two properties or municipalities are divided by a river or highway, the limit of each is primâ facie the centre of the river or road. *In re McDonough*, 30 U. C. R. 288.

**Expropriation of Highway by Crown** —*Compensation—Right to—Province of Ontario.*] — Certain lands on which were two roads called "Water street" and "the road to the wharf," being required for public works, were expropriated by the Dominion government, and the compensation therefor was claimed by the corporation of the village in which the roads were, and by one R. C. S., through or over whose lands the roads ran. It appeared that the roads were established as public highways by the municipal authorities by by-laws in the years 1842 and 1845, respectively, under 4 & 5 Vict. c. 10, ss. 39 and 51, although no compensation was paid to the owners therefor: — Held, that, although originally the soil and freehold of the roads or streets may have remained in the private owner, subject to the public easement (the right of user), since the year 1858, at all events, they became vested in the Crown as representing the Province of Ontario, by virtue of 22 Vict. c. 99, s. 301, and that the compensation therefor was payable to the attorney-general for Ontario, who was ordered to be made a party in order to give protection to the Dominion government in expropriating the land. *Re Trent Valley Canal*, 11 O. R. 687.

*See Rae* v. *Trim*, 27 Gr. 374.

**Improper Use of Highway**—*Contractor —Liability of Municipality.*]—See *Howarth* v. *McGugan*, 23 O. R. 396.

**Moving Houses through Streets.**]—See *Toronto Street R. W. Co.* v. *Dollery*, 12 A. R. 679; *Howard* v. *City of St. Thomas*, 19 O. R. 719.

**Names of Streets** — *Changing.*] — Remarks as to the serious consequences likely to arise from the constant changes in the names of the streets in the city of Toronto. *Van-Koughnet* v. *Denison*, 11 A. R. 699.

**Overflow from Dam.**]—The plaintiff declared in case for an injury to his horse by its falling into a hole made in a public highway, by the water overflowing a mill dam of the defendants, and tearing up the road, alleging that it was the duty of the defendants to fill up the hole, or fence it around, so as to prevent accidents. The declaration was held insufficient, as it ought to have been framed for the malfeasance in erecting or continuing the dam, &c., and not for the nonfeasance complained of, in not filling up or fencing around the hole. *Nellie* v. *Wilkes*, 1 U. C. R. 46.

**Quebec Turnpike Trust.**] — See *The Queen* v. *Belleau*, 7 App. Cas. 473, reversing judgment in 7 S. C. R. 53.

**Railway Act**—*What Constitutes a "Highway."*] — See *Shoebrink* v. *Canada Atlantic R. W. Co.*, 16 O. R. 515.

**Traction Engines.**]—See *County of York* v. *Toronto Gravel Road and Concrete Co.*, 3 O. R. 584, 11 A. R. 765, 12 S. C. R. 517.

**Trees.**]—See TIMBER AND TREES.

**Trespass extra Viam** — *Necessity.*] — Trespass q. c. f. Plea, that at the time when, &c., there was a highway adjoining the plaintiff's said land, which said highway was in certain places impassable and out of repair, wherefore defendant, for the purpose of using such highway, necessarily deviated a little therefrom on to the plaintiff's said land, going no further from said highway than was necessary, and returning thereto as soon as practicable, and doing no unnecessary damage in that behalf—which are the alleged trespasses:—Held, a good plea. *Carrick* v. *Johnston*, 26 U. C. R. 65.

**Trespassers on Road**—*Right to Restrain Others from Using.*]—See *Cockburn* v. *Eager*, 24 Gr. 409.

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## X. PRIVATE WAYS.

(*See* EASEMENT.)

### 1. *By Grant or Agreement.*

**Agreement after Demise.**]—Trespass q. c. f. Plea, liberum tenementum. Replication, demise to plaintiff from plaintiff from year to year. Rejoinder, that after the demise it was consented and agreed that defendant and his servants, &c., should have leave to pass and repass in and over the close, in which, &c.:—Held, that to support this rejoinder, a written agreement at least, if not one under seal, should be proved. *Brougham* v. *Balfour*, 3 C. P. 297.

**Agreement**—*Removal of Timber—Reservation—"Necessary."*]—The plaintiff was the owner of a farm of about a mile in breadth and five-sixths of a mile in length. About two-thirds of the farm was heavily wooded, and the rest of it was cleared and cultivated. The defendant became the purchaser of the trees and timber upon the land under an agreement which provided, among other things, that the purchaser should have "full liberty to enter into and upon the said lands for the purpose of removing the trees and timber, at such times and in such manner as he may think proper," but reserved to the plaintiff the full enjoyment of the land "save and in so far as may be necessary for the cutting and removing of the trees and timber." To have removed the timber through the wooded land at the time it was removed, would have involved an expenditure which would have possibly amounted to a sacrifice of the greater portion of the timber:—Held, affirming the judgment in 19 A. R. 176, that the defendants had a right to remove the timber by the most direct and available route, provided they acted in good faith and not unreasonably, and the reservation in favour of the plaintiff did not minimize or modify the defendant's right, under the general grant of the trees, to remove the trees across the cleared land. *Stephens* v. *Gordon*, 22 S. C. R. 61.

——— *Specific Performance—Perpetuity—Consideration.*]—An agreement to grant an easement will not necessarily be for an easement in perpetuity. Specific performance of an agreement to grant an easement may be enforced in equity. An oral agreement was entered into between the owners of two adjoining half lots, that each should give a strip of equal width from his land for a lane from the public highway to the clearing, which they should make upon their respective lots, the agreement not being expressly limited as to time. A rail fence accordingly was built by each on their respective sides of the lane, which they used in common for fifteen years, until the death of one of the parties. Upon a bill filed to restrain the defendant from closing up the portion of the lane situate on his land, it was proved that the greater part of the lane was on the defendant's land; and that there had been no expenditure on the plaintiffs' land, or on the lane upon the faith of this agreement:—Held, reversing the decision in 24 Gr. 573, that specific performance could not be enforced, as the site of the fence and the user of the included land could not be referable to the original agreement; but, even if the lane had been formed of equal portions of the land of each party, no agreement to keep it open in perpetuity could, under the circumstances, be presumed. Quære, whether the defendant's agreement could properly be said to be founded upon a valuable consideration. *Craig* v. *Craig*, 2 A. R. 583.

——— *Specific Performance — Voluntary Promise.*]—A person being about to effect the purchase of land, stipulated orally with another, who had been accustomed to use a road over the property, that in the event of the purchase being completed he would be allowed to continue the use thereof, but afterwards refused to carry out such agreement:—Held, that this promise was merely voluntary, and, as such, insufficient to found a bill for specific performance. *Barr* v. *Hatch*, 9 Gr. 312.

**Appurtenance**—*User—Other Adjoining Property.*]—Where a right of way is granted as appurtenant to certain lands, there is a right of unrestricted user of the way in connection with the beneficial enjoyment of the premises to which it is appurtenant by every part owner of the property, but such part ownership confers no right to further burden the land over which the way exists by using it in connection with other adjoining property to which the privilege is not annexed. *Telfer* v. *Jacobs*, 16 O. R. 35.

**Conditional Grant**—*Fences—Gates.*]—Plaintiff's predecessors in title had granted to defendant's predecessors in title a right of way over land afterwards conveyed to plaintiff, such right of way being conditioned upon the grantees thereof "fencing and keeping in repair" the roadway over which the easement was granted. Shortly afterwards the grantees fenced the sides of the roadway, and put gates at each end of it, which, after remaining many years, rotted away:—Held, that on the proper construction of the instrument the right of way was dependent upon defendant's maintaining fences not merely at the sides of the way in question, but also at the ends of it, where there might be gates as part of the fences. Held, also, that, even if this was not the proper construction of the instrument, plaintiff, as owner of the soil, was entitled, himself, to fence the ends of the way, putting gates therein of such width and construction as would reasonably admit of the right of way being conveniently used. *Clendenan* v. *Blatchford*, 15 O. R. 285.

**Conveyance of "Road"**—*Effect of—Easement.*]—A deed, after granting certain land, describing it by metes and bounds, continued, "also a road forty feet wide—" adding to the description thereof "and not included in the above quantity of land:"—Held, that by the conveyance of the road the fee in the freehold therein did not pass to the grantee, but merely an easement of the right of way over the land. Review of the American decisions. *Fisher* v. *Webster*, 27 O. R. 35.

**Crown Lease**—*Reservation—Obstruction—Pleading.*]—The plaintiff occupied certain premises on the bank of the river Niagara, near the Falls. Defendant occupied, under an assignment of a lease from the Crown, premises of the same nature nearer the Falls, in which lease was a condition that free access be permitted to the Falls by the staircase and pathway at the foot of the rock on the defendant's premises, at all times to all persons, on payment of a sum not to exceed 25 cents. "Mr. Thomas Barnett (the plaintiff) or any assignee of the premises now occupied by him at the Falls, or regularly employed guide or guides in his service, while conducting any person or persons to, under, or from the sheet of water, to be exempted from all charge for the use of the said pathway." Defendant erected a fence across the pathway at the most northern limit of his land below the bank, and thereby shut off the plaintiff's access to the Falls by means of his (plaintiff's) staircase, which was further from the Falls, for which obstruction the plaintiff brought this action, alleging in his declaration a wrongful obstruction of the said staircase and pathway. Defendant pleaded that he did not obstruct the staircase and pathway reserved for the use of the plaintiff by the letters patent:—Held, that the only right claimed in the declaration being that granted by the letters patent, which, on the pleadings, was shewn not to have been obstructed, the defendant was entitled to succeed. *Barnett* v. *Caplin*, 11 C. P. 76.

**Deed**—*Apparent Servitude—Registration—Evidence.*]—See *Macdonald* v. *Ferdais*, 22 S. C. R. 260.

——— *Appurtenances—Reference to Lane—Representation.*]—B., owning land in fee, conveyed a part of it, on which were two houses, to the plaintiff, by a deed under the Act respecting short forms of conveyances, describing the premises as consisting of two houses, numbered 112 and 114, "and the appurtenances thereof," and by metes and bounds also, one of the courses extending westerly "to a lane produced, six feet wide, then south . . along the said lane," &c. This lane then existed over B.'s land, and was used as a means of access to the two houses. The plaintiff claimed title under B. by a subsequent conveyance, and was aware of the description in defendant's deed before he purchased:—Held, that the right to use the way passed by the deed to defendant. B., when he sold to defendant, represented that this lane was laid out for the use of the land conveyed, and on the faith of this defendant purchased:—Held, that, even if the right had

not passed by the deed, the defendant would have been entitled to relief in equity against interference by R., or any one claiming under him. *Adams* v. *Loughman*, 39 U. C. R. 247.

——— *Appurtenances — User—Other Adjoining Property.*]—Where C., by deed, conveyed land to S., who owned certain land adjoining the land of C., but not adjoining the land now conveyed, and the deed proceeded—"and I further convey the right of way to cross my land . . from the highway . . to the land owned by S., . . to have and to hold the aforesaid lands and premises with the appurtenances unto and to the use of S., his heirs and assigns forever:"—Held, that the right of way was not a mere way in gross, but became appurtenant to the land of S., generally, and not merely to the land conveyed by the deed. The word "premises" in a deed may cover not merely the land conveyed, but all that goes before in the deed. *Saylor* v. *Cooper*, 2 O. R. 398, 8 A. R. 707.

Held, on appeal, that the words employed in the deed were sufficient to pass the interest intended, and that the right of way was thereby made appurtenant to all the lands of S. there situated; not merely to that so conveyed by C. *S. C.*, 8 A. R. 707.

——— *Construction—Mutual Rights—Servitude.*]—In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed, to which they all were parties, they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his auteurs, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way. In an action (négatoire) to prohibit further use of way:—Held, that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain. *Rion* v. *Rion*, 28 S. C. R. 53.

——— *Description—Application to Existing Lane.*]—One J. M. conveyed to plaintiff the south-east quarter of a lot, reserving the privilege of a road two rods wide through to the south-west quarter, which he afterwards conveyed with the right of way reserved. In trespass against the owner of the south-west quarter and his workmen, for breaking and entering plaintiff's close, which was a lane nearly two rods wide leading from defendant's lot through plaintiff's premises:—Held, that defendant might justify under a grant of right of way, and that the lane upon which the trespasses were said to have been committed having existed, of nearly the same width as that described in the grant, for a long time, the reasonable construction was, that the grant was meant to apply to that lane as the way granted. *Miller* v. *Anderson*, 5 C. P. 458.

——— *Description — Measurements.*]—A right of way ten feet wide, described as running north from a certain street, equally upon, along, and between two lots, to the depth of sixty feet, and then at right angles:—Held, to extend only sixty feet between the lots, so that the cross way would lie within that distance, not ten feet beyond it, which would make the depth seventy feet. *McCammon* v. *Beaupré*, 25 U. C. R. 419.

——— *Extent of User—Obstruction—Damage—Water's Edge.*]—O., on the 15th December, 1848, conveyed to P. part of lot 33, and he conveyed by the same deed "as appurtenant to the land, a full, free, and unrestricted right of way in, over, upon, and along, and to use as a public highway or street, a certain strip of land, of twenty feet in breadth, adjoining the westerly side of the said parcel of land, extending from the highway aforesaid to the water's edge of the river St. Lawrence, at all times and seasons for ever hereafter." In an action for obstructing this right of way:—Held, that the way was clearly a private, not a public way, the words "to use as a public highway or street" indicating only the extent to which the grantee might use it. (2) That the obstruction, without actual damage, gave the grantee a cause of action, for it was an interference with his easement, which, if submitted to, would become a right. (3) That it would be no defence that the boathouse was below high water mark, though O.'s right only extended so far, for O. and the defendant, claiming under him, were estopped by O.'s deed to P., which granted to the water's edge. *Plumb* v. *McGannon*, 32 U. C. R. 8.

——— *Limited Right—Special Purpose.*]—A deed of conveyance of land under the Short Forms Act from the plaintiff to the defendants recited that the latter had determined to construct waterworks in their municipality, and required the land for buildings and other purposes connected with the waterworks, and that the plaintiff had agreed to sell them such land for such purposes for the consideration and subject to the conditions set forth. The consideration was a valuable one. The grant was to the defendants and their assigns for ever, for the purposes mentioned in the recital, of the land described, with full right of ingress and egress to and from the said lands for the defendants, their employees and others doing business on and about the said waterworks with teams and otherwise, from a certain street, &c., along a certain road, &c.; habendum to the defendants, their successors and assigns, for the purposes aforesaid, to and for their sole and only use for ever, subject nevertheless to certain conditions:—Held, that the grant of the right of way gave to the defendants and their employees foot-way, carriage-way, and way for horses, but conferred no right of way upon persons to whom the defendants might sell or lease the land. *McLean* v. *City of St. Thomas*, 23 O. R. 114.

——— *Reservation of Right — Exception.*]—In an action of trespass q. c. f. the defendants justified under a reservation or exception in a deed through which the plaintiff claimed title, and in which the description of property was followed by the words, "excepting and reserving a right of way or road allowance of two rods in width along the south side of said lot:"—Held, that this was only a reservation of a right of way to the grantor, and not an exception of the soil. *Wright* v. *Jackson*, 10 O. R. 470.

——— *User of Right—Trade Purposes.*]—On the 26th March, 1853, one G. L. by deed of sale granted to P. C. "a right of passage through the lot of land of the said vendor fronting the public road as well on foot as with carriage," and with the charge upon the purchaser "of keeping the gates of the said passage shut." In 1882 McM., having acquired the dominant land, built a coal oil refinery and warehouses thereon. In the course of his trade he had several carts making three or four trips a day through this passage leaving the gates open, and in addition to his own carts most of the coal oil dealers of the city of Montreal, wholesale and retail, were supplied there with their own carts. At the time of the grant the land was used as agricultural land:—Held, that the passage could not be used for the purpose of a coal oil refinery and trade, as McM. thereby aggravated the servitude and rendered it more onerous to the servient land than it was when the servitude was established: art. 558, C. C. *McMillan* v. *Hedge*, 14 S. C. R. 736.

**Devise** — *Severance of Tenements — Continuance of Lane.*]—A testator devised part of lot 17 to his son C., and part of lot 18, adjoining it to the east, to his son W., adding that, in order to give C. free access to and from the side road on the east side of lot 18, the lane or road "now running across" the land devised to W., "commencing at my gate on said side road," and in width half a chain, to the west limit of 18, should be kept open for the free use of his said sons, with a proviso that, should the whole estate bequeathed to them come into the possession of any one person, this provision, "in reference to the continuance of said lane or road," should become void:—Held, that the testator evidently intended that the lane should be continued as then existing and used; and that the defendant, claiming under C., had no right to remove the gate on the side road. *Vansickle* v. *Kelly*, 42 U. C. R. 274.

**Lease** — *Right — Mode of User.*]—The defendant leased to the plaintiff a small knoll or island, standing in a shallow lake, which in the dry season became a muddy marsh. The land surrounding the knoll or island belonged to the defendant, and the lease provided that the plaintiff should have a right of way across it, nothing being said as to the mode of exercising the right. The plaintiff built a trestle bridge from the knoll or island to the main land, and this bridge the defendant pulled down:—Held, that the plaintiff's mode of user was reasonable, and that the defendant was not justified in interfering with the bridge. *Butchart* v. *Doyle*, 24 A. R. 615.

——— *Severance of Tenements — Visible Easement—Necessary Way—Appurtenance.*]—Declaration for breaking and entering the plaintiff's close, being a yard in the rear of a certain shop and premises, and throwing down a brick wall there. Plea, that before the alleged trespass one J. D. was seised in fee of the said shop and premises, and of the said close; that the occupiers of the shop enjoyed as of right and without interruption a certain way on foot and with cattle from a public lane over said close to said shop and premises, and therefrom over said close to the lane; that afterwards J. D., by deed, dated 12th July, 1869, demised the shop and premises, with all the appurtenances, to L. and W. as trustees for a term of years, which it was agreed by the deed should be renewed, and which was afterwards renewed; and that the defendants became and are assignees of the term, and took possession of the shop and premises under the assignment; that after the demise to L. and W., the executors of J. D. demised to S. the said close subject to said way, and the same afterwards became vested for a term in the plaintiff; that afterwards the defendants during their term, and in their own right, entered the close to use said way, and in using the same broke down part of said wall, which obstructed said way:—Held, that the plea might be read as alleging a defined way, necessary and convenient for the enjoyment of defendants' property, before the lease from J. D., constructed across the plaintiff's close, for the use and enjoyment of defendants' shop, and visible to all persons when the plaintiff acquired title; that so reading the plea, the way might be said to be an "appurtenance" to defendants' premises, which passed from J. D. by the deed under which defendants claimed; and that the plea therefore was good. *Harris* v. *Smith*, 40 U. C. R. 33.

This judgment was reversed, on the ground that the plea could not be read as alleging an apparent and continuous easement necessary for the proper enjoyment of defendants' premises, without which it would not pass under the deed. Upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law; easements not continuous or apparent, but used from time to time only, will not. A right of way is not such a continuous easement as to pass by implication of law with a grant of the land; only a way of necessity will so pass. A way used by the owner of two tenements over one for access to the other, is not in law appurtenant to the dominant tenement, so as to pass with a grant of it under the word "appurtenances," unless the deed shews an intention to extend the meaning of that word, and to embrace the way, or the grant is of all ways "used and enjoyed," or words are used shewing an intention to include existing ways, in which case a defined existing way will pass. *Ib.*

**Limited Grant** — *Colourable User.*] — A right of way granted for the benefit of a specific lot cannot be used by the owner of that lot generally apart from his ownership and use of the lot. *Robinson* v. *Purdom*, 26 A. R. 95, 30 S. C. R. 64.

**Purchase of Right of Way**—*Measure of Enjoyment — Subsequent Burden.*] — The nature of the enjoyment of an easement at the time of the grant thereof is the proper measure of enjoyment during the continuance of the grant. A person purchased a piece of land with the right of way across the property of the grantor by a lane, which at the time of the conveyance was perfectly open where it entered the public highway:—Held, that a person claiming under the grantor could not subsequently put a gate across the said

lane, though avowedly placed there not to exclude the plaintiff from the use of the right of way, but to preserve the lane from being trespassed on by the cattle of others. *Heward v. Jackson*, 21 Gr. 263.

An arrangement made between the plaintiff and B., whereby the latter "was allowed to go through" the plaintiff's land, was superseded by an arrangement whereby, in consideration of 150 cords of wood and the making of a road by B., the latter was to have a right of way through the same land. The plaintiff was to erect and keep up the gate at one end, and B. was to keep up the gate at the other end of the road. The wood was delivered, and the road made, according to the terms of the agreement. The plaintiff subsequently erected three additional gates along the course of the right of way, which were not necessary for the enjoyment of the land. The bill was filed to restrain the defendant from using the way except upon the terms of shutting those three gates when going through:—Held, that the right of way having been purchased when there were but two gates, the plaintiff had no right to fetter the enjoyment of the way by adding additional gates. *Kastner v. Beadle*, 29 Gr. 206.

*See Dixon v. Cross*, 4 O. R. 465; *Bliss v. Boeckh*, 8 O. R. 451; *Regina v. McDonald*, 12 O. R. 381; *Rogers v. Duncan*, 15 O. R. 369, 16 A. R. 3, 18 S. C. R. 710; *Wells v. Northern R. W. Co.*, 14 O. R. 594; *Stephens v. Gordon*, 19 A. R. 176, 22 S. C. R. 61.

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2. *By Necessity.*

**Devise** — *Partition by Agreement — Inaccessibility—Way by Implication—Obstruction—Express Grant—Notice.*]—B. and W., becoming entitled in 1830, as tenants in common, to 100 acres of land, under a devise, made a partition thereof by agreement, whereby fifty acres were allotted to each in severalty. The fifty acres allotted to B. were land-locked, and there was no way out to the highway, except over the fifty acres of W., over which accordingly B. was allowed by W. to pass at will. In 1840 W. sold to E. the thirty acres of his fifty next adjoining B.'s fifty acres, and also a strip for a road across the other twenty acres. In 1848 E. granted to the then owner of B.'s fifty acres a strip for a road along the north side of his thirty acres, and also the strip along W.'s twenty acres conveyed to him in 1840. This made a change in the course of the way theretofore used by B., and his successors, and was thenceforth the course followed by the latter, and was the right of way in question in this action; but this deed was not registered till 1882. B.'s parcel subsequently became vested in the plaintiff, under conveyances granting not only the land, but also all ways, &c., therewith used and enjoyed. The defendant claimed title to part of W.'s fifty acres by deed made in 1854, without notice, as he alleged, of the deed of 1848. The right of way in question had been used by the plaintiff and his predecessors in title for over thirty years, prior to the obstruction thereof by the defendant, to restrain which this action was brought:—Held, that the effect of the will and agreement together was the same as if the will itself had devised the one half to B., and the other to W., and the plaintiff had a right of way of necessity over the defendant's land, and was entitled to an injunction to restrain the obstruction complained of; and it was not necessary for him to shew any express grant of the right of way by the defendant, or his predecessors in title. Held, however, that the right of way would have passed under the grant of land, and all ways, &c., used and enjoyed therewith, as also under a deed of grant drawn according to the Act respecting short forms of conveyances, even if it had not been a way of necessity, and no such words were necessary in order to pass a way of necessity. Held, also, that the subsequent express grant of a right of way by the defendant's predecessor in title did not destroy the right to a way of necessity. Held, also, that the defendant, having notice of an actual travelled way across his land, was affected, also, with notice of the origin, as well as the existence, of the right. Held, also, that changing the locality of the way, from time to time, by the agreement of the respective owners, did not destroy the right of way, nor could the grant of a certain specific line for the road put an end to the right, in case a purchaser should buy without notice of the grant. Held, lastly, that any act of a tenant, without the knowledge or sanction of the landlord, could only affect his interest as tenant, and could not prejudice the reversioner. Semble, that a way of necessity does not give a right to the owner of the dominant tenement to cross any part of the servient tenement at pleasure, but is confined to a definite way to be determined by the agreement of the parties, or by the owner of the servient tenement, or of the dominant tenement in his default. *Dixon v. Cross*, 4 O. R. 465.

**Implied Grant**—*Person Entitled to Redeem—Unity of Possession.*]—C. conveyed to R. fifty acres of land and also a strip twenty feet wide, to the south, to give access from the fifty acres to the town line. R. mortgaged to C. the fifty acres, but not the twenty feet strip, and then conveyed the strip to N. Afterwards R. conveyed the fifty acres to his son, subject to C.'s mortgage, and on the same day gave him the occupation, under an agreement for sale, of the adjoining fifty acres to the west. The son mortgaged to the plaintiff the fifty acres conveyed to him. During the possession of R. and his son they got access from the east fifty acres to the side line through the west fifty acres owned by R. The agreement for sale of the west fifty acres to the son having been cancelled, and R. having refused to allow a tenant of his son of the east fifty acres access to the side line through the west fifty acres, the plaintiff brought this action against R., C., and N. for a declaration as to the existence of a right of way through the strip conveyed to N., or of a way of necessity through the west fifty acres, and for other relief:—Held, that if a right of way through the twenty feet strip did pass to C. under the mortgage to him, it was a right of way only to C., his heirs and assigns; and the existence of a right in the plaintiff to redeem C. did not give her the rights of C. until after redemption. But held, that the plaintiff was entitled to a declaration of the existence of a way of necessity through the west fifty acres, which was given by way of implied grant when R. conveyed to his son. The exercise of the implied grant was suspended during the time that the son had possession of the west fifty acres, but upon the termination of that possession the implied grant and the right of way under it was revived. *Lupton v. Rankin*, 17 O. R. 599.

**Inaccessibility** — *Severance of Tenement.*]—H. formerly owned a piece of land, of which the plaintiff's and defendant's closes formed parts. He used then to pass by sufferance over R.'s land to the east, and thus get into the highway, but he could get out of his own lot by a lane to the west. He first conveyed to M. a portion of his land between what he retained and this lane, reserving to himself no right of way over it; and he afterwards conveyed to plaintiff a strip between R.'s land and his own. R. having enclosed his land so that the plaintiff was shut in:—Held, that the plaintiff was entitled to a right of way of necessity over the land which H. had conveyed to M. *Turnbull* v. *Merriam*, 14 U. C. R. 265.

——— *Severance of Tenement — Action — Parties—Legal Estate.*]—Where C. conveyed to S. land which was inaccessible from the highway without passing over the lands of C. or some other person:—Held, that a way of necessity was impliedly granted by C. over his land conveyed to S. Since a way of necessity can only pass with the grant of the soil, the owner of the legal estate in the land as to which it is claimed, should be a party to an action claiming such way, and where an equitable owner of the land sued, he was permitted to make the owner a co-plaintiff by amendment at the hearing. *Saylor* v. *Cooper*, 2 O. R. 398.

——— *Convenience.*]—A way of necessity is founded on necessity, not on convenience, and the foundation of the right is the fact that the lands conveyed are physically inaccessible except by passing over other lands. The defendants in an action for trespass to land set up that a portion of their land was disconnected and separated by water from the remainder of it, called the mainland, and they contended that a way of necessity over the plaintiff's land was impliedly reserved by the Crown when these lots were respectively granted, and that such a way was to be deemed to have been reserved, although the land in respect of which it was claimed was not entirely surrounded by the lands of the grantor or other persons, and although there were other means of access to it, those means not being capable of utilization without an unreasonable expenditure of money, and not sufficient for the reasonable purposes of the owner of the lands:—Held, that the defendants were not entitled to the right claimed by them. Dictum of Lord Mansfield in Morris v. Edgington, 3 Taunt. at p. 31, and of Bowen, L. J., in Bayley v. Great Western R. W. Co., 26 Ch. D. at p. 453, referred to. *Fitchett* v. *Mellow*, 29 O. R. 6.

**Selection of Way** — *Convenience.*] — Semble, that a way of necessity to a purchaser of land is the one most convenient to the grantee by the shortest cut over the lands of the grantor; but that the right to select such a way is qualified by the effect which the selection of a particular line would have upon the interests and convenience of the grantor. *Fielder* v. *Bannister*, 8 Gr. 257.

**Severance of Tenement**—*Conveyances—Short Forms Act—Appurtenance.*]—S. by his will devised his farm to trustees, who divided up the property into six several parcels, designated parcel 1, parcel 2, &c., according to a plan which was registered, and, by contemporaneous conveyance under the Short Forms Act, conveyed the parcels to the testator's six surviving children. The description of parcel 2 included a lane, described as a right of way, the use of which was thereby reserved to the owners of parcels 4 and 6, to which it was a way of necessity. Parcel 3, which adjoined the way, was conveyed without any mention of the lane. During the unity of title some farm buildings stood upon parcel 3, adjacent to the lane in question, which was used as a means of ingress and egress thereto, but they had long since disappeared. By the Short Forms Act, R. S. O. 1877 c. 102, s. 4, every deed, unless an exception be made therein, shall be held to include all ways, easements, and appurtenances whatever to the lands therein comprised, belonging or in any wise appertaining or with the same, held, used, occupied, and enjoyed:—Held, that the defendant, claiming under the grantee of parcel 3, could not claim a right of way over the lane; that s. 4 of the Short Forms Act could not, under the circumstances, be deemed to apply; that the right of way was not a continuous easement, or way of necessity; and that plaintiff's right thereto was not barred by the Statute of Limitations. Held, also, that the defendant, as owner of a part of parcel 4, could not claim the right to use the way as appurtenant to parcel 3. *Maughan* v. *Casci*, 5 O. R. 518.

——— *Devise—Reasonable Enjoyment.*]—Upon the severance of a tenement by devise into separate parts, not only do rights of way of strict necessity pass, but also rights of way necessary for the reasonable enjoyment of the parts devised, and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts. *Briggs* v. *Semmens*, 19 O. R. 522.

**Waiver of Right**—*License to Use Road.*]—A. being entitled at his own expense to make a road for himself across B.'s farm at the most convenient point, it was agreed between them that A. should use B.'s road on certain terms:—Held, that this agreement was a mere license, not coupled with any interest or incident or auxiliary to a sale or grant, and was therefore revocable, and being revoked at law, no equity arose to interfere with A.'s legal right on the ground of encouragement on the part of the one, or forbearance and irreparable inconvenience on the part of the other. *Fielder* v. *Bannister*, 8 Gr. 257.

*See Harris* v. *Smith*, 40 U. C. R. 33, *ante* 1; *Knock* v. *Knock*, 27 S. C. R. 664, *post* 3.

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3. *By Prescription.*

**Interruption** — *Unity of Possession — Lease of Servient Tenement.*]—A right to an easement previously enjoyed cannot be acquired by the lapse of time during which the owner of the dominant tenement has a lease of the land over which the right would extend. During such unity of possession the running of the Statute of Limitations is suspended. *Stothart* v. *Hilliard*, 19 O. R. 542.

——— *Unity of Possession—Unity of Seisin—"Lost Grant"—Tenancy—Estoppel.*]—A testator dying in 1874 devised adjoining lots of land, 4 and 5, to his two sons respectively. House No. 9 stood mainly on lot 4, but also partly on lot 5, and house No. 13 stood on the remainder of lot 5, there being

a passageway between the two houses, used in common by the occupants of both for the purpose of getting in wood and coal and getting out ashes. The appellant, the owner of lot 4, had, as was admitted, by virtue of a conveyance from the devisee of lot 4 and by the Statute of Limitations, acquired title to the portion of lot 5 on which house No. 9 stood:—Held, that a right of way over the passage between the two houses did not pass by implication of law to the devisee of lot 4. The passage in question was used by the occupants of house No. 9 from the time of the death of the testator until 1895, but during the period from March to June, 1894, the owner of No. 13 was also the tenant of No. 9:—Held, that the unity of possession during that period interrupted the running of the statute, and the appellant had not acquired a right of way as an easement by prescription under R. S. O. 1887 c. 111, s. 35. Dictum of Hatherley, L.C., in Ladyman v. Grave, L. R. 6 Ch. 763, not followed. But that at all events the locus in quo in question could not be treated as a way to lot 4; it was rather a way to that portion of lot 5 on which house No. 9 stood; and there being unity of seisin of the alleged dominant and servient tenements in the devisee of lot 5, no easement could exist while that unity continued; and therefore the enjoyment of the way as an easement began only when the title of the devisee of lot 5 to that portion of it on which house No. 9 stood became extinguished by the statute, which was less than twenty years before this litigation. Semble, that, but for this latter circumstance, the claim of the appellant might have been sustained by the application of the doctrine of "lost grant." And, also, that the respondent, by reason of his tenancy of house No. 9, was estopped from asserting that his possession of the land of which he was tenant, and his user of the way which was enjoyed in connection with it, were other than possession and user by him as tenant. *Re Cockburn*, 27 O. R. 459.

**Period**—*Application of Statute.*]—The Ontario Act (R. S. O. 1877 c. 108) reducing the period of limitation to ten years, does not apply to the interruption of an easement, such as a right to a way in alieno solo, in this case a lane, which the defendant had occupied and obstructed for ten years, but which the plaintiff had used prior to such obstruction. *Mykel* v. *Doyle*, 45 U. C. R. 65.

——— *Pleading—Parties.*]—In trespass q. c. f., a plea of right of way under a deed must shew the parties to the deed, and a private right of way cannot be claimed by prescription in a less period than twenty years. *Smith* v. *Smith*, 3 O. S. 215.

———*Possession Animo Domini—Revendication—Quebec Law.*]—See *Pinsonneault* v. *Hebert*, 13 S. C. R. 450.

**Railway**—*Crossing.*]—When a line of railway severs a farm, and no crossing is provided by the company, a right of way across the line may be acquired by the owner of the farm by prescription. A farm crossing provided by a railway company, may be used by any person who, after the severance, becomes the owner of portions of the farm on both sides of the line of railway, and has a right of access to the crossing. A right of way may be acquired, although the dominant tenement is not contiguous to the servient tenement. *Guthrie* v. *Canadian Pacific R. W. Co.*, 27 A. R. 64.

——— *Subway—Reservation—Lost Grant—Continuous User—Compensation for Loss.*]—Where in building their road the defendants left a subway under a trestle bridge, and the evidence shewed that the plaintiff, the owner of the land crossed by the railway at this point, had enjoyed the open and continuous user of this subway as of right ever since 1862, but that the defendants were now proceeding to fill it up:—Held, that, though the plaintiff could not prevent the filling up of the subway he was entitled to damages for his property in the easement. The plaintiff was entitled to assume that there was a reservation of the subway in the deed from the original grantor of the right of way to the railway company, which deed was lost, or he was entitled to claim the easement under the Prescription Act from long and uninterrupted enjoyment as of right. Clouse v. Canada Southern R. W. Co., 4 O. R. 28, 11 A. R. 287, 13 S. C. R. 139, distinguished. *Wells* v. *Northern R. W. Co.*, 14 O. R. 594.

**Termini**—*Slight Deviations — Interruptions—Evidence—Gate.*]—The termini a quo and ad quem of a way over the defendant's land, used and enjoyed as of right by the plaintiff and his predecessors in title for upwards of twenty years before the commencement of the action, had not varied during that period, except at two points, where, about fourteen years before action, one of the plaintiff's predecessors slightly altered the line of the way for the purpose of going round muddy spots, and the user of the original line at these two points was abandoned for the substituted one. These deviations were short as compared with the length of the way:—Held, that they did not operate to do away with the plaintiff's right to claim the way between the termini, that way having been substantially used during the whole period; but the plaintiff should be confined either to the original or substituted line. Slight temporary interruptions by the defendant were insufficient to prevent the statute from running. The plaintiff, having omitted to give formal proof of his title at the trial, was allowed to supply it upon appeal. Upon the plaintiff's assent, the defendant was allowed by the decree to erect and maintain a gate across the end of the way in question. Clendenan v. Blatchford, 15 O. R. 285, followed. *Warren* v. *VanNorman*, 29 O. R. 508.

**User for Statutory Period**—*Cessation for Year before Action—Way of Necessity.*]—K. owned lands in the county of Lunenburg, N. S., over which he had for years utilized a roadway for convenient purposes. After his death the defendant became owner of the middle portion, the parcels at either end passing to the plaintiff, who continued to use the old roadway, as a winter road for hauling fuel from his wood lot to his residence, at the other end of the property. It appeared that, though the three parcels fronted upon a public highway, this was practically the only way plaintiff had for the hauling of his winter fuel, owing to a dangerous hill that prevented him getting it off the wood lot to the highway. There was not any formed road across the lands, but merely a track upon the snow during the winter months, and the way was not used at any other season of the year. This

user was enjoyed for over twenty years prior to 1891, when it appeared to have been first disputed, but from that time the way was obstructed from time to time up to March, 1894, when the defendant built a fence across it that was allowed to remain undisturbed and caused a cessation of the actual enjoyment of the way, during the fifteen months immediately preceding the commencement of the action in assertion of the right to the easement by the plaintiff. The statute (R. S. N. S., 5th ser., c. 112) provides a limitation of twenty years for the acquisition of easements, and declares that no act shall be deemed an interruption of actual enjoyment, unless submitted to or acquiesced in for one year after notice thereof and of the person making the same:—Held, that, notwithstanding the customary use of the way as a winter road only, the cessation of user for the year immediately preceding the commencement of the action was a bar to the plaintiff's claim under the statute. Held, also, that the circumstances under which the roadway had been used did not supply sufficient reason to infer that the way was an easement of necessity appurtenant or appendant to the lands formerly held in unity of possession, which would without special grant pass by implication, upon the severance of the tenements. *Knock v. Knock*, 27 S. C. R. 664.

**User in Common**—*Lane between Tenements.*]—E. and B. owned adjoining lots, each deriving his title from S. E. brought an action of trespass against B. for disturbing his enjoyment of a right of way between said lots and for damages. The fee in this right of way was in S., but E. founded his claim upon a user of the way by himself and his predecessors in title for upwards of forty years. The evidence at the trial shewed that it had been used in common by the successive owners of the two lots:—Held, that, as E. had no grant or conveyance of the right of way, and had not proved an exclusive user, he could not maintain his action. *Ellis* v. *Black*, 14 S. C. R. 740.

**User**—*Undefined Way—License—Revocation—Construction of Agreement.*]—In an action for obstructing a right of way the plaintiff claimed the use of such right, both by prescription and agreement, and also claimed that by agreement the way was wholly over the defendant's land. The evidence at the trial shewed that the plaintiff had acquired the land from his father, who retained the adjoining land, which was eventually conveyed to the defendant, and that after so acquiring it the plaintiff continued to use a track or trail over the adjoining land, and mostly through bush land, to reach the concession line, and his claim to the use of a way by prescription depended on whether or not his user was of a well-defined road, or merely of an irregular track, and by license and courtesy of the adjoining owner. Finally an agreement was entered into between the plaintiff and his brother, who had acquired the adjoining lot, which he afterwards conveyed to the defendant, by which, in consideration of certain privileges granted to him, the brother covenanted to permit the plaintiff to have a right of way along a lane to which the way formerly used led, and extending forty rods east from the centre of the lot, so as to allow the plaintiff free communication from the defendant's lot along said lane to the concession line. The issue raised on the construction of this agreement was whether the right of way granted thereby should be wholly or in part on the plaintiff's land, or wholly on that of the defendant:—Held, reversing the judgment in 16 A. R. 3, and restoring that in 15 O. R. 699, that the plaintiff had no title to the right of way by prescription, the evidence clearly shewing that the user was not of a well-defined road, but only of a path through bush land, and that he only enjoyed it by license from his father, the adjoining owner, which license was revoked by his father's death; but held, affirming the judgment in 16 A. R. 3, that under the agreement the right of way granted to the plaintiff was wholly over the defendant's land, the agreement, not being explicit as to the direction of such right of way, requiring a construction in favour of the plaintiff and against the grantor. *Rogers* v. *Duncan*, 18 S. C. R. 710.

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4. *Other Cases.*

**Abandonment**—*Sale of Land—Sale by Plan—Lane not in Use.*]—Abandonment of an easement may be shewn not only from acts done by the owner of the dominant tenement, indicating an intention to abandon, but also from acquiescence in acts done by the owner of the servient tenement. Where, therefore, the owner of the property, over which a right of way existed, built, with the knowledge of the owner of the property for the benefit of which the right of way had been reserved, an ice-house upon the portion reserved, and after some years pulled down the ice-house, and with the same knowledge built a stable on the same site, and a row of shops over another part of the right of way, it was held that the owner of the dominant tenement could not then have the right of way opened. Mykel v. Doyle, 45 U. C. R. 65, considered. A conveyance, made in pursuance of the Short Forms Act, of a lot according to a registered plan upon which a lane is laid out, does not pass any interest in the lane when it has not in fact been opened on the land, and has not been used or enjoyed with the lot in question. *Bell* v. *Golding*, 23 A. R. 485.

**Conversion of Private Road into Colonization Road** — *Quebec Law.*] — See *Chamberland* v. *Fortier*, 23 S. C. R. 371.

**Conversion of Private Way into Highway.**]—The right vested in a municipal corporation by 46 Vict c. 18 (O.) to convert into a public highway a road laid out by a private person on his property, can only be exercised in respect to private roads, to the use of which the owners of property abutting thereon were entitled. *Goodeham* v. *City of Toronto*, 25 S. C. R. 246.

*See S. C.*, 21 O. R. 120, 19 A. R. 641; *Skiitzsky* v. *Cranston*, 22 O. R. 590.

**Extinguishment** — *Closing of Highway —Res Judicata—Pleading.*]—In an action for obstructing a right of way, defendant pleaded that the close over which the supposed way passed was a public way, which had been shut up by order of the municipal council:—Held, plea bad, the plaintiff's private right of way not being necessarily extinguished by the closing of the public road. Defendant by another plea denied the right of way claimed, and the plaintiff replied, by way of estoppel, a judgment in his favour in a

former suit with the plaintiff, in which the same right was in question, averring that the way claimed was the same in both actions:—Held, a good replication, for, if the right had been lost by any thing occurring since the former action, the defendant should have shewn it. *Johnson* v. *Boyle*, 11 U. C. R. 101.

**Limits of Way**—*Evidence.*]—Held, that the case of Johnson v. Boyle, as reported in 8 U. C. R. 142, and 11 U. C. R. 101, taken in connection with the evidence given in this case, only established a right of way in the plaintiff over the east half of lot 23 in the 9th concession of Markham, to the concession line between the 8th and 9th concession, but none over the west half of the lot. *Walsh* v. *Johnson*, 24 C. P. 367.

**Obstruction**—*Res Judicata — Pleading.*]—The third and fourth counts charged defendant with obstructing the plaintiff's right of way from his land over lot 14 to a highway, and back again from the highway over lot 14 to plaintiff's land. To a plea denying plaintiff's right to the way, the plaintiff replied, by way of estoppel, a former recovery against defendant for obstructing a right of way then claimed by the plaintiff from her said land "over lot 14 to a highway, and back again from the highway over lot 14 to plaintiff's land:"—Held, replication good, for that the issue was as to the existence of any right of way in plaintiff over lot 14, and that was determined by the former recovery. *Dean* v. *Gray*, 22 C. P. 202.

**Severance by Railway**—*Access to Separated Parts.*]—Plaintiff owned land along the river Thames at a point where there was a bend or elbow in the stream. He conveyed to defendants the strip required for their track, which ran close to the bank at this bend so as to leave no passage from his land above to that below, but he had access to each part separately by the highway:—Held, that defendants were not bound to provide any such passage. *Carroll* v. *Great Western R. W. Co.*, 14 U. C. R. 614.

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*See* DEED, III. 2, 4 (a)—EASEMENT—MASTER AND SERVANT, VI. 4 (e)—NUISANCE, II.

## WAY OF NECESSITY.

*See* WAY, X. 2.

## WEEKS.

*See* TIME, III.

## WEIGHTS AND MEASURES.

**Conviction under Weights and Measures Act**—*Imprisonment in Default of Distress.*]—See *Regina* v. *Dunning*, 14 O. R. 52, *ante* JUSTICE OF THE PEACE, II. 2 (c).

## WHARF.

**Erection**—*Obstruction of River — Direction to Jury.*]—Where defendants were indicted for obstructing a navigable river by the erection of a wharf, and there was no evidence that the part covered by the wharf had ever been navigated by vessels of any size, but it was shewn only that the prosecutor was prevented by it from landing there with his skiff, and the wharf was proved not to interfere with the navigation:—Held, that the jury were rightly directed that on this evidence the only verdict which could be rendered was not guilty. Such a direction is not so much a direction on the law as a strong observation on the evidence, which may properly be made in a proper case without being open to the charge of misdirection. *Regina* v. *Port Perry and Port Whitby R. W. Co.*, 38 U. C. R. 431.

**Lease of Wharf**—*Liability to Repair.*]—A lease of a wharf or pier, for eight years, dated 7th May, 1874, contained covenants by the defendants, the lessees, to repair generally, "reasonable wear and tear and accidents by fire and tempest excepted." In May, 1876, the wharf was damaged by the action of the ice forced against it by a high wind:—Held, that the damage sustained could not be said to be an accident caused by tempest, so as to bring it within the exception. *Thistle* v. *Union Forwarding and R. W. Co.*, 29 C. P. 76.

**Municipal Corporation** — *By-law — Wharf Dues — Fine for Non-payment.*] — A municipal corporation by by-law authorized individuals to erect wharves, and to remunerate themselves by charging tolls on goods, part of which was directed to be paid to the treasurer of the municipality. The harbour master was empowered to detain any vessel having on board any goods on which these tolls were unpaid, or any such goods; and a fine of not less than $1 nor more than $50, was imposed on any master or owner of a vessel refusing to comply with these conditions, to be enforced by distress and sale:—Held, that the by-law was illegal. *In re Hagaman and Town of Owen Sound*, 20 U. C. R. 583. But see 24 Vict. c. 63.

——— *By-law—Incumbering Wharf—Imprisonment.*]—A provision that any person incumbering, injuring, or fouling any public wharf, should be liable to a penalty named, and in default of payment or sufficient distress to imprisonment "for not less than ten nor more than thirty days:" — Held, bad, twenty-one days being the limit authorized by 36 Vict. c. 48, s. 372, s.-s. 13. *Re McLeod and Town of Kincardine*, 38 U. C. R. 617.

**Non-repair** — *Liability — Ownership — Damages.*]—See *Johnson* v. *Port Dover Harbour Co.*, 17 U. C. R. 151.

*See* COMPANY — EVIDENCE — HARBOURS, CANALS, AND DOCKS—LANDLORD AND TENANT — LIEN — MUNICIPAL CORPORATIONS—WATER AND WATERCOURSES.

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## WHARFINGER.

**Duty to Provide Storage**—*Lien for Wharfage.*]—It is not necessary that the proprietor of a wharf or quay upon navigable waters, used for the loading and unloading of vessels, should have a warehouse or shed or other convenience for the storage of goods and protection thereof from the weather; and as

such wharfinger he is entitled to a lien on goods unloaded at his wharf, for money due to him for wharfage. Renald v. Walker, 8 C. P. 37, and Llado v. Morgan, 23 C. P. 517, referred to, observed upon, and, though doubted, followed. *Sills* v. *Bickford*, 26 Gr. 512.

**Harbour Company Owning Wharf.**]—The Cobourg Harbour Company are not wharfingers because they have erected piers and wharves according to their charter, and are not therefore responsible for goods left upon their wharves unstored. *Logan* v. *Cobourg Harbour Co.*, 3 U. C. R. 55.

**Lien for Wharfage**—*Payment—Finding of Jury.*]—Where defendant claimed a lien on certain goods for wharfage, but it appeared that for many years, including the time when these goods came into defendant's hands, defendant and plaintiff had been dealing together, and defendant had charged his claims for wharfage in account current, on which payments had been made from time to time:—Held, that it was properly left to the jury to say whether the wharfage on the goods in question had been paid, and that they were justified in finding that it had been. *Boyd* v. *Maitland*, 16 U. C. R. 311.

**Lien for Wharfage and Fuel**—*Good of Owners—Charter of Third Party—Evidence.*]—See *Provincial Insurance Co.* v. *Maitland*, 7 C. P. 426.

**Loss of Goods** — *Liability for.*] — The plaintiff landed with his goods in the night at defendants' wharf. The landing waiter of the custom house, being there, sent a person employed by defendants as watchman against fire to get the key of their warehouse on the wharf, and all plaintiff's goods were put into it, except a packing case, for which there was no room. Next day the plaintiff got all his goods except the case, and paid defendants' charges upon them. The case was lost. The plaintiff was asked by one of the defendants to go and look at a box in the town which was thought to be his; not to speak of the loss; and to furnish a list of the things contained in the case:—Held, that there was sufficient evidence to go to the jury to charge the defendants. *Towers* v. *Talbot*, 11 U. C. R. 614.

**Negligence** — *Wrong Address — Forwarder.*]—Certain packages were sent from New York by the Canandaigua and Niagara Falls Railway, addressed to the plaintiff at Hamilton, to go on by the Great Western Railway from the Falls. A bill of freight and charges due the Canandaigua and Niagara Falls Railway Company was made out to the Great Western Railway Company. In consequence of a telegraphic communication, of which defendant knew nothing, the address to Hamilton entered on this bill was struck out, and Toronto substituted, and Great Western Railway was also struck out, and E. & O. R. R. (meaning Erie and Ontario Railroad) put in its place, but the address on the packages was left unchanged. They were brought by the Erie and Ontario Railroad to Lewiston, and thence shipped to Toronto, where defendant, a wharfinger, received them, with an abstract in which they were described as addressed to plaintiff at Toronto. The defendant, relying on the address to Hamilton, which still remained on the case, shipped them to that place, and they were burned on the passage:—Held, that it was properly left to the jury to say whether defendant was guilty of negligence by not going by the address in the abstract instead of that on the packages, and that they rightly decided in his favour. Held, also, that the fact of defendant being described in the declaration as a wharfinger and forwarder, and not denying either character, could not make him liable as a forwarder in face of the evidence. *Hunter* v. *Borst*, 13 U. C. R. 141.

**Payment by Consignee** — *Agency for Consignor.*]—Semble, that a wharfinger is not an agent of the forwarder, to whom the consignee is authorized to make payment, after the delivery of the goods to the consignee, and after an account has been stated between him and the forwarder. *Torrance* v. *Hayes*, 2 C. P. 338.

——— *Agency for Carriers—Freight.*]—Declaration for work and labour in the carriage of goods by carriers by water. Plea, that a wharfinger, to whom the goods were delivered by plaintiffs for defendant, was agent of plaintiffs to receive payment, and that they paid him accordingly:—Held, that from the course of dealing between the parties, as shewn by the evidence, the wharfinger was such an agent. Held, also, that after delivery of the goods without exacting freight, the wharfinger still continued plaintiff's agent to demand and receive the freight till his authority was revoked. *Torrance* v. *Hayes*, 3 C. P. 278.

*See Gibbs* v. *Dominion Bank*, 30 C. P. 36.

*See* CARRIERS — WAREHOUSEMEN AND WAREHOUSE RECEIPTS.

## WIFE.

*See* HUSBAND AND WIFE—MORTGAGE, IV. 8 (f).

## WILD ANIMALS.

*See* ANIMALS, VI.

## WILD LANDS.

*See* LIMITATION OF ACTIONS, II. 3 (b).

## WILL.

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## I. Capacity to Devise.

### 1. *In General.*

**Accruing Possessory Title.**]—A person having a power of attorney to sell certain lands, entered into possession after the death of the owner, with an intention to acquire the title, and died in possession, but before his possession had ripened into a title:—Held, that he had such an interest as passed under a general devise in his will. Held, also, that the devisees were entitled to claim the property in equity, as against the testator's heirs, who had gone into possession; but that a suit for the purpose could be successfully resisted by shewing sufficient length of possession by the heirs after the testator's death to give a title as against the plaintiffs. *Heward* v. *Heward*, 15 Gr. 516.

**Indian.**]—An Indian male or female may make a will, and may by such will dispose of real or personal property subject to the provisions of the Indian Act, R. S. C. c. 43, or other statute. Quære, whether the last part of s. 20 of the Indian Act, R. S. C. c. 43, does not leave all questions arising in reference to the distribution of the property of a deceased Indian, male or female, to the superintendent-general, so that his decision, and not that of the court, should determine such questions. *Johnson* v. *Jones*, 26 O. R. 109.

**Land Adversely Occupied.**]—The effect of the exception in 4 Wm. IV. c. 1, s. 17, in favour of a grantee of the Crown, who has never taken possession, is, that while ignorant of the fact of his land being in the actual possession of some other, he is not to be regarded as disseised, and consequently can devise. *Doe d. McGillis* v. *McGillivray*, 9 U. C. R. 9.

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### 2. *Married Woman.*

**Acquiescence** — *Family Arrangement.*]—The owner of land, by letter written to his mother, directed that she should have the power to dispose of his property, and she by her will devised portions thereof to some, to the exclusion of others, of her children. Before reading this will, the executors named therein called her several heirs together, and suggested that they should sign an agreement to submit to and acquiesce in the provisions of such will, and they did sign an agreement:—Held, that this being in the nature of a family agreement or settlement, the parties to it were bound thereby, and would be compelled to carry out the provisions of the will. One of the parties executing this agreement was, to the knowledge of all interested, under age at the time of the agreement:—Held, no answer to a bill by the infant after attaining twenty-one, against parties who had obtained the benefits of the will intended for them, notwithstanding the want of mutuality at the time of the agreement. *Melville* v. *Strathcrne*, 26 Gr. 52.

**Devise to Husband.**] — C. S. U. C. c. 73, does not authorize a married woman to devise her property otherwise than to or among her child or children, if any. Any disposition in favour either of her husband or other parties is void, and as to the portion attempted to be so disposed of there is an intestacy. *Mitchell* v. *Weir*, 19 Gr. 568.

**Excluding Some Children.**]—Under R. S. O. 1877 c. 106, s. 6, a married woman could not devise or bequeath her property to one of several children to the exclusion of the others. *Munro* v. *Smart*, 26 Gr. 37, 310. See *S. C.*, 4 A. R. 449.

**Infant Married Woman.**] — In a so-called will, executed a few days before her death, G., L.'s wife, assumed to devise the land in question to L. At the date of this will G. was only eighteen years of age:—Held, that the will was invalid. C. S. U. C. c. 73, s. 16 (R. S. O. 1877 c. 106, s. 6), only removes the disability of coverture in respect to wills, not of infancy. *Re Murray Canal, Lawson* v. *Powers*, 6 O. R. 685. And see *Smith* v. *Smith*, 5 O. R. 690.

**Separate Estate.**]—A devise by a married woman of property which was her separate estate, but of which her husband had been in possession before the 4th of May, 1859, was held to be good. *Re Hillker*, 3 Ch. Ch. 72.

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3. *Mental Capacity and Undue Influence.*

**General Rule.**]—The principle of what is a sufficiently sane and disposing mind and memory treated of and acted on. *Menzies* v. *White*, 9 Gr. 574.

**Beneficiary's Instructions** — *Suspicious Circumstances.*] — The testator, by his will, made in June, 1880, gave the bulk of his property to the plaintiff, his sister, with whom, in the autumn before his death, he had quarrelled, and it did not appear that she saw him again before he died. The defendant, another sister, claimed under a second will made an hour or two before the testator's death. The evidence shewed that the testator was a very determined man, and not easily influenced; that he was suffering from excessive indulgence in drink; that he latterly spoke in very bitter and offensive terms of the defendant, and had frequently said that she should have nothing; that he had frequently, and as late as a few days before his death, stated that if he died everything was arranged and that the plaintiff would get his property. Shortly before his death the defendant had him brought to her house. On the night of his death the physician in attendance told defendant that if anything was to be settled it should be done at once. A solicitor was sent for to draw a will. The defendant instructed him before he saw the testator, and upon her instructions the will was drawn, which gave the bulk of the property to the defendant, and a bequest of $1,000 to the plaintiff. This the solicitor read over to the testator and asked him if he approved of it. He made a sign of dissent. The defendant urged the testator to give the plaintiff the $1,000, but (as the defendant stated), he said $10 was enough for the plaintiff. The solicitor thereupon went away leaving the will with the defendant, and during his absence it was signed. The evidence of various witnesses for the defence was conflicting as to the incidents which happened during this time and until the testator's decease; and while they all spoke of the testator's unwillingness to give the plaintiff more than $10, there was no evidence, other than that of the defendant, of his desire to give her the bulk of his property or to make any disposition of it: — Held, that the second will could not be established on the uncorroborated evidence of the defendant, and the prior will was declared to be the testator's last will. *Hogg* v. *Maguire*, 11 A. R. 507.

**Clause Inserted in Will.**] — E., the agent of a testatrix, introduced into her will a clause declaring that she had sold to one S. two properties therein described, and directing the plaintiff (to whom she devised all her real and personal estate beneficially), to convey these properties to S. The testatrix contracted with S. for the sale to him of one only of these lots; but E. alleged an oral bargain by the testatrix to sell the lot to him; there was no writing as to such a bargain, and no part performance. After the death of the testatrix, E. induced the plaintiff, who was not of age, to execute a conveyance to S. of the two lots:—Held, that the alleged bargain with E. was not binding on the plaintiff, and a release of the lot to her was directed, with costs to be paid by E. *Archer* v. *Scott*, 17 Gr. 247.

**Conflict of Evidence.**]—The validity of a will established; the evidence of the medical attendants and surrounding circumstances tending to shew that testator was of sufficiently sound mind to understand the meaning and effect of the devises, though other witnesses swore differently. *Menzies* v. *White*, 9 Gr. 574.

**Effect of Probate.**]—Letters probate issued by the proper surrogate court are, notwithstanding the Devolution of Estates Act, only primâ facie evidence as far as real estate is concerned of the testamentary capacity of the testator; and in an action asserting title to real estate under a will, the defendant is entitled to give evidence to shew want of testamentary capacity. *Sproule* v. *Watson*, 23 A. R. 692.

**Extreme Weakness**—*Instructions at Intervals.*]—A will was executed by the testator on his death-bed; he was compos mentis at the time, although so extremely weak in body and mind that his directions were given at intervals, and difficult to understand. No fraud, however, was pretended, and the court was satisfied that the will accorded with his wishes, and contained all that was understood of them, though probably not all he desired to express; and was understood by the testator at the time of executing it:—Held, affirming 12 Gr. 500, that the will was valid. *Martin* v. *Martin*, 15 Gr. 586.

**Great Age** — *Absence of Explanation.*]—The testator when nearly eighty years of age executed a will devising the whole of his estate to a son and daughter by his first marriage to the exclusion of his wife and other children of the second marriage. At the time of its execution he was on his death-bed, staying with his daughter in the United States, having shortly before left his farm in Ontario without any notice to his wife and other children. For some time before he had been afflicted with a complication of diseases rendering him incapable of managing his farm, and which resulted in his death shortly after the execution of the will in question. A will was prepared by an attorney practising in the place the testator was staying at, leaving everything to the daughter, solely on the instructions of her husband. On this being read over to the testator, who was lying in bed and unable to rise, suffering great physical and mental prostration, he remarked that it was not right, that he wanted the son's name in it too. The will in question was then prepared, and after being read over to him, without explanation as to the effect of the language used, was executed by him with assistance, with great difficulty. The attorney and medical man in attendance were of opinion that he had sufficient mental capacity to make a will. The same attorney had some time before induced him to refrain from making a similar will. Shortly before the execution of the will he had handed to his daughter a bank deposit receipt which she had had transferred to her name, and had used part of the money, he stating that he wanted her to take care of him and that he was going to have a will drawn. From the evidence it appeared that the testator, as well as his daughter, were under the impression that the will

had reference to the deposit receipt only:—Held, that the will was invalid, its execution under circumstances of the testator's condition, and the absence of any explanation to him of the effect of his testamentary act, being a fraud on the part of those concerned in procuring its execution. *Freeman* v. *Freeman*, 19 O. R. 141.

**Illness Inducing Stupor.**]—A testator was suffering from a disease which had the effect of inducing drowsiness or stupor during the time he gave the instructions for drafting and when he executed his will, but as the evidence shewed that he thoroughly understood and appreciated the instructions he was giving to the draftsman as to the form his will should take and the instrument itself when subsequently read over to him, it was held to be a valid will. *McLaughlin* v. *McLellan*, 26 S. C. R. 646.

**Insanity.**]—P. L., executor under the will of the late W. R., sued W. C. A., curator of the estate of W. R. during the lunacy of the latter, to compel W. C. A. to hand over the estate to him as executor. After preliminary proceedings had been taken, E. R. (the appellant) moved to intervene and have W. R.'s last will set aside, on the ground that it had been executed under pressure by D. J. M., W. R.'s wife, in whose favour the will was made, while the testator was of unsound mind. The appellant claimed and proved that D. J. M. was not the legal wife of W. R., she having another husband living at the time the second marriage was contracted. W. R. who was a master pilot, died in 1881, having made a will two years previously. His estate was valued at about $16,000. On the 4th October, 1878, W. R. made a will by which he bequeathed $4,000 and all his household furniture and effects to his wife J. M., $2,000 to his niece E. R., $1,000 to F. S. for charitable purposes, and the remainder of his estate to his brothers, nephews, and nieces in equal shares. On the 8th of the same month he made another will before the same notary, leaving $800 to his wife J. M., $400 to each of his nieces M. and E. R., and $400 to his brother with reversion to the nieces if not claimed within a year, and the remainder to E. R. On the 27th November, 1878, W. R. made another will which was the subject of the present litigation, and by which he revoked his former wills and gave $2,000 to F. S., for the poor of the parish of St. Roch, and the remainder of his property to his "beloved wife J. M." On the 10th January following W. R. was interdicted as a maniac, and a curator appointed to his estate. He remained in an asylum until December, 1879, when he was released, and lived until his death with his niece E. R., sister of the appellant:—Held, that the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will of the 21st November, was that the testator, at the date of the making of the will, was of unsound mind. *Russell* v. *Lefrancois*, 8 S. C. R. 335.

Insane delusion of the testator as to the illegitimacy of his youngest child. See *Bell* v. *Lee*, 8 A. R. 185.

**Insanity after Will Made.**]—See *Miller* v. *Miller*, 25 Gr. 224.

**Medical Testimony.**]—The court, in adjudicating upon the question of the mental capacity of a testator, will give effect to the evidence thereof given by the medical attendants rather than to that of others, particularly those benefited by the will. A testator in January, 1871, while in full possession of his mental faculties, made a will, whereby he directed all his property to be invested, and one-half of the proceeds thereof paid to his widow during widowhood, and the other half to his sister; and in the event of issue, then that the issue, widow, and sister should share the same equally; and on the child, if a son, attaining twenty-five, or if a daughter attaining twenty-one, or marrying, that then one-half of all the estate (real and personal) should go to such child absolutely; and afterwards (on the 5th July, 1873), whilst the testator was on his death bed, another will was signed by him, without any consultation with the wife, and without her knowledge, whereby he gave one-third of his estate absolutely to his sister, and directed the residue to be invested, and out of the proceeds his mother to be paid $1,600 a year as a first charge thereon, and his widow $800 a year during life. The residue of his estate he gave to his child on attaining twenty-one. The reason stated by the parties benefited thereunder, and by the solicitor who drew it, for the testator making such second will, was that his wife was likely soon to become a mother, and that he desired to make provision for the expected issue. The testator died on the 12th July, and in the results which followed, the $1,600 a year given to his mother would absorb nearly, if not quite, all the income of the estate not given to his sister. It was shewn that the testator and his wife had lived on the most friendly and affectionate terms, and that there was not any intention, on his part, to deprive her of any benefits given by the former will. The widow, by this second will, was named as executrix, though not so under the prior one; and being guided by her husband's relatives, and informed by them that she was entitled to a third of the estate, and being without any independent advice, joined with the executors in proving the will; but, six months afterwards, becoming aware of her true position thereunder, she filed a bill charging that the same had been obtained by undue influence exercised over the testator while he was incapable of properly understanding the effect of the dispositions he was making of his property. Some of the parties benefited by such will swore that at the time of signing it the testator was clear in his intellect and understood perfectly what he was about; whilst the medical attendants swore that at that date he was in an almost comatose state, and had been rapidly becoming so for some days previously, and that from the 1st to the 5th of July his mind was not in such state as to be capable of any continuous action. The court, under these circumstances, refused to allow the paper to stand as his will. *Wilson* v. *Wilson*, 22 Gr. 39, 24 Gr. 377.

**Onus.**]—In order to set aside a will on the ground that its execution was obtained by undue influence on the mind of the testator it is not sufficient to shew that the circumstances attending the execution are consistent with the hypothesis that it was so obtained. It must be shewn that they are inconsistent with a contrary hypothesis. *Adams* v. *McBeath*, 27 S. C. R. 13.

**Partial Insanity.**]—The question as to what degree of unsoundness of mind will incapacitate a person from executing a will,

considered. *Ingoldsby* v. *Ingoldsby*, 20 Gr. 131.

A person who had at one time been insane, afterwards made a will. It was shewn that, though he continued to be eccentric in his habits, he had a clear appreciation of the value and extent of his property, as also of the objects of his bounty:—Held, that he was qualified to make a valid disposition of his estate, within the ruling in Banks v. Goodfellow, L. R. 5 Q. B. 549. *Ib.*

**Physical Weakness.**] — Mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt by a testator. *Emes* v. *Emes*, 11 Gr. 325.

**Quebec Law**—*Weakness of Mind—Undue Influence.*]—In 1889 an action was brought by G. H. H., in the capacity of curator to Mrs. B., an interdict, against A. in order to have a certain deed of transfer made to him by Mrs. B., his mother, set aside and cancelled. Mrs. B. having died before the case was brought on to trial, the respondent, M. B., presented a petition for continuance of the suit on her behalf as one of the legatees of her mother under a will dated the 17th November, 1869. This petition was contested by A. B., who based his contestation on a will dated the 17th January, 1885 (the same date as that of the transfer attacked by the original action), whereby the late Mrs. B. bequeathed the residue of all her property, &c., to her two sons. Upon the merits of the contestation as to the validity of the will of the 17th January, 1885:—Held, that art. 831, C. C., which enacts that the testator must be of sound mind, does not declare null only the will of an insane person, but also the will of all those whose weakness of mind does not allow them to comprehend the effect and consequences of the act which they perform. Held, further, that upon the facts and evidence in the case, the will of the 17th January, 1885, was obtained by A. at a time when Mrs. B. was suffering from senile dementia and weakness of mind, and was under the undue influence of A., and should be set aside. *Baptist* v. *Baptist*, 23 S. C. R. 37.

**Question and Answer**—*Spontaneity.*]—The testator, a man of education and a minister of the Presbyterian church, had become so weakened by illness as to be confined to his bed for some time prior to his death, and a day or two before that occurred executed a will by affixing what was intended as his mark thereto, the instructions for which were entirely obtained by the person preparing it, by putting questions to the testator as to the disposition of his different properties, and suggesting also the objects of his bounty; such will, when drawn, having been read over clause by clause to the testator, who expressed his assent to some of the bequests, while as to others he made intelligent remarks, and some changes in the provisions thereof. The court, in a suit brought to impeach the will as having been obtained by fraudulent practices and undue influence of persons benefited thereunder, as well as by the persons concerned in the preparation of the will, refused the relief sought, and dismissed the bill, with costs to be paid out of the residuary estate, although it was shewn that though notice had been given to the testator, he was wholly unprepared to make the will when he came to the act; that there had not been any previous intention on his part to make a will; that he was a man who, when in possession of his mental faculties, was not likely to take suggestions from others; that not a single bequest or devise originated with the deceased; that the writer of the will did not know what property the deceased had, and admitted that if he had had this knowledge he would have spoken to him seriously on the subject of his relations, of whom there were several; that the will was inofficious; that the testator was eighty-four, and during the preparation of the will, as one clause would be written out after his giving assent to a devise or bequest, he fell into a doze or sleep, from which he had on each occasion to be aroused; and it took two hours to prepare the will, although it covered but one foolscap sheet, and that the parties preparing the will sent for and obtained the numbers of the lots devised by the will from a neighbour, thus shewing that they could not obtain such information from the deceased. *Thompson* v. *Torrance*, 28 Gr. 253. An appeal was dismissed, the court being equally divided, 9 A. R. 1.

**Son.**]—The plaintiff being old and infirm, was induced by his son, with whom he resided and who had great influence with him, to agree in writing to leave to the decision of two referees the terms of his will, and to execute a will in pursuance of their award. A lease to the son was executed at the same time. The son having failed to establish that his father had competent independent advice in the matter, or had entered into the transaction willingly, or without pressure from the son, the court decreed the lease void, and the will revocable at the pleasure of the plaintiff. *Donaldson* v. *Donaldson*, 12 Gr. 431.

**Temporary Incapacity.**] — The court, though the weight of evidence seemed the other way, refused to set aside a verdict upholding a will made by a testator in his last illness, which was disputed on the ground that he was not competent at the time to exercise a disposing power, though his strength of mind when in health was not doubted. Harwood v. Baker, 3 Moo. P. C. 282, commented on. *Brown* v. *Bruce*, 19 U. C. R. 35.

**Wife.**] — The mere exercise of influence by a wife or other person over the mind of a testator is not sufficient to invalidate a will; such influence must amount to a control subjecting his mental will to the desire of another, so that the will is not in reality his will, but that of another; the question is, in what sense is the document the will of the testator. The testator, an infirm man eighty-two years of age, within the year preceding his decease made four wills, the two last on the 27th July and 8th September, and on the 14th of the same month died. For some time he had been physically weak, and suffering from disease of the brain. There was medical and other testimony, however, going to establish that at the time of the execution of the will he was competent to make a will. The will of the 27th July was made while absent from his house, the latter while there, and under the control of his wife, who it was shewn had him entirely under subjection, and by whom the instructions for this will were given, and in whose presence it was presented to him for execution. The evidence also shewed that for a long time he had been unable to resist her views with regard to any matters of business, and there was nothing to indicate any

desire to change the disposition of his estate made by the will of July. The court set aside the will of September, as having been obtained by the exercise of undue influence by the wife, and established that of July, and ordered the widow, who had largely benefited under the will of September, to pay the costs of the cause. *Waterhouse* v. *Lee*, 10 Gr. 176.

*See Currie* v. *Currie*, 24 S. C. R. 712.

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II. Execution of Wills.

**Absence of Witnesses.**]—A person insured his life and signed a document directed to the managers of the insurance company, in these words: "I give and bequeath to . . . the amount stated on the policy given on my life by the S—— Life Insurance Company. To be paid to none other unless at my request, dated later." After shewing or reading the policy, which he retained, he handed the document to the plaintiff, remarking: "There, that is as good as a will:"—Held, that on account of its incompleteness, the transaction was not a gift or a declaration of trust, as the trust intended was not irrevocable, nor could the paper take effect as a will. *Kreh* v. *Moses*, 22 O. R. 307.

**Acknowledgment of Signature**—*Subsequent Changes and Re-acknowledgment.*]—The plaintiffs were the devisees of the land in question in this action under the will of H. O'N.; the defendant A. O'N., the father of the plaintiffs, was one of the heirs-at-law, and had obtained conveyances of the land from the other heirs-at-law, of H. O'N.; and the defendant O. was the assignee of all the estate of A. O'N. and had besides a mortgage from A. O'N. on the land in question. On the 17th April, 1877, H. O'N. signed a will in the presence of one witness; another witness was then called in, before whom the testator acknowledged his signature, and then both witnesses signed in the presence of the testator and of each other. On the 23rd April, 1877, the testator, desiring to have two changes made, caused two of the sheets of the will to be rewritten and read to him; the two new sheets were then put into the place of the old ones, the document pinned together, and on the last sheet, which was not one of those rewritten, the date 17th was changed to 23rd; the same witnesses were then called in, and the testator then acknowledged his signature to the will, and each of the two witnesses his. The two sheets taken out of the will were afterwards destroyed by one H., by the direction of the testator, but not in his presence. The testator died a few days after this without having made any other will. The will of the 23rd April was offered for probate, but was refused by a surrogate court:—Held, that the will of the 17th April was duly executed; but that the will of the 23rd April was not duly executed, and probate was properly refused; and the will of the 17th April was not revoked by the destruction of the two sheets out of the presence of the testator, nor by the defective execution of the will of the 23rd April, the intention of the testator not being to cancel the whole of the earlier will, but only to make two changes in it, and he being under the belief that the later will was a valid one; and it was adjudged that the earlier will should be admitted to probate. *O'Neill* v. *Owen*, 17 O. R. 525.

**Alteration.**]—In the will the number of the lot devised had been altered from 18 to 17, the former number having been struck out and the latter written over it. The alteration was in the same handwriting as the will, and at the foot of the will, before the attestation clause, was a note in the same hand, "the word seventeen being the true number of the said lot." It was proved that the testator owned lot 17:—Held, that the plaintiff was bound to shew that the alteration had been made before execution, but that the jury might infer it from these circumstances; and semble, that the note should be treated as part of the will. *Field* v. *Livingston*, 17 C. P. 15.

**Attesting Alteration.**]—Any alteration or revocation made in or of the provisions of a will after 1st January, 1874, to be effectual, must be attested in the same manner as a will requires to be attested; and that notwithstanding the will was made anterior to that date. *Smith* v. *Meriam*, 25 Gr. 383.

**Credible Witnesses** — *Interest.*] — In ejectment the plaintiff claimed under the heir-at-law of J. D., defendant under J. D.'s will, by which the land in question was devised to defendant, with a devise over to another son if he died before twenty-five, and similar devises over if that and other devisees named died before that age, his son John being the last named; but whoever got the property was to pay each of his children £5. There were the names of three attesting witnesses, John and M., who had married one of the testator's daughters, being two of them; and the will was registered on a memorial signed by John as one of the devisees. The jury, however, found that John was not in fact an attesting witness:—Held, that this finding was wrong, upon the evidence set out in the case; and that it should have been shewn whether testator's title was registered, for otherwise registration of the will, under C. S. U. C. c. 89, would be unnecessary. A new trial was therefore ordered. If John was an attesting witness, then, under 25 Geo. II. c. 6, the devise to him was void, and the registry on a memorial signed by him as devisee was ineffectual. If he was not, then of the two remaining witnesses M. was disqualified, for the devise to his wife of a legacy was not avoided by 25 Geo. II., and it made him not a credible witness within the Statute of Frauds. C. S. U. C. c. 82, s. 13, which allows wills to be attested by two instead of three witnesses, changes the number only, not the character; they must still be credible witnesses. Semble, therefore, in either case, if the will required registration the plaintiff would be entitled to recover. *Ryan* v. *Devereux*, 26 U. C. R. 100.

**Deed Poll.**]—H., by deed poll, in consideration of natural love and affection, and of 5s., conveyed land to her daughter, R., in fee, adding after the habendum, "reserving, nevertheless, to my own use, benefit, and behoof, the occupation, rents, issues and profits of the said above granted premises for and during the term of my natural life:"—Held, a conveyance of the fee simple in the reversion, not a mere testamentary paper which the grantor could revoke by a subsequent deed. *Simpson* v. *Hartman*, 27 U. C. R. 460.

**Evidence**—*Witnesses not Available—Consent.*]—In an action to establish a will in

the handwriting of the testator, purporting to be executed in the presence of two subscribing witnesses, who could not be found and whose handwriting could not be proved, and probate whereof had been refused by the proper surrogate court, a motion for judgment asking to have the will established and probate thereof granted, notwithstanding that all parties interested consented, was dismissed and the application refused, on the ground that sufficient evidence had not been produced to shew that such will was the will of the testator under R. S. O. 1887 c. 109, s. 12. *Williamson* v. *Williamson*, 17 O. R. 734.

——— *Witnesses not Available.*]—Where the surrogate Judge is satisfied of the inability to furnish proof of the execution of a will by the attesting witnesses, it may be proved by other sufficient evidence. A will in testator's handwriting and signed by him was found in a place where testator was accustomed to keep his papers, it being so signed in the presence of two persons, who signed as witnesses, the handwriting being apparently that of two persons and distinct from that of the testator, and who, though due search was made for them, could not be found, this being attributable to their being strangers, testator being under the belief, from the misreading of a text book on wills, that strangers were the best witnesses. The surrogate Judge being satisfied as to the inability to procure proof by the witnesses, and that the due execution of the will had been proved by other evidence, admitted it to probate. On appeal to the divisional court the judgment was affirmed. Where the will is itself in evidence with the testator's and witnesses' signatures thereon, post-testamentary letters of the testator are receivable in evidence to enable the court to come to a right conclusion. *Re Young*, 27 O. R. 698.

**Presumption of Due Execution.**]—C. S. U. C. c. 82, s. 13, does not repeal but merely extends the Statute of Frauds as to the execution of wills; and a will subscribed by the witnesses in accordance with either Act, is sufficiently attested:—Held, therefore, that a will subscribed by two witnesses, in the presence of the testator, though not of each other, was well executed. Held, also, that although there was no positive evidence that one of the witnesses, who was dead, had subscribed in presence of the testator, the circumstances attending the execution of the will, and the fact of possession having for sixteen years gone along with it, would warrant the inference that the witness had so signed. *Crawford* v. *Curragh*, 15 C. P. 55. See *Ryan* v. *Decereux*, 26 U. C. R. at p. 107.

Held, the court being left to draw inferences of fact, that upon the evidence set out in this case, it must be inferred that the devisee, whose name was subscribed as a witness, did see the testator sign, although he swore that he thought he did not, and that he subscribed in his presence. *Little* v. *Aikman*, 28 U. C. R. 397.

**Signed Will Brought to Witnesses.**]—A testator brought his will which had been previously signed by him to two persons to sign as witnesses. The witnesses signed in the testator's presence, at his request, and in the presence of each other; and they either saw or had the opportunity of seeing the testator's signature:—Held, that the will was validly executed. *Scott* v. *Scott*, 13 O. R. 551.

III. Invalidity of Wills or Special Devises.

1. *In General.*

**Attack by Persons Claiming under Heirs-at-law**—*Proof of Title.*]—A will purporting to convey all the testator's estate to his wife was attacked for uncertainty by persons claiming under alleged heirs-at-law of the testator and through conveyances from them to persons abroad:—Held, that as the evidence of the relationship of the alleged grantors to the deceased was only hearsay and the best evidence had not been adduced; that as the heirship at law was dependent upon the alleged heir having survived his father and it was not established and the court would not presume that his father had died before him; and that as the persons claiming under the will had no information as to the identity of the parties in interest who were represented in the transactions by men of straw, one of whom was alleged to be a trustee, and there was no evidence as to the nature of his trust and there was strong suspicion of the existence of champerty or maintenance on the part of the persons attacking the will, the latter had failed to establish the title of the persons under whom they claimed, and the action should be dismissed. *May* v. *Logie*, 27 S. C. R. 443.

**Felony**—*Death of Testator Caused by Devisee.*]—No devisee can take under the will of a testator whose death has been caused by the criminal and felonious act of the devisee himself, and in applying this rule no distinction can be made between a death caused by murder and one caused by manslaughter. Judgment of court of appeal, sub nom. McKinnon v. Lundy, 21 A. R. 560, reversed, and that at trial, 24 O. R. 132, restored. *Lundy* v. *Lundy*, 24 S. C. R. 650.

**Foreign State**—*Trust — Accumulation.*]—A testator directed his executors to pay and deliver the residue of his estate to the the government and legislature of the State of Vermont, to be disposed of as to them should seem best, having regard to certain recommendations set forth in the will:—Held, affirming 27 Gr. 361, that the State was sufficiently designated as the legatee to entitle it to take the bequest; and the fact that the bequest was for the benefit of, and to take effect in a foreign country, could not be urged as an objection to its validity; neither could the objection that the State could not be made amenable to the courts of the State, and thus there would not be any supervision of the trusts, as it must be assumed that a sovereign state would not do anything to violate a trust; besides which it appeared that the legislature was not, in reality, to assume the trust, their duty being to appoint trustees who would be amenable to the courts. Held, also, that the direction for accumulation did not render the bequest invalid, it being for the courts in Vermont to say whether the direction should be carried out. *Parkhurst* v. *Roy*, 7 A. R. 614.

**Illegal Charge.**]—The devise of an estate is not wholly void because the estate has been charged to some extent with an illegal trust. *Doe d. Vancott* v. *Read*, 3 U. C. R. 244.

**Indefiniteness.**]—See *Re Wilson, Reid* v. *Jamieson*, 30 O. R. 553.

**Jurisdiction of Court of Chancery.**]—A bill impeaching a will of which probate had been granted to the plaintiff by the surrogate court, stated that after the probate had been granted the plaintiff had discovered a subsequent will of the testator, and that this subsequent will was the deceased's last will. The wills disposed of both real and personal estate:—Held, that whether the will had been proved in common form or in solemn form, the court of chancery had jurisdiction to try its validity. *Perrin* v. *Perrin*, 19 Gr. 259.

The court has jurisdiction to set aside a will as having been executed under improper influence, or when the testator was not of sufficient capacity, without waiting for a revocation of probate. Perrin v. Perrin, 19 Gr. 259, on this point, approved of and followed. *Wilson* v. *Wilson*, 24 Gr. 377.

*See Re White, Kersten* v. *Tane*, 22 Gr. 547, 24 Gr. 224; *Dickson* v. *Monteith*, 14 O. R. 719.

**Jury.**]—Right to jury in actions to establish wills. See *Re Lewis, Jackson* v. *Scott*, 11 P. R. 107.

**Perpetuities**—*Division after Sixty Years.*]—A testator directed his executors to lease and rent and invest his lands, money, and mortgages for the term of 60 years, after which the property was to be divided as in his will provided:—Held, that this infringed the rule against perpetuity, and 52 Vict. c. 10, s. 2 (O.), and was invalid. *Baker* v. *Stuart*, 28 O. R. 439. See *Ferguson* v. *Ferguson*, 39 U. C. R. 232, 1 A. R. 452, 2 S. C. R. 497; *Parkhurst* v. *Roy*, 27 Gr. 361, 7 A. R. 614; *Meyers* v. *Hamilton Provident and Loan Co.*, 19 O. R. 358; *Heron* v. *Walsh*, 3 Gr. 606.

**Rent**—*Payment to Trustee.*]—A testator devised land, subject to a lease, to J. H. in fee, and as to the rent directed half to be paid to J. H., and half to the executor in trust for J. H. The executor, assuming the devise to be valid, paid all the rent to J. H. The latter executed a deed of the land to C. H., to whom he afterwards paid the rent with the privity of the executor, as soon as he received it from him. C. H. went into possession of the land after the expiration of the lease, and had been so receiving rent or in possession for more than ten years before action commenced. J. H. was a witness to the will:—Held, that the devise of rent was void under 25 Geo. II. c. 6, s. 1, as J. H. was the beneficial devisee of the whole of it. *Hopkins* v. *Hopkins*, 3 O. R. 223.

**Restraint on Marriage.**]—See sub-head Conditions, *post*.

**Restraint on Parental Rights.**]—See *Clarke* v. *Darraugh*, 5 O. R. 140.

**Setting up Alternative Will.**]—The defendant contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills, under which, in the event of the last being invalidated, he claimed:—Held, that this was a proper subject of counterclaim. Held, also, that a general defence of fraud was admissible in such a case; but under that defence the defendant was required to give particulars immediately after the examination of the plaintiff. *Appleman* v. *Appleman*, 12 P. R. 138.

**Solicitor's Advice.**]—A will is not invalid because it is executed in pursuance of a solicitor's opinion on a matter of law, which proves to be unsound. *Macdonell* v. *Purcell*, *Cleary* v. *Purcell*, 23 S. C. R. 101.

**Supposed Wife.**]—Held, that, as it appeared that the only consideration for the testator's liberality to J. M. was that he supposed her to be "my beloved wife Julie Morin," while at that time J. M. was, in fact, the lawful wife of another man, the universal bequest to J. M. was void through error and false cause. *Russell* v. *Lefrancois*, 8 S. C. R. 335.

**Thelluson Act.**]—Held, that the Act against accumulations, commonly called the Thelluson Act, 39 & 40 Geo. III. c. 9, which was passed after the statute 32 Geo. III. c. 1, by which English law was introduced into Canada and which did not extend in terms to the colonies, is not in force in this Province, where the law appears to be as it was in England before that statute. *Harrison* v. *Spencer*, 15 O. R. 692.

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2. *Interest of Witness.*

**Attestation by Mistake.**]—A will having been attested by one of the legatees, the solicitor for the testator, being present at the time, and apprehensive that the legatee was incompetent, signed the will himself, and procured another also to do so, but the name of the legatee was not struck out of the attestation clause:—Held, that evidence was admissible to prove the actual fact of the case, and it thus appeared that the mistake of having the legatee as an attesting witness had been remedied, not by striking out her name, but by the parties proceeding to a new attestation and subscription of the will, and the legatee was therefore not incapacitated from taking under the will. *Re Sturgis, Webling* v. *Van Every*, 17 O. R. 342.

**Election by Heir.**]—Where, by a will, land is devised to an attesting witness, there is an intestacy as to this devise by virtue of 26 Geo. II. c. 6, s. 1, and the heir is not bound to elect as between this land and a legacy bequeathed to him by the will. *Munsie* v. *Lindsay*, 1 O. R. 164.

**Extent of the Rule.**]—Quære, whether since Ryan v. Devereux, 26 U. C. R. 100, a bequest to one of the witnesses to a will would be held to be invalid. *In re Munsie*, 10 P. R. 98. But see *Munsie* v. *Lindsay*, 1 O. R. 164; *S. C.*, 11 O. R. 520; *Morrison* v. *Morrison*, 9 O. R. at p. 225.

**Husband of Devisee.**]—A devise by a testatrix, who died in 1860, to a married woman, whose husband was one of the two witnesses to the execution of the will:—Held, void, notwithstanding the provisions of the Evidence Act of 1852, 16 Vict. c. 19. *Crawford* v. *Boyd*, 22 Gr. 398.

**Residuary Legatee.**]—Where one of several residuary legatees was also a witness to the will:—Held, that the will must be read as if the gift to her had been blotted out by the testator and the residuary gift distributed ratably among the other residuary legatees as if she were non-existent. *Farewell* v. *Farewell*, 22 O. R. 573.

**Unnecessary Attestation.**]—Where the devisee witnesses the will, the devise to him is void, although there are two other witnesses; and the will would therefore have been sufficiently attested without him. *Little* v. *Aikman*, 28 U. C. R. 337.

**Validating by Codicil.**]—A legacy invalid because of the legatee's husband being a witness to the will was held validated by a reviving codicil witnessed by independent persons. *Purcell* v. *Bergin*, 20 A. R. 535.

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3. *Mortmain Act and Charitable Uses.*

**Acquiescence by Person Entitled in Default.**]—H. S. by his will bequeathed certain pure and impure personalty to the London City Mission, a charitable organization, and died in 1865. In 1866 A. S., his heiress and next of kin, sent a signed writing to the executor of the will, in which, after reciting that doubts might arise whether the impure personalty passed to the executor in trust for the charity, she declared her acquiescence in what she said she knew had been the testator's intention, viz., that the whole of the personalty, pure and impure, should be treated by the executor as so passing to him, and renounced her rights thereto, and requested the executor to treat it all as so passing. In May, 1870, A. S. made a will devising and bequeathing all real and personal property on certain trusts. In July, 1870, she informed the executor of H. S. that she had changed her intentions as to the matter referred to in the writing of 1866, above mentioned, and she forwarded another will, dated July, 1870, in which she bequeathed all the property she had as heiress and next of kin to H. S. to J. R., and appointed the same person her executor as was executor of the will of H. S. J. R. died before A. S. In 1869, and in March, 1870, A. S. had written letters to the secretary of the London City Mission, in which she had expressed her intention of carrying into effect the intentions of H. S., as expressed in his will. A. S. died in 1877, and probate of her first will of May, 1870, was granted to the executors named in it:—Held, that the impure personalty could not pass by the will to the London City Mission, and the writing of 1866 and the letters to the London City Mission did not amount to such an assignment of it as would pass it to the charity inasmuch as the requirements of the Mortmain Acts were not complied with: that a gift by will of property that failed to take effect by reason of the Mortmain Acts, could not be aided or set up by the person entitled to the property by anything less than what would be required to constitute a good gift by such person of the same property to the person intended to be benefited by the gift in the will. As to the two wills of A. S., the bequest to J. R. by the second will lapsed by reason of her death before that of H. S., and the subject of it fell into the estate of A. S., so as to pass under the former will. *Becher* v. *Hoare*, 8 O. R. 328.

**Agricultural Society**—*Freemasonry—Free Thought.*]—By his will the testator directed his executors to invest $2,000 and pay over the yearly interest to an agricultural society (incorporated under R. S. O. 1877 c. 25, and thereby authorized to acquire and hold, but not to take by devise, real estate), to be applied as a premium for the best results in a specified mode of agriculture, but with a provision that all competitors should declare that they were neither Freemasons, Orangemen, nor Oddfellows; and, in case of neglect to comply with the conditions, the executors were to apply such yearly interest in procuring lectures against Freemasonry and other secret societies. The legacy was payable out of a mixed fund consisting in part of impure personalty:—Held, that the society came under the Mortmain Act, and, so far as the bequest consisted of impure personalty, it was void. Held, also, that the society was not bound to expend annually the interest received, but might apply it from time to time as deemed best, so long as it acted in good faith and did not divert the money from the purpose directed by the testator. The executors were directed to invest the residue of the estate and to apply the annual interest therefrom for the promotion of free thought and free speech in the Province of Ontario:—Held, that this bequest was void as opposed to Christianity. Pringle v. Corporation of Napanee, 43 U. C. R. 285, followed. *Kinsey* v. *Kinsey*, 26 O. R. 99.

**Application of Mortmain Act.**]—The Imperial statute 9 Geo. II. c. 36 (the Mortmain Act) is in force in the Province of Ontario. *Doe d. Anderson* v. *Todd*, 2 U. C. R. 82; *Corporation of Whitby* v. *Liscombe*, 23 Gr. 1; *Macdonell* v. *Purcell*, *Cleary* v. *Purcell*, 23 S. C. R. 101.

**Attorney-General.**]—To a bill either to establish or impeach the legality of charitable bequests, the attorney-general may be made a party. *Davidson* v. *Boomer*, 15 Gr. 1. *See*, also, *Long* v. *Wilmotte*, 2 Ch. Ch. 87.

**Bishop**—*Diocese—Mortmain and Charitable Uses Act, 1892.*]—A devise of real estate to a bishop in trust for the use of his diocese is not a devise "to or for the benefit of any charitable use," within the meaning of ss. 4 and 5 of the Mortmain and Charitable Uses Act, 1892, 55 Vict. c. 20 (O.) *Re McCauley*, 28 O. R. 610.

**Charities "of" a Named Place.**]—A testator bequeathed to "the Benevolent Institutions and Charities of Owen Sound, $1,000, to be distributed as my executors shall deem meet:"—Held, that he intended a bequest to the Municipal Corporation of Owen Sound, to be distributed as the executors should direct. *Williams* v. *Roy*, 9 O. R. 534.

**Church**—*Mixed Fund.*]—A testator by his will bequeathed a sum of money to the trustees of a church "to be . . . used in the payment of any indebtedness on said church and for such other purposes as they may deem wise." At the time the will took effect there was no debt on the church:—Held, that the reference in the will meant outlay in connection with the church such as repair and maintenance or any obligation incurred for which the land was not liable, and that the bequest was valid. Bunting v. Marriott, 19 Beav. 163, followed. The will directed the bequest to be paid out of a mixed fund derived from the sale of land and personalty:—Held, as far as the real estate was concerned, that the gift failed. Directions as to the application of the fund. *Ostrom* v. *Alford*, 24 O. R. 305.

**Church Society.**]—By the Act of incorporation, 7 Vict. c. 68, the Church Society of Toronto is enabled to hold real estate without any license for that purpose. *Church Society of the Diocese of Toronto* v. *Crandell*, 8 Gr. 34.

**Confirmatory Codicils.**] — A testator made his will dated 2nd February, 1884, in which was contained the following devise: "To the congregation of Burns' Church . . I bequeath the sum of $2,000 to be used by the trustees of the said church towards the purpose of purchasing land for a glebe in any place that they may judge suitable, and for erecting thereon a manse, all for the use of the said congregation through their trustees for ever." He added two codicils on 21st September, and 5th December, 1885, respectively, not varying the above bequest, but confirming his will, and died on the 27th December, following:—Held, that the fact of the codicils having been executed within six months of the testator's death did not, in the absence of anything in them revoking the charitable gift, render it void under R. S. O. 1877 c. 216, or 38 Vict. c. 75 (O.) *Holmes* v. *Murray*, 13 O. R. 756.

**Control by Minister.**] — A direction to trustees to dispose of an estate "as the ministers of (a certain church) may see fit," is good, not being necessarily a devise to charitable uses. *Doe d. Vancott* v. *Read*, 3 U. C. R. 244.

**Conveyance** — *Church of England.*]—A will is a "conveyance." Under the terms therefore of s. 16 of 3 Vict. c. 74, viz., "by deed or conveyance," a person may devise, as well as grant by deed, lands to the Church of England for the purposes of that Act. *Doe d. Baker* v. *Clark*, 7 U. C. R. 44.

Held, also, that a will as a conveyance is perfect at the time of its execution, though its effect could not be felt till the death of the testator, and that therefore the condition of s. 16, requiring "a deed or conveyance to be made and executed six months at least before the death of the person conveying the same," might be complied with in the case of a will. *Ib.*

A devise under that statute to the bishop and the rector is good, notwithstanding the statute speaks of a conveyance to the bishop or rector, &c. *Ib.*

**Direction to Sell Lands**—*Effect of Failure of Bequest.*]—Three weeks before the testator died he made his will whereby he directed his lands to be sold, and out of the proceeds gave $2,000 to his widow in lieu of dower and further directed that "all moneys then remaining in the hands of my executors shall be divided between the following funds," naming five different charities in connection with the Presbyterian Church in Canada—such "money to be divided in whichever way my executors may think best:"—Held, that the bequests to the charities were void under the Mortmain Acts; and there being no residuary clause the bequests so failing to take effect went to the heirs-at-law, not to the next of kin of the testator; costs of all parties to be paid out of the estate. *Re Trusts of John McDonald's Will*, 29 Gr. 241.

**Education of Person from Time to Time Named**—*Algoma, Huron, and Ontario Diocesan Missions.*]—R. P. L., by his will directed his executors "by and out of the moneys which shall be received by them from the P. B. & M. Co., for or on account of the debt or sum of $25,000, owing and secured by mortgage by that company to me at the time of my decease, and of the interest thereof which shall accrue after my decease, in the first place to pay the sum of $1,500, part thereof to the bishop for the time being of Algoma in Canada, to be invested by him in or upon any of the investments hereinafter authorized with power for the Bishop of Algoma aforesaid for the time being from time to time to vary and transpose the investments thereof at his discretion for any other or others of the kind prescribed and the income of such investment to be applied in and for the education and qualifying of John Eskinah, an Algoma Indian at present of the Shingwauk Home, Sault Ste. Marie, Algoma, aforesaid, theretofore supported by me), as and for a missionary in the diocese of Algoma aforesaid for and during and until such time as the bishop of said diocese for the time being shall consider him sufficiently qualified for such purpose, and upon and after the completion of such education and qualifying to apply such income as aforesaid for ever thereafter from time to time in and for the education and qualifying of some other person to be nominated by such bishop for the time being for a like purpose, and during such time as he shall think proper; but for which applications the trustees and executors shall not be responsible. And after payment of the aforesaid legacy I give and bequeath the following legacies to be paid out of the same fund or moneys, namely:—To the treasurer for the time being of the Algoma missions in British America the sum of $1,500 of Canadian currency for the benefit of those missions. To the treasurer for the time being of the Huron missions in British America the sum of $1,500 of the aforesaid currency for the benefit of those missions. And to the treasurer for the time being of the Ontario missions in British America, the sum of $2,500 of the aforesaid currency for the benefit of those missions:"—Held, that the bequest to the Bishop of Algoma for the benefit and education of John Eskinah and others was intended to set apart a fund which was to have perpetual continuance and in which no individual was to have a personal right, and following Gillam v. Taylor, L. R. 16 Eq. 584, such bequest was void. Held, also, that the bequest to the treasurer for the Algoma missions was a charitable gift and must fail, because no person or body was empowered to hold it as against the Statute of Mortmain, 9 Geo. II. c. 36, inasmuch as there was no incorporation of Algoma for ecclesiastical or missionary purposes with such powers. Held, also, that the bequests to the treasurers of the Huron and Ontario missions respectively were intended for the missions sustained by the incorporated synods of the dioceses of Huron and Ontario, and that by virtue of their Acts of incorporation both those dioceses were enabled to hold lands, &c., in mortmain, and that such bequests therefore did not fail either for uncertainty or because they could not be held by the defendants the synods respectively. *Labatt* v. *Campbell*, 7 O. R. 250.

**Erection of Parsonage.**]—Where a sum of money was bequeathed for the erection of a parsonage:—Held, that there was an implied authority to purchase land whereon to erect such parsonage; and that, in the absence of anything to shew that no portion

of the fund was to be applied in the purchase of the land, the bequest was void under the Statutes of Mortmain. *Davidson* v. *Boomer*, 15 Gr. 1.

——— *Surrounding Circumstances.*]—In the interpretation of a will, extrinsic evidence of surrounding circumstances, to shew what a testator intended by his will, is admissible; but declarations by the testator of what he intended by his will, will not be received for that purpose. *Davidson* v. *Boomer*, 15 Gr. 218.

Where a testator bequeathed a sum of money for the erection of a parsonage, but did not refer to any land already in mortmain whereon it was to be built, extrinsic evidence was given to shew that land for the site of a parsonage had already been given by a third person, and that the testator had on various occasions pointed it out as the site of a parsonage, and had avoided building a school house upon it lest doing so should interfere with its use for a parsonage; such evidence was received to rebut the presumption that would otherwise arise from the generality of the bequest, that the money bequeathed was to be applied in the purchase of land for a site, as well as for the erection of the building. *Ib.*

*See Murray* v. *Malloy*, 10 O. R. 46.

**Foreign Testator**—*Foreign Charity—Debts.*]—A testator, domiciled in a foreign country, died in 1891, possessed of certain lands and personal estate in that country, and also of lands in Ontario. His personal estate was insufficient to pay his debts. By his will, after specific bequests and devises, he gave the residue of his estate, real, personal, and mixed, wherever situated, to his trustees, to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights, or, in case of such trust becoming inoperative, to his heirs-at-law:—Held, that the devise of lands, so far as Ontario was concerned, was void and inoperative. (2) That the trustees held the lands to the use of the heir-at-law until satisfaction should be made thereout for the charges thereon of debts and testamentary expenses, and the heir-at-law was entitled to a conveyance thereafter. (3) That the Ontario lands were liable to contribute pari passu with the other lands for the payment of debts and testamentary expenses. (4) That the proportion chargeable on Ontario lands might be raised by sale of an adequate part, or the rents might be applied therefor. *Lewis* v. *Doerle*, 28 O. R. 412.

**General Charitable Devise.**]—A testator directed his real and personal estate to be sold, and after investing sufficient to secure an annuity for his sister, directed the trustees "to pay over the balance of the moneys so to be received from all these sources to the treasurer or other receiving officer of such religious or charitable societies as in their judgment and discretion require it," and after the death of his sister, the sum so invested for her benefit was to be disposed of by the trustees in like manner. On a bill filed to impeach this devise as within the Statutes of Mortmain, the court, as to the realty, directed an inquiry whether there were any, and what society or societies, of the nature contemplated by the will that could properly take real estate. *Anderson* v. *Dougall*, 13 Gr. 164.

A testator directed all his estate, real and personal, to be sold, and out of the proceeds gave $1,000 each to "The Rochester Theological Baptist Institution," and to "The American Baptist Missionary Union Society," and after the payment of these and other legacies, directed "all the remainder and residue of his estate to be distributed, at the discretion of his executors, to the support of Christianity throughout the world; such as bible, tract, missionary societies, and institutions of learning of the Baptist denomination;"—Held, a valid bequest, and one which could not be objected to on the ground of indefiniteness. *Anderson* v. *Kilborn*, 13 Gr. 219, 22 Gr. 385.

*See*, also, *Anderson* v. *Paine*, 14 Gr. 110.

**Indefiniteness**—*Scheme.*]—A testator by his will devised to certain named persons, who were appointed the executors and trustees thereof, the remainder of his estate to be used to further "the cause of our Lord Jesus Christ:"—Held, that the legacy was not void for indefiniteness, and discretion having been given to the executors and trustees, it was not necessary that a scheme should be directed. *Phelps* v. *Lord*, 25 O. R. 259.

**Marshalling Assets.**]—The court will not direct assets to be marshalled in favour of a charity unless the will says this is to be done. *Anderson* v. *Kilborn*, 22 Gr. 385.

There can be no marshalling of assets in favour of a charity. *Becher* v. *Hoare*, 8 O. R. 328.

There can be no marshalling in favour of charities; yet where charitable and other legacies are payable out of a mixed fund, the proceeds of realty, impure personalty, and personalty, the charitable legacies do not fail in toto, but must abate in the proportion which the sum of the realty and impure personalty charged with charitable gifts bears to the pure personalty. *In re Staebler, Staebler* v. *Zimmerman*, 21 A. R. 266.

*See Attorney-General of Nova Scotia* v. *Axford*, 13 S. C. R. 294.

**Masses.**]—A bequest by a member of the Roman Catholic Church of a sum of money for the purpose of paying for masses for his soul, is not void in this Province. *Elmsley* v. *Madden*, 18 Gr. 386.

**Methodist Church in Canada.**]—A testator devised all his estate, real and personal, to a trustee upon trust to convert the same into money, to hold upon trust to pay "to the treasurer for the time being of the superannuation fund of the Methodist Church, $1,000;" and "to pay all the rest and residue unto the treasurer, for the time being, of the trustee board of the Brant Avenue Methodist Church, to be applied by them or their successors, in redeeming the debt existing against the church property:"—Held, that the legacy to the superannuation fund of the Methodist Church was valid, for by 14 & 15 Vict. c. 142, the corporation was empowered to take land devised in any manner whatsoever in its favour; and that all the benefits of the statute were extended to the Methodist Church, by the statutes of Union, 47 Vict. c. 106 (D.); and 47 Vict. c. 88 (O.), so far as the superannuated preachers' fund was concerned. Held, however, that the residuary devise was invalid, for neither by 47 Vict. c. 88 (O.) nor by any other statute, was the new corporation

"The Methodist Church," empowered to hold land for all purposes, including that for the endowment of particular churches, and the proper construction of s. 6 of 47 Vict. c. 88 (O.), as amended by 51 Vict. c. 83, s. 2, was that the corporation of the Methodist Church should have the rights, privileges, and franchises conferred upon the connexional society, but only for the purposes and objects of the said connexional society. Held, lastly, that the residuary benefit intended was invalid both as to realty and personalty, because the direction was, as to money, that it should be applied in payment of incumbrances on the church property. *Smith* v. *Methodist Church*, 16 O. R. 199.

Section 6 of 47 Vict. c. 88 (O.), does not confer upon the Methodist Church the powers of the connexional society of the Wesleyan Methodist Church in Canada to take by devise without reference to the restrictions of the Religious Institutions Act; and a bequest to the church payable out of realty, made by will executed within six months of the testator's death, was held void. Smith v. Methodist Church, 16 O. R. 199, approved. *Tyrrell* v. *Senior*, 29 A. R. 156.

**Minister's Residence**—*School Teacher's Residence.*]—A testator by his will, made more than six months prior to his death, directed that after his wife's death a house and lot should go to the trustees, for the time being, of a named Presbyterian church for a manse, if required, or that it might be kept in good repair, and rented for the benefit of the congregation. The widow died shortly before the commencement of this action, which was for the construction of the will, and the land had not yet been used for a manse:—Held, that the devise was valid, for s. 23 of the Religious Institutions Act, R. S. O. 1887 c. 237, and s. 10 of 38 Vict. c. 76 (O.), enabled the trustees to take land for a minister's residence, if actually used as such, although it could not be held merely for the purposes of rental: that an intention not to so use it would not be presumed from the non-user for the short period that had elapsed since the widow's death; but that, in any event, the effect of such non-user would be that the interest of the trustees in the property could be sold within seven years, as provided for by that section, or that the property would revert to the testator's heirs; and, semble, that the trustees could legally sell. By another clause, certain other land was devised to the trustees of a named common school section, on which a teacher's residence might be erected, or that it might be rented for the benefit of the school funds, subject, however, to a condition of preserving and keeping in order an adjoining plot:—Held, a devise for charitable purposes within 9 Geo. II. c. 36, and so void. *Sills* v. *Warner*, 27 O. R. 266.

**Missions.**] — A testator by his will bequeathed to his executors out of his pure personalty the sum of $10,500, to be paid by them as follows: "$3,500 to Wycliffe College, $3,500 to the bishop of the diocese of Algoma for the support of missions of the said diocese, and the balance, to wit, the sum of $3,500, towards the support of any mission or missions which may be undertaken or established by the Rev. Edward F. Wilson, the said Mr. Wilson having left the Shingwauk Home with the intention of establishing a new mission or missions elsewhere:"—Held, that the bequest of the sum for the support of missions to be undertaken was not a bequest to the Rev. Edward F. Wilson personally, but to the executors for the support of the missions. (2) That it was a good charitable bequest, and referred to missions connected with the spread of religious teaching in a field or locality of missionary work. In re Jarman's Estate, Leavers v. Clayton, 8 Ch. D. 584, and In re Riland's Estate, Phillips v. Robinson, W. N. 1881, p. 173, distinguished. *Toronto General Trusts Co.* v. *Wilson*, 26 O. R. 671.

**Mixed Residue**—*Church Debts—Incumbent's Salary.*]—A will dated the 1st April, 1880, contained this clause:—"I will and desire that the residue of my real and personal estate, being the sum of $2,800, more or less, shall be paid to the four churches of England, in the townships of Orford and Howard, in four equal parts to each such churches as follows: to Trinity Church, Howard; St. John's Church, Morpeth; St. ——— Church, Highgate, and the proposed new church at Clearville, and to be applied by my executors in the payment of any debt or debts upon each of such churches respectively; and in case of no debt, or there being a balance or residue after the payment of such debt or debts on each of such churches, respectively, then the residue (if any) is to be paid by my executors to the churchwardens of said church, to be held by them in trust; and said money is to be invested by such churchwardens, and the interest arising therefrom is to be paid to the incumbent of said church as a portion of his salary or stipend." The testator died on the 10th of the same month. Upon a special case stated for the opinion of the court, it was shewn that there was a large debt existing on the Morpeth church for money borrowed on mortgage wherewith to pay off the building debt. The church at Clearville was not built at the time of the testator's death, but some debts were existing in respect of materials and work on the foundation:—Held, that the mortgage debt on the Morpeth church could not be considered as a building debt; but if it could be so considered the bequest to pay the same would be void, under the Statutes of Mortmain. (2) That as to the Clearville church, which was in course of erection, the building debts would form a lien on the lands from the beginning of the work under the Mechanics' Lien Act, and the bequest to pay off those debts would therefore be void, unless the work was being performed in such a manner as excluded the creation of a lien on the land. (3) That the bequest for the benefit of the incumbent would have been void if the investment had been directed to be made upon realty; but as the trust might be carried out by investing in personalty the bequest was valid if so invested. (4) That the amount to which the incumbent would be entitled was the residue after deducting the void bequests for debts. *Stewart* v. *Gesner*, 29 Gr. 329.

**Mortgages.**]—The residuary estate in this case consisted of mortgages, the bequest of which, under the Mortmain Act, was declared invalid, and the estate to belong to the next of kin of the testator. *Thomson* v. *Torrance*, 28 Gr. 253, 9 A. R. 1.

**Poor of County.**]—The testatrix by her will gave the residue of her estate in trust for a certain class of the poor of a county, "who must have been bonâ fide residents of the said county before becoming destitute or needy."

A town in the county originally formed part thereof for all purposes, but was in 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only:—Held, in the absence of anything in the context of the will clearly to the contrary, that residents of the town coming within the class referred to in the bequest were included therein. *Steele* v. *Grocer*, 26 O. R. 92.

**Poor House** — *Postponement of Realization.*]—A testator directed his farm to be sold at the expiration of four years and the proceeds paid over to the treasurer of the Bruce county poor house to be expended in luxuries for the inmates. It appeared that the house of refuge of the county was generally known as the county poor house:—Held, that the bequest was a good charitable use within R. S. O. 1897 c. 112. Held, also, that the provision postponing the sale for more than two years, contrary to s. 4 of said Act, was invalid, unless the period were extended by the court or Judge. *In re Brown, Brown* v. *Brown*, 32 O. R. 323.

**"Protestant Charitable Institutions"**—*Legacy Duty.*] — In an action for construction of a will:—Held, that the gift of the residue of a mixed fund to the executors to be distributed "among such Protestant charitable institutions as my said executors and trustees may deem proper and advisable, and in such proportions as they . . . may deem proper," was a valid gift, having regard especially to s. 8 of 55 Vict. c. 20, R. S. O. 1897 c. 112, the provision in force at the time of the testator's death in 1895. Held, also, that the legacy duty was to be deducted from the legacies, and the executors had no discretion to pay such duty out of the residue. Kennedy v. Protestant Orphans' Home, 25 O. R. 235, followed. Held, also, that the house of refuge for the poor of a county was not within the terms of the residuary gift. The word "Protestant," as used in the will, was referable as well to the objects of the charitable institutions as to their government; and "Protestant charitable institutions" were such charitable institutions as were managed and controlled exclusively by Protestants and were designed for the bestowal of charity upon Protestants alone. *Manning* v. *Robinson*, 29 O. R. 483.

**Promise to Pay for Building.**] — The testator having been interested in having a place of worship, of which he was a deacon, completed, told the building committee to collect all they could from the other members, and that he would see the building paid for; and the committee, relying on this assurance, completed the edifice, and incurred liability for the expense, and were out of pocket a considerable amount:—Held, that the executors were at liberty to discharge this sum out of their testator's estate. *Anderson* v. *Kilborn*, 22 Gr. 385.

**Public Library.**]—Held, affirming 22 Gr. 203, that the Statute of Mortmain, 9 Geo. II. c. 36, is in force in this Province; and that a bequest to the town of Whitby "for the purpose of establishing and maintaining, in the said town of Whitby, a public library and mechanics' institute, to be dedicated to and be under the control of the said corporation of the said town of Whitby," and which bequest could only be paid out of moneys arising from the sale of lands or mortgages on lands, was void, under the Act, as a charitable bequest. *Corporation of Whitby* v. *Liscombe*, 23 Gr. 1.

**Queen's College.**]—A bequest issuing out of realty to Queen's College for the founding of a bursary, is a charitable bequest within the Mortmain Acts, and therefore void. *Ferguson* v. *Gibson*, 22 Gr. 36.

**Sisters of Charity**—*Imputing Corporate Capacity.*]—A testator devised land to K., in trust to sell and pay the proceeds "to the Sisters of Charity of Hamilton, to be their property absolutely." There were also bequests to K. of money, to pay the same to the St. Mary's Hospital, an orphan asylum and a convent. No evidence was given to shew who the Sisters of Charity were. In an action to recover the land brought by the heirs-at-law of the testator:—Held, that a corporate capacity could not be imputed to the Sisters of Charity, in order to destroy the gift to them under the Statutes of Mortmain, and that the devise might be supported as a gift to the individuals who, at the time of the testator's death, filled the character of Sisters of Charity. *Walker* v. *Murray*, 5 O. R. 638.

**Temperance Legislation** — *Impure Personalty.*] — Where a testator bequeathed a sum of money to trustees, upon trust "to apply the same in such lawful ways as in their discretion they may deem best in order to promote the adoption by the parliament of the Dominion of Canada of legislation prohibiting totally the manufacture or sale in the Dominion of intoxicating liquor to be used as a beverage, and in order to give practical aid in the enforcement of such legislation when adopted, whether by educating and developing a strong public sentiment in its favour or by other and more direct means, or in such other ways as my trustees shall think best:"—Held, a good charitable legacy, being for a lawful public or general purpose, and not contrary to morality or to public policy. The testator merely sought to promote a desirable change in the law by constitutional means. Held, also, that a promissory note payable to the testator collaterally secured by mortgage on land was impure personalty. *Farewell* v. *Farewell*, 22 O. R. 573.

**Toronto General Hospital**—*Canon of Construction.*]—The Act of incorporation of the Toronto General Hospital provides that the trustees shall have the powers and rights of bodies corporate, and shall be capable of taking from any person by grant, devise, or otherwise, any lands, or interest in lands, &c., for the support and use of the hospital:—Held, following Smith v. Methodist Church, 16 O. R. 199, that the plain meaning of this provision is to capacitate any person to devise land to the hospital, and to qualify the hospital to receive and hold beneficially land so devised. It is the duty of the court where it finds legislation intended to legalize the dedication of property to laudable public purposes, to construe the Act so as to enlarge rather than limit its operation. *Butland* v. *Gillespie*, 16 O. R. 486.

**Trust for Benefit of Citizens of the United States of African Descent.**]—A devise of lands in Ontario, by a testator dying in 1891, in trust "to promote, aid, and protect citizens of the United States of African descent in the enjoyment of their civil rights," is a charitable devise and void, and the fact

that the trust is to be executed in a foreign country makes no difference. Judgment below, 28 O. R. 412, affirmed. *Lewis* v. *Doerle*, 25 A. R. 206.

**Uncertainty.**]—A testator, a minister of the United Presbyterian Church of North America, after bequeathing $1,000 to the said church, proceeded as follows: "I give for a Jewish mission $1,000 to that church which is sound and evangelical in doctrine and pure in worship, using the songs of praise, the inspired book which can unite all nations." &c. The evidence shewed that this description applied to the said church:—Held, not void for uncertainty, for that the testator clearly intended the said church as the legatee. *Gillies* v. *McConochie*, 3 O. R. 203.

The testator then proceeded thus: "To the pious poor converted Jews that meet together for the reading of the scriptures for their instruction and mental edification I leave $1,000:"—Held, a valid bequest so far as the residue consisted of personalty, and an inquiry was directed to guide the court in the application of the fund. *Ib.*

——— *Poor Relatives — Public Protestant Charities.*]—In 1865 J. G. R., a merchant, then and at the time of his death domiciled in the city of Quebec, while temporarily in the city of New York made the following will in accordance with the law relating to holograph wills in Lower Canada: "I hereby will and bequeath all my property, assets or means of any kind, to my brother Frank, who will use one-half of them for public Protestant charities in Quebec and Carluke, say the Protestant Hospital Home, French Canadian Mission, and amongst poor relatives as he may judge best, the other half to himself and for his own use, excepting £2,000, which he will send to Miss Mary Frame, Overton Farm." A. R. and others, heirs-at-law of the testator, brought action to have the will declared invalid:—Held, that the will was valid. In this action interventions were filed by Morrin College, an institution where youth are instructed in the higher branches of learning, and especially young men intended for the ministry of the Presbyterian Church in Canada, who are entitled to receive a free general and theological education, and are assisted by scholarships and bursaries to complete their education; by the Finlay asylum, a corporate institute for the relief of the aged and infirm belonging to the communion of the Church of England; and by W. R. R., a first cousin of the testator, claiming as a poor relative:—Held, that Morrin College did not come within the description of a charitable institution according to the ordinary meaning of the words, and had therefore no locus standi to intervene; but that Finlay asylum came within the terms of the will as one of the charities which F. R. might select as a beneficiary, and this gave it a right to intervene to support the will. Held, further, that in the gift to "poor relatives" the word "poor" was too vague and uncertain to have any meaning attached to it, and must therefore be rejected, and the word "relatives" should be construed as excluding all except those whom the law, in the case of an intestacy, recognized as the proper class among whom to divide the property of a deceased person, and W. R. R. not coming within that class his intervention should be dismissed. *Ross* v. *Ross*, 25 S. C. R. 307.

**Unincorporated Associations.**]—A testator bequeathed £100 to the Society of St. Vincent de Paul, and directed the residue of his estate to be converted into cash, and paid to the House of Providence. These were voluntary unincorporated associations:—Held, that so far as they could be paid out of personalty these legacies were good; and should be paid over to the persons having the management of the pecuniary affairs of the institutions named. *Elmsley* v. *Madden*, 18 Gr. 386.

A testator domiciled in the State of Missouri, U.S., at the time of the execution of his will and at the time of his death, bequeathed personal property situate in this Province to a lodge of Oddfellows in the State of New York, U.S., which, although unincorporated at the time of the testator's death, was subsequently authorized by law to take and hold, in the names of trustees, property devised to the lodge. In an action to test the validity of the bequest:—Held, that the parties having selected their forum in this Province, the action must be dealt with here according to the law of the testator's domicile, which, in the absence of evidence to the contrary, would be presumed to be the same as the law of this Province. Held, also, there being no prohibitory law of the legatees' domicile, the bequest to the lodge was a valid bequest to the members thereof, and that the trustees of the lodge could be added as parties defendants, on behalf of all the members. Walker v. Murray, 5 O. R. 638, followed. *Graham* v. *Canandaigua Lodge*, 24 O. R. 255.

**Unincorporated Church** — *Erection of Buildings.*]—J. M. died on August 9th, 1884, having made his will three days before, in which, after giving certain legacies, he provided as follows: "I give and devise all my real and personal estate whatsoever and wheresoever, with the above exceptions, to the Lutheran Church, for the purpose of building a college in Canada, and not elsewhere, and in his name." The Lutheran Church was not incorporated and held no lands, but was composed of a number of congregations in different parts of the Province. The lands upon which the various churches belonging thereto were erected, were vested in trustees for the benefit of the congregations, and some of these lands were suitable as building sites for a college:—Held, that the devise of the realty and all personalty savouring of the realty was void. Held, also, following Giblett v. Hobson, 3 My. & K. 517, that the bequest of the pure personalty was also void; that a bequest of money or other personalty to any charitable institution to build or erect buildings, taken by itself, is within the Statute of Mortmain; and that the onus of shewing that the intention of a testator was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and that the intention must appear absolutely certain and clear; and that land already in mortmain must be indicated or the future acquisition of building land, otherwise than by means of the legacy, must plainly be contemplated, or the words of the will must expressly include the application of the money given in the acquisition of land, which was not done in this case. *Murray* v. *Malloy*, 10 O. R. 46.

*See Davidson* v. *Boomer*, 15 Gr. 218.

**Void Bequest** — *Intestacy.*] — Certain charitable bequests having been held void, it was further held that those that were good were not increased, but that the amount of the void bequests was distributable as in case of intestacy. *Purcell* v. *Bergin*, 20 A. R. 535.

**Void Devise**—*Residuary Devise.*]—A will contained a void devise of lands to charitable purposes, and then a residuary devise of testator's lands not thereinbefore mentioned or disposed of:—Held, that the property in the void devise passed to the heirs-at-law. *Lewis* v. *Patterson*, 13 Gr. 223.

**Void Legacy Charged on Specific Property.**] — Where land is specifically devised charged with a void bequest, the charge sinks for the benefit of the specific devisee. Therefore, where a testator devised his real estate, consisting of . . . to A. F., eldest son of . . . to exercise ownership over said lots during his natural life; he shall not sell or alienate any or either of them, but they shall remain an inheritance unincumbered to his legal heir, whether male or female, for all time to come. I bequeath to A. F., the aforementioned heir, the shop on the church property, with all its goods and contents . . . With respect to lot . . . and lot . . . they appear very rich in precious stones; they are a mine, and worth a great deal; they must therefore be assessed to the said A. F., with lot . . . along with the shop and its contents. $4,000 to be paid to the English Church of Cornwall:"—Held, that the $4,000 was charged on the devise and bequest to A. F.; that so far as this was charged on land—freehold or leasehold—the bequest was void; so far as charged on personalty it was valid, and would be apportioned pro ratâ between the realty and personalty; and that A. F. was entitled to hold the several properties absolutely, subject only to such proportion of the legacy as was properly applicable to the personalty. *Fulton* v. *Fulton*, 24 Gr. 422.

**Void Bequest** — *Augmentation of Particular Fund or Residuary Estate.*]—A testator by his will provided as follows:—"I do order and direct that my executor sell the real estate owned by me, such sale to be made inside of three years from the date of my decease, and out of the proceeds of the said sale to pay to the Archbishop of the Diocese of Toronto $500; to the Bishop of the Diocese of Hamilton $500 to be applied for the education of young men for the priesthood; and the balance to be invested by my executor in the proportion of $15 for my wife and $8 for my mother. At my mother's death, I order that her proportion . . . be divided . . ." between five nieces, and that "on my wife's death, her proportion . . . be divided" between nephews and nieces. All the residue of my estate not hereinbefore disposed of, I give, devise, and bequeath unto my wife:"—Held, that the bequests to the archbishop and bishop named in the will being essentially different from their names in their corporate capacity, were intended for them individually, subject to the trust declared, the purpose of which was a charitable use, and that the money being derived from the sale of land, the legacies failed, and the amount went to augment the residuary gift of the particular fund out of which it was directed to be paid, and not the general residue of the estate. That as there was no special devise of the real estate, but only a direction to the executors to sell and pay legacies, the land and rents arising therefrom belonged to the widow, under the general residuary gift to her, and that the executor had no power to lease. That the widow was not bound to elect between her dower and the will. *McMylor* v. *Lynch*, 24 O. R. 632.

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4. *Restraint on Alienation.*

**Absolute Restraint.**]—By his will P. T., after giving a life estate to his widow, devised lands to his son as follows: "That T. T. do inherit the same as his property on the conditions that he never will or shall make away with it by any means but keep it for his heirs:"—Held, that the condition attached to the devise was invalid, being an absolute and unqualified restraint on alienation. *Re Watson and Woods*, 14 O. R. 48.

**Alienation by Will only.**]—E. R. W. was a devisee under the will of her father R. B., of certain real estate in Toronto, the material parts of which will were as follows: "After the death of my wife I direct the said freehold and leasehold property to be for the benefit of my son R. and my daughters M. and E., their heirs and assigns, to be divided in the manner following." He then gave a part to the son R. and proceeded thus: "The freehold property I hold at present on Jarvis street in this city, to be divided in two lots from Jarvis street (to?) Mutual street, the lot with the house to be given to M. L. to hold for her benefit during her natural life, and to dispose of the same by will and testament only, the remaining lot thirty-five feet wide on Jarvis street, running through to Mutual street, I bequeath to my daughter E. R. and that she shall not dispose of the same only by will and testament, and if either of my said daughters shall depart this life without leaving issue, then and in such case the survivor shall be possessed of the share of the deceased sister." E. R. W. contracted to sell the property devised to her when the purchaser objected to complete the purchase on the ground that she had only a life estate in it:—Held, that E. R. W. took an estate in fee simple, which was, however, restricted by a condition against alienation in any manner, except by a testamentary instrument, and that such restraint was valid. *Re Winstanley*, 6 O. R. 315.

Testator devised as follows: "I also will that that portion of the within-mentioned lands which I have hereby bequeathed to my son William, to my son Robert, and to my son James, shall not be disposed of by them, either by sale, by mortgage, or otherwise, except by will to their lawful heirs:"—Held, that the condition imposed by the will was invalid, and that the plaintiff, one of the devisees, was entitled to hold the land freed from the restrictions above mentioned. *Heddlestone* v. *Heddlestone*, 15 O. R. 280.

After a devise to his son C., his heirs and assigns for ever, of certain lands, a testator added that his devise to C., was subject to this express condition, that he should not sell or mortgage the land during his life, but with power to devise the same to his children as he might think fit in such way as he might desire:—Held, that the case was governed by Re Winstanley, 6 O. R. 315, and that the property was not clothed with a trust in

favour of the children, but the devisee took it in fee simple with, however, a valid prohibition against selling and mortgaging it during his life. *Re Northcote*, 18 O. R. 107.

A testator devised land to his three sons, in equal shares, in fee simple, adding, "without power to them, or any of them, to charge or alien the same or any part thereof except by . . . will:"—Held, following Re Winstanley, 6 O. R. 315, a valid restraint on alienation. The three sons were the sole heirs-at-law of the testator. After becoming entitled to the possession of the land under the devise, they joined in a mortgage of it in fee to a stranger. One of the three then contracted to sell his share to the other two:—Held, that each of the devisees, by making the mortgage, had forfeited his estate under the will, and each had become entitled as heir-at-law to an undivided third of the whole, and therefore the vendor could make a good title in fee simple to his undivided share to his brothers, the purchasers. *Re Bell*, 30 O. R. 318.

**Attachment by Creditors.**]—A testator, after devising all his real estate to his daughter, and in the event of her death without issue to trustees for his sister's children, proceeded: "Sixthly — I will and bequeath to Mrs. M., in consideration of her long services to my late brother M. and myself, as follows, viz., £20 per annum during her life, to be a charge upon the VanEvery or Mackenzie tract hereinbefore mentioned; (2) the whole of my household furniture, bedding, linen, and kitchen utensils; (3) during the minority of my aforesaid daughter the use of my present dwelling house and grounds contiguous, &c. But as these several bequests are intended for her aliment and support and not attachable by her creditors, I declare that should any creditor succeed in attaching any or all of them, that they shall immediately revert to the general fund of my estate to be appropriated to the use of my said daughter:"—Held, that the reversion over of the chattels was invalid, and that the devisee under the will was entitled. *Barker* v. *Davis*, 12 C. P. 344.

**Consent of Named Person.**]—Devise of real estate to a son with a condition as follows: "But I direct that before my said son . . . shall sell, mortgage, trade or dispose of, or encumber the said property or any part thereof, or any farm produce or timber, that he shall first obtain the consent of my sister . . . :"—Held, that the restriction being against all kinds of alienation, and in that regard absolute and unlimited, as the required consent was a condition precedent to any kind of alienation and unlimited as to time, the restraint was void. *McRae* v. *McRae*, 30 O. R. 54.

**Married Woman**— *Limited Restraint — Anticipation.*]—Certain lands were devised to a married woman with the proviso that she should not alienate or incumber them until her sister should arrive at the age of forty years; and also that the devise should be for her separate use, independent of her husband's control. She applied under R. S. O. 1887 c. 132, s. 8, for an order to bind her interest, for her own benefit, in these lands:—Held, that the restraint against alienation was valid, and would have been so even if the applicant had been a feme sole. Earls v. McAlpine, 27 Gr. 164, 6 A. R. 145; Pennyman v. McGregor, 18 C. P. 132; Smith v. Faught, 45 U. C. R. 484; Re Winstanley, 6 O. R. 315, followed in preference to Re Rosher, Rosher v. Rosher, 26 Ch. D. 801. Held, also, that the restraint on alienation was not a restraint on anticipation, within the meaning of the statute. *Re Weller*, 16 O. R. 318.

**Purchasers to be Members of Testator's Family.**]—A testator by his will devised certain real estate to two of his nephews subject to the following condition: "But neither of my said nephews is to be at liberty to sell his half of the said property to any one except to persons of the name of O'S., in my own family; this condition is to attach to every purchaser of the said property:"—Held, that the condition was valid. Re Watson and Woods, 14 O. R. 48, distinguished. *O'Sullivan* v. *Phelan*, 17 O. R. 730.

**Repugnancy** — *Invalidity — Contingent Executory Interest — Remoteness — Perpetuities.*]—In the early part of a will, lands were devised to the vendor, a son of the testator, in fee, and other lands were devised to other children, but in the latter part of the will there was this clause: "It is fully understood that my children have no power to make sale or mortgage any of the lands mentioned, but to go to their heirs and successors . . . Should any of my children die childless leaving husband or wife, said husband or wife to have a third during the term of their natural life:"—Held, that the first part of this clause amounted to a total restriction upon alienation, and was repugnant to the nature of the estate given by the devise, and was therefore void. Held, that the words "die childless" in the last part of the clause should be taken to mean "die not having children or a child living at the time of such death," and this part of the clause created a contingent executory interest or estate of freehold, which, from its legal nature, would, upon the contingency happening in its favour, spring up into existence. Held, also, that although many children of the vendor were living, none of whom was born till many years after the testator's death, and all of whom must die before the executory interest could take effect, yet the gift was not too remote, and did not infringe upon the rule against perpetuities. *Re Thomas and Shannon*, 30 O. R. 49.

**Restraint against Sale** — *Power to Grant to Children.*]—A direction in a devise in fee simple that the devisee should "not sell, or cause to be sold, the above named lot, or any part thereof, during her natural life, but she shall be at liberty to grant it to any of her children whom she shall think proper:"—Held, a valid restraint upon alienation. Held, also, that the giving of a mortgage by the devisee was not a violation of the restraint. *Smith* v. *Faught*, 45 U. C. R. 484.

**Restraint against Sale without Consent**—*Charge on Land.*]—Testator, after devising the use and control of all his property, real and personal, to his wife until his two sons, W. and H., were twenty-one, divided his farm between W. and H., to be possessed by them when respectively of the full age of twenty-one, subject to certain legacies to his daughters. The will then proceeded, "also my two sons H. and W. above named, give my beloved wife a comfortable support, or the sum of ten pounds annually during her natural life, said support or annuity to commence

at the time my said younger son H. shall possess his share of said property. I also will that my above named sons W. and H. do not sell or transfer the said property without the written consent of my said wife during her life." The will was registered. Some years after attaining his majority, H. mortgaged to defendant McC. without his mother's consent, and having made default in payment the land was advertised for sale. Upon a bill filed by the mother, a decree was made, declaring that according to the true construction of the will H. had no power to sell, transfer, or mortgage the land in question without her consent in writing, and McC. was restrained from selling: — Held, (without deciding whether such a restraint upon alienation without a gift over was effectual, because the plaintiff had no right to require its determination, and if adverse to her contention such an opinion would not bind the heirs), that she was not entitled to reside upon the land, and thereby prevent its alienation, since there was the option of paying her in money, and the mortgage did not interfere with her right to this payment as a charge upon the land. *Armstrong* v. *McAlpine*, 4 A. R. 250. See the next case.

The testator directed that his wife should have the use and control of all his property real and personal until his two sons W. and H. should come of age or until the said property is disposed of as hereinafter mentioned. He devised to each of these sons one-half of his farm, to be possessed by them when respectively of the full age of twenty-one. He then gave to his five daughters certain pecuniary legacies to be paid by each of his said sons within specified periods after their possessing the property, and directed them to give his wife a comfortable support, or £10 each annually during her life; and the will then proceeded; "I also will and direct that my above named sons W. and H. do not sell or transfer the said property without the written consent of my said wife during her life." The will was registered. After attaining twenty-one H. mortgaged his share without his mother's consent, to the defendants C. and M., who sold on default in the mortgage to the defendant O., who purchased as trustee for M., with full knowledge of the state of the title:—Held, affirming 27 Gr. 161, that the restriction upon alienation was valid, and was a condition, the breach of which worked a forfeiture, but that the heirs took the land in question charged with payment of the annuity and the legacies. Semble, that the mortgaging of the estate operated as a forfeiture. *Earls* v. *McAlpine*, 6 A. R. 145.

**Sale Restrained for Twenty Years.**]—A testator who died in 1854, devised land to his two sons in fee, "but not to be assigned to any person, except a son of his, for the term of twenty years from the day of his decease:"—Held, that the condition was not void, as in general restraint of alienation; and that the plaintiff, who claimed, in ejectment, under a title derived from the sons, in violation of this condition, could only recover such portion of the land as they were entitled to as heirs of their father. *Pennyman* v. *McGrogan*, 18 C. P. 132.

**Selling or Incumbering for Twenty-five Years.**]—A testator, after devising two parcels of land respectively to his two sons, provided as follows: "I will that the aforesaid parcels of land shall not be at their disposal at any time until the end of twenty-five years from the date of my decease. And, further, I will that the same parcels of land shall remain free from all incumbrances, and that no debts contracted by my sons W. C. and H. C. shall by any means incumber the same during twenty-five years from the date of my decease." One of the sons died about two years after his father, having devised his lot to his brother, the plaintiff, who, within the period limited by his father's will, sought to mortgage it:—Held, a valid restriction, so far as it was a restriction against the plaintiff selling and conveying the lands or incumbering them by way of mortgage within the period mentioned. *Chisholm* v. *London and Western Trusts Company*, 28 O. R. 347.

**Selling or Incumbering.**]—Devise of real estate to two grandchildren in fee, with a condition as follows: "and I further will and direct, and it is an express condition of this my will and testament that none of the devisees herein . . that is to say neither my said grandchildren . . shall either sell or mortgage the lands hereby devised to them:"—Held, an absolute and unqualified restraint on alienation, and so invalid. Semble, had the condition been valid, the grandchildren, being the testator's heirs-at-law, could have made title as such. *Re Shanacy and Quinlan*, 28 O. R. 372.

**Sons to Sell only to Each Other.**]—G. devised property to his three sons, M., H. and G., in fee simple and in joint tenancy, adding that they "shall not be at liberty to sell any part of my homestead farm herein willed, except to each other, and so descend to their heirs to the third generation:"—Held, that the condition in restraint of alienation was void. *Gallinger* v. *Farlinger*, 6 C. P. 512.

*See Dickson* v. *Dickson*, 6 O. R. 278, and *Peterborough Real Estate Co.* v. *Patterson*, 15 A. R. 751, *post* IV. 7; *Meyers* v. *Hamilton Provident and Loan Co.*, 19 O. R. 358, and *Re Casner*, 6 O. R. 282, *post* IV. 8; *Doe d. McIntyre* v. *McIntyre*, 7 U. C. R. 156, *post* IV. 9; and *Crawford* v. *Lundy*, 23 Gr. 244, *post* IV. 16.

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## IV. Interpretation and Effect of Wills.

### 1. *Admissibility of Evidence.*

**Ages of Devisees.**]—By his will, dated 28th January, 1840, testator devised to his son C. certain land, to be by him peaceably possessed and enjoyed for his natural life, and after his decease the same land to be devised to the heirs of the said C., and to their heirs and assigns for ever; in consideration whereof it was directed that C. should pay yearly to his mother £25 during her widowhood, and to his sister M. £25 yearly, so long as she should remain single. Then followed a devise to his son J. B. of certain lands in similar words, and then, after certain devises and bequests to others of his children, including a gift of £500 to his son R., there was this further provision, "and in the event of either of my sons, C., J. B., or R., or either of my daughters, S. or M., dying before they come of age, or without issue, then and in such case the legacies herein devised and bequeathed to them shall be equally divided among the surviving ones share and share

alike:"—Held, that extrinsic evidence of the ages of testator's children was admissible for the purpose of aiding in the construction of the will. *Forsyth* v. *Galt*, 22 C. P. 115.

**Identifying Devisee.**]— See *McIntosh* v. *Bessey*, 26 Gr. 496, *post* IV. 6.

**Intention to Include Land.**]—Held, affirming 28 C. P. 406, that a lot, which exactly fitted the devise, alone passed thereunder; and that parol evidence was inadmissible to shew that the testator intended to include another lot. *Lawrence* v. *Ketchum*, 4 A. R. 92.

**Misdescription of Land.**]—Where a testator devised lot 14, concession 10, in the township of A. to his two nephews, and, after certain pecuniary bequests, directed as follows: "The balance of my estate that may remain after paying the above bequests, to be paid to my relatives as my executors may think advisable;" and the evidence shewed that the testator did not and never had owned that lot; but that he did own lot 21, con. 10, in the township of A., which was not specifically devised by the will:—Held, that the evidence of the testator's intention to devise lot 21 in con. 10 to his nephews was inadmissible. Held, further, that the court would not authorize the executors to convey lot 21 in con. 10 to the nephews under the residuary clause in the will. *Summers* v. *Summers*, 5 O. R. 110.

A testator by his will devised as follows: "I devise the south-west quarter of lot 5, con. 2 of Westminster, containing fifty acres, more or less, to H. P. S., his heirs and assigns, in fee simple." The evidence shewed that the testator did not own the south-west quarter of the lot, but did own the south-east; that he and the devisees had lived on it for many years, and that he did not own any other part of the lot, except the fifty acres of the south-east quarter:—Held, that evidence was admissible to explain the error, and cause the will to operate on the south-east quarter. *Re Shaver*, 6 O. R. 312.

The erroneous part of the description in a will may be rejected if there is enough left to identify the subject matter devised. Summers v. Summers, 5 O. R. 110, distinguished. *Ib.*

A testatrix devised the south quarter of lot 20, concession 9, township of R., to T. L., and east quarter of said lot to her two daughters. It was sought to shew that she had at the time of her death no other land than the south half of lot 20, concession 8, of R., and to make the will operate to pass this to T. L.:—Held, that the devise being in its terms free from ambiguity, the Judge below was right in rejecting evidence of extrinsic facts, and that even if it might have been shewn that lot 20 in concession 8, was the only land which the testatrix owned, the will could not operate to pass it. *Hickey* v. *Stover*, 11 O. R. 106.

*See*, also, *Description of Property*, *post*, IV. 6.

**Mortmain**—*Money for Erection of Building.*] — Where a testator bequeathed a sum of money for the erection of a parsonage, but did not refer to any land already in mortmain whereon it was to be built, extrinsic evidence was given to shew that land for the site had already been given by a third person, and that the testator had on various occasions pointed it out as the site of a parsonage and had therefore avoided building a school house upon it. Such evidence was received to rebut the presumption that would otherwise arise that the money bequeathed was to be applied in the purchase of land for a site, as well as for the erection of the building. *Davidson* v. *Boomer*, 15 Gr. 210.

**Provision in Lieu of Dower.**]—Where a testator by his will made provision for his widow, but did not express the same to be in lieu of dower, evidence for the purpose of shewing that the testator intended such provision to be in lieu of dower, was held inadmissible. *Fairweather* v. *Archibald*, 15 Gr. 255.

**Rebutting Presumption** — *Explaining Ambiguity—Members of Class Intended.*]—The rule as to the reception of parol or extrinsic evidence, to rebut a presumption raised, or explain an ambiguity created by a will, considered and acted on. A testator, by his will, bequeathed "the sum of $500 to each of the four children of my brother G. R., on their attaining their twenty-first year." At the date of this will G. R. had five children—one son and four daughters—which fact was known to the testator, who had been heard to say that he would provide for the daughters, but that G. himself must provide for the son. By a previous will the testator had bequeathed the sum of $500 to each of the four "daughters" of his brother G. R.; and the person who drew the will proved that the testator, in giving him instructions therefor, said that "he wished to leave $500 to each of G.'s four children, the same as in the old will:"—Held, that evidence of the instructions so given was properly admissible for the purpose of rebutting any presumption of a change of mind of the testator, and thus shewing which four of G. R.'s children were intended to be benefited by the bequest. *Ruthven* v. *Ruthven*, 25 Gr. 534.

**Surrounding Circumstances**—*Declarations.*]—In the interpretation of a will, extrinsic evidence of surrounding circumstances, to shew what a testator intended by his will, is admissible; but his declarations of such intention will not be received for that purpose. *Davidson* v. *Boomer*, 15 Gr. 218.

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2. *After Acquired Property.*

**Additions to Estate**—*Tenant for Life—Power of Disposition—Unfinished House.*]—J. C. devised to J. B., G. E. S., and J. F. D. all his property and effects, real, personal, and mixed, upon trust (after reciting that his intention was to make provision for his daughter E. M. C., and to do it in such a way that the administration of the fund thereinafter provided should be controlled by the trustees of his will), to hold that part of "my property known as 'Walkerfield,' being the property I now reside upon, containing fifty acres more or less, until the same shall be sold by them as hereinafter provided for the use and behoof of my daughter E. M. C., so long as she may desire that the same should remain unsold, and should she desire the same to be sold, then to hold the proceeds of the same upon the same trusts and for the same purposes as hereinafter directed, with regard to the sum of $40,000 hereinafter directed

to be set apart." He then directed his trustees to set apart the sum of $40,000 to be held by them upon certain trusts, and also a certain further sum to provide an annuity of $1,200 for his wife, and provided that after the said two funds should have been set apart, the residuary estate should be divided among his nephews and nieces; and lastly, he gave to his trustees "full and absolute power to sell and dispose of all his lands ('Walkerfield' if sold in my daughter's lifetime, to be sold with her consent only) at such time or times, and in such manner as to them may seem best." The will was made on 10th September, 1879, and J. C. died 18th December, 1885. After making the will, on 27th June, 1883, J. C. purchased five acres, and on 21st September, 1883, another five acres, forming a block of ten acres of which one corner nearly coincided with one extremity of a diagonal of "Walkerfield." On 22nd November, 1884, he sold a piece of about three and one third acres of "Walkerfield." In his lifetime J. C. entered into a contract in writing for the erection of a dwelling house on "Walkerfield," which was not completed at his death, and since his death the executor had paid to the contractor and architect certain sums in respect of it:—Held, that the ten acres subsequently purchased passed under the devise of "Walkerfield." The word "now," in the devise of 'Walkerfield,' which "I now reside upon" should not be allowed to control the other parts of the will, and was not sufficient to oust the effect of the statute by virtue of which the will is to speak from the death. Held, also, that the daughter of E. M. C. was tenant for life of "Walkerfield," and after the death her children took the proceeds of sale as she might appoint, and in default of appointment equally, and in default of children, the residuary legatees took. Held, also, that the funds to build the house must come out of the residue. *Hatton* v. *Bertram*, 13 O. R. 766.

**Dower.**]—Where a testator makes a bequest to his wife which he expresses to be in lieu of dower, the presumption is that this applies only to lands he then owned; not to lands subsequently acquired by him. *Laidlaw* v. *Jackes*, 25 Gr. 293.

**General Devise Followed by Specific Enumeration.**]—Held, affirming 22 Gr. 267, that although a will coming under 32 Vict. c. 8 (O.) speaks from the death of the testator, and so would carry after acquired lands, yet where a testator devised to his wife all the remainder of his real estate, and then proceeded to enumerate the lands comprised in such remainder, after acquired lands did not pass as part of the residue. *Crombie* v. *Cooper*, 24 Gr. 470.

**Old Law.**]—P. by his will, dated 29th March, 1847, after giving several legacies, devised in fee to the plaintiff, who was also one of his heirs-at-law, the rest and residue of his estate both real and personal:—Held, that land acquired after the date of P.'s will did not pass by the residuary devise to the plaintiff. *Plumb* v. *McGannon*, 32 U. C. R. 8.

Held, that a general devise made in 1859 of all the testator's real and personal estate, did not carry after acquired real estate. *Whateley* v. *Whateley*, 13 Gr. 436, 14 Gr. 430.

**Specific Bequest of Mortgage**—*Purchase of Land with Mortgage Moneys—Residuary Clause.*]—A testatrix by her will, after giving to her two sons a certain mortgage, and after sundry other specific bequests, continued: "I further direct that the balance of personal property, consisting of notes and other securities for money, be given to my two sons aforesaid . . . also that if there be any effects possessed by me, at the time of my decease, that the same may be divided equally in value among my grandchildren share and share alike." The testatrix had no real estate at the date of the will, but she afterwards in her lifetime collected the money due on the mortgage, and invested it and other funds in the purchase of land of which she died seised: — Held, affirming 6 O. R. 681, that the grandchildren were entitled to the said lands, as well as to the personal estate, of which the testatrix died seised and possessed, not specifically disposed of by the will. *Hammill* v. *Hammill*, 9 O. R. 530.

**Specific Description**—*Residuary Clause.*]—A testator, by his will dated 19th May, 1873, devised to R. M. the "property on H. street," and proceeded: "I give all the rest and residue of my estate, real, personal, and mixed, which I shall be entitled to at the time of my decease, to A. M." At the date of the will he possessed only one property on H. street, but he subsequently acquired other property on that street:—Held, that, notwithstanding R. S. O. 1877 c. 106 s. 26, the after acquired property on H. street did not go to R. M., but fell into the residue. The testator having expressed his intention with reference to all land acquired by him after the date of his will by appropriate words in that will, it would be going contrary to that intention to declare that some after acquired property should be withdrawn from the residuary clause and held to pass under the prior specific devise. Lord Lifford v. Powys Keck, 30 Beav. 399, distinguished. *Morrison* v. *Morrison*, 9 O. R. 223, 10 O. R. 303.

**Specific Exception.**]—The testator by his will devised as follows: "4th. I give and devise unto my son Nathan, his heirs and assigns for ever . . . as much of lot No. 12 in the first concession of the township of Beverley . . . as I may die seised and possessed of (except therefrom the south 80 acres of said lot). 5th. I further give and bequeath unto my said son Nathan, his heirs and assigns, the south 80 acres of said lot No. 12 in the first concession of the said township of Beverley, excepting so much thereof as I may have sold and conveyed, subject, however, as follows:" providing in certain events for the division thereof between the children of Nathan and the four other sons of the testator. At the time of making the will the testator had sold portions of the said southerly eighty acres; amongst others, lots 1 and 2 on the south side of Margaret street which afterwards became vested in his son George. Subsequently George reconveyed these lots to the testator. Nathan claimed that the consideration therefor was paid or secured by him, and that in fact they should have been conveyed to him:—Held, per Spragge, C.J.O., and Morrison, J.A., that although the will spoke from the death of the testator these lots did not pass under it; but that the facts, stated in the report, sufficiently established that the testator, as to these lots, was trustee for Nathan. Per Burton and Patterson, JJ.A., that the will

spoke from the death of the testator and that therefore these lots passed under it. The judgment below, 1 O. R. 107, was therefore reversed. *Vansickle* v. *Vansickle*, 9 A. R. 352.

### 3. *Annuities.*

**Abatement**—*Payment out of Corpus—Interest.*]—Where the income of an estate, which was made applicable to the payment of annuities, had for some years been insufficient to satisfy them, the court held that the annuities did not bear interest, and that they were not payable out of the corpus of the estate. By a codicil to her will the testatrix stated that "it is my intention to build upon the two acres . . . and in case of my death before the completion of the house, I desire that it may be completed and furnished according to my present plans and intentions, which are known to my family. . . . My son W. I wish to have £500, to be paid to him by my executors. What is here is to stand prior to everything in my said will." By the same codicil the testatrix gave annuities to two daughters:—Held, that the payment of the amount needed for the furnishing of the house, the annuities to the daughters, and the legacy of £500 to the son, were first charges on the estate, after payment of debts; and that the parties entitled to these several charges would in the event of the estate ultimately proving deficient, be bound to abate ratably. *Wilson* v. *Dalton*, 22 Gr. 160.

**Accumulations**—*Substitution.*]—A testator set apart a fund as a provision for his wife and also for his children until majority or marriage. He gave the residue of his estate to his children living at his death, and directed that it should be divided on the death of all of them. He further directed that from majority or marriage each child was to receive the revenue derivable from his share, limited to $6,000 a year, each child being charged with a substitution in favour of his or her children:—Held, in a suit by the eldest son to recover arrears of his annuity of $6,000 a year, that according to the true intention of the testator as disclosed by the words of the will: (1) the annuity of each child was a charge on the revenue of his own share and its arrears, not on the total revenue of the estate; (2) each child was entitled from the testator's death to an equal share of the net revenue current and accumulated, without regard to the benefits which during minority he received from the fund set apart or under other clauses of the will; (3) the substitution was confined to the share of each child in the capital of the residue, and did not extend to the accumulation of its revenue. *Beaudry* v. *Barbeau*, [1900] A. C. 569.

**Annuitant's Right to Redeem Mortgage.**]—The owner of property mortgaged it, and then died, having devised one-half the property to one son and the other half to another, charging each half with an annuity to the testator's widow. One of the sons afterwards died intestate, and his widow paid off the mortgage and took an assignment to herself:—Held that the one annuity not being in arrear, and the assignee of the mortgage being willing to pay the arrears of the other annuity, the testator's widow could not insist on redeeming the mortgage. *Long* v. *Long*, 16 Gr. 239, 17 Gr. 251.

**Apportionment**—*Shares in Proportion to Legacies and Annuity.*]—The surplus from the sale of testator's lands, after payment of legacies, was to be divided amongst the legatees in proportion to the other sums bequeathed to each. One legacy was of $200, and an annuity; and the legatee died within a year after the testator:—Held, that her personal representative was entitled to a proportionate part of the annuity; and that her share of the surplus was to be based on the $200, plus this sum. *Woodside* v. *Logan*, 15 Gr. 145.

**Ascertainment of Sum to be Set apart.**]—P. having an estate estimated at £60,000 by will provided that after payment of the debts and certain pecuniary legacies, a sum sufficient to secure an annuity of £500 during her life should be invested for the use of his widow; that £5,000 should be invested for each of his four daughters; and that the residuary estate should be divided equally among testator's three sons, J., P., and W., when W., the youngest, should attain majority. And in case the value of the estate should not prove sufficient after providing for the annuity and the daughters' portions, to produce £7,000 for each of the sons, then a ratable reduction should be made from the share of each child. He also directed that after the decease of his wife the sum set apart for securing her annuity should be equally divided amongst his children. He provided that in case his sons desired to continue his business his executors should afford them facilities therefor, and should sell to them at a fair valuation the store and stock-in-trade. Stock was being taken at the time of his death, and the goods in hand were, in accordance with his custom, valued, by adding 75 per cent. to their sterling price, at £13,990. The sons J. and P. having agreed to continue the business, were charged in the books with that sum. The estate proved to be of only one-half the value at which it was estimated at testator's death, so that there was insufficient, without taking into account the value of the stock, to realize the widow's annuity and the portions for the daughters. The valuation of the stock was proved to be about twice its actual value, and no actual consent had been given by J. and P. to be charged with it at its estimated value:—Held, that there had been no absolute sale of the stock to them and that they were only chargeable with it at its actual value; that the sum required to be set apart to raise the annuity for the widow, who had died, and which should be divided among all the children, and not go to the sons as part of the residuary estate, was such a sum as, being invested at six per cent. per annum, the legal rate at the time of testator's death, would produce £500 per annum. *Paterson* v. *McMaster*, 11 Gr. 337.

**Bond for Annuity**—*Legacy.*]—Where a testator had bound himself by bond to pay to his mother £12 10s. annually, and devised part of his lands to his brothers on condition that they should pay to his mother £12 10s. per annum, and pay all his just debts, and made them his executors:—Held, that at law the legacy could not be considered as a satisfaction of the annuity, and that the mother was entitled to both. *Cole* v. *Cole*, 5 O. S. 744.

**Charge on Land.**]—One W. devised his farm to his wife during widowhood, provided that she pay to his mother $20 a year during

her life, and to his brother W. the same: and on the marriage or death of his wife, he willed that the property should be sold, and the proceeds be divided between the children of his brothers and sister:—Held, that the will created no charge upon the land, and that the annuitants had no power to distrain. *Clifton* v. *Ryan*, 26 U. C. R. 9.

A testator gave his son A. his board and lodging and £5 a year during his natural life. He devised to his eldest son a portion of his real estate on condition of his paying A. £3 out of the £5 a year. He further devised another portion of his real estate to his wife for her life, and then to his son R., on condition that R. should pay the balance of £2 a year and keep his son A. in board and lodging during his natural life:—Held, that the annuity to A., though chargeable against different parties, was not separable. (2) That the intention of the testator was to provide for A. from the time of the testator's death, and that R.'s land was chargeable with such £2 a year, and the board and lodging from that time, notwithstanding the tenancy for life. *Mansie* v. *Lindsay*, 10 P. R. 432. But see also *S. C.*, 11 O. R. 520.

——— *Personal Liability of Devisees.*]—Where a devise of real estate is made subject to the payment of an annuity, and the devisee accepts the devise, he will be deemed to have assumed a personal liability to pay the amount, which will be enforced by the court. *Carter* v. *Carter*, 26 Gr. 232.

**Distributive Share and Annuity.**]—A testator by his will and codicils, devising his real estate, &c., to G. H. M. and B. M. trustees, and the survivor of them, and the heirs of such survivor, gave his widow an annuity and provided that, when his son should attain the age of twenty-one his trustees should convey to him one-half of the estate and the residue when he should attain thirty, subject, however, to the annuity. He also provided that if his son should die before attaining the age of thirty, the said trustees or trustee should hold "the said real and personal estate, moneys, and securities, or so much thereof as shall remain in their hands, in trust to distribute the same according to the Statute of Distributions." The last codicil appointed G. E. T. and G. R. and the survivor of them, and the heirs, executors, administrators and assigns of such survivor new trustees and executors in place of G. H. M and B. M., with the same powers. The son attained the age of twenty-one, received half of the estate, and died before attaining the age of thirty unmarried and without issue:—Held, that the widow was entitled to her annuity as well as her share under the Statute of Distributions; but that the testator, having treated the real and personal estate as a blended fund to be distributed, she was not also entitled to dower, and that she must elect between the distributive share and the dower. *Re Quimby, Quimby* v. *Quimby*, 5 O. R. 738.

**Duration.**]—A testator gave to his wife $50 a year in lieu of dower, and directed that, if she should have a child to the testator, the annuity should be increased to $100, so long as both lived and as the annuitant remained the testator's widow. In a subsequent part of the will he directed that if such child should live till fourteen he should be put to trade "and pay stopped when of age, shall $100:"—Held, that the widow was entitled to the annuity of $100 absolutely until the child was twenty-one, provided the child lived so long and the widow remained unmarried; and that in case the child should die before twenty-one, or the widow should marry, the amount was thenceforward to be reduced to $50 a year for the remainder of her life. *Bateman* v. *Bateman*, 17 Gr. 227.

A testator, by his will, provided as follows: "I give and devise to my four daughters" (naming them), "an annuity of $120 per year each, to be paid one year after my decease, and to be for the period of their natural lives. Also to my two granddaughters (children of a deceased daughter), an annuity of $60 each, to be paid annually, . . . which annuity will expire at the death of my last daughter. In the event of the death of any of my daughters, the annuity which she received during life to be equally divided amongst her children until the decease of my last daughter, share and share alike. In the event of the death of my last surviving daughter, the annuities are immediately to cease, and the amount of real and personal estate in the hands of the executors is to be equally divided amongst my grandchildren, provided they are not lazy spendthrifts, drunkards, worthless characters, or guilty of any act of immorality." One of the granddaughters named married and died, leaving an infant child, and her husband was appointed administrator of her estate:—Held, that each annuity given was to continue to the death of the last surviving daughter, and that the annuity of the deceased granddaughter from the time of the last payment to her until the death of the last surviving daughter was payable to her proper personal representative for the benefit of those who were, according to law, entitled to her estate. Held, also, that the words "to be equally divided," were equivalent to a direction to "pay and divide," and that the interest taken by the deceased granddaughter, in the property to be divided by the executors, was a vested interest subject to be divested by the clause as to lazy spendthrifts, &c., which clause was not a condition precedent but rather in the nature of a condition subsequent, and that her personal representative became entitled to her share. *Woodhill* v. *Thomas*, 18 O. R. 277.

——— *During Widowhood.*]—See *Cowan* v. *Allen*, 26 S. C. R. 292, *post* IV. 19.

**Interest on Arrears.**]—J. S. by his will gave his wife E. S. an annuity of $2,000 a year, and charged it on his estate. After his death E. S. the annuitant, C. E. S. and M. A. S., two daughters, and W. A. S. and G. E. S., two sons, entered into an agreement whereby the annuity was charged on certain real estate and other property, and the sons covenanted to pay it, and the executors of J. S. transferred all their interest as executors in all the estate of J. S. to the said sons, subject to the said charge. Subsequently all parties joined in borrowing $16,000 on mortgage of part of the property for the purpose of reconstructing the buildings, the annuity being postponed to the mortgages. W. A. S. and G. E. S. afterwards became insolvent, and B. became assignee in insolvency. The annuity fell into arrear for several years, and E. S. died having made a will by which she devised all her estate to C. E. S. and M. A. S., who brought an action against B. to

have a lien declared on the property for the amount of the arrears of the annuity. On a reference to the master he found that they had the right to maintain the action, and settled the amount of the annuity due, and allowed interest for the six years preceding action brought:—Held, that R. S. O. 1877 c. 50, ss. 266 and 267, under which the interest was allowed, is not applicable to cases where a recovery is sought not against a defendant personally, but against his estate, and following Booth v. Coulton, 2 Giff. 520, that except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity. In this case, under any circumstances, the award of interest could not be upheld as against the assignee in insolvency. Held, also, that the expense of some flooring, lathing, and plastering, was properly charged against the defendant, as W. A. S. and G. E. S. had covenanted to keep the houses tenantable, and these repairs were made because the tenant threatened to leave. Held, also, on the evidence in this case that the master was right in disallowing a large set-off brought in by the defendant over and above the sum of $16,000 allowed for reconstructing the buildings. *Snarr* v. *Badenach*, 10 O. R. 131.

**Interest on Fund**—*Resort to Corpus.*]—A testator by his will directed his executors "to take as much of my estate and moneys to be put to interest as will make $200 of interest per year, said amount of $200 to be paid to my beloved wife . . each and every year of her life, said $200 to be paid by my executors to my beloved wife on the 1st day of January next after my decease, and every subsequent payment to be paid on the 1st day of January in each and every year thereafter . . . At the death of my said wife said principal to be equally divided between my brothers." There were specific devises of some real estate and chattels, and the residue was not sufficient to produce $200 a year:—Held, that the widow was entitled to $200 a year, and that the corpus of the estate should be resorted to if necessary for that purpose. *Kimball* v. *Cooney*, 27 A. R. 453.

**Lunatic**—*Charge on Land — Arrears.*]—A testator who died in 1872, by his will devised land to two of his sons, their heirs and assigns for ever, subject to the payment of $200 per annum for the benefit of another son (a lunatic) for his life, payable to the person who might be his guardian. Payments were made to the mother for the support of the lunatic son from 1880 to 1889, the last of which was made in February, 1889. The plaintiffs were appointed committee for the son in December, 1898:—Held, that the annuity was charged on, and that the right to recover out of, the land was not barred as to future payments. Hughes v. Coles, 27 Ch. D. 231, followed. Held, also, that the payments made were discharges pro tanto of the annuity. Held, also, that as the son was under disability until the plaintiffs' appointment, and as the action was brought within twenty years they were entitled to recover the annuity from February, 1890, and the annuity being an express charge on the land it might be sold to satisfy the arrears. *Trust and Guarantee Co.* v. *Trusts Corporation of Ontario*, 31 O. R. 504.

**Occupancy**—*Caretaker.*] — S. M. had become entitled under T. C. S.'s will to certain property called "Clark Hill," of which T. C. S. was owner when he died, and also to an undivided interest in certain other property of which T. C. S. was tenant in common. He also became entitled to a legacy under the following clause of A. H. S.'s will: "I will and direct that so soon as S. M. . . . can and does take actual possession of the real estate and property . . . under the will of T. C. S. . . . my executors . . shall . . . so long as he remains the owner and actual occupant of the said real estate pay over to him . . . the annual sum of $2,000 to enable, &c.: — Held, that this clause, read in connection with the will of T. C. S., referred only to the land of which T. C. S. was absolute owner, and not to the land he owned as tenant in common. Held, also, that actual possession and occupation of the land by S. M. was consonant with and satisfied by the possession of a servant or caretaker, or even a worker on shares, and that S. M.'s temporary absence from the mansion house on the property, which was kept furnished and in charge of a servant, did not create a forfeiture. *Macklem* v. *Macklem*, 19 O. R. 482.

——— *Vis Major.*] — T. C. S. devised his estate of Clark Hill, with the islands, lands, and grounds appertaining, to his nephew M. M.'s grandmother, by her will, directed her executors to pay him $2,000 a year so long as he should remain the owner and actual occupant of Clark Hill, "to enable him the better to keep up, decorate, and beautify the property known as Clark Hill and the islands connected therewith;"—Held, that the expropriation, under an Act of the legislature, of part of the Clark Hill estate, did not in any way affect M.'s right to this annuity; and therefore in awarding compensation to M. for the lands expropriated the arbitrators properly excluded the consideration of any contemplated loss by M. of this annuity. A failure by M. to reside and occupy would be in the nature of a forfeiture for breach of a condition subsequent, and his right to the annuity would continue absolute until something occurred to divest the estate which must be by his own act or default; the vis major of a binding statute could not work a forfeiture. Upon the evidence the court refused to interfere with the amount of compensation awarded. *In re Macklem and Commissioners of the Niagara Falls Park*, 14 A. R. 20.

**Payment out of Corpus.**]—Where the testator directed his executors to invest in good securities such a sum as would pay an annuity thereby bequeathed, and the income of the fund was insufficient to pay the annuity:—Held, that the annuitant was entitled to be paid the deficiency out of the corpus or capital. *Anderson* v. *Dougall*, 15 Gr. 405.

A testator bequeathed the annual income of all his estate, real and personal, to his widow during widowhood, subject to the payment of $160 a year to his father, and after the death of his father to his mother, and after the death of both his father and mother, the said annuity of $160 was given in equal shares to N. and J., a sister and niece of the testator, and he thereby made this annuity to his father and mother, and also the annuities to N. and J., a charge upon all his real estate; and directed his executors and trustees to pay or cause to be paid the net annual income of his estate ("after payment of the annuities as aforesaid") to his wife absolutely during

widowhood:—Held, that in the event of the income of the estate proving insufficient to pay the annuities, the annuitants were entitled to have the same raised out of the corpus of the estate. *Jones* v. *Jones*, 27 Gr. 317.

J. R. died on the 3rd August, 1876, leaving a will dated 6th August, 1875, and a codicil dated 21st July, 1876. By the will he devised to his widow an annuity of $10,000 for her life, which he declared to be in lieu of her dower. This annuity the testator directed should be chargeable on his general estate. The testator then devised and bequeathed to the executors and trustees of his will certain real and personal property particularly described in five schedules marked respectively, A, B, C, D, and E, annexed to his will, upon these trusts, viz.:—Upon trust during the life of his wife, to collect and receive the rents, issues, and profits thereof which should be, and be taken to form a portion of his "general estate," and then from and out of the general estate, during the life of testator's wife, the executors were to pay to each of his five daughters the clear yearly sum of $1,000 by equal quarterly payments, free from the debts, contracts, and engagements of their respective husbands. Next, resuming the statement of the trusts of the schedule property specifically given, the testator provided, that from and after the death of his wife, the trustees were to collect and receive the rents, issues, dividends, and profits of the lands, &c., mentioned in the said schedules, and to pay to his daughter M. A., the rents, &c., apportioned to her in schedule A; to his daughter E. those mentioned in schedule B; to his daughter M. those mentioned in schedule C; to his daughter A. those mentioned in schedule D; and to his daughter L. those mentioned in schedule E; each of said daughters being charged with the insurance, ground rents, rates, and taxes, repairs and other expenses of or incidental to the management and upholding of the property apportioned to her, and the same being from time to time deducted from such quarterly payments. The will then directed the executors to keep the properties insured against loss by fire, and in case of total loss, it should be optional with the persons to whom the property was apportioned by the schedules, either to direct the insurance money to be applied in rebuilding, or to lease the property. It then declared what was to be done with the share of each of the daughters in case of her death. In the residuary clause of the will there were the following words: "The rest, residue, and remainder of my said estate, both real and personal, and whatsoever and wheresoever situated, I give, devise, and bequeath the same to my said executors and trustees, upon the trusts and for the intents and purposes following." He then gave out of the residue a legacy of $4,000 to his brother D. R., and the ultimate residue he directed to be equally divided among his children upon the same trusts with regard to his daughters as were thereinbefore declared with respect to the said estate in the said schedules mentioned. The rents and profits of the whole estate left by the testator proved insufficient, after paying the annuity of $10,000 to the widow and the rent of and taxes upon his house in L., to pay in full the several sums of $1,000 a year to each of the daughters during the life of their mother, and the question raised on this appeal was, whether the executors and trustees had power to sell or mortgage any part of the corpus, or apply the funds of the corpus of the property, to make up the deficiency:—Held, that the annuities given to the daughters, and the arrears of their annuities, were chargeable on the corpus of the real and personal estate subject to the right of the widow to have a sufficient sum set apart to provide for her annuity. *Almon* v. *Lewin*, 5 S. C. R. 514.

**Several Annuities.**] — A testator, after directing payment of his debts, and funeral and testamentary expenses, disposed of the residue as follows:—"Secondly, I give to my wife $150 annually, during her natural life, or so long as she may remain my widow, the said sum to be received and accepted by her in lieu of dower, the said yearly allowance to be a lien upon my real estate, and to be paid my said wife as she may need it either quarterly or half-yearly." He then directed his executors to sell his farm and all his personal property except that previously disposed of, and out of the proceeds: first to pay his debts, &c., as aforesaid; and to divide the balance then remaining between his sons, subject to each of them securing to their mother an annual payment of $50 during her natural life, the security to be satisfactory to her and his executors:—Held, that there were sufficient points of difference between the first annuity and the subsequent ones, to make it apparent that the several annuities in favour of the widow were intended to be cumulative. *Edwards* v. *Pearson*, 4 O. R. 514.

**Unregistered Agreement Creating Charge on Land**—*Notice—Registry Act.*]—A testator by his will directed his executors to pay his widow an annuity for the support and maintenance of one of his sons until he became of age; and he also directed that if there were not sufficient funds therefor, it was to be a charge on separate parcels of land severally devised to three of his other sons. There were sufficient funds in the executors' hands for the payment of the annuity, but by an agreement, for valuable consideration, made between the widow and the devisees of the lands, it was agreed that the annuity should not be paid out of the moneys but should be a charge upon the lands, the intention being that the moneys should be kept in hand for the payment of a legacy payable to the first named son on his attaining his majority. A sale was subsequently made by one of the sons of the parcel of land devised to him, the purchaser being informed as to an agreement having been entered into with reference to the annuity, but being at the same time told that it in no way affected the land, merely creating a personal obligation to pay the annuity, and he made no further inquiry with regard to it:—Held, that the purchaser could not be deemed to have purchased the land with actual notice of the contents of the agreement so as to be affected thereby. *Coolidge* v. *Nelson*, 31 O. R. 646.

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### 4. *Conditions.*

**Abstaining from Intoxicants and Cards** — *Obedience to Mother—Industry.*]—Testator, after granting to his wife a life estate in certain land, devised the same to his son, subject to the following conditions: "First, that he abstain totally from intoxicating liquors and card-playing. Second, that he be kind and obedient to his mother. Third,

that he be known among his friends as an industrious man ten years after the death of his mother. Should he fulfil these above mentioned conditions I give and devise to him to hold to his heirs and assigns for ever the said lot. Should my son Michael not fill to the letter these conditions, then he shall have no right or title to the use of the said property during or after his mother's lifetime. But I will and bequeath said half lot to my grandson J., to hold to his heirs and assigns for ever:"—Held, (1) that the three conditions were conditions precedent up to the time of the mother's death, and that conditions one and three were conditions subsequent for ten years after the mother's death. (2) That either the use of intoxicating liquors or the playing of cards would be a breach of the first condition. (3) That the first condition was valid and was not too vague or indefinite for trial or adjudication by the court; and having been broken the son's title failed in so far as the condition was precedent, and was forfeited in so far as the condition was subsequent. Semble, that conditions two and three were valid, and not too vague or indefinite for trial or adjudication by the court. Held, also, that although the son was one of the heirs-at-law it was not necessary to shew that he had notice of the will or the conditions in it, for he had possession of the land as devisee under the will from his mother's death until his own. *Jordan* v. *Dunn*, 13 O. R. 267, 15 A. R. 744.

Such a condition as the first could not fairly be interpreted to preclude the use of intoxicants for purely medicinal purposes. *S. C.*, 15 A. R. 744.

**Acquisition of Property.**] — See *Re Sproule, Sharp* v. *Sproule*, 17 O. R. 334, *post* IV. 12.

**Assuming Name and Arms.**]—The devise was to one C., subject to a condition that he should within two years take the name and arms of testator, in default of which, or in case of his death before testator, there was a devise over to one D., through whom the plaintiff claimed. The evidence of facts necessary to shew the effect of this devise not being clear, a new trial was granted, with costs to abide the event, on condition that both parties should admit the seisin of the testator. *Nicholson* v. *Burkholder*, 21 U. C. R. 108.

**Claim to be Made.**]—Testator devised lands to his brother's two eldest sons "in case of their coming to Canada and claiming the same:"—Held, that, though the devisees took as joint tenants, yet that either of them by coming to Canada could entitle himself to his moiety. *Doe d. McGillis* v. *McGillvray*, 9 U. C. R. 9.

**Division of Other Property.**]—Testator, by his will, in 1842, devised the land in question, lot 37, to his son J., and to the plaintiff, Alexander, another son, lot 32, but directed that if J. should prefer lot 32 he should take it, and the plaintiff should then have lot 37. By a codicil he declared his will to be, that if his son Allan should not take holy orders as he intended, then he should have lot 37 and J. lot 32, and the plaintiff the west half of lot 31; and he added, "the one brother may change or sell to the other with consent of the major part of the executors, but not out of the family; but should Allan not divide, or give over in full an equal portion of the house in St. Paul street, Montreal, as was his mother's intention, as appears by her last will, in which case I order and devise, that my said son Allan shall only receive of my property what has been willed to him in my last will, then this codicil to be null and void." The will of Mrs. Macdonell referred to was made in Upper Canada, in 1828, and devised the house mentioned to her son Allan, "with power to give an equal share to his sisters Helen, Catharine, and Harriet, and to his brother John." After the testator's death J. elected to take lot 32. Allan never took holy orders, but he had not divided the property in St. Paul street, but on the contrary had treated it as his own, and having mortgaged it his interest was sold under a judgment to the mortgagees, who subsequently procured a release from the brothers and sisters named in Mrs. Macdonell's will, of their interest, and obtained a judgment of distribution in Lower Canada. It was proved by two advocates from Montreal, that by the law of Lower Canada the will of Mrs. Macdonell vested an equal interest in the land in Allan and his brothers and sisters named:—Held, reversing 19 U. C. R. 130, that the event upon which the estate was to become divested from Allan and to devolve upon the plaintiff had not happened; or, in other words, that the condition upon which Allan held the estate had not been broken. *Macdonald* v. *Macdonell*, 2 E. & A. 341.

**Formation of Partnership**—*Predecease of Intended Partner.*]—A testator by his will directed that "as soon as conveniently may be after my decease, a partnership be formed by my two sons . . . in which partnership and firm my two sons shall be equal partners in every particular, and sharing equally in the profits of the same. To the said firm so to be formed I give and bequeath as partnership assets, the building," &c. The testator then proceeded to give and bequeath to the said firm certain specific lands and personal property, and ultimately the whole of his residuary real and personal estate. After the death of one of his said sons, who predeceased him, he made some codicils to his will, in which he referred to the above portion of his will and revoked some of the bequests to the said firm, but otherwise ratified his will:—Held, that the formation of the partnership as directed was a condition precedent to the vesting of the gifts and bequests above mentioned, and that, as one of the two sons predeceased the testator, there was an intestacy as to them. *McCallum* v. *Riddell*, 23 O. R. 537.

**Legatees to Work on Charged Land.**]—W. O. by the third clause of his will devised and bequeathed the residue of his estate to his wife, four sons, and two daughters, the devise and bequest being subject to the condition that they should all unite in paying to the executors before the 1st January, 1877, the sum of $1,000, and the same sum before the 1st January, 1882, said sums to pay the shares of two of the sons, Alexander and Duncan. By the fourth clause he gave the sum of $1,000, without condition, to each of his sons, Alexander and Duncan. By the fifth clause he devised to his sons Douglas and Robert Oliver two lots, and after giving several legacies to his daughters, he proceeded: "and further, that Alexander and Duncan work on the farm until their legacies become due." Alexander left the farm in 1871, and entered into mercantile pursuits:—Held, reversing 6 A. R. 595, that the direction that Alexander should

work on the farm was a condition precedent to his right to the legacy of $1,600. *Oliver* v. *Davidson*, 11 S. C. R. 166.

**Maintenance.**]—A testator, seised in fee of land, devised it to his son on condition that he supported the plaintiff during her life, and that she should be mistress and have control in the dwelling house on the land:—Held, that the son took the land conditioned for the maintenance of the plaintiff during her life, but that no title was conferred upon her under which she could bring ejectment, the control intended being merely the domestic management, not the ownership of the house. *Grant* v. *McLennan*, 16 C. P. 395.

**Maintenance of Child**—*Subsequent Impossibility.*]—A testator bequeathed his chattels and $1,500 to his widow. His estate he directed to be sold and the $1,500 to be paid out of the proceeds. After providing for the investment of the estate, he proceeded: "the yearly interest accruing from the same to be paid over to my said wife yearly for the term of six years, or until my son shall become twenty-one; 5th. It is my will that the above mentioned gifts and bequests to my wife shall be given to her in lieu of dower, and on the further condition that she will clothe, maintain, and suitably provide for my said son until he shall become twenty-one; 6th. It is further my will that on the coming of age of my said son, my executors shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses and legacies; 7th. In case my said son should die before coming of age, then the money so remaining as above, and to which he would then be entitled, shall be paid over to my two eldest brothers." The son died under twenty-one:—Held, that all the gifts to the widow were upon the condition of maintaining the son; but the condition having become impossible of performance by the son's death, the gifts were denuded of the condition. Held, also, that the testator's brothers were not entitled to payment of the capital until the time at which the son would have attained the age of twenty-one if he had lived; and in the meantime the widow was entitled to the income. *Graham* v. *Boulton*, 9 O. R. 481.

**Marriage of Widow.**]—A testator appointed his wife executrix, and gave her certain legacies, provided she remained single, and in the event of her marrying again made other disposition of his estate, and appointed another person his executor. An assignment of a mortgage made by her and her husband after her second marriage was held to pass no interest. *Conron* v. *Clarkson*, 3 Ch. Ch. 368.

L. devised lands to his widow, "provided she does not marry or misbehave," and to his son after his wife's death:—Held, that the widow's estate was not absolutely determined by her again marrying; the party next entitled not having claimed the estate. *Leech* v. *Leech*, 11 Gr. 572.

*See Cowan* v. *Allen*, 26 S. C. R. 292, *post* IV. 19.

**Marriage with Approbation.**]—A testator devised his property in trust amongst other things, to pay his son an annuity of £100, and in case of his marrying with the approbation of the trustees, then they were to hold certain specified property, or to convey the same for the separate use of the wife during her life, subject, if the trustees thought best, to the payment of such annuity to the son, and after the death of the wife then to the use of the children of the marriage or their issue, with a proviso "that the trusts in favour of such wife and children shall not arise, nor shall the approbation of my said trustees of such marriage be presumed or provable unless my said trustees shall by deed declare the said trusts in favour of such wife and children." The son married, but no declaration of trust in accordance with this proviso was made:—Held, that a declaration by deed was necessary to give the wife or children a locus standi in court, and that evidence of conduct on the part of the trustees tending to shew their approbation of the marriage was insufficient. *Foster* v. *Patterson*, 15 Gr. 426.

**Marriage.**] — A testator devised all his real estate to his two daughters and a granddaughter "during their lives or the lives of any one of them, for their support; and in case of the marriage of any of them then to those above named remaining unmarried," and after their decease the property was to be sold for the benefit of all his grandchildren. At the time of his death all were living and unmarried; subsequently one of the daughters married, but became a widow, the other daughter died unmarried and intestate, and the granddaughter afterwards married (in 1864):—Held, reversing 15 Gr. 413, that on the marriage of the granddaughter, the property was to be sold and distributed among the grandchildren. *Wright* v. *Church*, 16 Gr. 192.

**Occupation** — *Maintenance.*]—A testator devised all his real and personal estate to his wife for life; and upon her decease his real estate to his daughter for life, remainder to her son in fee; with liberty to the daughter and her husband to occupy the land, provided they supplied his widow with a comfortable support and maintenance out of the same during her life, and if they did not do so to her satisfaction, the executors should have power to sell or lease the land:—Held, that the duty of supplying the widow with maintenance was conditioned upon the parties occupying the land; and a sale effected by the executors in default of their supplying the widow with such support, although not occupying the land, was declared void. *Dougherty* v. *Carson*, 7 Gr. 31.

——— *Temporary Interruption.*]—A testator, amongst others, made the following bequest, in favour of his housekeeper, "And further, for her, the said H. P., to have her own free will to stay on the premises I now at this time enjoy and possess, and for her to have a quiet home and maintenance as long as she may think good to hold to the said privilege:"—Held, that H. P. had not forfeited her right to the provision by merely ceasing for a time to avail herself of her intended benefit. *Hesp* v. *Bell*, 16 Gr. 412.

**Payment of Legacy.**]—A testator devised 100 acres to his son R., for which he was to pay the executors, by instalments, a sum which was to be invested for the benefit of another son, T., on his attaining twenty-one. The testator further declared that should R., "neglect or refuse to pay the aforementioned sums in the manner specified, then it should be in the power of the executors to dispose of fifty acres of the said land for the benefit of T., or to give him T., a deed for fifty acres of said lot;

which fifty acres shall be such part of the said lot as the executors shall see fit." The legacy was not paid, and the executors conveyed fifty acres to T.:—Held, notwithstanding such default in payment, that upon R. paying the amount due for principal and interest on the footing of the legacy he was entitled to a reconveyance of the fifty acres. *Carson* v. *Carson*, 6 Gr. 368.

A testator devised land to his eldest son, J., for life, and after his decease without issue to his grandson, the plaintiff, in fee. By a codicil he declared that if J. should "after three months after my decease" deposit in the hands of any person to be chosen by plaintiff's parents £100, to be invested for plaintiff's benefit, then the land should go to J. in fee:—Held, that payment of the £100 within a reasonable time after three months from testator's decease was sufficient; and that "after" should not be read as "within." Quære, whether under the codicil the parents could have directed payment of the £100 to themselves. *Hyland* v. *Throckmorton*, 29 U. C. R. 560.

*See Lundy* v. *Maloney*, 11 C. P. 143, *post* IV. 5.

**Payment of Mortgage.**]—Where land is devised upon condition that a mortgage thereon be paid by the devisee, and the devisor pays off the mortgage, the devise is good, such a condition being a condition subsequent. *McKinnon* v. *Lundy*, 24 O. R. 132, 21 A. R. 560. Reversed on another point by the supreme court, *sub nom. Lundy* v. *Lundy*, 24 S. C. R. 650.

**Possibility** — *Re-entry.*]—On 26th September, 1844, J. Le B. by deed bargained and sold, &c., to the municipal council of D. district, in consideration of five shillings, a certain lot for the purpose of erecting thereon a school house for the use of the D. district. Habendum, for the purpose aforesaid, unto the municipal council forever. The deed was subject to a proviso that the said council should within one year from its date erect a school house for the use of the said district, or if the said council should at any time erect any other building save said school house and necessary offices, or should sell, lease, alien, transfer, or convey the said land, it should be lawful for the said J. Le B. and his heirs to re-enter and avoid the estate of the said municipal council. J. Le B. by his will, dated 23rd July, 1847, devised all his real estate to certain nieces, and died in the year 1848, without having revoked or altered said will. The municipal council complied with the condition by building a school house, and at the time of the making of the will, the condition had not been broken, but the successors of D. district dealt with the land otherwise than was authorized by the deed, and broke the condition. The land having been sold, a petition was filed to have it declared whether the devisees under the will of J. Le B. or his heirs-at-law were entitled to the proceeds thereof:—Held, that the word "possibility" in R. S. O. 1877 c. 106, s. 2, includes a "right of entry for condition broken," mentioned in s. 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of "land." And that upon the breach of the condition no new estate was acquired, so as to require words applicable to after acquired estates to be found in the will. The possibility of reverter was a contingent interest that existed in the testator when the will was made, and the subsequent breach of the condition gave a right of entry by which the contingent interest might be converted into an estate in possession. Held, also, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is to be prematurely defeated and determined, and no other estate created in its room; and that the condition in this case was therefore perfectly valid. The devisees and not the heirs of J. Le B. were consequently held entitled to the land or the money representing it. *In re Melville*, 11 O. R. 626.

**Residence with Named Person.**]—A father devised to trustees for the benefit of his daughter, an only child, real estate on her attaining twenty-one years or marrying, and until that period he directed that she should reside with and be brought up under the care of his mother, or in the event of the death of his mother, then that she should in like manner reside with his sister; and in the event of the death of his sister before the period named, he directed the trustees of his will to place his daughter in some respectable family other than that of the child's mother, and in case the daughter failed to comply with these conditions, he devised the estate to other parties. On a bill filed to obtain the construction of the will, the court was of opinion that although the provisions seemed harsh and cruel, the father had the power in disposing of his property to clog it with the condition he had; that a court of equity could afford no relief; and that the estate devised to the daughter unless the conditions were complied with would be forfeited. *Davis* v. *McCaffrey*, 21 Gr. 554.

*See Hamilton* v. *McKellar*, 26 Gr. 110, and *Clarke* v. *Darraugh*, 5 O. R. 140, *post* IV. 5.

**Residence on Named Property**—*Annuity to Keep up Property—Expropriation.*]—See *In re Macklem and Commissioners of Niagara Falls Park*, 14 A. R. 20; *Macklem* v. *Macklem*, 19 O. R. 482; *ante* IV. 3.

**Restraint on Alienation.**]—See *ante* III. 4.

**Sober, Steady, and Industrious.**]—The petitioner in a quieting title application claimed title as devisee under a will which contained the following provisions: "Secondly, I devise to my son J. F. (the land in question) but he is to be known as a sober, steady, and industrious man. Thirdly, if at any time during the period of five years after my death, it appears to my executors, hereinafter named, that my said son J. does not remain sober, I give them power to sell and dispose of the said property for such charitable purposes as to them shall seem meet;"—Held, that the power of sale in the will was not void for uncertainty, and that the certificate of title could only issue subject to such power. *Re Fox*, 8 O. R. 489.

**Steadiness and Respectability.**]—A bequest was made to the son of testatrix payable on his attaining twenty-one, provided he continued a steady boy and remained in some respectable family until that time, with a bequest over if he did not do so. Without any reason being assigned therefor, the legatee enlisted and served as a private soldier in the army of the United States, against the

then Confederate States: — Held, that the son had not performed the condition, and was not entitled to the legacy. *Pew* v. *Lefferty*, 16 Gr. 408.

See, also, *Woodhill* v. *Thomas*, 18 O. R. 271, *ante* IV. 3.

**Valid and Invalid Conditions.**]—Where a devise is made upon two conditions, one of which is void, the other, though good by itself, being coupled with the void one, will also be rejected. *Re Babcock*, 9 Gr. 427.

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5. *Contingent or Vested Bequests and Devises.*

**Attainment of Majority.**]—The devise was: "I give, devise, and bequeath unto my grandson, W., upon his attaining the full age of twenty-one years, and his heirs for ever, all and singular, &c., (naming certain lands); and my executors are hereby required to make whatever use or benefit they can or may for the advantage of my said grandson during his minority, and to pay him, upon his reaching the age of twenty-one years, whatever the said lots may have produced of clear profit during the said term of his minority, from the day of the death of my said wife, S." W. survived the testator, but died during his minority:—Held, that he took a vested interest, descendible to his heirs. *Marcon* v. *Alling*, 5 U. C. R. 562.

The will of P. M., dated 23rd October, 1858, devised to his third son, W. M. "when he comes of age," part of the homestead farm, describing it, and some personal property. It also devised to the eldest son, P., "when he comes of age," the remainder of the homestead farm; and proceeded, "out of which said homestead farm, I will and bequeath that my said wife shall have her maintenance and support for the term of her natural life, and also when my son W. shall come of age to have for her own use and benefit the new part of house lately erected. . . I moreover will that my said wife shall dwell in my said house, . . and receive the rents and profits of the said farm, to bring up and support my said children, . . while she remains my widow." The will also provided that the stock on the said farm should be kept for the benefit of the farm under the direction of the trustees until P. should come of age. Semble, that W. M. took a vested interest in the land, subject to be divested on his death before coming of age:—Held, that if not he took at least a contingent and future interest, which might be disposed of by deed under C. S. U. C. c. 9, s. 5. *McCoppin* v. *McGuire*, 34 U. C. R. 157.

The testator having devised certain lands to trustees for his sons, directed these lands to be conveyed to his sons on their coming of age, but omitted to make any provision for the application of the rents and profits in the meanwhile:—Held, that the sons had vested estates from the death of their father, and were entitled to the rents and profits during their minority. *Dobbie* v. *McPherson*, 19 Gr. 202.

A bequest of £500 "to each of the four children of my brother, G. R., on their attaining their 21st year," with a gift over after the payment of all debts, charges and bequests:—Held, to be contingent upon the legatees respectively attaining their majority. *Ruthven* v. *Ruthven*, 25 Gr. 534.

A testator by his will gave his homestead and certain personalty to his wife, while unmarried, for the maintenance and support of the family surviving him, until the members of his said family should respectively attain twenty-one, and afterwards for the maintenance of his wife for life. He then proceeded to give and bequeath all his other real and personal estate, not thereinbefore mentioned, to his executors in trust to dispose of and invest, and "upon my son Thomas attaining the age of twenty-one years, should he be my only child, in trust to pay to him and put him in possession of the said residue;" but if there were more children, he directed that it should be divided amongst all, in the proportion of one part to a daughter and two parts to a son, to be paid to them when they should respectively attain twenty-one. He then proceeded to devise to his son Thomas the homestead, together with the household goods, &c., on the decease or second marriage of his said wife, should he have attained his twenty-first year. And in case his son Thomas should not survive him, or attain the age of twenty-one, or in case he (the testator) should have no other surviving child who should attain the age of twenty-one, or in case he should have no grandchild, his real and personal estate was to be divided in certain proportions among his brothers and sisters. Thomas, the only child surviving the testator, attained twenty-two, and died without issue, leaving him surviving his mother who had not married again:—Held, Thomas took a vested estate, for that it did not appear that the testator intended it to be contingent either on his attaining twenty-one, or surviving his mother. Held, also, the testator's intention was, that the gift over should not take effect unless Thomas died under twenty-one, without leaving a child. *Gairdner* v. *Gairdner*, 1 O. R. 184.

**Conditional Limitation over.**] — Held, upon the following will, devising certain lands to testator's wife for life, "and after her decease then unto her son W. his heirs and assigns for ever, provided that the said W. will pay all demands that may be against the (testator), by his having signed any promissory notes with his said son W., or any other sum or sums that he might be owing on account of his said son W., and if his said son W. should make default in paying all demands as aforesaid, or if any part thereof should be collected from any devisee in the said will mentioned, then, and in that case, he devised the said land to his daughter Margaret, her heirs and assigns for ever:" that W., the son, took a vested estate in remainder, with a conditional limitation over to his sister, in case of a certain event happening; and that his estate could be sold under 5 Geo. II. c. 7, during the lifetime of his mother. *Doe d. Jarvis* v. *Cumming*, 4 U. C. R. 390.

**Devise to Children of Life Tenant.**] —Testator, after devising certain land to his son G. and his wife, and to the survivor of them, added, "after the decease of the said G. and his wife, I give, devise, and bequeath the said lands (so devised to them) to the children of the said G. and his wife, including E., son of the said G. by his first wife, to have and to hold the same to the said children of the said G. or the survivors of them

for ever, share and share alike." G. and his wife left two children surviving them. E. died before the father:—Held, that the remainder in fee vested upon the death of the last tenant for life, and that E. therefore took nothing. *Keating* v. *Cassels*, 24 U. C. R. 314.

**Devise "if living."**]—A will contained a devise in trust for the support and maintenance of the testator's widow during her life or widowhood, with a direction that she should have the full right to possess, occupy and direct the management of the property; and at her death or second marriage, "my son Thomas, if he be then living, shall have and take lot one, which I hereby devise to him his heirs and assigns." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner. He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage to be equally divided among his said children. At such death or marriage all his personal property and estate remaining was to be divided equally among his children: Provided always, that in the event of any of his children dying without issue before coming into possession of his or her share "of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue; and in the event of such death leaving issue, such issue to take the share which would have belonged to the parent if then living: and lastly, he directed that in the event of his wife dying before him his property should be disposed of at his death, as thereinbefore directed at her death or second marriage, in the event of her surviving him, so far as practicable. Thomas died unmarried before his mother:—Held, reversing 29 Gr. 162, and 9 A. R. 117, sub nom. *Keefer* v. *McKay*, that the interest devised to Thomas was contingent upon his surviving his mother. *Merchants Bank of Canada* v. *Keefer*, 13 S. C. R. 515.

**Devise to Take Effect after Death of Life Tenant.**]—The will further contained a devise of lots two, &c., to the testator's sons, Alexander, John, Charles and Thomas, their heirs and assigns, as tenants in common, and a direction that the same should take effect from and after the death or second marriage of the testator's widow. There was a proviso that if any child died without issue before coming into possession of his share, the same should go to the survivors. An indenture was executed between the parties, conveying all the estate, &c., of those interested to Alexander, John, Charles, and Thomas, after the execution of which Alexander and Charles died. An Act of parliament was subsequently passed confirming this indenture, and declaring that it should take effect from its date, and not be affected by the subsequent death of any of the testator's children; and it confirmed the estate in John and Thomas as tenants in common, subject to the life estate of their mother; with the right of survivorship between them in case of one dying before the other without issue, before the death or marriage of their mother. After this, and in his mother's lifetime, Thomas died, having, however, survived his brother John, who died without issue:—Held, that Thomas took a vested remainder in fee expectant upon the determination of his mother's life estate. *S. C., sub nom. Keefer* v. *McKay*, 29 Gr. 162.

The residue of the estate was directed to be converted, and to be at the disposal of the widow for her life, while she remained unmarried, and thereafter to the children. This was subject to the above proviso as to coming into possession:—Held, that the children took vested interests in the fund, subject to be divested on the happening of the contingency mentioned. *Ib.*

**Direction for Possession at Named Age.**]—R. C. by his will devised all his personal estate to his wife, M. S. C., to be held for the interest of his son, A. S. C., when he should have arrived at the age of twenty-four years; an annuity to his wife, M. S. C., for life; appointed her guardian to the son to take charge of all remaining money that should accrue from all sources; such money to be used for the necessary expenses of education, &c., for the son. He desired that the wife should have control of all money coming to the son till he was of the age of twenty-four years, and at that time all rents and other property should come into his possession, except the annuity. He further declared that at the death of the wife all rents and all interests and all property should pass into the possession of the son, to be owned by him, his heirs and assigns for ever. In case of the death of the wife before the son attained twenty-four another guardian with similar powers was appointed. In case of the death of the son before his mother, then all the property and rents, &c., were to be hers during her natural life, and after her death one-half to go to the testator's relatives and the balance to the relatives of the wife, she making this disposition before her death; but if the son at the time of his death should leave a wife or children, then all property should be subject to such disposition as he should make at the time of his death:—Held, that the will was sufficient to pass all the testator's property, including the land in question; that the interest taken by the son was a vested one, and was to come into his possession and control on his attaining twenty-four, and, following Gairdner v. Gairdner, 1 O. R. 191, that the son having attained that age the subsequent gift never could affect his interest, which had become absolute. If the lands passed by the will, the son and the widow joining as grantors could convey such title as the testator had. If the lands did not pass by the will, the son as heir-at-law and the widow as to dower could make title. *Re Cooke and Driffil*, 8 O. R. 530.

**Division at Named Period.**]—A testator, after making specific devises of certain lands, added, "at which time" (i. e., after his youngest son should have arrived at the age of 21 years), "it is my will that the whole of my lands be divided in four equal parts; one part of which I give and bequeath to my two daughters, A. and B., the other three parts to be divided among my three sons, C., D., and E." Semble that under this devise of the residuary estate the devisees took not a vested estate, but a contingent and future estate, and that for life only; the estate in the meantime vesting in the heir-at-law. Semble, also, that the heir-at-law would then have an estate which would not entitle his widow to dower, the estate not being a beneficial estate of inheritance, but a mere tem-

porary interest of uncertain duration, contingent upon a distribution being made in pursuance of the will. *McClellan* v. *Meggatt*, 7 U. C. R. 554.

A testator devised certain property to trustees, to hold it in trust for twenty years after his decease; during that time to pay the income to his widow and children, naming them, in certain shares; and after the expiration of twenty years to sell and to divide the proceeds among his "said children" in certain shares. He also devised certain other property to the trustees upon trust to sell from time to time as they in the exercise of "full discretion" should think fit, and to pay the income to his widow for life, and upon her decease, to divide the corpus among his children, naming them, in certain shares:—Held, that the children took vested interests. *Kirby* v. *Bangs*, 27 A. R. 17.

Where a testator devised his estate, real and personal, upon trust, amongst other things, for the support, &c., of his children until they should attain 21 or marry, and so soon as the youngest attained 21 or married, then to convey in equal proportions to the children, with a devise over to his brothers and sisters in the event of the death of all his children under the age of 21 and unmarried; a petition presented by the widow and infant children of the testator, praying for a sale of a portion of the corpus of the personal estate, for the purpose of maintaining the family and keeping houses in repair, was refused with costs, the interests of the children being contingent only. *McIntosh* v. *Elliott*, 1 Gr. 440.

A testator devised all his residuary estate, real and personal, to trustees to convert into money, and to accumulate during the lifetime of his widow; and, after the payment of certain anticipated claims thereon, in trust for all the testator's children who should be living at the decease of the widow in equal shares, and for the child and children of such of the testator's children as might then be dead, in equal shares; such grandchild or grandchildren to be entitled to the share which his, her, or their father or mother would have been entitled to if living:—Held, that the children of the testator took only contingent not vested interests. *Re Goodhue, Tovey* v. *Goodhue, Goodhue* v. *Tovey*, 19 Gr. 366.

A testator devised and bequeathed his real and personal estate upon trust for the benefit of his wife and children in certain proportions, and directed that in case of any of his children dying, leaving issue, his or her share should be equally divided amongst such issue, or should be divided by the will of such child so dying leaving issue as to such child might seem meet so soon as such issue should attain the full age of 21 years; but in default of any of the issue of his children attaining the age of 21 years then the whole of his property was to be applied to found an asylum for the blind and dumb of Toronto:—Held, that the interests of the devisees were not vested: that the children of the testator took only life interests with remainders to his grandchildren, and in default of the latter attaining 21 to the charity. *Re Charles, Fulton* v. *Whatmough*, 23 Gr. 610. But see *S. C.*, 1 O. R. 302, 10 A. R. 281.

*See*, also, *Scott* v. *Duncan*, 29 Gr. 496, *post* IV. 9; *Harrison* v. *Spencer*, 15 O. R. 692, and *Anderson* v. *Bell*, 29 Gr. 452, 8 A. R. 531, *post* IV. 12.

**Division at Death of Widow.**]—A testator devised his real and personal estate to his wife for life, for the benefit of herself and their children, and directed that upon her death his property should be equally divided among the children:—Held, that only such of the children as survived the widow were entitled to participate in such partition of the estate; and one of the sons, as personal representative of the testator, having purchased land with the moneys of the estate, and executed a declaration that he held the lands so purchased (except as to his own interest) in trust only for the other parties interested under the will, and afterwards died during the life of his mother:—Held, that his children were not entitled to any share in such land, the only persons entitled being such of his brothers and sisters as should survive their mother. *Baird* v. *Baird*, 26 Gr. 367.

**Division at Decease of Life Tenant.**]—A testator, by his will, "as touching his worldly estate," gave to his wife the use of all his personal property and of his farm and buildings for her support and the bringing up of his children,—"and at her decease the whole of the personal and real property to be equally divided between my six children:"—Held, that the shares of the children vested on the death of the testator. Baird v. Baird, 26 Gr. 367, explained and reconciled. Held, also, "worldly estate" includes not only the corpus of the testator's property, but the whole of his interest therein. *Town* v. *Borden*, 1 O. R. 327.

**Double Condition.**]—See *Re Metcalfe, Metcalfe* v. *Metcalfe*, 32 O. R. 103, *post* IV. 12.

**Gift Contained in Direction to Pay—***Postponement of Enjoyment.*]—A testator by his will directed that his estate should be divided upon his youngest child attaining the age of twenty-one years, the income of the estate in the meantime to be paid to the wife, for the benefit of herself and the children. The only gift was contained in the direction to pay and divide upon the arrival of the period of distribution:—Held, that the gift vested prior to the enjoyment of the corpus of the estate, which was only postponed in order to provide for the maintenance of the family. Held, also, that the gift vested in each child upon attaining the age of twenty-one and that no child who did not attain that age was intended to take a share of the corpus. *Re Douglas, Kinsey* v. *Douglas*, 22 O. R. 553.

**Gift Over upon Death before Named Period.**]—The testator, in the event of there being issue of the marriage of himself and his wife, devised half of his estate to such issue; if a son, on his attaining the age of twenty-five years; if a daughter, on her attaining the age of twenty-one years or marriage, "and in the event of there being no such issue . . born or if born not living within one year from my decease," then over. A few weeks after the testator's death his wife had a son, who lived only a few days:—Held, that the gift over must take effect, as there was no child living at the end of the year. *Wilson* v. *Beatty*, 2 A. R. 417.

**Income to One Devisee for Life**—*Corpus to Two Others.*]—A testator directed his real estate to be sold, and the proceeds to be divided among his children; but the share of one of them (J.) he directed to be placed at interest for his benefit, and the interest to be paid by the executors to J. every six months; and he directed that at the death of J. his share should be equally divided between A. and S., two of testator's other children:—Held, that the gift to A. and S. was vested, and not contingent; and that A. having assigned his interest, and died before J., the interest of A. went to his assignee. *Martin* v. *Leys*, 15 Gr. 114.

**Legacies Charged on Remainder.**]—A testator devised all his estate ("lands and chattels") to his mother for life, and after her death to her sister P. H. absolutely, charged with legacies to several persons. One of the legatees died after the testator, but before his mother, the tenant for life:—Held, that the legacy did not lapse, but was a vested interest in the legatee, and as such went to his personal representative. *Pollard* v. *Hodgson*, 22 Gr. 287.

**"Legal Personal Representatives."**]—Devise of land to executors and trustees upon trust to allow the testator's wife to use and occupy it during her life and after her death to sell and pay, among other legacies, a moiety of the purchase money to his son, with a provision that if any of the legatees died before their shares should be paid over, the share of the person so dying should be paid to his "legal personal representative." The son assigned his share to the plaintiff, and died before his mother and before payment:—Held, that the legacy vested in the son, by being given in the event of his death "as his share" to his executor and administrator as "legal personal representative," and that the plaintiff was entitled. *Kerr* v. *Smith*, 27 O. R. 409.

**Life Estate**—*Remainder — Trust — Conversion into Personalty—"Pay or Apply."*]—Devise of land to widow for life for the support of herself and testator's children, with power to sell, &c., as she might think proper for the general benefit and purposes of his estate; and upon her death, devise of such part of land as might remain undisposed of to trustees to stand seised and possessed of for the benefit of testator's children, in equal shares, and to pay to each his share at majority; with a provision that upon the death of any child before majority without issue, the trustees were to pay or apply his share to and among the survivors:—Held, that the estates of the children became equitably vested upon the death of the testator, subject to the mere powers for sale contained in the will; and so vested as realty, for there was no trust which required, and the use of the words "pay" and "pay or apply" did not work, a conversion of realty into personalty. *McDonell* v. *McDonell*, 24 O. R. 468.

**Mode of Payment.**]—S. by his will gave four legacies to his daughters in four different clauses, each worded as follows: "I bequeath to my daughter——the sum of five hundred dollars." By a subsequent clause he provided: "I also order that should any of my daughters die, their portion to be equally divided among the remaining ones." The legacies were charged on his lands. Directions were also given that after a certain farm which he had purchased but not paid for in his lifetime was paid for, and all his debts paid, his two sons E. and A. "shall each pay my daughter M. A. S., the sum of $50, which she shall receive together with the rent of lot 126 (from the executors), to apply on her legacy. The other three daughters to be paid in the same manner, E. in one year after M. A., &c." A direction was also given, that in case of any of the daughters dying their funeral expenses were to be paid out of their legacies, and in case of sickness their physician's bill to be paid from the same source:—Held, that these provisions and all others of a like kind in the will, had reference at most to the mode and time of payment of the legacies, and not to the substance of the gift, and that as the testator had not clearly and with certainty expressed the intention that the legacies should not vest until times of payment, the legacies were given in the ordinary way to vest upon the death of the testator. *Re Stevens, Stevens* v. *Stevens*, 14 O. R. 707.

**Partially Divested to let in Others of Class.**]—A testator gave to his wife certain real estate, and the interest of all his moneys and securities, and the value of one-third of his personal property, and after her death directed his money to be divided among his cousins, viz., the family of his uncle J. F., the family of J. S., the family of A. M., and the daughter of his aunt S.:—Held, that the gift of his money was to the cousins as a class, and that those living at his death took vested interests liable to be divested to the extent required to let in other cousins, of the families named, coming into existence before the death of the widow, the period of distribution; and that as the testator directed his wife to have one-third of the value of his personal property, which could only be ascertained by a sale, it was the duty of the executors to make such conversion; and as the gift was not to take effect till the death of the wife, the money the testator thereby meant to dispose of was not merely the money he possessed at the time of his death, but the money belonging to his estate at the time of his wife's death, when all the personal estate would be, or ought to be, in the shape of money. *Ferguson* v. *Stewart*, 22 Gr. 364.

A testator in a will containing inconsistent provisions devised certain real estate, after the death of his daughter, to his grandsons J. and F., "to hold as joint tenants, and not as tenants in common. To have and to hold the same to them during their joint lives, and to the survivor of them, and to their male heirs after their or either of their decease, and to their heirs and assigns for ever," and in case of the death of F. without leaving lawful issue, then the portion that would have belonged to him if living the testator gave to another grandson, H., for his life, and after his death to his heirs and assigns for ever. The will contained the following devise: "My will is, that after the decease of my daughter B. and after the decease of all my sons-in-law James Esmond, John Emery, and John Severs, and not before they are all deceased, then my will is, that the money and mortgages belonging to my estate is to be divided into equal parts and paid to my grandchildren, equally amongst all my grandchildren; but in case of the death of any of my grandchildren before the death of my daughter B., and before the death of all my sons-in-law leaving lawful issue, then the share that would have belonged to my grandchild if

living shall go and belong to the lawful issue of such deceased grandchild:" — Held, that the estate was not to be divided till twenty-one years from the death of the testator, and not then unless his daughter and three sons-in-law were dead; and that all the grandchildren living at his death took an immediately vested interest, subject to be divested pro tanto as the number of grandchildren should be increased by future births before the period of distribution. *Hellem* v. *Severs*, 24 Gr. 320.

A testator devised certain land to E. T. "during his and M. A.'s natural life, then and after that to be given to M. A.'s children to them, their heirs and assigns for ever:"—Held, that the children of M. A. in existence at the testator's death forthwith took vested interests, subject to be partially divested in favour of children of M. A. subsequently coming into existence during the life of M. A., and that the representatives of any child dying before the period of distribution were entitled to claim the share of that child. Paradis v. Campbell, 6 O. R. 632, distinguished. *Latta* v. *Lowry*, 11 O. R. 517.

See also, *Re Chandler*, 18 O. R. 105, *post* IV. 7.

**Payment at Named Periods.**]—A testator devised as follows: "My will is, that J. B., my son, shall have the homestead, and that the property be divided in the following manner: First, that all my just debts be paid out of the personal property, and then two-thirds of the whole to be given equally among my six boys as they come of age, and the other third to be equally divided among my seven girls as they come of age or marry, or as it can be raised from the estate; that the property be appraised after my death. My will is, that my wife, E. B., so long as she remains my widow, shall have two cows kept for her maintain, with meat and flour, and wood, and every other necessary for her age and maintenance, and a girl, should her have one left her, and doctor if necessary. The family to be maintained on the place with every necessary thing for their use. That the younger branch of the family receive a common education equal with the rest of the family:"—Held, that the testator's children took vested interests in the real estate on the death of the father. *Bigelow* v. *Bigelow*, 19 Gr. 549.

A testator devised his estate to trustees to invest for the benefit of his wife and children, and to give to each child on attaining 21 years a sum of $1,000; and further directed that when his youngest child should attain the age of 21 years the trustees were to invest a sufficient sum to yield to his widow $400 a year; and all the rest and residue of his real and personal estate remaining, after investing such sum, to be equally divided among his children, share and share alike:—Held, that each child on attaining 21 years took a vested interest in the residue of the estate. *Murphy* v. *Murphy*, 20 Gr. 575.

The testator bequeathed his money in the Bank of Commerce to "H. F., son of C. and A. F., when he becomes of age, to receive it in full with the interest. Should he not survive them, his next heir shall become inheriter:" — Held, a specific bequest of the money and interest, which vested presently. *Fulton* v. *Fulton*, 24 Gr. 422.



After directing a particular disposition for a period of seven years of the interest of moneys invested, the testator declared that afterwards "the yearly proceeds or interest, as it accrues, to be the property of my beloved niece A. F., who will cause to be paid out of said moneys to the English Church in Cornwall, $150; $50 per year for three years. Should she die, then the inheritance shall be in the person of the said A. F., so far as the proceeds are concerned, while the sum invested remains intact for ever. She can name any of her brothers or sisters who shall enjoy it after her:"—Held, that A. F. took presently an absolute interest in the fund. *Ib.*

**Payment after Life Estate.**] — The testator gave £1,500 by will to his widow, and in the event of her marrying again or dying intestate, this sum was at her death to be divided share and share alike among "my heirs (my brothers' children)." The widow did marry again, and a daughter of W., a brother of the testator, died after marriage but before the death of the widow, and so before the time for distribution:—Held, that the rule is in such a case, that a bequest in the form of a direction to pay, or to pay and divide at a future period, vests immediately if the payment be postponed for the convenience of the estate, or to let in some other interest; that the intention here was to let in the life estate of the widow, and that this was a share vested in the deceased child of W., which passed to her representatives. *Webster* v. *Leys*, 28 Gr. 475.

**Payment Postponed.**] — A. died leaving two sons and two daughters, and by her will directed that her property should be invested until C., her eldest son, should attain twenty-one; when it was to be divided into four equal shares, and he was to get the income of one share until he attained thirty, when he was to get his share out and out. The other three shares were to be invested, and the income arising from each share was to be accumulated until the remaining three children respectively attained twenty-one, when they were each to receive the annual income thereof, until the youngest (son), F., attained the age of thirty, when he was to get his share out and out, and thereafter the income of the remaining two shares was to be paid equally to the two daughters, C. and J., until one of them should die, and then one share was to be paid to the person or persons who would be entitled thereto under the Statute of Distributions in case such share was the property of the daughter so dying. C. attained twenty-one, married, and died before F. attained twenty-one, having made her will and left all her property to her husband for her children:—Held, that the proper effect of the will of A. was to vest in C.'s husband and children the one-fourth share that she was to draw the income of for life, and they were the persons entitled under the Statute of Distributions pertaining to the personal estate of married women who die intestate: R. S. O. 1877 c. 125, s. 25. *Arkell* v. *Roach*, 5 O. R. 699.

**Protection of Contingent Right.**] — D. was entitled to a legacy under a will provided he survived the testator's wife, and during her lifetime he brought a suit to protect his legacy against dissipation of the estate by the widow:—Held, that D. had more than a possibility or expectation of a future interest;

he had an existing contingent interest in the estate and was entitled to have the estate preserved that the legacy might be paid in case of the happening of the contingency on which it depended. *Duggan* v. *Duggan*, 17 S. C. R. 343.

**Remainder Charged with Legacies.**]—Testator devised land to his wife for life or widowhood, and after her death to her son J. M., on condition that he should pay certain sums to his other children, within three years from testator's death. Plaintiff in ejectment claimed title by sheriff's deed under an execution against J. M.:—Held, that the conditions of the will were conditions subsequent, and it was for defendant to shew that the estate had been divested by nonfulfilment thereof, not for the plaintiff to shew performance. (2) That J. M.'s estate was a vested remainder, and saleable under execution. *Lundy* v. *Maloney*, 11 C. P. 143.

**Residence.**]—Land was devised to the devisee after the death of her mother, the testator having directed in the event of the devisee not coming to live thereon that it should be rented, and the rent paid to the devisee, the land to come to her heirs afterwards:—Held, that these words did not operate to make the devise contingent, or to interfere with her estate in fee; and that under any circumstances the language was too indefinite, if the clause was not invalid, to create a forfeiture. *Hamilton* v. *McKellar*, 26 Gr. 110.

**Sale at Named Period.**] — A testator, after sundry bequests and devises, amongst others an estate for life in all his lands to his widow, devised the same lands to trustees upon trust, within two years after the death of his widow, to sell and dispose thereof; to execute deeds, and to give receipts, &c., and "after the sale of my said real estate I give and bequeath the proceeds of such sale or sales to my nephew G. B., son of my brother Joseph, and to the following children of my brother George, (naming them) equally share and share alike, male and female, without exception, when they respectively attain the age of twenty-one, to them their heirs and assigns; and in the event of any of my legatees dying before getting their share or portion as aforesaid leaving child or children, in such case the child or children of any so dying shall inherit the share of the deceased parent." One of the nephews died during the lifetime of the widow without issue:—Held, that there was no bequest of anything until the sale had taken place; that the bequest was one of personalty, not of realty; that no interest vested in such deceased nephew, as he did not live till the time of sale; that the gift was not a gift to a class; and there being no residuary clause in the will, that the share of such deceased nephew lapsed and passed to the next of kin of the testator, and not to the legatee of the nephew. *Bolton* v. *Bailey*, 26 Gr. 361.

A testator directed the trustees under his will to hold for accumulation the proceeds and income of his personal estate upon certain trusts. He also directed with reference to his real estate (with the exception of some land in Lindsay) that the income should, in the same manner as the income from his personal estate, form one fund until the death or second marriage of his widow and his youngest child should attain twenty-one, when the lands were to be sold and the proceeds held upon the same trusts as were declared concerning the personal estate, which were for the children named, in equal shares as tenants in common. The will contained a provision that in the event of the death of any of the children leaving issue, the share of the one so dying should be divided among the issue on their attaining twenty-one. As to the lands in Lindsay, the will contained a power to the trustees to grant building leases for terms not exceeding twenty-one years, and he directed that upon the happening of the double event above referred to the trustees should hold and apply the rents in the same manner and proportions as theretofore limited with reference to the accumulations, and the dividends and income derived therefrom. The will further provided that in default of any of his grandchildren attaining majority the proceeds of all his estate, real and personal, should be applied towards founding an institution in the city of Toronto for the dumb and blind:—Held, reversing 1 O. R. 362, that the children took absolute vested interests on the happening of the double event. *Re Charles, Fulton* v. *Whatmough*, 10 A. R. 281.

**Survivorship**—*Youngest Surviving Child Attaining Majority—Period of Distribution—Vesting of Shares.*]—A testator by his will gave his residuary estate to his executors upon trust to make provision for the support and maintenance of his family and for their education until his youngest surviving child should attain twenty-one years of age, when it was to be divided by the executors, by their setting apart one-third thereof for his widow, during her widowhood or until she remarried, and the remaining two-thirds to his surviving children in the proportion of four parts to the sons and three parts to the daughters; and after the death or marriage of his widow, the said one-third was to be divided between his surviving children in the above proportions. The widow survived the testator, but died before the youngest surviving child attained the age of twenty-one years: — Held, that the words of survivorship referred to the period of distribution, namely, when the youngest surviving child attained twenty-one years of age, and, therefore, only the children then living were entitled to share in the residue, and this applied as well to the shares to be taken by the children as to the share to be set apart for the widow. *Re Soules*, 30 O. R. 140.

**Time Fixed by Will.**] — A testator bequeathed £2,000 of bank stock, which stood in the name of trustees, to his daughter Jane, the interest of which was "to be allowed to remain, and no part thereof to be raised or drawn out of the bank until she comes of age, and that the amount of interest so accumulated should, from and after the aforesaid time, when she comes to age, be added to and form part of the aforesaid principal, and thenceforth be and remain an additional amount of bank stock; and that from and after the period when she shall come to age, as aforesaid, she may draw the amount of interest yearly, and every year, so arising from the before-mentioned sums during her own natural life, and that no part of the principal be raised by her at any time; but if she marry and have children to the number of four or less, that the said sum or principal shall be equally divided amongst them, and be at their disposal, and under their own control and management at any time they come to age,

after her death, but not sooner. But if she have no children, then after her decease the aforesaid principal be at the disposal of my son Robert, provided he be twenty-five years of age, or upwards, or to his heirs after him in case of his death; but if she shall have more children than four, then and in such case she shall be at liberty to will the aforesaid principal after her death to her children respectively in way and manner she may think proper." Jane married and had three children, all of whom died in infancy during the life of their mother:—Held, that no interest had ever vested in the children, and that on the death of their mother, the testator's son Robert became absolutely entitled to the fund. *Re Bank of Montreal and Imperial Statutes*, 26 Gr. 420.

**Time Fixed for Distribution.**]—Testator devised all the rents and profits of her estate to C., an unmarried daughter, so long as she remained unmarried, and upon her marriage the whole to be divided between her and her four sisters; but if she died unmarried the division was to be amongst her four sisters; and in case of either of these four dying before the marriage or death of C. the share of the one so dying was to go to the children. Then followed a provision that in case of the death of any of her said daughters, without leaving child or children, the share of such daughter was to be divided among the surviving daughters and the children of deceased daughters:—Held, reversing 26 Gr. 310, that it was the intention of the testatrix that there should be a distribution of the estate upon the marriage of C., and that on the event happening each of the daughters took an immediate absolute interest. *Munro v. Smart*, 4 A. R. 449.

**Trust Pending Minority** — *Condition Subsequent.*]—A testator left all his estate to his executors "in trust for the benefit of G. H. till he arrives at the full age of twenty-one, at which time I direct my said executors to give to G. H. all the said property," subject to the condition that "should the said G. H. at any time before coming of age go to live with his father, W. H., he is to be disinherited of the whole or any portion of my estate. And the said estate so forfeited is to be then given to my son J. D., his heirs and assigns." The testator died in 1875. In 1876, while G. H. was still a minor, being only eleven years old, J. D. and W. H. entered into an agreement under seal, whereby it was agreed that J. D. should support the widow of the testator, who was his mother and the mother-in-law of W. H., during her life, and should convert into money the estate of the testator, to which he was or should be entitled under the will, and pay a moiety of the proceeds to W. H. in trust for the support of G. H. till he should attain twenty-one, the residue to be then paid by W. H. to G. H. Pursuant to this agreement G. H. forthwith resided with W. H. till he was seventeen years of age, when this action was brought by the executors for a declaration of the rights of G. H., J. D., and W. H. under the will:—Held, that G. H. took a vested interest in the property under the will: that the condition was a condition subsequent, and was void as being "against law;" and G. H. was entitled to all the estate given to him by the will, notwithstanding the agreement of 1875, which could not be regarded as a family compromise, or for the benefit of the infant. *Clarke v. Darraugh*, 5 O. R. 140.

**Vested Subject to Being Divested.**]—The testator expressed a desire "to have retained for my children my property on Yonge street; and for this purpose I desire that the proceeds of my life insurance be applied in the purchase for my daughters' benefit of the incumbrances of that property. Under any circumstances, I desire that all my other lands be sold. . . I desire that the proceeds of my estate and rents of my Yonge street property be applied . . in the support, maintenance, and education of my two daughters, and in paying the incumbrances on the Yonge street property. After paying the necessary charges, my wish is, that the interest of my estate be applied by my trustees in the support of my children. Should one of my said two daughters die, or become a Roman Catholic, her share to go to the other, and should both die without issue, or become Roman Catholics, then my estate is to go to my sister L. and her heirs . . I direct that my trustees shall divide the proceeds of my estate equally between my two daughters, allowing each, during their minority, or until the marriage of one or other of them, a sum sufficient to maintain and educate them, and after they come of age an equal share of all proceeds to be secured and paid them, free from all control of any husband or any other person." There were only these two daughters, children of the testator, and both attained the age of twenty-one years without either having become a Roman Catholic:—Held, that the interests taken by the daughters were vested, though subject to be divested upon the happening of the events mentioned before twenty-one; and that at that time the shares vested absolutely in them: so that L. took nothing under the will. *Griffith v. Griffith*, 29 Gr. 145.

The testator made a residuary devise of real estate to his executors, in trust for his four children, "until they, or the survivor or survivors of them, shall have attained the age of twenty-one years, said real estate to be divided among the said four children, share and share alike, and in case any of them shall have died, leaving issue, the said issue shall take the share which otherwise would have gone to his, her or their parents." The will further directed that the four children of the testator should be maintained and educated out of the income of such property during their minority, and the surplus invested during such minority, and upon the youngest, or the survivor or survivors of them, attaining twenty-one the personal estate divided share and share alike. And upon any of the children attaining twenty-one, the executors were directed to advance such sum as might be necessary to establish such child in business, &c. And all the residue of his personal estate was to be held by his executors and divided at the same time as the lands:—Held, affirming 14 O. R. 13, that one of the sons, who had attained twenty-one, was not entitled to maintenance out of the estate. Held, also, varying 14 O. R. 13, that the four children took vested and not contingent interests in the residuary real and personal estates, the interest in the real estate being liable to be defeated as to any one or more of them, upon the condition subsequent of death before partition leaving issue, in which event the share of the deceased would go over to the issue. *Ryan v. Cooley*, 15 A. R. 379.

*See*, also, sub-head *Lapse and Mode of Distribution and Payment*, *post*, IV. 12.

*6. Description of Devisees and Property.*

**Agreement to Convey**—*Ambiguous Reference to Ownership.*]—B. owning the south half of lot two, agreed under seal in 1859 with defendant, his son, to let him have the east twenty acres, in consideration of work done, and to convey it so soon as defendant should get it surveyed. In 1860, he devised to his wife, for life, all that part of lot two, "now owned by me," and to defendant in fee "twenty acres of the east side of lot two, which I do now own." The remainder of his estate, at his wife's death, he devised to his daughters, the plaintiffs, on condition of their supporting their brother, E., who was not in his right mind. It appeared that two and a-half acres of the lot had been sold by B., but whether conveyed or not was not shewn, and that after the agreement defendant and the others had continued to live upon the lot as one family. The mother having died, the daughters claimed the twenty acres west of the easterly twenty acres, while the defendant contended that this passed under the devise to him, not the east twenty acres, of which he was already entitled to a conveyance under the agreement:—Held, that parol evidence that the twenty acres intended to be devised to defendant was the land in dispute was inadmissible. (2) That the plaintiffs were entitled to such land, for defendant was wrong in his contention, and the devise to him was of the land which the testator had agreed to convey, but had not conveyed to him. *O'Day* v. *Black*, 31 U. C. R. 38.

**Ambiguous Description of Land**—*Erroneous Description of Legatee.*]—A testator by his will directed his executors, "hereinafter named," to pay his debts and funeral expenses; and then devised the residue as follows: To his son David, "lot 16, con. 7, N. H., real and personal property;" the said David to pay to each of his daughters $500, namely, Janet, Mary, and Agnes in two years after his death; Margaret and Ellen at twenty-five, and Christina to remain on the farm, the said sum to be given her when she became of age. No executors were named. Parol evidence was admitted to shew that the land mentioned was in the township of Morris, that "N. H." meant the north half, and that it was the only land owned by the testator; parol evidence was also admitted to shew that Christina, though spoken of as a minor, was twenty-three years old when the will was made, and that she was of delicate constitution and of weak mind:—Held, that there was an effectual disposition of the real and personal estate: that to a disposition of personal estate executors need not be expressly named, but may appear by implication, and that David was executor according to the tenor: that as to the land the parol evidence, which was properly admissible, cleared up any ambiguity as to the description: and the parol evidence also shewed that as regarded the provision in favour of Christina, she must be treated as an adult: and that the provision for her would include maintenance. *Young* v. *Purvis*, 11 O. R. 597.

**Arbitrary Description by Reference to Fence.**]—A. devised to defendant "that 100 acres which he now occupies, being No. 26 only, and that he is not to occupy or use that part or strip of said lot on the east side of the stone fence which is now a divisional line between his farm and mine, and that that stone fence is to be considered a boundary line, and to be continued all through between the two farms." The stone fence, it appeared, if continued, would cross the division line between 25 and 26, and cut off a triangular piece of 25 at the north-west corner of that lot:—Held, that defendant was entitled to that piece, being on the west side of the stone fence, although not part of 26. *McDonald* v. *McPhail*, 17 U. C. R. 299.

**Bequest of Specific Fund**—*Fund Larger than Amount Named.*]—A testatrix to whom a debt of £2,900 was owing by the E. estate, by her will bequeathed as follows: "The two hundred and ninety pounds due from the E. estate . . and moneys in . . to be used by my executors in payment of debts . . the balance thereof to be equally divided among the daughters of . . :"—Held, that only the sum of money mentioned in the will and not the whole amount due by the E. estate passed by the clause in question. *Re Sherlock*, 28 O. R. 638.

**Cancellation of Specific Mortgage.**]—J. S. directed his executors to cancel and entirely release the indebtedness of his son W. S. upon a mortgage made by him to the testator, such release to operate and take effect immediately on and from the testator's death. W. S. was also indebted to the testator on a promissory note and for goods, which, together with interest, amounted to upwards of $3,740. This amount the executors claimed they were entitled to demand payment of before they could be called upon to discharge the mortgage, but this contention was held untenable. *Archer* v. *Severn*, 12 O. R. 615, 14 A. R. 723.

**Chattels**—*Pecuniary Bequests.*]—The bequest of a testator's chattels, when unrestricted either expressly or by the context of the will, covers all the personal estate; but where a testator, after directing his executors to pay all his just debts and funeral expenses out of his personal property, bequeathed all his chattel property to his son, and then made sundry pecuniary bequests payable out of his personal property, and it appeared that after deducting the chattels, i.e., furniture, farming implements, and movable goods of a like nature, paying all the debts, and satisfying the legacies, there still remained a balance of personal estate:—Held, that as to such balance there was an intestacy. *Peterson* v. *Kerr*, 25 Gr. 583.

**Codicil Aiding Will.**]—C. died, leaving a will, which, after disposing of certain real property, proceeded as follows: "all the rest and residue of my real as well as personal estate, which I may die seised or possessed of, in reversion, remainder, or contingency, I will, devise, and bequeath unto my beloved wife Catharine, in trust to sell or dispose of any part or parcel thereof for the payment of my just debts, and to use and enjoy in such a manner as in her prudence and discretion will be most conducive to her own comfort and that of her children and grandchildren, during the term of her natural life," &c. Afterwards the testator added a codicil, referring to certain land obtained by him since the execution of the will, and bequeathing the same as follows: "I do now, therefore, by this codicil, to this my last will annexed,

give and devise the said parcel or tract of land, as it is in the same deed and surrender more particularly described, to the same persons, my beloved wife and children, to whom I have devised all the rest and residue of my real estate in my will hereunto annexed," adding the usual words of publication:—Held, that the codicil, referring expressly to the will, must be looked upon as forming part of it; and that, taking the two together, the will might be construed to include all the testator's lands of which he should die seised or possessed, and not only those in reversion, remainder or contingency. *Doe d. Dickson* v. *Gross*, 9 U. C. R. 580.

**Compensation Payable on Expropriation.**]—The tenant for life conveyed to the railway in 1871. The person entitled to the reversion after the life estate died in 1871 intestate, and I. H. Y., his sole heiress-at-law, died in 1884, leaving a will, in which she devised to the plaintiff a specific parcel of land, including the part conveyed to the railway company:—Held, that this will did not pass to the plaintiff the right to receive the compensation money, and that as to it I. H. Y. died intestate and it descended to her heirs-at-law, of whom the plaintiff was one; and the plaintiff was allowed to amend by adding the other heirs-at-law as parties. *Young* v. *Midland R. W. Co.*, 16 O. R. 738.

**Crops.**]—Growing crops on the land of a testator may or may not be assets according to the contents of the will, which was not in evidence. Under ordinary circumstances they go to the executor, and not to the heir, but if the land on which the crops were growing was devised by the will, that would in general make the crops go with the land. *Fisher* v. *Trueman*, 10 U. C. R. 617.

**Ejusdem Generis.**]—A testator, after bequeathing an annuity to his wife, proceeded: "I also give and bequeath to my said wife all my household furniture, goods, and chattels, of what nature or kind soever, and wheresoever situate; to have and to hold to her, my said wife, her heirs and assigns, for ever;" and in subsequent clauses devised real property to different persons, and for different estates, and bequeathed annuities to different persons, charging them on his estate generally; and disposed of his residuary real and personal estate:—Held, that though the bequest to the wife was comprehensive enough to pass the whole of testator's personal estate, and not inconsistent with the gift to her of an annuity, yet the subsequent bequests restricted the application of the bequest to personalty ejusdem generis with the other property bequeathed to her; and the residuary bequest of personalty having failed through uncertainty as to the objects of testator's bounty:—Held, that the wife was not entitled to it under the words of the bequest to her. *Davidson* v. *Boomer*, 15 Gr. 1.

"To R. O. K. I give my carpet, blankets, and whatever else I may have at his house:"—Held, that mortgages and a bank deposit receipt, which were in the house, did not pass. *Smith* v. *Knight*, 18 Gr. 492.

**Elliptical Sentence.**]—A testator, after declaring the will in question to be his last will and after revoking all previous wills, proceeded thus: "It is my will that as to all my estate both real and personal my wife Elizabeth, and I hereby appoint my said wife Elizabeth to be executrix of this my will:"—Held, that the intention to devise the estate to the wife might fairly be gathered from this language. *May* v. *Logie*, 27 O. R. 501, 23 A. R. 785. See *S. C.*, in supreme court, 27 S. C. R. 443.

**Estate.**]—Testator describing himself as "of the township of S., south half of lot 24, tenth concession," devised as follows: "all of my estate, goods and chattels, I give and bequeath to my dear and beloved wife, whom I appoint sole executrix," &c.:—Held, that the word "estate" clearly passed testator's land, notwithstanding its connection with the personalty. *McCabe* v. *McCabe*, 22 U. C. R. 378.

**Falsa Demonstratio**—*Mistake in Quantity.*]—Held, that "200 acres of land, the west half of lot No. 14," was falsa demonstratio of the west half, the testator having referred to the whole lot as being 200 acres in a subsequent part of the will. *Holtby* v. *Wilkinson*, 28 Gr. 550.

——— *Lot Described by Wrong Concession.*]—A testator, owning lots 6 and 8 in the first concession, devised the same in his will in two separate devises as "my property known as lot . . second concession," &c.:—Held, that his lots in the first concession passed. *Hickey* v. *Hickey*, 20 O. R. 371.

Testator by will, after leaving different lands to his wife and other children, devised to his daughter Maria, "all those certain lots of lands being Nos. 6, 7, and also No. 8, together with the half of No. 7, in the 4th concession in the township of Oxford." He then devised to his executors 800 acres for the purpose of educating his children, and accomplishing building as might be thought necessary; and the will proceeded thus: "I give and bequeath to my son J. C. all and singular residue and remainder to now or may have at my decease, together with that certain tracts of land," &c., specifying 900 acres. No personal property had been previously mentioned. It was proved that the testator did not own a lot numbered 6 in any concession of Oxford; or lots 6, 7, or 8 in the fourth; but he did own 7 and 8 in the sixth, and 7 in the seventh and eighth concessions. The question was, whether lot 7 in the eighth concession was included in the devise to Maria, or passed under the residuary clause:—Held, that although it seemed most probable that the testator intended to give to Maria lot 7 in the sixth, seventh, and eighth concessions, yet the will could not be so read; and that the lot passed to J. under the residuary devise, which, notwithstanding its obscurity, must be taken to apply to all lands not before disposed of. *Campbell* v. *Campbell*, 14 U. C. R. 17.

A testator by his will devised to his son G. "the property I may die possessed of in the village of M., also lot 28 in the tenth concession of B." In the early part of the will he had used the words "wishing to dispose of my worldly property." The testator did not own lot 28, and the only land he did own in the tenth concession of B. was a part of lot 29. The will contained no residuary devise:—Held, that the part of lot 29 owned by the testator did not pass by the will to the son. *Re Bain and Leslie*, 25 O. R. 136.

——— *Lot Described by Wrong Number.*]—A testator who was the owner of the south-west quarter of lot 12 in the fourth concession and of lot 12 in the fifth concession of a township and of no other real estate, after providing for payment of his debts and funeral expenses by his executors, declared that "the residue of my estate which shall not be required for such purposes I give, devise and bequeath as follows," and then devised "the south-westerly quarter of lot 11, concession four" and lot 12 in the fifth concession:—Held, that the word "eleven" might be rejected as falsa demonstratio and the devise read as if it were "the residue of my real estate in the fourth concession." Doe d. Lowry v. Grant, 7 U. C. R. 125, applied and considered. *Dogle* v. *Nagle*, 24 A. R. 162.

A testator devised to certain parties "the 18 acres, more or less, that was deeded to me by the late Henry Buchner, senior, reference being had to the said deed for description." A deed conveying that quantity of land to the testator was proved, but he had sold it long before making his will. He held, however, at the date of his will, about twenty-one acres, under another deed from one Henry Buck, which he usually called eighteen acres, and which was the subject of dispute in the action:—Held, that the devise was void for uncertainty. *Buchner* v. *Buchner*, 6 C. P. 314.

In 1845, K., who then resided in Toronto, went to reside in Buffalo, visiting Toronto once or twice every year. In 1862, he purchased lots 1 and 2 in the township of Mono, in the county of Simcoe. In 1863 Orangeville was incorporated as a village, and annexed to the county of Wellington, lot No. 1 being detached from Mono, and included in Orangeville. In 1866 K. made his will, wherein, amongst other devises, he made a devise of "all my real estate situated in the township of Mono, in the county of Simcoe," &c.:—Held, that lot 2, which exactly filled the description of the devise, alone passed thereunder; that parol evidence was inadmissible to shew that the testator intended to include lot 1; and that even if such evidence were admissible, the evidence, set out in the case, was insufficient for the purpose. *Lawrence* v. *Ketchum*, 28 C. P. 406, 4 A. R. 92.

**General Devise**—*Erroneous Specific Description.*]—Where a testator, after devising to his wife for life all his real estate, stated the lots of land of which it was composed, and, amongst others, the front half of a lot, of which only the rear half belonged to him:—Held, that the wife took the rear half. *Doe d. Taylor* v. *Paterson*, 3 O. S. 497.

Held, upon the following will: "Know ye, that I, A. B., do bequeath all and every part of my real property situated in the township of Huntley, viz., north half 26, sixth concession," &c.: that parol evidence was permissible to shew that the testator did not own 26, but 22 in the sixth concession of Huntley, and that (it appearing upon such evidence that lot 26 had been inserted by mistake for lot 22,) lot 22 would pass under the will. *Doe d. Lowry* v. *Grant*, 7 U. C. R. 125.

The will devised: "My farm being lot No. 15 in the first concession of the township of Sidney." This farm really consisted of this lot and the corresponding lot in the broken front concession:—Held, that the devise covered both lots. *Smith* v. *Bonnisteel*, 13 Gr. 29.

A testatrix by her will devised as follows: "I give, devise, and bequeath to my husband all my real estate, comprised of the north-west quarter of lot No. 10 in the sixth concession of the township of Mersea:" and it appeared that she had never owned the said lands, but had owned and lived upon the north-west quarter of lot 10 in the fifth concession of the said township. There was no residuary devise:—Held, that as the will, taken apart from the erroneous description, contained a gift or devise of all the real estate of the testatrix, which would, if taken alone, be a sufficient description for the purpose of passing the lands really owned by her, the part of the description referring to lot 10 in concession six, might be rejected as falsa demonstratio, and that the lands really owned by the testatrix passed to the devisee. Hickey v. Stover, 11 O. R. 106; Re Shaver, 6 O. R. 312; Summers v. Summers, 5 O. R. 110, distinguished. *Wright* v. *Collings*, 16 O. R. 182.

**Homestead** — *Intention.*]—"My will is that J. B., my son, shall have the homestead," &c. The evidence shewed that the property of which testator was seised in fee at the time of his death consisted of the north-easterly 50 acres of lot number 12 in the second concession of East Flamborough, and of 150 acres, part of lot 13 in the same concession. The testator lived on the last mentioned farm. Appurtenant to and used with his dwelling house there were a yard, garden, orchard, carriage house, and lane, containing in all about four acres of land. There were other provisions tending to shew that testator intended to treat all his sons equally:—Held, that the son J. B. was entitled to four acres only, not the 150 acres on which the dwelling house was situated. *Bigelow* v. *Bigelow*, 19 Gr. 549.

**Household Furniture**—*Residue.*]—The testator directed all his just debts, &c., to be paid; and devised and bequeathed to his wife for life, his real estate, and his "household furniture, plate, linen, and china." After her decease, he gave the proceeds of the sale of the land, and also all and singular the residue of his personal estate that might be in her possession at the time of her decease, to other parties:—Held, that there was an intestacy as to all the personalty not specifically bequeathed to the wife. *Holmes* v. *Wolfe*, 26 Gr. 228.

**Imperfect Description** — "*Methodist Church.*"]—A gift or devise will not fail for a misdescription or an imperfect or inaccurate description of a legatee or devisee, if the description is sufficient to designate with reasonable certainty the object of the testator's bounty. Therefore the Methodist Church may take under a gift to "The Missionary Society of the Methodist Church in Canada." *Tyrrell* v. *Senior*, 20 A. R. 156.

**Incomplete Description.**] — The land claimed was in the township of East Flamborough, and the will through which plaintiff claimed devised all the testator's land in "Flamborough." There were two townships, called respectively East and West Flamborough, and none called Flamborough; but it was proved that testator owned this land, and not shewn that he had any other land in

either East or West Flamborough:—Held, that this land might pass by the devise. *Nicholson* v. *Burkholder*, 21 U. C. R. 108.

**Intention to Dispose of Whole Estate**—*Specific Sums Named.*]—A testator commenced by saying that he disposed of the whole of his estate, and then gave $2,000 to one person and $500 to another person; his estate in fact being greatly in excess of these two amounts:—Held, that as to such excess there was an intestacy; the rule as to cases of imperfect enumeration not applying to cases where a sum of money is named in the will. *McLennan* v. *Wishart, In re Nelson*, 14 Gr. 160, 512.

The testator left two unsigned and undated scraps of paper, on one of which he had written, "I leave the whole of my personal property (on one line) to William Brown, Townhead, Arbuthnot, by Fordoun, Scotland, $2,000;" and on the second scrap of paper he had written, "I give Peter Cran $500 for himself," which were admitted to probate as the last will of the deceased:—Held, that there was an intestacy as to the residue of the personalty over and above the $2,500 mentioned. *Ib.*

**Land Facing on Two Streets.**]—In 1886 a testator by his will devised to his brother "all that real estate now owned by me, being No. 32 on the north side of A. street, for and during his life," and afterwards over, and then made a general residuary devise of the rest of his land to his sisters. It appeared that in 1867 the testator purchased the land in question, with a frontage of 26 feet on A. street, by a depth of 200 feet to a lane twenty feet wide, which lane was in 1882 converted into P. street. At the time of purchase there was a house facing on A. street known as No. 32, and also one facing on the lane, afterwards known as No. 21 P. street, occupied as distinct tenements, and each with a fence in the rear, but with certain ground between the two fences used to some extent in common:—Held, that the specific devise was confined to No. 32 A. street, and the lands appertaining to it, to the exclusion of the house on P. street and the lands appertaining to it, which passed under the residuary devise. *Scanlon* v. *Scanlon*, 22 O. R. 91.

**Land not Owned by Testator**—*Application to Land Owned by Testator.*]—A testator purporting to devise "all his real and personal estate," gave to one son the south fifty acres of lot 21, and to another the north fifty acres of the same lot. The will contained no residuary devise and no other gift of land. The testator died seised of the east half of lot 21, 100 acres, but had no interest in the west half:—Held, that the one son took the south twenty-five acres of the east half of the lot and the other the north twenty-five acres, and they took together the central fifty acres as tenants in common. *McFadyen* v. *McFadyen*, 27 O. R. 598.

**Lane.**]—A testator devised part of lot 17 to his son C., and part of lot 18, adjoining it to the east, to his son W., adding that, in order to give C. free access to and from the side road on the east side of lot 18, the lane or road "now running across" the land devised to W., "commencing at my gate on said side road," and in width half a chain, to the west limit of 18, should be kept open for the free use of his said sons, with a proviso that should the whole estate bequeathed to them come into the possession of any one person, this provision, "in reference to the continuance of said lane or road," should become void:—Held, that the testator evidently intended that the lane should be continued as then existing and used; and that the defendant, claiming under C., had no right to remove the gate on the side road. *Vansickle* v. *Kelly*, 42 U. C. R. 274.

**Mistake in Description of Land**—*Evidence to Explain.*] — See *Lawrence* v. *Ketchum*, 28 C. P. 406, 4 A. R. 92; *Summers* v. *Summers*, 5 O. R. 110; *Re Shaver*, 6 O. R. 312; *Hickey* v. *Stover*, 11 O. R. 106, *ante* IV. 1.

**Mistake in Name of Donee.**]—A testator bequeathed a sum of money to his "sister Anastasia Cummings." He had only two sisters, Catharine Kelly, to whom he bequeathed a like sum, by her proper name, and Maria Cummins:—Held, that the gift took effect in favour of Maria Cummins. Held, also, that a declaration to that effect could properly be made upon an originating notice under rule 938. In re Sherlock, 18 P. R. 6, followed. *Re Whitty*, 30 O. R. 300.

**Mortgage.**]—An assignment under seal, annexed to a mortgage, stated that the assignor "bargained, sold, assigned, and transferred" unto the assignee, "his heirs and assigns, the annexed mortgage, and all the right, title, and interest therein," of the assignor, "to have and to hold the same unto the said, &c., his heirs and assigns, to his and their sole use forever:"—Held, that the land, which was the subject of the mortgage, did not pass by these words; but held, that had the instrument been a devise, instead of a deed operating inter vivos, the land would have passed under the term "mortgage." *Auston* v. *Boulton*, 16 C. P. 318.

——— *Residue.*] — After a bequest by a mortgagee of several legacies, the will proceeded: "the above mentioned legacies to became due and payable in money or securities twelve months after my decease, and each legatee to be entitled to the interest and profits on their respective legacies from the time of my decease. Lastly, I give and bequeath to my two nephews A. and B. the residue and remainder of my property, real and personal, after paying the above named legacies, to be divided equally among them, share and share alike"—Held, to vest the mortgage estate in the nephews, the devisees. *Doe d. Helliwell* v. *Hugill*, 6 O. S. 241.

——— *Interest.*]—A testator bequeathed his personal estate to his executors, in trust for the purposes of his will, and gave to them, in the quality of trustees, for the use of his son for life, and after his death for the use of his son's children, "the sum of £1,500, due to me by C., and secured by a certain mortgage" &c.:—Held, that this passed the principal mortgage money, (£1,500) but did not pass the interest then due or which would fall due before the testator's decease. Held, also, that the legatee was entitled to claim more than six years' arrears of interest, the trust being express, and the Statute of Limitations therefore not applying to the case. *Loring* v. *Loring*, 12 Gr. 374.

**Part of House on Devised Land.**]—In 1883, M. W. being seised of certain lands, conveyed half thereof to G. W. in fee, describing the same by metes and bounds, and afterwards died, having devised the other half to M. There was a house upon the lands in question so situate that half of it was on the portion granted to G. W., and half on the portion devised to M. No specific mention of the house was made either in the deed to G. W. or in the will. M. now commenced, in defiance of G. W.'s protests, to pull down the half of the house situate on the land devised to her, and G. W. applied in the present action for an injunction to restrain the same:—Held, that he was entitled to the relief claimed. *Wray* v. *Morrison*, 9 O. R. 180.

**Plate, Books, Furniture, &c.**]—A testator, after making sundry devises and bequests, proceeded: "and I further leave to my son G., all my plate and plated goods, books, and pictures, together with all accounts, papers, and personal effects that may be in my possession at the time of my death, always excepting household furniture, beds, bedding, and linen and these I leave to my daughters, (naming them) to be divided, share and share alike; . . . and I further leave, give, and bequeath all my horses, cattle, cows, sheep, and farming implements to my two daughters," being those already named:—Held, that the bequests to the son and daughters were specific; and that the residue, if any, was not disposed of. *McKidd* v. *Brown*, 5 Gr. 633.

**"Possibility"**—*Land.*]—Held, that the word "possibility" in R. S. O. 1877 c. 106, s. 2, includes a "right of entry for condition broken," mentioned in s. 10, and is more extensive than the latter phrase; and might therefore be a subject of a devise, and is covered by the general name of "land." *In re Melville*, 11 O. R. 626.

Held, that a "condition of re-entry," or condition strictly so called, as distinguished from a "conditional limitation," is a means by which an estate or interest is prematurely defeated and determined, and no other estate created in its room. *Ib.*

**Poor of County**—*Town Detached from County for Municipal Purposes only—Right of Residents of Town to Participate.*]—The testatrix by her will gave the residue of her estate in trust for a certain class of the poor of a county, "who must have been bonâ fide residents of the said county before becoming destitute or needy." A town in the county originally formed part thereof for all purposes, but was in 1859, under the provisions of the Municipal Act then in force, detached from the county for municipal purposes only:—Held, in the absence of anything in the context of the will clearly to the contrary, that residents of the town coming within the class referred to in the bequest were included therein. *Steele* v. *Grover*, 26 O. R. 92.

**"Property"**—*Estate.*]—Either of the words "property" or "estate" is sufficient to pass realty under a will. *Cameron* v. *Harper*, 21 S. C. R. 273.

**"Properties, Moneys, and Personal Effects"**—*Possession.*]—A testator by his will provided as follows: "I will and bequeath to . . . C. H. all properties moneys, and personal effects now in my possession, for her own and sole use, to be disposed of as she may see proper:"—Held, that the devise passed real estate. Held, also, that real estate in the occupation of a tenant at the time of the testator's death, was in the possession of the testator. *Re Hargan and Fritzinger*, 16 O. R. 28.

**Rooms Projecting over Devised Land.**]—A testatrix, being the owner of certain lands and premises upon which a block of buildings was erected, devised the property in two parcels, describing the buildings thereon as being in the occupation of certain tenants. The description of one parcel included an alley-way running through the centre of the block, but the rooms built over the arch of the alley-way were structurally a part of, and were used with a store that formed part of the other parcel, to which a right of way over the alley-way was given:—Held, affirming 16 O. R. 152, that the presumption "cujus est solum ejus est usque ad cœlum" is a rebuttable one, and that under the circumstances the rooms in question did not pass with the land. *Potts* v. *Boivine*, 16 A. R. 191.

**Special Share.**]—A testator directed that one of his sons, W. R., should be educated for a learned profession, medicine, law or the church, over and above a child's share, and if brought up to a trade he was to receive £250 over and above a child's share. W. R. did not receive a professional education, but entered into the employment of a bank as a clerk:—Held, that he was entitled to receive £250 over and above a child's share. *Travers* v. *Gustin*, 20 Gr. 107.

**Special Words.**]—A testator devised, "east half of lot number seven, together with the broken front of same, with forty acres of lot number eight, west side, situate in the first concession, township of Kingston," and to his daughter S. M., "east half of lot number eight, with the whole of the broken front of the same, as also sixty acres of the west half of said lot situate in the first concession of the township of Kingston:"—Held, that the whole broken front of lot eight passed to S. M., and not merely the broken front in front of the east half. *Hawley* v. *Miller*, 12 C. P. 70.

**Specific Descriptions**—*Portions Previously Sold.*]—A. McL. S. being the owner of a 200 acre lot, and having disposed of twelve acres at the north-east corner and five acres in the centre portion in his lifetime, by his will devised as follows: "First, I devise and bequeath unto W. A. S. the easterly part of lot No. 6, . . . being described as one-third part of the length and the entire width, measuring westward from the easterly limit of the said lot No 6, and containing sixty-six and two-third acres, more or less. Second, I devise and bequeath unto H. D. S. the middle part of my said lot No. 6, in . . . being described as one-third part of the length and the entire width, measuring westward from the land hereinbefore devised to W. A. S. of the said lot No. 6, and containing sixty-six and two-third acres more or less. Third, I devise and bequeath to my daughter A., the wife of J. B., of . . . the remaining one-third part of my said lot No. 6 in . . . being described as one-third of the length and the entire width of the said lot No. 6, measuring westward from the land hereinbefore devised to H. D. S., and extending to the west-

erly limit of said lot No. 6, containing by admeasurement sixty-six and two-third acres more or less. To have and to hold the said hereby devised land and premises, unto and for the use of my said daughter A., for and during the term of her natural life, with remainder thereof on her decease to the children of her body, and their heirs and assigns for ever." A codicil provided as follows: "I do hereby alter my said will, so that if my said daughter A., the wife of J. B., die without issue, or should outlive her issue, the remainder thereof shall revert to my own heirs, share and share alike:"—Held, that each of the three devisees took under the will according to the measurements given, that is to say, one-third part of the length of the lot, and the whole width of it, and only such portion of his or her respective parcel thus described, as the testator had title to and power to give, and that it could not be held that what land the testator had was to be equally divided amongst his three children. *Saunders* v. *Breakie*, 5 O. R. 603.

**Specific Quantity**—*General Location.*]—W. devised to his daughter T. six acres "off the north-west portion of lot 20 in the third concession of Haldimand," to be chosen by his executors, and "to extend twenty rods in width joining the northern line of said lot 20, and extending as far south as will comprise six acres aforesaid." One B. owned a strip of land at the north-west corner of the lot, extending twenty rods in width to the east, the whole lot being eighty rods wide; and this strip had for forty years been enclosed and occupied. The executors chose the six acres for T. adjoining this, and extending twenty rods east. Afterwards, on a survey made under C. S. U. C. c. 93, s. 11, the north-west angle of lot 20 was placed four rods further west; and defendants, who owned the remainder of lot 20, then contended that T. must lose that width off the east side of her strip, as the devise restricted her to the "north-west portion" of the lot, and she could not therefore come beyond the centre into the north-east part, although she could not otherwise get more than sixteen rods in width, B. having acquired a title by possession, so that his eastern fence could not be moved:—Held, however, that the intention of the testator was to give six acres, twenty rods in width along the northern boundary of the lot, without reference to the strict meaning of the words "north-west portion;" that the executors had therefore chosen the land in accordance with the will; and that defendants, having trespassed thereon, were liable. *Tucker* v. *Phillips*, 24 U. C. R. 626.

**Two Devisees Answering Description.**]—The testatrix devised and bequeathed all her real and personal estate (except her ready money) to one M. for life; and upon the death of M., she directed that all her real and personal estate should be sold; and the proceeds thereof, together with all her other moneys, she bequeathed to (among others) the sons and daughter of her sister M. A. There were at the date of the will two daughters of M. A. living:—Held, that parol evidence was admissible to shew that the testatrix intended to benefit only one of the daughters; and that the evidence shewed that she intended to exclude the other. Held, also, that the division of the ready money was postponed until the death of M., the tenant for life. *McIntosh* v. *Bessey*, 26 Gr. 496.

**Two Legatees Answering Description.**]—G. W. by his will bequeathed $1,000 to "The Protestant Orphans' Home for Boys in Toronto." The evidence shewed that there were two institutions, either of which might have been intended by the testator:—Held, that the legacy should be divided between them. *Williams* v. *Roy*, 9 O. R. 534.

**Unintentional Omission** — *Words Read into Will.*] — A testator, being possessed of personalty and realty, bequeathed pecuniary legacies to a much greater amount than the personalty left by him, and then bequeathed to his "executors . . . in trust to dispose thereof to best advantage, in trust to be divided and paid over to my children in the sums mentioned, and as soon as may be agreeable to the terms and conditions of certain mortgages and leases now standing against the property," without mentioning any property:—Held, that the words "my property," presumably unintentionally omitted, should be read into the will. *Colvin* v. *Colvin*, 22 O. R. 142.

*See*, also, the sub-head *Special Words and Expressions, post*, IV. 19.

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*7. Estate for Life.*

**Devise of Proceeds for Life.**]—A devise "of all the proceeds" issuing from a farm, for life, gives an estate for life in the farm by implication, especially where the devisee over in fee is entitled to the cattle and effects on the farm, by the express words of the devise, only on the death of the devisee for life. *Brennan* v. *Munro*, 6 O. S. 92.

**Devise to Son "for his Children."**]—A testator by his will, made in 1832, gave certain lands to his son J. D., "for his children," adding, in a concluding paragraph, "any other lands I may now or hereafter have I may add:"—Held, that the devise carried only a life estate; and that the concluding words had no effect. *Hamilton* v. *Dennis*, 12 Gr. 325; affirmed on appeal, 14th March, 1867.

**Direction to Convey to Heirs.**]—A. devised land to his executors, "to hold the same in trust for the use and benefit of my son W. during his lifetime, and after the death of my son W. in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs, the children of my said son W. taking equal shares, and the child or children of any deceased child of my said son to take their parent's share in equal proportion:"—Held, that W. took only an estate for life, and that the legal estate in remainder vested in the trustees for the benefit of his heirs. *In re Romance and Smith*, 8 P. R. 323.

**Direction for Equal Division among Heirs.**]—J. S. by his will devised as follows: "I will and bequeath to my son J. S., for the term of his natural life, the farm I purchased . . . but if my said son J. should leave lawful heir or heirs, then said lands shall be equally divided among them on the death of their father, but if my said son J. S. shall die without leaving lawful heirs, then in that case I direct the said lands shall be sold and the proceeds thereof to be equally divided among my remaining children or their heirs." The son

J. S. had been married for some years at the date of the will, and had a daughter after that date, who with her father was living at the time of the testator's death:—Held, that the devisee J. S. took a life estate with remainder to his child or children; and not an estate in fee, under the rule in Shelley's case. *Smith* v. *Smith*, 8 O. R. 677.

**Direction to Divide among Children.**]—A. by his will devised as follows: "I give and bequeath to my nephew B., and C. his wife (describing the land), to their use for the term of their natural life, and at their decease to be divided among their children as they may see fit." C., the wife, died, and after her death B. conveyed to one of his children, D. B. and D. then mortgaged to a company, and the company sold to E. under the power of sale in the mortgage, but E. refused to take the company's title:—Held, that B. and C. took an estate for life only; that the appointment in favour of one child to the exclusion of the rest was not a valid appointment, and that the title offered was not one that the purchaser could be compelled to accept. Semble, had a similar appointment been made by both husband and wife, it would have been invalid. *Re Ontario L. and S. Co. and Powers*, 12 O. R. 582.

**Disposal During Life.**]—Held, that a devise to testator's wife of land, "to be at her will and disposal during her life," with a subsequent direction as to what should become of the estate after her decease, clearly gave her only an estate for life, not in fee. *Doe d. Keeler* v. *Collins*, 7 U. C. R. 519.

**Division at Devisee's Death.**]—A will contained the following clause: "To my son G. W. I give and bequeath during his lifetime, the north-east quarter of said lot 4 before mentioned, and at his death to go to and be vested in his son W. C., or in case other sons should be born to my son G. W., then to be equally divided between all the boys:"—Held, that G. W. took a life estate only, and that there was a vested remainder in fee in his sons, as a class, which would let in all born before his death. *Re Chandler*, 18 O. R. 105.

**Estate not to be Transferable.**]—After directing a sale and division of the proceeds of an estate, the will as to one of the legatees, M. S., "provided that the said M. S.'s interest in my estate shall not be transferable or transferred to any other person whatsoever, but may be inherited by her children, legitimate; and in case the said M. S. die without legitimate issue, then her interest in my estate shall revert back to the other legatees." &c.:—Held, that M. S. took only a life estate. *Jeffrey* v. *Scott*, 27 Gr. 314.

**Estate to Devolve on Children to be Selected.**]—One J. McP. lived upon lot 26, of which his father A. McP. was owner from 1826 till 1878, when he died, leaving twelve children him surviving. A. McP. died in 1841, having by will devised lot 26 to J. McP., but adding: "He is not to sell or dispose of the said lands, nor any timber or wood now growing on the said lot; on the contrary, the land is to devolve on the most deserving of his children according to the discretion of my executors, that is to say after his own death." In 1869 J. McP. conveyed the north half of lot 26 in fee to the defendant. The executrix of A. McP. made no selection as to who was the most deserving of his children on whom the land should devolve. Nevertheless the plaintiff, a son of A. McP., now laid claim under the above devise to seven-twelfths of the lot, being his own share and six other shares which he had acquired:—Held, that he was entitled to judgment in respect of seven-twelfths of the land, for that J. McP. only took a life estate under the said will, under which he must be held to have taken, as he did not disclaim the benefit of it, and had not acquired title by possession at the time of his father's death; and though no selection had been made among the children of A. McP., the court would carry out the general intention in favour of the class by holding that the estate descended on the twelve children of J. McP. There was no estate tail given to J. McP. under the will, for (1) "children" in it had its primary meaning of descendants of the first generation only; and (2) the children were not to take as a class, in the first instance, but only those out of that class to be indicated by the executors as the most deserving. *McPhail* v. *McIntosh*, 14 O. R. 312.

**Failure of Issue.**]—By his will the testator devised to his son the use during his lifetime of certain land, but if he died without issue, then it was to be equally divided between two named grandsons, and by a subsequent clause, on the death of the testator's widow, he directed that the said land and all other property not bequeathed by his will should be equally divided amongst all his children. The son died, leaving issue, his mother predeceasing him:—Held, that under R. S. O. 1887 c. 109, s. 32, the failure of issue referred to was a failure during the son's lifetime or at his death and not an indefinite failure, and that by virtue of the subsequent clause he took a life estate and not an estate tail by implication, and that on the termination of the life estate the lands fell in and formed part of the residue. Re Bird and Barnard's Contract, 59 L. T. N. S. 166, and Stobbart v. Guardhouse, 7 O. R. 239, distinguished. *Martin* v. *Chandlar*, 26 O. R. 81.

**General Devise with Direction for Division at Devisee's Decease.**]—A testator made his will as follows: "I bequeath to my wife E. K. all the real and personal property that I die possessed of . . . My wish and desire is, that she shall divide the said real estate or personal property, £50 to my daughter S., £50 to my daughter E., the balance to my son W. (providing any more) (if a daughter) £50, and if a son then the balance after £50 to each of my daughters to be equally divided betwixt them at her decease:"—Held, that the widow E. K. took a life estate in the whole real and personal property, excepting what was necessary to pay the legacies. *Wilson* v. *Graham*, 12 O. R. 469.

**Issue to Hold in Fee Simple.**]—A testator devised lands to his daughter: "to her own use for the full term of her natural life, and from and after her decease to the lawful issue of my said daughter to hold in fee simple," and in default of such issue over:—Semble, that the issue should hold the property in fee simple appeared incompatible with an estate tail in the mother, and that "issue" must be construed "children," and the mother took an estate for life only. *Re Hamilton*, 18 O. R. 195.

**Issue to Take in Fee Simple.**]—A testator by the third clause of his will devised certain lands "to my son James for the full term of his natural life, and from and after his decease, to the lawful issue of my said son James, to hold in fee simple; but in default of such issue him surviving, then to my daughter Sarah Jane, for the term of her natural life; and upon the death of my daughter Sarah Jane, then to the lawful issue of my said daughter Sarah Jane, to hold in fee simple; but in default of such issue of my said daughter Sarah Jane, then to my brothers and sisters and their heirs in equal shares." By a later clause, the testator added: "It is my intention that upon the decease of either of my said children without issue, if my other child be then dead, the issue of such latter child, if any, shall at once take the fee simple of the devise mentioned in the third clause of my will."—Held, reversing 23 O. R. 404, that the clauses must be read together, and that, having regard to the latter clause, and to the direction that the issue of James were to take in fee simple, there was a sufficiently clear expression of intention to give James a life estate only to prevent the application of the rule in Shelley's case. *Evans* v. *King*, 21 A. R. 519, 24 S. C. R. 356.

**Joint Estate with Survivorship.**]—A testator devised his property, real and personal, to S., his grandson, but upon certain conditions (which were proved to have been performed), and further ordered that the said S.'s mother and testator's youngest daughter, C., should have a lien upon said lands as a home during either of their natural lives, then after their decease the same should revert to the said S. and his heirs for ever:—Held, that a joint estate for life passed to testator's two daughters, remainder to the survivor for her life, with a remainder in fee to the grandson. *Scouler* v. *Scouler*, 8 C. P. 9.

**Life Estate to Widow of One Devisee** —*Similar Estate by Implication to Husband of Another Devisee.*]—Testator who died in 1858, devised land to his son D., and other land to his daughter A., charged with legacies to his other children. The will further declared that if D. died without heirs, D.'s property "shall remain for the use of his widow during her life, after which it shall be divided as seems best, between the rest of my children," and if A. died without heirs, the property devised to her, "shall revert in the same way." D. was married before the making of the will, and A. after the testator's death married the plaintiff, and died in 1870:—Held, that the words "revert in the same way," meant "shall follow in like manner," and that therefore A.'s husband after her decease, took a life estate in the property devised to her, as D.'s wife would take in that devised to B. *Jardine* v. *Wilson*, 32 U. C. R. 498.

*See Doe d. Butler* v. *Stevens*, 6 O. S. 63.

**Life Estate with Power of Disposal.**]—A testator devised his property to his wife for life, provided she remained unmarried; but if she married it was at once to be equally divided among his children; if, however, she should continue his widow, and be guilty of no misconduct, then it was to be at her disposal, without the hindrance or molestation of any person whomsoever, with a final declaration that it was not to be disposed of or rented during the devisee's life. The widow remained unmarried and died:—Held, that the widow took either a fee simple estate, or an estate for life, with power to dispose of the fee if she should not marry again, in which event both estates would be divested. *Burgess* v. *Burrows*, 21 C. P. 426.

**Life Tenant**—*Lease.*]—A testator gave all his estate, real and personal, to trustees upon trust to allow and give the use thereof to his wife during her life for her support and maintenance, and after her death to sell and divide the proceeds among his children equally:—Held, that the wife had the right to lease the farm and deal herself directly with the tenant during her life. *Hefferman* v. *Taylor*, 15 O. R. 670.

In this case, those entitled in remainder were the adult children of the life tenant, and no active duties were cast by the will on the trustees during the continuance of the life estate, and such being the case, the court would give effect to the usual incidents of an estate for life by which the tenant can occupy the property or let it, or otherwise dispose of it as seems best to that tenant:—Held, therefore, that a lease theretofore made by the trustees, without the sanction of the widow, though there was no evidence of mala fides on their part, must nevertheless be set aside, and possession of the property given to the widow or her nominee. *Ib.*

——— *Renewal of Lease — Profits—Account.*]—A widow was entitled under her husband's will to the use and enjoyment of all his property during her life. It was conceded that she was entitled to the enjoyment in specie of the personal estate. The testator owned a brick-field on leasehold land, and carried on there a brickmaking business at the time of his death. This and the plant in connection therewith the tenant for life took possession of, and went on with the working of it. She put other assets of the estate into this business and extended it, and when she died it was still a going concern. At the expiration of the term of her husband's lease, she obtained a new one, covering a larger area of land:—Held, that the widow, having elected to carry on the business on these premises, did so for the ultimate benefit of the estate. She was entitled to all the income, earnings, and profits derivable therefrom each year, in so far as she applied them to the maintenance of the family, or in the acquisition of other property, or in the paying off of mortgages; but whatever profits went into the business to increase it, and whatever plant, stock, and belongings of the business remained on the premises or elsewhere at her death, became the property of her husband's estate. An account against her executor was directed, and the scope of the inquiry defined. *Wakefield* v. *Wakefield*, 32 O. R. 36.

**No Words of Limitation.**]—Under the following will (the testator dying before 4 Wm. IV. c. 1, came into force), "And touching my worldly estate, I give and dispose of the same, &c.," then followed various devises to several children; then "all other property of which I shall die possessed and not herein mentioned, I wish to be divided among the five children above named." The testator then added, "to A. B. of K., I give and bequeath lot No. 9 in the 7th concession of the township of Nelson, and county of Halton, and I appoint the said A. B. one of my executors:"—Held, that A. B. took only an estate for

life in lot 9, and that the reversion therein passed to the residuary devisees, not to the heir-at-law. *Doe d. Ford* v. *Bell*, 6 U. C. R. 527.

**Offspring**—*Power of Appointment.*]—J. P. by his will provided as follows: "I give and devise to my brother D. P. the . . . on which he resides . . . to hold the same to the said D. P. for and during his natural life, and after the death of the said D. P. I give and devise the said . . . to H. P., second son of said D. P., to be held by the said H. P. for and during his natural life, and if the said H. P. shall leave offspring him surviving, then I give and devise the same to such of his offspring as the said H. P. shall appoint, and in case of no appointment being made by the said H. P. in his lifetime, then I devise the same equally to the children of the said H. P. in fee, and in case the said H. P. shall die without lawful offspring or during his father's lifetime, then I give and devise the same to . . ." D. P. and H. P. by conveyances and mortgages dealt with the land as if they were the owners in fee. After several mortgages to one J. E., who was H. P.'s solicitor, were registered against the land, and after D. P.'s death, J. E., having assured H. P. that his (J. E.'s) title to the land was perfectly good, and that H. P.'s children had no interest in it, persuaded H. P. as a matter of form to execute the power of appointment in favour of L. S., one of his children, and to obtain from L. S. and her husband, without their knowing of the execution of the power of appointment, and on making the same representation and without consideration, a quit claim deed of all their interest in the land. In an action by L. S. and her husband, on discovering their interest, to have the quit claim deed delivered up to be cancelled, and to have it declared that the conveyances and mortgages made by D. P. and H. P. only bound their life estate:—Held, that only a life estate was given to H. P., and not an estate in fee tail. If "offspring" is read as "children," or construed as meaning "issue," the devise falls within the rule that when words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, their ancestor takes for life only. Here to the children or issue, in default of appointment, is given expressly an estate "in fee," and it is distributed to them "equally." Held, also, that untrue representations were made which induced the execution of the power of appointment and the transfer of the estate thereunder without consideration; and that the instruments subsequent to the deed of appointment, did not affect the fee simple of the land and that the operation of the mortgages should be limited to the life estate of H. P. in the land. *Sweet* v. *Platt*, 12 O. R. 229.

**"Owned for Life."**]—A testator devised certain real estate "to be owned, possessed, and inherited by my wife during her natural life subject to the further provisions of my will," followed by a devise to "W. G. when he is of the age of twenty-three years, 200 acres, or if sold before he arrives at the years mentioned, that some other lot of land or money amounting in value to the above mentioned lot be given him in lieu thereof:"—Held, that the wife took a life estate with a vested remainder over to W. G., and the testator having shortly before the date of his will contracted for the sale of the land so devised, that the estate of W. G., who died during the life of the widow, and before he had attained twenty-three, was entitled to the proceeds of such sale. *Holtby* v. *Wilkinson*, 28 Gr. 550.

**Restraint against Mortgaging or Selling**—*Gift to Children.*]—A testator, by his will, dated 25th June, 1866, devised to the plaintiff "and his heirs and executors for ever," a parcel of land subject to the following proviso: "That he neither mortgage nor sell the place, but that it shall be to his children after his decease." The plaintiff had children living at the date of the will. The testator died in 1867:—Held, that the plaintiff could not, by his own conveyance, confer an indefeasible title upon an intending purchaser, and that the preferable construction of the devise was to give the plaintiff an estate for life, remainder to his surviving children for their lives, remainder to the plaintiff in fee. *Dickson* v. *Dickson*, 6 O. R. 278.

**Restriction against Disposal and Intention to Benefit Children.**] — By her will the testatrix devised as follows: "I give and devise to my beloved children A. P. (her son) and M. P. (his wife) and to their children and children's children for ever all and singular lot 15. . . . Provided always that the aforesaid A. P. or M. P. shall not be at liberty at any time or for any purpose to convey or dispose of (said lot) as it is my will that the same be entailed for the benefit of their children." The residue of her estate the testatrix devised to her daughter-in-law the said M. P.:—Held, that upon the true construction of the will A. P. and M. P. took only an estate by entireties for their lives and the life of the survivor of them. Held, also, that they did not take an ultimate remainder in fee, expectant on any estate tail given to the children, and that under 48 Vict. c. 13, s. 5, R. S. O. 1887 c. 44, s. 52, s.-s. 5, it was the duty of the court to make a declaratory decree as to this in order to answer as to the whole estate taken by the parents. Held, also, that a mortgage by A. P. and M. P. was valid and bound their life estate in the land notwithstanding the attempted restraint on alienation. Semble, that the children took an estate tail but the special case which was stated for the opinion of the court did not require this to be declared. The judgment in 13 O. R. 142 affirmed with a variation. *Peterborough Real Estate Co.* v. *Patterson*, 15 A. R. 751.

**Right to Live on Property.**]—J. F., by will dated 8th October, 1871, devised all his real property to his son, the plaintiff; he next devised his personal property, with slight exceptions, to his wife E. F.; and the fourth clause was, "My will is that my wife shall be allowed to live on the said property during the term of her natural life." The last clause gave $50 to his daughter, to be paid by plaintiff. On ejectment by plaintiff against E. F. and another:—Held, that the fourth clause gave the wife a life estate in the land. *Fulton* v. *Cummings*, 34 U. C. R. 331.

A testator devised all his real and personal estate to his beloved sons E. and J. in fee, "subject, however, to the following conditions: First. That my beloved daughters" (six in number, naming them) "shall have at all times a privilege of living on the homestead and maintained out of the proceeds of

the said estate during their natural lives;"—Held, that the daughters took a life estate in the homestead, and that the death of some of them did not diminish the right of the survivors. *Bartels* v. *Bartels*, 42 U. C. R. 22.

**Rooms in a House**—"*Life in a Lot.*"]—The testator by his will made a provision for his wife as follows: "I give and devise to my beloved, &c., 'all household goods,' &c., 'for the term of her natural life;' and I give and devise to her one bedroom, and one parlour of her own choice in the dwelling house wherein I now dwell,' &c., 'also the use of the kitchen, yard, garden; also, I give and devise to my said wife her life in the said lot theretofore mentioned; also an annuity of $20 yearly.'" He then subject to the above and to the payment of $1,000 to his eldest son D., and other legacies, devised the lot to his second son J. After the testator's death the plaintiff, the widow, and J., lived on the lot, arranging between them as to her maintenance. In order to raise money to pay D.'s legacy, the plaintiff and J. mortgaged the lot to a loan company, and on default, proceedings were taken under the power of sale to compel payment. The plaintiff set about making arrangements to pay off the mortgage, but the company refused to accept payment unless the amount of two other mortgages made by J., alone was also paid. No tender was made by plaintiff, nor was any demand made by her for arrears of annuity or dower. An action was brought by plaintiff to establish the will, and to have the rights of the loan company declared:—Held, that the proper construction of the will was, that the widow was to have a life estate in the bedroom and parlour she should select, and also in the kitchen, yard, garden, and also the annuity of $20; and that the loan company could not claim to have the mortgages consolidated, and that as the plaintiff had not made any tender to the loan company she could not claim her costs, but it was directed in lieu of her paying costs that the arrears of annuity and dower should be wiped out. *Smith* v. *Smith*, 18 O. R. 205.

**Shares to be Held and Proceeds Paid during Life.**]—A testator directed his real estate to be sold and the proceeds, after payment of the debts and certain legacies, to be divided into twelve equal parts, "five of which I give and devise to my beloved daughter C. M., four of which I give and devise to A. E. F. (daughter), and three of which subject to the conditions and provisions hereinafter set forth, I reserve for my son C. W. M. But in no case shall any creditor of either of my children, or any husband of either of my children, daughters, have any claim or demand upon the said executrices, &c., but their respective shares shall be kept and the interest, rents, and profits thereof shall be paid and allowed to them annually . . . during their respective lives." In an action by the daughters to have their shares paid over to them untrammelled by any trust:—Held, that it was clearly the intention of the testator that the daughters should only receive the income from the shares during their lives. *Foot* v. *Foot*, 15 S. C. R. 699.

**Specific Devise and General Clause.**]—A testator devised certain lands as follows: "I will, devise, and bequeath unto my wife for and during her natural life all that parcel of land (describing it) . . . I also will and bequeath unto her, my beloved wife, everything, real and personal, within and without; and it is hereby understood that the property above described shall be under the control of my said beloved wife. After the demise of my wife it is my will and pleasure that the aforesaid real estate shall descend to my nephew and his heirs." The testator had no other real estate than the said lands, and there was nothing else to which his language, importing that his wife was to have control of everything, real and personal, could be referred:—Held, nevertheless, that the intermediate clause had no effect on the life estate expressly given to the wife, and there was nothing to change or enlarge the usual character of such life estate, so as to render her dispunishable for waste. White v. Briggs, 15 Sim. 17; S. C. in appeal, 2 Phil. 583, distinguished. *Clow* v. *Clow*, 4 O. R. 355.

**Usufruct**—*Quebec Law.*]—See *Robin* v. *Duguay*, 27 S. C. R. 347.

*See*, also, sub-heads 8, 9, 14 and 19.

*See* ESTATE.

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8. *Estate in Fee.*

**"Absolutely"** — "*In the Event of her Death.*"]—A testator, who died on the 9th April, 1891, seised in fee, by his will devised and bequeathed all his real and personal estate to his wife absolutely, and in the event of her death to be equally divided among her children:—Held, that the will was to be construed as if the words "in my lifetime" followed the words "in the event of her death," and that the widow took an estate in fee simple in the lands. Construction of s. 30 of the Wills Act, R. S. O. 1887 c. 109. *Re Walker and Drew*, 22 O. R. 332.

**Alien Devisee**—*Effect on Prior Estate.*]—J. S. demised lands on the 22nd March, 1824, to H., his daughter, for life, and after that to her husband if he should survive her, at a nominal rent. On the 24th March, 1828, he by his will devised to his son S. all his lands by him "freely to be possessed and enjoyed . . . after the death of H. and her husband "if she dies without heirs." J. S. died in May, 1828. S. died in 1842, an alien, not having taken the oath under the Act of 1828 or 1841, and having before his death given a bond for a deed of the land to one H.; and the trustees under his will conveyed in fee to I. in 1871. H. died in 1869 without issue, and her husband in 1864:—Held, that, under the devise in the will of J. S., H. took a fee, by reason of S.'s incapacity through alienage to inherit as her heir-at-law, the intervention of the possible estate for life of H.'s husband making no difference. If S. had been capable of inheriting, H. would have taken an estate tail only, with remainder to him in fee; for the limitation over to him on failure of heirs would be restricted to lineal heirs, he himself being a relative, and capable of being a collateral heir. Quære, whether S., if not an alien, would have taken in fee or for life under the words "freely to be possessed and enjoyed," &c., in the will of J. S. Quære, also, whether s. 12 of 12 Vict. c. 197, has any relation to titles previously acquired. The defendant was held not estopped from setting up the alienage of S., for he claimed under H., whose

title he supported against that of S. *Iler* v. *Elliott*, 32 U. C. R. 434.

**Conditional Fee.**]—A devise to two persons of separate lots of land with a proviso that if either devisee should die without lawful issue the part and portion of the deceased should revert to the surviving devisee, and with the further proviso that in case both devisees should die without issue the devised lands should be divided by certain named persons as they should deem right and equitable among the relatives of the testatrix, confers upon each devisee only a defeasible fee simple. Judgment below, 22 O. R. 542, affirmed. *Nason* v. *Armstrong*, *McClelland* v. *Armstrong*, *Wright* v. *Armstrong*, 21 A. R. 183. Reversed by the supreme court, on another point, 25 S. C. R. 263.

——— *Executory Devise.*]—A testator by his will devised as follows: "I give and bequeath to my son F. . . lot No. . . at the age of twenty-one years, giving the executors power to lift the rent and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of twenty-one years . . . At the death of any one of my sons or daughters having no issue their property to be divided equally among the survivors." F. attained twenty-one and died unmarried and without issue:—Held, a conditional fee, with an executory devise over. Little v. Billings, 27 Gr. 353, distinguished. *Crawford* v. *Broddy*, 25 O. R. 635. Reversed in appeal on another ground, 22 A. R. 307.

**Devise over.**]—W. F. died in 1841, leaving a will as follows: "I will and devise unto my son C. F., all and singular that farm, &c., the same to be by him the said C. F. peaceably possessed and enjoyed for and during his natural life; and after his decease I will and devise the same to the heirs of the said C. F., and to their heirs and assigns for ever; . . . and in the event of either of my sons C. F., I. B. F., or R. F., or either of my daughters, S. F. or M. F., dying before they come of lawful age, or without lawful issue, then, and in such case, the legacies herein devised and bequeathed to them shall be equally divided amongst the surviving ones, share and share alike." C. F. died at the age of thirty, and unmarried:—Held, that the plaintiff, as heir-at-law of the testator, could not recover. Per Robinson, C.J., the word "or" should be read "and;" and C. F. took an estate in fee, subject to an executory devise over, in case he should die under age and without issue. Per Burns, J., the will should be read without alteration; C. F. took an estate tail, and therefore on failure of such estate the devise over took effect. *Doe d. Forsyth* v. *Quackenbush*, 10 U. C. R. 148.

Testator devised certain lands to his son H. in fee, with a devise over, and "in case my son H. shall die intestate or without issue:"—Held, that "or" must be read "and," and that the condition was inoperative. *Re Babcock*, 9 Gr. 427.

By his will, dated 28th January, 1840, testator devised as follows: "I will and devise to my son C., all and singular, &c. (certain land), to be by him peaceably possessed and enjoyed for and during his natural life, and after his decease I will and devise the same to the heirs of the said C., and to their heirs and assigns for ever; in consideration whereof I will, order, and direct, that the said C. shall pay yearly and every year unto his mother the sum of £25 during her widowhood; and also, that he shall pay to his sister M. the sum of £25 yearly and every year, so long as she shall remain single." Then followed a devise to his son I. B. of certain lands in similar words; and then, after certain devises and bequests to others of his children, including a gift of £500 to his son R., there was this further provision, "and in the event of either of my sons, C., I. B., or R., or either of my daughters, S. or M., dying before they come of age, or without issue, then and in such case the legacies herein devised and bequeathed to them, shall be equally divided amongst the surviving ones, share and share alike:"—Held, that extrinsic evidence of the ages of testator's children was admissible for the purpose of aiding in the construction of the will. (2) That C. having been over twenty-one years of age at the date of the will, and having died without issue, the gift over took effect as respected the land devised to him. (3) Per Draper, C.J., and Gwynne, J., the gift to C. was an estate in fee simple, subject to an executory devise over in the event of his dying without issue. *Forsyth* v. *Galt*, 21 C. P. 408, 22 C. P. 115.

——— *Impossibility of Event—"And"—Lifetime of Two Persons—Death of One.*]—A testatrix devised and bequeathed all her real and personal estate to her son in fee with a proviso that in case he should die without issue previous to the death of "my brother . . . and sister . . . " then over. The sister mentioned died in the lifetime of the son:—Held, that, as the event, viz., the death of the son previous to the death of both the brother and sister, could not happen, the son took an estate in fee simple. *Lillie* v. *Willis*, 31 O. R. 198.

**Direction for Sale**—*Trust—Perpetuities.*]—A testator by his will devised certain lands to his son N. M. for life and after his decease to his heirs and assigns for ever, but subject to the payment within three years out of the rents and income of a sum of money charged upon the lands therein specified; after his death the land was to be sold provided N. M.'s youngest child then living was of the age of twenty-one years, the proceeds thereof to be equally divided between N. M.'s children at the time of sale:—Held, that under the rule in Shelley's Case N. M. took an estate in fee simple in the land, and that there was no trust in favour of N. M.'s children. Held, also, that by the terms of the will there was a restraint on alienation by sale, but not by mortgage. Held, lastly, that the executory devise in favour of N. M.'s children was void as a violation of the rule against perpetuities. *Meyers* v. *Hamilton Provident and Loan Co.*, 19 O. R. 358.

**Executory Devise**—*Death of Devisee before Contingency Happens.*]—A testator devised his farm to his wife "to have and to hold unto my said wife until my daughter E. shall arrive at the age of twenty-one years. After that, to my said daughter and her heirs for ever, and should my said daughter die before attaining the age of twenty-one years, I give and devise the said farm to my said wife, to have and to hold unto her and her heirs for ever." The widow died intestate before the daughter, who was the only child, and

who herself died intestate and unmarried before attaining twenty-one:—Held, that the widow, under the second gift to her, took an executory devise in fee, which passed upon her death to the daughter, upon whose death it passed to her proper representatives. *Re Bovey, Bovey* v. *Ardull*, 21 O. R. 361.

——— *Happening of Event.*]—A testator devised a farm to his executors in trust for his grandson, with power to sell and apply the proceeds for his benefit, and in case he died before attaining twenty-one, they were to transfer the land, or, if sold, the balance of the proceeds, to his father. The father died before his son, who died before attaining twenty-one without issue. The land was not sold:—Held, that the grandson took a vested estate in fee simple, subject to be divested on the happening of a certain event, which had become impossible, and that his estate had become absolute. *Parkes* v. *Trusts Corporation of Ontario*, 26 O. R. 494.

——— *Residuary Devise.*]—A testator devised certain land to his son W. during his lifetime; and in the event of his death, leaving his wife surviving him, he devised the rents, issues, and profits to her during her lifetime or widowhood; but in the event of both dying within thirty years from his death, in such case he devised the rents and profits thereof, until the expiration of such thirty years, to W.'s children equally, share and share alike; and after W.'s death, and after the death or remarriage of his said wife, and provided that the thirty years should have elapsed, to all of W.'s children by his said wife, share and share alike, to have and to hold the same after the specified periods to them, their heirs and assigns for ever. By the last clause of the will, the testator gave all the residue of his estate, real, personal, and mixed, of whatever nature or kind soever, and not otherwise disposed of by his will, to W., to have and to hold the same to him, his heirs and assigns for ever. The testator died on the 9th January, 1876; W. and his wife both survived the testator and enjoyed their life estates, and died leaving children still surviving:—Held, that under the will the fee in the land, subject to the estate devised to the children until the expiration of the thirty years, vested in W. and his heirs, and, in the absence of any evidence shewing whether or not W. had disposed of the land, the children could not impart a good title in fee. *Re Garbutt and Rountree*, 26 O. R. 625.

In 1857 James Gray made a will, in which he said: "I give and devise to my son John Gray, his heirs and assigns, &c., to have and to hold the premises above described to the said John Gray, his heirs and assigns for ever. But if my son John should die without leaving any issue of his body lawfully begotten, or the children of such issue surviving him, then and in such case I will and devise the said, &c., to my son Thomas Gray, his heirs and assigns, to have and to hold the same at the death of the said John Gray:"—Held, that under the will John Gray took an estate in fee, with an executory devise over to Thomas Gray in the event that happened, of John Gray dying without leaving lawful issue. *Gray* v. *Richford*, 2 S. C. R. 431.

**Executory Limitation**—*Legacy—Mode of Application.*]—J. C. by his will directed his trustees to divide his real estate equally between his sons then living, when his eldest son should attain the age of twenty-five years, when the share coming to his eldest son was to be conveyed to him and they were to give him $2,000 to stock the same. In case any of his sons should die, before attaining the age of twenty-five years, without issue, then the share of the party so dying should be divided equally among the survivors. J. J. C., the eldest son, died under the age of twenty-five leaving a widow and infant daughter, having made a will making no devise of real estate, but giving his wife his life insurance, then standing in favour of a loan company, and directed that so much of his $2,000 as was necessary be used to redeem the insurance from the company, and the balance he gave to his wife:—Held, that the devise to the eldest son was a devise in fee simple, subject to an executory limitation over on his dying under twenty-five and without issue, and as issue was left, the infant was entitled to the land, as her father's heiress-at-law, subject to her mother's dower. Held, also, that the $2,000 was an absolute bequest, with a direction as to its application, and that the legatee was entitled to the money regardless of the particular mode of its application. *Cook* v. *Noble*, 5 O. R. 43.

**Failure of Heirs.**]—Testator devised his farm to G., and directed that if G. should die without heirs the land should be sold and a legacy paid; and if the testator's widow should die or marry before G. should have paid $2,000, the balance should be equally divided amongst the testator's heirs. In a subsequent part of the will the testator directed that G. should pay $2,500:—Held, that the estate intended for G. was the fee simple, with an executory devise over in case he should die without issue living at his death. *Bateman* v. *Bateman*, 17 Gr. 227.

Held, that the words "heirs" in the bequest of the balance did not include the widow; and the same construction was put upon the word "heirs" in a residuary clause contained in the subsequent part of the will. *Ib.*

**Habendum Applied to Two Devises**—*Indefinite Restricting Clause.*]—"To my son J. P. I give and devise all that my real estate situate, lying and being lot number five in the fourth concession of Yarmouth, in the London district, containing 200 acres, be the same more or less," (the land in question), "and also I give and bequeath to my said son J. all that my real estate situate, lying and being lot number six in the fourth concession of Yarmouth, in the London district, containing 200 acres, be the same more or less, to hold unto him, the said J. P., his heirs and assigns for ever." After several other devises of land in fee to other children, with other special provisions, he added, "It is my further wish that all my estate herein devised to my children shall be entailed to their heirs and successors for ever, none of the lots to be divided, but to be the sole property of the heir-at-law; at the same time there shall be an incumbrance on the said lots of land, whatever may be considered a fair allowance, according to the interest of the said estate, to be for the support and benefit of the younger heirs:"—Held, that J. P., by the first part of the will, took a fee in lot five, the habendum applying to that lot as well as to lot six; and (2) that the subsequent general clause was not sufficiently definite or

intelligible to cut down such estate to an estate tail. *Philan* v. *Graham*, 22 U. C. R. 380.

**Heirs but not Assigns.**]—A devise in a will was as follows: "I also will, devise, and bequeath to my daughter L. A. the land and premises on which she now lives, and being all the land in said locality now owned by me, to her and her heirs, but not to their assigns." L. A. married and had issue:—Held, that she took an estate in fee simple. *Re Traynor and Keith*, 15 O. R. 469.

**Implication**—*"Child or Children."*]—T. S. after providing for his widow in his will, made the following devise: "And I give and devise to my nephew R. S., lot No. 30 in the 2nd con., said township of Etobicoke, during the term of his natural life (excepting he have a child or children), if not at the expiration of his life to go to my daughter Ann Guardhouse or her heirs, &c.. . ." The will also contained a residuary devise in favour of the testator's widow. R. S. took possession, married, had children and died leaving his widow and several children. In an action by the widow of T. S., claiming that R. S. was only entitled to a life estate in the lot and that she was entitled to it in fee under the residuary clause:—Held, following Lethieallieur v. Tracy, 3 Atk. 796, that an estate in fee might by implication be vested in the child or that the testator's intention might be properly effectuated by applying the rule in Bifield's Case (acted upon in Doe d. Jones v. Davies, 4 B. & Ad. 55), and reading "child or children" as nomen collectivum, and so creating an estate tail in R. S. Under the circumstances in this case "child" was not a designatio personæ, but comprehended a class, and therefore the plaintiff must fail. *Stobbart* v. *Guardhouse*, 7 O. R. 239.

**Limiting Gift over.**]—"In the first place, my will is that my beloved wife shall inherit all my messuages and tenements, situated, &c., with the appurtenances thereunto belonging; also, all my personal estate, goods and chattels, of what kind and nature soever, I give and bequeath to my loving wife, and during her widowhood; and in case of her marriage or decease, then to be disposed of and equally divided between my sons and daughters," &c., (naming them.) To my son J. S. I bequeath 100 acres of land (describing it). And for the execution hereof I do hereby appoint T. M. and C. S. to be my executors of this my last will and testament, with full power and authority to do and perform every thing herein mentioned." On the 21st September following, this codicil was added: "And further, it is my will that my youngest daughter, E., born on the 23rd August, during my sickness, should equally share with the rest of my children (naming them); and in case of the death of either of the above named children before the estate be divided, then their share to be justly divided between the survivors." The testator died in 1818:—Held, that the widow took a fee in the land first mentioned. *Wright* v. *Wright*, 16 U. C. R. 184.

**Limiting Devise over** — *Management Vested in Trustees.*] — A testator devised all his estate, real and personal, to trustees for the support and maintenance of his wife during her widowhood, and of his daughter until she should attain 21; and directed, in case she should survive her mother, that the trustees might convey to the daughter on her attaining majority, but in no case was she to have control of the property until after marriage or death of her mother; and further, that "even after death or marriage of my said dear wife, and after the majority of my said daughter, my said trustees may still continue to manage said estate, and allow her the yearly proceeds arising therefrom only, till they shall see proper to give the management thereof to my said daughter. . . In the event of the death of my said daughter without leaving lawful issue of her own body to survive her, I order and direct that my said trustees shall sell and convey said estate after the death or marriage of my said dear wife, and that they divide the proceeds arising from such sale, and the rest of the personal property that may then belong to my estate, equally among all my brothers and sisters. . . But if my said daughter live, said lands and premises shall be preserved for her and her heirs and assigns for ever." The widow died shortly before the daughter attained 21; the daughter married, but had no issue, and the object of the suit was to compel the trustees to convey the estate to her:—Held, that on the death of the mother, and the daughter attaining 21, she took an estate in fee simple, subject to the discretion of the trustees as to the time of conveying the same, and not an estate in fee, with an executory devise over; but whether the trustees chose to exercise the discretion vested in them of conveying the estate to her or retaining it in their hands, for the purpose of managing it, she was entitled to the whole proceeds; and the management of the estate must be exclusively for her benefit. *Carradice* v. *Scott*, 22 Gr. 426.

**Old Law.**]—Semble, that a devise of lands to testator's wife for life, to be at her full and free disposal, to whom and whensoever she pleases, and out of which the testator's just debts are to be paid, gives an estate in fee, and not for life, with a power of sale. *Doe d. Humberstone* v. *Thomas*, 3 O. S. 516.

Where a testator devised lands to his daughter, without words of inheritance, and the rest of his estate, except that devised to his daughter, to his sons in fee:—Held, that the daughter also took a fee in the lands devised to her. *Doe d. Stevenson* v. *Hainer*, M. T. 3 Vict.

Where a testator devised as follows: "As touching my worldly estate, I give, devise, and dispose of the same in the following manner. I will that my just debts be paid, should any remain unpaid at my decease; I hereby give and bequeath unto my executors, hereinafter named, my real property, for the purpose of satisfying the same; after which I will that the residue of my lands, messuages, hereditaments, and premises, with my personal estate, or the proceeds thereof (if sold by my executors, which I hereby authorize them to do for the benefit of my children), be divided in equal shares among my six beloved children (naming them)," and then appointed executors:—Held, that the children took an estate in fee, not for life, in the real estate. *Baby* v. *Baby*, 1 U. C. R. 54.

A testator, by a will made in 1826, devised as follows: "As touching such worldly estate, wherewith it hath pleased God to bless me

in this life, I give and dispose of the same in the following manner and form." (After giving certain furniture to his wife)—"Also, I give and bequeath to her the sum of £12 19s. annually, to be well and truly paid to her quarterly from the produce of my real estate lying in the township of Smith," &c. "Also, to my beloved sons W. and J., to be apportioned to the said W. and J., 159 acres of land," describing it, being the land in question, situate in said township of Smith—"Also, to my beloved sons W. and J., the first lot on the west side of the communication road, as above described, to be possessed jointly and severally in equal shares by them, the aforesaid W. and J., for the purpose of erecting a saw-mill, and such other machinery as they may deem expedient; also, my farming utensils and stock to be equally divided between my two sons, W. and J. I also leave and bequeath my beloved son J. (the eldest son) five shillings. And for the purpose that my beloved wife may suffer no hardship in her old age, I do enjoin by this my last will and testament, that my sons W. and J. shall provide meat, drink, and lodging befitting the age and infirmities of my beloved wife; that is to say, so long as she may remain my widow." W. was appointed one of the executors:—Held, that W. and J. took a fee in the land in Smith. *Dixon* v. *Dixon*, 14 U. C. R. 275.

"My farm, situate on the river Thames, in the first concession of Harwich, lot No. 23, likewise all the rest of my personal goods and chattels of what kind and nature soever, I give and bequeath, after the decease of my beloved wife S., to my children, married as well as unmarried, to be equally divided amongst them after the youngest becomes of age, which said property is not to be sold out of the family," &c.; adding below the attestation clause, but above the signatures of the witnesses, "It is my request, before signing the above, that Mr. A. K. is to be maintained by my heirs during his life:"—Held, that the children took a fee. *Smith* v. *Holmes*, 14 U. C. R. 572.

"And as touching such worldly estate as wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form: first, I give and bequeath to M., my dearly beloved wife," whom he made sole executrix, "all and singular my lands, messuages, and tenements, together with my ready cash, household goods, debts, and movable effects, by her freely to be possessed and enjoyed:"—Held, that the widow took a fee in the land. *Hurd* v. *Levis*, 19 U. C. R. 41. Affirmed in appeal: see 22 U. C. R. 11.

"Touching such worldly estate wherewith it has pleased God to bless me in this life, I give, devise, and dispose of the same in the following manner and form: first, I give and bequeath to P. B. two acres of land, (describing it,) also, I give to Sophia, the child whom I have raised, one feather bed, &c., (naming other personal property;) also, I give the remainder of my property, when my lawful debts are paid, to Sarah B., my beloved wife:"—Held, following the preceding case, that the widow took a fee in the land included in the devise to her. *Brooke* v. *McCaul*, 22 U. C. R. 9.

A testator, by his will, written in French, after devising to his wife "the full enjoyment of all his goods, property (biens) real and personal, movables and immovables of what nature or kind they may be, during her life," proceeded, "I will and order that after the decease of my wife A., all my goods, property (biens) aforesaid whatever they may be, be divided and owned equally among all my children (naming them):"—Held, that the devisees were tenants in common in fee, and not merely for life. *Sanders* v. *Janette*, 3 C. P. 292.

The testator, who died in 1832, devised as follows:—"I make and give all my property, both land, house, and all the stock, and every other article I possess or own, to my loving wife Elizabeth, making her my executrix:"—Held, that the wife took an estate in fee. *Hicks* v. *Snider*, 44 U. C. R. 486.

**Power to Devisee to Dispose of Land.**]—Testator gave to his wife certain land, to be at her disposal during her natural life, and to his son the reversion of all his property that this mother might not have disposed of in her lifetime:—Held, that she had the power, during her life, of disposing of the estate by any conveyance in fee or otherwise. *Doe d. Anderson* v. *Hamilton*, 8 U. C. R. 302.

J. C., the testator, died in 1809, and first devised different lands to his wife and children, giving them clearly an estate in fee; then in a subsequent clause he gave and bequeathed, "in like manner as before," to his wife the land in question, with other lots in the same concession, "together with the equal third of all and singular of the property I now live on, to be for her support during her lifetime or widowhood, at which period it goes to such of my children as she may direct, the real and personal estate, to have and to hold the above described land as before described, with all and every appurtenances thereunto belonging, unto my said wife, her heirs and assigns for ever." The land on which testator lived was in a subsequent clause devised in fee to his son J. C.:—Held, that the words "the above described land" should be referred only to that described by lots; and that the widow took a fee in that, and a life estate with a power of disposal over in the land on which testator lived. *Campbell* v. *Fretwell*, 10 U. C. R. 328.

"Should my beloved wife C. survive me, all my worldly substance, all that I am worth, all my worldly estate, I give and bequeath to her for ever, to dispose of it as she may think proper. Be it understood this power of authority it is only during her widowhood; if the estate or property be not alienated during her natural life, or no will by her made in favour of any of my brothers and sisters or any of their children, then, and not till then, I give and bequeath unto my sister M., or to her heirs for ever, (the land in question). Those lands or estate devised is not to be sold or mortgaged for ever out of the family, except one brother or sister to the other, or to a brother's or sister's children, as far as the second degree:"—Held, that the widow took an estate in fee. *Bergin* v. *Sisters of St. Joseph*, 22 U. C. R. 204.

**Proceeds of Land.**]—Where in a will there is a charge of debts upon the real and personal estate, and an express power is given to the executor to sell and the proceeds of the sale are devised in certain proportions,

the effect is the same as if the testator had devised the lands unequivocally to the devisees of such proportions. *Casselman* v. *Hersey*, 32 U. C. R. 333.

A devise of the proceeds of land, will pass the fee simple in the land. *Moore* v. *Power*, 8 C. P. 109.

*See* also *Brennan* v. *Munroe*, 6 O. S. 92; *Crawford* v. *Lundy*, 23 Gr. 241.

**Repugnant Devise over.**]—F., who died in 1864, by his will, made in 1861, gave to his wife all his lands for life; and after her decease he devised to each of his seven children separate lands, adding "and in case any of the aforesaid legatees should die before he or she comes of age, or should die intestate, then and in such case his or her portion shall be equally divided among the remaining survivors." J. F., the eldest son, and one of the devisees, died intestate in 1867, at the age of thirty, leaving a son, the testator's widow having died in 1864:—Held, that J. F., being twenty-one at his father's death, took an absolute vested interest in fee in remainder expectant on his mother's death: that the devise over was void as being repugnant to this gift preceding it; and that the land devised to J. F. went therefore to his son, not among the other surviving devisees. Semble, that if necessary "or" in the devise over might have been read "and." *Farrell* v. *Farrell*, 26 U. C. R. 652.

A testator directed all the rents and income of his estate to be divided between his widow and children, one share to each of the children, and two to the widow, her heirs and assigns for ever, and proceeded: "I hereby direct that each child on attaining his or her majority receive his or her share, (after expenses of proper repairs are deducted,) for his or her sole use:—Held, that the widow took an absolute interest in all his estate, and that a subsequent devise over of her share in the event of her dying intestate was repugnant and void; and that the children were entitled to the income only on attaining twenty-one. *Kerr* v. *Leishman*, 8 Gr. 435.

A testator devised as follows: (1) I will and direct that all my just debts and funeral expenses be paid by my two sons, A. and B., share and share alike, and I hereby charge the estate hereinafter devised to them with the said payments . . . (3) I give and devise unto my son B. the north part of lot 24, to have and to hold unto the said B., his heirs and assigns to and for his and their sole and only use for ever . . . (6) I desire it should be distinctly understood that the property hereinbefore devised unto my two sons, A. and B., is to be held by them only during their lifetimes and then to become the property of their heirs, and that they, my said sons, shall have no power to convey or dispose of the said lands in any manner whatever:"—Held, that the rule in Shelley's case applied, and B. took an absolute and unconditional estate in fee simple, and that the limitations contained in clause (6) were void as repugnant to the estate devised by clause (3) and unreasonable. *Re Casner*, 6 O. R. 282.

*See*, also, sub-heads 7, 9, 14, and 19.

*See* ESTATE.

9. *Estate in Tail.*

**Cross-remainders.**] — A. McL., by his will, after leaving other land to his daughter H., "her heirs, executors, and assigns, for ever," devised the land in question to his son A., "and to his heirs lawfully begotten," and to his grandson J. other land, in the same manner, adding, "in the event of any of the above named devisees," (naming the three,) "dying before they have, or without a lawful heir, then his, her, or their devise, or property given them by this will, shall be equally divided among the survivors or survivor; but if they shall all die without a lawful heir, then the property given them by this will shall be equally divided among my sister E. S.'s children:"—Held, that the devisees took an estate tail with cross-remainders; and consequently, A. and J. having died without issue, and H. having left children, that J.'s share went to them not to his heir-at-law. *Ray* v. *Gould*, 15 U. C. R. 131.

**Death without Heirs** — *General Reference to Previous Devise.*] — A testator, who died in 1868, devised land to his son D., and other land to his daughter A., charged with legacies to his other children. The will further declared that if D. died without heirs D.'s property "shall remain for the use of his widow during her life, after which it shall be divided as seems best between the rest of my children," and if A. died without heirs the property devised to her "shall revert in the same way." D. was married before the making of the will, and A., after the testator's death, married the plaintiff, and died in 1879:—Held, that D. and A. took estates tail; for the persons in remainder, the rest of the testator's children, being the collateral heirs of D. and A., only lineal heirs could have been intended to take under D. and A. Held, also, that the words "revert in the same way," meant "shall follow in like manner," and that therefore A.'s husband after her decease took a life estate in the property devised to her, as D.'s wife would take in that devised to D. *Jardine* v. *Wilson*, 32 U. C. R. 498.

**Devise over on Death without Issue.**] —Testator, after devising certain land to his wife for life, provided that at her death the said land, together with the residue of his real estate, should be equally divided between his two daughters, to hold during their lives, and after the death of either her share to be equally divided between her children, share and share alike, as soon as they should attain the age of 21 or should marry; and in case either should die without leaving legal issue, then her share to be equally divided among the testator's brothers, &c. He died in 1832, leaving these two daughters, his only children:—Held, that the widow took no interest in the residue; that the daughters took an estate tail therein; and that under the Act either of them could convey a fee simple in her share. *Sisson* v. *Ellis*, 19 U. C. R. 559.

**Devise over on Death without Heirs.**] —The testatrix devised lands to A., his heirs and assigns for ever, subject to certain legacies, and declared that in case A. died without leaving lawful heirs, his widow should enjoy the property during her widowhood; and that on her marrying again the land should be sold, and the proceeds equally divided among such of the sons and daughters of the testatrix

or their heirs as were living:—Held, that A. took an estate tail, and by a disentailing deed could give a good title to a purchaser of the fee. *Dale* v. *McGuinn*, 15 Gr. 101.

**Devise in Fee**—"*Entailed.*"]—By a will made in 1847 a testator, who died in 1854, devised to his son a piece of land, describing it, and proceeded: "All which shall be and is hereby entailed on my said son and his heirs for ever." In 1859 and again in 1860 the son granted the land in question in fee by way of mortgage, each mortgage being duly registered within less than six months of its execution and each containing the usual proviso that it should be void on payment at a named date. No discharge of either mortgage or reconveyance of the mortgaged land had been registered, and there was no evidence whether either mortgage had in fact been paid:—Held, per Maclennan, and Lister, JJ.A., that under this will the son took an estate tail. But held, also, per curiam, that even if the son did take an estate tail, that estate had been barred and converted into an estate in fee simple in his own favour as well as in that of the mortgagee by the execution and registration of the mortgages. Lawlor v. Lawlor, 10 S. C. R. 194, applied, and Plomley v. Felton, 14 App. Cas. 61, distinguished. *Culbertson* v. *McCullough*, 27 A. R. 459.

**Direction for Transmission from Father to Son.**]—A. devised land to his son J., "to hold to him and his heirs for ever," and then added, "My will is that none of my sons shall have power to alienate the lands thus bequeathed to them respectively, but they shall transmit them from father to son, or the next nearest heir so that they may be always preserved in the family:"—Held, that J. took an estate tail by implication, and that the restriction being only such as distinguished an estate in tail, was not illegal. *Doe d. McIntyre* v. *McIntyre*, 7 U. C. R. 156.

**Direction to Entail.**]—A testator, who died before the 6th March, 1834, seised in fee, devised to each of three sons, D., R., and C., "to be by him entailed to any of his issue he may think proper," with the further provision, that if any of the three should die without issue, the property should "be divided equally between their successors, subject to entailment:"—Held, that the three sons took estates tail in the land; that D. and R. had a contingent interest in fee tail on failure of the issue of C.; and that D., as the heir-at-law of the testator, had the reversion in fee. *Dumble* v. *Johnson*, 17 C. P. 9.

**"Dying without Heirs."**]—By his will and codicil a testator devised to his son J. on the death of his mother, certain land in consideration for which he was to pay the sum of £150 to the executors in four years. In the event of his dying without heirs the land was to be sold and the amount received therefor over and above £150 "to be equally divided amongst my surviving children:"—Held, (1) that J. took a fee-tail in remainder after an implied life estate in favour of the mother, as the "dying without heirs" must be taken to mean heirs of the body, not heirs generally, he having brothers and sisters still living. J. died during the lifetime of his mother:—Held, (2) that the period of division should be the death of the tenant for life, and the survivors at the time of such death were to take the whole amount realized by the sale of the lands, upon which, however, the £150 was to form a charge. *Tyrchilt* v. *Dewson*, 28 Gr. 112.

**Dying without Issue** — *Executory Devise.*]—A testator, amongst other devises and bequests, devised as follows:—"Secondly, I bequeath to my son, Robert Little, eighty-six acres of land (describing them), also one span of horses and one-half of my farming utensils; he is nevertheless subject to pay the sum of £112 10s. to my daughters, as hereinafter provided, the sum of £18 15s. to be paid annually, the first instalment to be paid one year after my decease, until the whole is paid." He next devised to his son John fifty acres of land, together with one span of horses and one-half of his farming utensils, subject also to a charge of £112 10s. for his daughters. He then made several bequests in favour of his daughters and wife; and if his unmarried daughters should die before their legacies were paid, John and Robert were to divide the unpaid sums equally between them. He then provided as follows: "Should either of my two sons, Robert and John, die without issue, I wish that their shares should be divided equally among my surviving children:"—Held, that the sons took an estate tail, and not a fee simple subject to an executory devise over. *Little* v. *Billings*, 27 Gr. 353.

**"Dying without Issue."**]—The testator directed all the lands to be sold by public auction or private sale on his youngest surviving child attaining twenty-one, and the proceeds to be divided amongst nine of his children, share and share alike; but in the event of any of the nine children dying without issue before the youngest surviving child should attain twenty-one, the share of the one so dying should go to the survivors:—Held, that these words did not create an estate tail or quasi entail, and that the shares of the legatees were vested. *Scott* v. *Duncan*, 29 Gr. 496.

**Estate Tail by Cy pres** — *Void Devise over.*]—A testator, who died in 1849, devised as follows: "It has pleased the Lord to give me two sons, equally dear to my heart. To give them equal justice I leave all my land to the first great grandson descending from them by lawful ordinary generation in the masculine line. To him I bequeath it, and to him I will that it pass free from any incumbrance, except the burying ground, and the quarter of an acre for a place to worship." (To Duncan, his son, he gave his family Bible and 5s., above what he had done for him.) "To Peter Ferguson, my son, I bequeath my implements belonging to my farm, and to occupy the farm, and to answer state dues and public bindings himself and the lawful male offspring of his body, until the proper heir come of age to take possession, but Peter himself and all are restricted and prohibited from giving any wood or timber, of whatsoever kind, away off the land, or bringing any other family on to it but his own. But if he leave a situation so advantageous . . . I appoint Peter McVicar, my grandson, to take charge of the place, farm, and all that pertains to it, and occupy the same for his own benefit and advantage, according to the forementioned restrictions and conditions, until the heir be of lawful age as aforesaid." The testator died in 1849, leaving the land subject to a lease, which expired in 1857. Peter Ferguson, after having gone into occupation, in that year conveyed

his interest to Peter McVicar, named in the will, and left the place in the same year. Neither of the testator's sons had any sons born during the testator's lifetime. The plaintiff in ejectment, the heir-at-law of Peter Ferguson, the son, claimed that under the will his father took an estate tail, which descended to him. The defendant was the heir-at-law of the testator, and had also a conveyance from Peter McVicar:—Held, in the Queen's bench, 39 U. C. R. 252, that Peter Ferguson did not take an estate tail under the doctrine of cy pres; and that, the principal devise to the unborn grandson being void for remoteness, defendant, the heir-at-law, was entitled. Held, in appeal, reversing the judgment of the Queen's bench, that Peter Ferguson took an estate tail male, with an executory devise over to the first great grandson descending from one of testator's sons in the masculine line; that the condition as to occupation, &c., if it imposed the duty of personal occupation, was void, as being repugnant to that estate; that such estate being destructible by barring the entail, was not an infringement of the law against perpetuities; and that the plaintiff therefore was entitled to recover. *Ferguson* v. *Ferguson*, 1 A. R. 452. But held on appeal that the devise by the testator to his first great grandson being void for remoteness, and there being no intention to give to P. F., junr., any estate or interest independent of or unconnected with the devise to the great grandson, there was no valid disposition to disinherit the heir-at-law, and therefore the plaintiff was not entitled to recover. *Ferguson* v. *Ferguson*, 2 S. C. R. 497.

When the rule of law, independent of and paramount to testator's intentions, defeats the devise, the proper course is, to let the property go as the law directs in cases of intestacy. *Ib.*

**Failure of Heirs.**]—B., being nominee of the Crown, devised the land to his son J. and his heirs; and in failure of his heirs male, then to the heir-at-law of his son T. The patent issued after B.'s death to J., the devisee, his heirs and assigns, to the uses specified in the will of the devisor:—Held, that the patent gave to J. whatever estate he would have been entitled to under the will if the testator had died seised in fee; that he was only tenant in tail, and had therefore no estate which could be sold after his death to satisfy his debts. *Doe d. Butler* v. *Stevens*, 6 O. S. 63.

A testator devised lands to his daughter, to hold during her life, and afterwards to her heirs for ever, adding a provision for its division among others, "should it so happen that my daughter shall not have heirs," &c.:—Held, that she took only an estate tail. *Doe d. Anderson* v. *Fairfield*, 3 U. C. R. 140.

**"Heirs of the Body."**—M. C. by her will devised as follows: "First, I give and devise to my grandson, J. C., the farm . . . to have and to hold the same and every part thereof for and during his natural life, and after his death to the heirs of his body, should he leave any such, him surviving, and in the event of his leaving no such heirs, then the same and every part thereof is to be divided as fairly and equally as may be, amongst . . . to have and to hold the same to them, their heirs and assigns for ever; but my will and desire is that my said grandson, J. C., shall not have or go into the possession . . . until he shall have attained the age of twenty-five years, or five years after my death. Secondly, I give and bequeath to my son, J. C., $100 annually during his natural life, the same to be paid to him quarterly . . . and to be a charge on the farm or homestead above devised to his said son John:"—Held, that the effect of the limitations was to give J. C. an estate tail, which he had barred as the result of his dealings with the land by way of conveyance. Greenwood v. Verdon, 1 K. & J. 74, distinguished. *In re Cleator*, 10 O. R. 326.

**Life Estate to Wife**—*Remainder to Husband and "Heirs of their Bodies."*]—A devise was to A. C. M. for life with remainder to her husband, W. M., "and the heirs of their bodies for ever:" — Held, that W. M. took an estate tail. By a subsequent clause the will provided that, in the event of the said W. M. dying without making a will, the property should be divided among his surviving children in certain shares, but declaring it to be the intention of the testatrix that he should have full powers, with the consent of his wife, to sell and convey absolutely any part or portion thereof; "and in case of his making a disposition by will to vary the shares and proportions thereof as he may deem best:"—Held, that the powers so given to W. M. to vary the shares or proportions of the heirs in tail, did not affect the quality of the estate devised. *Fleming* v. *McDougall*, 27 Gr. 459.

**Life Estate to Wife** — *Remainder to Heirs—Power of Appointment.*]—See *Archer* v. *Urquhart*, 23 O. R. 214, *post* IV., 15.

**Nova Scotia Acts.**] — See *Ernst* v. *Zwicker*, 27 S. C. R. 594.

**Power of Appointment to Heirs.**]—A testator devised property to his son A., and to the heirs of his body lawfully to be begotten, with power to appoint any one or more of such heirs to take the same:—Held, that A. took an estate tail; that there was no trust in favour of his children; and that mortgages theretofore executed by him took precedence of the claims of the children under an appointment which he afterwards executed in their favour. *Trust and Loan Co.* v. *Fraser*, 18 Gr. 19.

**Sons to take Successively.**]—A testator, after devising land to his son William and his heirs, added, "and it is my will and intention that if the said William should die leaving no legitimate issue, the said two lots to vest and be to the said Walter," (another son,) "and his heirs, and," &c., making provision for the estate going to his other sons successively, in case of failure of issue; "and if the last named should die leaving no legitimate issue, then the same to the surviving heirs of my family, in equal proportion:"—Held, that William took an estate tail, not a fee, and that a conveyance by him (before 9 Vict. c. 11) was void. *O'Reilly* v. *Corrie*, 11 U. C. R. 557.

**" Sons of the Body in Tail Male."**]—The testator devised certain lands to his son W. M. "for and during and unto the end and term of his natural life," and after the determination of that estate to the sons of the

body of W. M. in tail male, as they should be in point of birth, and for want of such issue to the daughters of the body of W. M. and the heirs of the body of such daughters, who were to take as tenants in common, and for want of such issue the lands were to be divided amongst the testator's other sons, or the heirs of their respective bodies, who at the death of W. M. should be entitled to any part of the lands devised in tail in the will to hold to his said other sons respectively, or the heirs of their respective bodies in the same course of descent in tail as the other lands devised to them in tail respectively, and for default of such other sons and of their issue at the death of W. M. to the right heirs of W. M. for ever:—Held, that W. M. took a life estate, with remainder in tail male, to his first and other sons successively, according to priority of birth, and failing male issue, with a further remainder to his daughters. And though circumstances might arise in which W. M. would have an estate in tail by way of remainder after the intermediate limitations to his first and succeeding sons, yet he could not so deal with that ultimate remainder as to divest their right to take as purchasers. *Riddell* v. *McIntosh*, 9 O. R. 606.

**Support of Children**—*Division at Majority.*]—See *Travers* v. *Gustin*, 20 Gr. 106, *post* IV. 16.

**Trust for Devisee and Heirs of his Body.**]—H. devised land "in trust for the only benefit of R. B., for and during his natural life, without impeachment of waste, and from and after the determination of that estate, in trust for the heirs of the body of him, the said R. B., and in default of such issue, then in trust for the next heirs of me, the said H.:"—Held, clearly within the rule in Shelley's case, and that R. B. took an estate tail. *Tunis and Bamberger* v. *Passmore*, 32 U. C. R. 419.

*See*, also, sub-heads 7, 8, 14 and 19.

*See* ESTATE.

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10. *Exoneration of Mortgaged Property.*

**Devise Free from Incumbrances** — *Dower—Election—Remainder—Acceleration.*]—By paragraph 3 of his will, made in 1886, the testator, who died in 1895, devised house No. 35, until 1st January, 1890, to his wife, and from and after that to his brother, "his heirs and assigns forever, free from all incumbrances." This property together with house No. 45, which, by paragraph 6, he devised, with other lands, to his wife for life, and after her decease to his brother, his heirs and assigns, subject to certain legacies, was subject at the date of the will to a mortgage for $1,200, made by the testator, which was subsequently discharged and replaced by a mortgage for $1,300 on the same lands, which was that subsisting at the date of the death. By paragraph 4 the testator bequeathed to his wife certain leasehold premises held by him at the date of his will. The term, however, expired in his lifetime, and nothing passed to his wife under this paragraph. By paragraph 5 the testator directed his wife to pay off the mortgage for $1,200, and any other incumbrances upon the property devised by paragraph 3, and declared that the bequests made to the wife by paragraphs 3 and 4 were made to her for that purpose:—Held, that the effect of the will was to exonerate house No. 35, to the extent of the interest in it devised to the brother, from the payment of the proportionate part of the mortgage, and to cast the burden of the payment of it upon the residuary estate, leaving the other house to bear its proportionate share of the mortgage. (2) That the devisee of house No. 35 was not entitled to have the dower of the widow in it discharged out of the residuary estate, she having elected to take her dower instead of the provision made for her by the will. (3) Paragraph 7 provided, in the event of the brother dying before the wife, for a sale of what the will described as "all my said property," and directed that the proceeds of the sale should be invested and the interest of the investment paid to certain persons for their lives, and for the division of the corpus, after the death of the survivor, among certain persons named:—Held, that the provisions of paragraph 7 applied only to the devise contained in paragraph 6, and not to that in paragraph 3. (4) That the effect of the disclaimer by the widow of the provision made for her by the will was to accelerate the brother's remainder and make it an estate in possession. *Toronto General Trusts Co.* v. *Ircin*, 27 O. R. 491.

**Devise in Lieu of Dower.**]—The testator, by his will made 26th June, 1876, devised a portion of his lands, which were subject to mortgages, to his wife in lieu of dower; the residue of his lands and all his personal estate he gave to his father, subject to the payment by his executors of all his just debts, funeral and other expenses:—Held, that the father was bound to discharge the mortgages, and that the widow was entitled to hold the part devised to her, freed from the debts of the testator. *Dungey* v. *Dungey*, 24 Gr. 455.

**Devise Subject to Payment of Debts.**]—Lands subject to mortgage were devised, "after payment of debts," to the widow for life, remainder to the plaintiff, who accepted from the widow a lease for her life of the premises. The widow having refused to pay the interest accruing on the mortgage, the plaintiff paid the same, and also the principal money thereon:—Held, that these facts did not entitle the plaintiff to call upon the widow for payment out of the rents reserved by the lease or out of the personal estate bequeathed to her; the only relief to which he was entitled being to have the mortgage debt, together with the interest on the sum secured until it became due, raised out of the land. *Burk* v. *Burk*, 26 Gr. 195.

**Devolution of Estates Act.**]—The Devolution of Estates Act, 49 Vict. c. 22, has not superseded, but is to be read in conjunction with R. S. O. 1877 c. 106, ss. 36, 37, and mortgaged land devised by will is primarily liable to pay its own burdens, unless the will otherwise directs by such terms as distinctly and unmistakably refer to or describe the mortgage debts:—Held, that the fact that of two lots owned by the testator, subject to incumbrances, he devised one to his son D., while the other passed under a general devise to the executors in trust for the heirs at-law, afforded no indication of intention that D. should enjoy free from the mortgage debt, nor did the fact that the testator

directed his debts to be paid out of a mixed fund. *Mason* v. *Mason*, 13 O. R. 725.

——— *Distribution of Estate.*]—The testatrix, who died in 1891, specifically devised to her grandson a part of her land, which was incumbered. To the plaintiff she gave a legacy of $5,000. The remainder of her estate, consisting of personalty and other lands, she did not dispose of or in any way refer to in her will, except in this clause: "I hereby charge my estate with payment of all incumbrances upon the said lands at the time of my death:"—Held, that the residue of the estate was charged with mortgage debts to the exclusion of the land specifically devised. Such residue was to be treated as one fund, and as if it were all personalty, under s. 4 of the Devolution of Estates Act, R. S. O. 1887 c. 108; and out of it the debts, including the mortgage debts upon the land specifically devised, were first to be paid, and then the legacy; the balance, if any, to go to the heirs-at-law and next of kin. *Scott* v. *Supple*, 23 O. R. 393.

**Mortgaged Land Charged with Legacies.**]—A testator devised all his real estate to a mortgagee thereof, charged with a legacy in favour of an infant, and bequeathing legacies to others. The mortgagee filed a bill claiming to have the sums appropriated as legacies applied to the payment of his mortgage debt:—Held, that he was not entitled to be paid out of the personalty in preference to the legacies; but that he was entitled to be paid his mortgage debt out of the property so devised to him, before the sums charged thereon for legacies were raised. *Ricker* v. *Ricker*, 14 Gr. 264.

**Mortgage after Will.**]—Where a testator devised property and afterwards mortgaged it, and the personal estate was insufficient to pay the debts and legacies, it was held that the devisee of the mortgaged property was entitled, as against the legacies, to have the property exonerated from the mortgage at the expense of the personal estate. *Lapp* v. *Lapp*, 16 Gr. 159.

**Quebec Law.**]—See *Harrington* v. *Corse*, 9 S. C. R. 412.

**Settlement of Mortgaged Land.**]—Certain land, subject with other lands to an overdue mortgage made by the settlor, was conveyed by him to trustees for his daughter by way of settlement to take effect on his death or her marriage. The conveyance to the trustees contained no covenants by the settlor and no reference to the mortgage, which remained unpaid at the time of the settlor's death:—Held, that the mortgage should be paid out of the settlor's general estate. *Lewis* v. *Moore*, 24 A. R. 393.

**Specific Charge.**]—Lands were conveyed to the son of the testatrix, and he, as to part thereof, stated in writing that he held it in trust for his mother for her life, and after her death for her daughters, H. and M., in fee. The son created a mortgage upon the whole property, and by the writing acknowledging the trusts—to which the testatrix was a party—it was agreed that £600, part of the mortgage money, should be charged on that part of the mortgaged premises settled on the daughters:—Held, that this sum was payable as a debt out of the estate. *Wilson* v. *Dalton*, 22 Gr. 160.

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11. *Joint Tenancy and Tenancy in Common.*

**Charge of Maintenance.**]—Testator, after 1st July, 1834, devised to his sons C. and F., the land in question, with the mills thereon erected, "the said land and mills to be held and divided by the said C. and F., as they shall deem most equal and just;" and a direction was added, that they should equally contribute towards the maintenance of the testator and his wife during their lives, and to the payment of his debts:—Held, that the devisees took a fee as tenants in common, not as joint tenants. *Ingalls* v. *Arnold*, 14 U. C. R. 296.

**Devisees Directed to Value Lands in their Possession.**]—H. P., who died in 1833, desired by his will that his sons and daughters should meet to have an inventory taken of all his goods and lands, and if any of them had received any goods they should give them in to be appraised, and keep them as part of their shares, and if any of them were living on his lands they should keep the same at the inventory price; and at a subsequent meeting they should agree together for the division of "my said goods and chattels, lands and tenements, by me given and bequeathed to them, their heirs, and each of their heirs and assigns for ever, to share and share alike." He left seven children, one of whom, a married daughter, was living on the land in question with her husband at the testator's death, and had been so for many years previous. The plaintiff, claiming through another daughter, contended that the will made all testator's children tenants in common of all his land, and that he was entitled to a one-seventh part of this:—Held, that even if the will created a tenancy in common as to all other lands, it did not extend to lands on which any of the children were living. *Morross* v. *McAllister*, 26 U. C. R. 368.

**Direction to Pay Debts.**]—A will devised certain property to the testator's two sons, their heirs, &c., and provided that the devisees should jointly and in equal shares pay testator's debts and the legacies in the will. There were six legacies of £50 each to other children of the testator, and these were to be paid by the devisees at the expiration of two, three, four, five, six and seven years respectively. The estate vested before the statute abolishing joint tenancies in Nova Scotia came into operation:—Held, that these provisions for payment of debts and legacies indicated an intention on the testator's part to effect a severance of the devise, and the devisees took as tenants in common and not as joint tenants. Fisher v. Anderson, 4 S. C. R. 406, followed. On the trial of a suit between persons claiming through the respective devisees to partition the real estate so devised, evidence of a conversation between the devisees, which plaintiff claimed would shew that a severance was made after the estate vested, was tendered and rejected as being evidence to assist in construing the will:—Held, that it was properly rejected. Held, per Gwynne and Patterson, JJ., that the evidence might have been received as evidence of a severance between the devisees themselves, if a joint tenancy had existed. *Clark* v. *Clark*, 17 S. C. R. 376.

**Joint Tenancy with Devise over.**]—A testator, in a will containing inconsistent provisions, devised certain real estate, after the death of his daughter, to his grandsons, J. and F., "to hold as joint tenants, and not as tenants in common. To have and to hold the same to them during their joint lives, and to the survivor of them, and to their male heirs after their or either of their decease, and to their heirs and assigns forever," and in case of the death of F. without leaving lawful issue, then the portion that would have belonged to him if living, the testator gave to another grandson, H., for his life, and after his death to his heirs and assigns for ever: —Held, that the remainder after the death of the daughter went to J. and F. as joint tenants for life, with several inheritances in tail male, and with remainder in fee as to F.'s part to H. *Hellem* v. *Severs*, 24 Gr. 320.

**Remainder to Children.**]—A testator on the 23rd February, 1819, devised all his property, real and personal, to his wife for life or widowhood, and directed the same to descend equally between his children, A., B., C., D., and E., their heirs and assigns, lawfully begotten, and in case of failure of issue the same property, real and personal, to F., his heirs and assigns:—Held, that the children took estates tail in the realty as tenants in common and with cross-remainders amongst them, and that B., C., D., and E. took the share of A., who died before the testator. Per Esten, V. C., the bequest over of the personalty was void for remoteness. *Heron* v. *Walsh*, 3 Gr. 606.

Testator, on the 20th December, 1833, after devising certain land to his son G. and his wife, and to the survivor of them, added, "after the decease of the said G. and his wife, I give, devise, and bequeath the said lands (so devised to them) to the children of the said G. and his wife, including E., son of the said G. by his first wife, to have and to hold the same to the said children of the said G., or the survivors of them, for ever, share and share alike." G. and his wife left two children surviving them. E. died before the father. In ejectment by one child against a purchaser from the other:—Held, that the two children took as tenants in common, and not as joint tenants, and that the plaintiff therefore was entitled only to one undivided moiety. *Keating* v. *Cassels*, 24 U. C. R. 314.

**Tenants in Common.**]—Held, upon the special terms of a will set out in the report, giving the estate to trustees with directions for accumulation and distribution, that the intention of the testator was that his estate should be divided, and that the children of the testator's daughter took as tenants in common, and consequently on the death of the eldest son the whole right, title and interest in his share, vested in the appellant. *Fisher* v. *Anderson*, 4 S. C. R. 406.

**Widow and Issue.**]—A testator who died 1st October, 1853, devised his estate, upon trust, inter alia, as follows: "To pay my debts and funeral expenses, and manage the said premises so given, granted, devised, and conveyed to the said executors, in whatever manner they consider most advantageous for my wife and my issue, who I will and declare to be entitled to receive the benefit of any and every portion of the aforesaid lands, goods," &c.:—Held, that the widow and children of the testator took as tenants in common. *Shaw* v. *Thomas*, 19 Gr. 489.

*See* ESTATE.

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12. *Lapse and Mode and Time of Distribution and Payment.*

**Assignment**—*Payment before Period of Distribution.*]—Two devisees of full age having a vested interest absolute in a definite fund in court, although not divisible by the terms of the will until a third devisee attained twenty-one, having assigned their interest in the fund to a purchaser, the court, the estate having been otherwise wound up, made an order for payment out to the assignee, without waiting for the period of distribution. *Re Wartmen*, 22 O. R. 601.

**Attainment of Majority**—*Devise Conditional on Testator's Acquisition of Property.*] — A testator by his will provided that in case his father did not revoke his will and so deprive him (the testator) of certain lands therein devised to him, then he (the testator) devised to S. certain lands, but in the event of his father altering his will and depriving him (the testator) of the lands therein devised to him, then he devised the said land otherwise. He then bequeathed pecuniary legacies to certain of his children, adding in the case of those of them who were under eighteen, the words "to be paid to them when they come of age," and concluding, "I do hereby authorize and direct my said executors to invest the moneys devised to my children in good legal securities, until they arrive of age, and the interest obtained from such investment to be paid to my wife to assist her in supporting and educating my family." The father of the testator did not revoke or alter his will in the way referred to, but the testator predeceased him: —Held, that the words relating to the alteration of his will by the father of the testator must be construed as meaning that if the testator became the owner of the lands devised in his father's will, so that he could have a disposing power over them, then that they should go in the manner mentioned. Held, also, that the pecuniary legacies were all of them vested; and that the legacy left to each child which did not attain twenty-one within the year after the testator's death, was to be invested until each child came of age, and the interest up to the several times when they should each attain twenty-one, should be applied in assisting the widow or mother to maintain and educate such child or children, and as each child attained twenty-one he or she would be entitled to be paid their respective legacies. *Re Sproule, Sharp* v. *Sproule*, 17 O. R. 334.

**Bequest to Two Sisters and their Children.**]—A testator bequeathed personal estate to his two sisters, M. and S., and to their children, all to share alike if living. One of the sisters died before the testator:—Held, that her share lapsed. *Bradley* v. *Wilson*, 13 Gr. 642.

**Conversion.**]—Although there may be a trust for conversion, the beneficiaries may, if absolutely entitled, elect to take the property in its actual state. *Crawford* v. *Lundy*, 23 Gr. 244.

——— *Absolute Direction to Sell—Division per Capita.*]—A testator by his will directed his executors to pay his debts, funeral expenses and legacies thereinafter given out of his estate, and proceeded: "My executors are hereby ordered to sell all my real estate, after the payment of all my just debts and funeral expenses, and all my property and personal effects, money or chattels, are to be equally divided between my children and their heirs, that is the heirs of my son G. and daughter E., now deceased, and my son J., Mary and Hannah, or their heirs. Should any of my said heirs not be of age at my death, my executors are to place their legacies in some of the banks of Ontario until the said heirs are of age:"—Held, that there was no intestacy either of the real or personal estate. It is to be presumed that the testator did not intend to die intestate, and the language shewed that he did not intend his heirs to take his property as real estate, as he peremptorily directed a sale, making an actual conversion of it into money, thus blending the real and personal property into a common fund, and then bequeathed it all to the legatees. (2) That the persons entitled to share under the will took per capita and not per stirpes upon the same principle as in the case of Abrey v. Newman, 16 Beav. 431. (3) That the grandchild of G. was not entitled to a share, the children of G. taking in their own right and not in a representative capacity. *Wood* v. *Armour*, 12 O. R. 146.

**Death of Named Person.**]—A testator devised his lands to his wife "to have and to hold the said premises with appurtenances unto the said J. S., for and during her natural life, and afterwards unto the surviving children of my cousin T. S. S., to be divided share and share alike:"—Held, that the period of distribution was after the death of the tenant for life—the wife; and that the children of T. S. S. who were living at that date, or their issue, were the only parties entitled to the estate. *Smith* v. *Coleman*, 22 Gr. 507.

———*Distribution per Capita.*]—A testator, in 1856, devised certain land to M., and in case of her death without issue, then to the heirs of C. and E., "to be equally divided between them." C. died after the testator, leaving five children. M. died after C. without issue. E. survived at the date of the hearing, having one child living:—Held, that the period of distribution was upon the death of the first taker, M., so that those were entitled who were then the heirs of C. and E., and that they took per capita and not per stirpes. *Sutter* v. *Johnson*, 22 Gr. 249.

——— *Issue Coming into Existence.*]—A testator directed that, at the death of his wife, if she survived him, all his estate (with certain exceptions) should be sold, and the proceeds equally divided among his four daughters and three sons and their children, after paying $200 to each of the three children of his deceased daughter R. He left surviving him his widow, who was still living, three sons and four daughters and twenty-seven grandchildren, besides the children of R. Two of the grandchildren were born after the date of the will but before the testator's death, and one was born after his death:—Held, that all the children and grandchildren would take concurrently who were in existence at the death of the widow; but as other grandchildren might still come into being who would not be bound by the present proceedings, the court declined to make any order upon the will. *Dryden* v. *Woods*, 29 Gr. 430.

S. P. by her will provided as follows: "Also, I will and ordain that my said (property) after the death of my before mentioned daughters E. O. W. and S. A. W., be sold . . . and the proceeds . . . be divided between the children of my daughters E. O. W., M. K., and S. A. W. one-third to the children of the said E. O. W., one-third to the children of the said M. K., and one-third to the children of the said S. A. W., share and share alike, and in case of the decease of one of the said families of children as aforesaid, then I will and ordain that the said proceeds . . . be equally divided between the two remaining families, the children of each family receiving share and share alike, of such half to each family." At the time of the making of the will M. K. was dead, leaving three children who survived the testatrix. S. A. W. survived E. O. W., and died many years after the testatrix. All three of the said children of M. K. predeceased S. A. W., two of them intestate and without issue, and one leaving two children who survived S. A. W. E. O. W. had three children, one of whom died childless before the testatrix, and the other two survived M. A. W. S. A. W. had several children, one of whom died during her lifetime leaving children, and the others all survived her:—Held, that the period of distribution was the time of the death of M. A. W., and that the children of E. O. W. and M. A. W., then living, were entitled to the whole of the property, one moiety to each family, the members of each family sharing equally their moiety. *Jenkins* v. *Drummond*, 12 O. R. 696.

**Devisee in Tail Predeceasing Testator.**]—In one clause of his will, a testator devised certain lands to his son A. S. M. "as soon as he attains the age of twenty-one years, for and during the term of his natural life," and after the determination of that estate to the sons of the body of A. S. M. in tail male, as they should be in point of birth, and for want of such issue, then to the daughters of the body of A. S. M. and the heirs of the body of such daughters, which daughters and their issue were to take as tenants in common, and for default of such issue, the lands were to be divided among the testator's two sons, or the heirs of their respective bodies, who at the death of A. S. M. should be entitled to any part of the lands devised in tail in the will to hold to his respective other sons, and in default of such sons and of their issue at the death of A. S. M. then to the right heirs of A. S. M. for ever. A. S. M. predeceased the testator:—Held, that thereupon the devise to A. S. M. lapsed, the whole scope of the clause intending that A. S. M. should survive the testator. *Riddell* v. *McIntosh*, 9 O. R. 606.

**Devise to Children and their Issue**—*Per Stirpes or per Capita.*]—Under the following provision of a will, "when my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money . . . and to divide the same equally among those of my said sons and daughters who may then be living, and the

children of those of my said sons and daughters who may have departed this life previous thereto:"—Held, reversing 18 A. R. 25, sub nom. *Wright* v. *Bell*, that the distribution of the estate should be per capita and not per stirpes. *Houghton* v. *Bell*, 23 S. C. R. 498.

**Devise of Rents and Interest**—*Payment of Debts.*]—A testator, after directing that his debts should be paid by his executors, gave to his wife during her life all the rents and interest of the property for her sole use; and then willed that his property should be divided into three equal portions, one to his wife, one to his daughter M., and one to his daughter E., on condition that his wife should have power to bequeath her portion as she pleased; that M. should have her portion after her mother's death, and should invest it for the benefit of her children; that E. should have one-half of her portion in absolute control, and the other half to receive the interest as long as she should live, and that then this half should go to M.'s children; but, further, if E. had a child or children at her death, the remaining half should go to such child or children:—Held, that a sale and conversion of the real estate was not required or authorized during the lifetime of the wife, the tenant for life, even with her consent. Held, also, that the direction for payment of debts by the executors did not affect the devises of the real estate, for they were not charged on the land, and there was no implied power of sale. *Henry* v. *Simpson*, 19 Gr. 522.

**Devise to Son**—*Change in Law.*] — H. made his will on 10th October, 1868, devising land to his son J., without words of limitation, and added a codicil on 23rd February, 1870, by which he confirmed the will save as changed by the codicil. J., the devisee, died 17th February, 1874, and H., the testator, died 15th December, 1879:—Held, that as the will was made and republished by the codicil prior to 1st January, 1874, the sections subsequent to s. 7 of R. S. O. 1877 c. 106, and among them s. 35, did not apply, and that under the former law the devise to J. lapsed. *Zumstein* v. *Hedrick*, 8 O. R. 338.

**Discretion as to Sale.**]—Where there is no absolute direction to sell, but a discretion is given to a trustee to sell or not, there is no conversion; but the property remains of the character it possessed at the death of the testator until the trustee has seen fit in his discretion to change it by an execution of the power. *In re Parker Trusts*, 20 Gr. 389.

**Discretionary Right to Increase Share of Devisee.**]—Testator gave to his son John £25, "with such other provision as my executors may deem proper, and his own conduct may deserve." He then devised to his son R. certain lands in fee, "except and in so far as any reservation may be made by my executors in favour of my son John:"—Held, that the executors took no estate in the lands devised to R., but that under the reservation they had power to convey to John a life estate in part of them. Semble, that they could not have conveyed the whole of such lands to John for life, or any part in fee. *McKenzie* v. *Grant*, 13 U. C. R. 180.

**Discretion.**]—A testator directed his residuary estate to be realized, and the proceeds to be divided equally between his three children on his daughter attaining twenty-one. As to one—his eldest son G.—the testator empowered his executors in their discretion to withhold his bequest, and pay him £10 within one year after the testator's death. And in case of the death of any of the legatees before the time for payment, the share or shares of the party so dying to go to the survivor or survivors; "but it is to be understood, however, that in case either of my children should die other than G., that it is not my will or desire that he should have any share of the deceased party's portion, unless my said executors should deem it expedient to give it to him; and that it is my will and desire that he should not receive any part of my property under any circumstances other than the £10 before mentioned, unless my executors think it advisable to give it to him:"—Held, that the executors were not put to an election whether they would pay only the £10 in one year after the testator's death; but that they could at any time withhold any further payment to G., notwithstanding they had already paid him a larger sum than the £10. *Bain* v. *Mearns*, 25 Gr. 450.

The testator gave certain shares of his estate to two sons, the provision for payment being as follows:—"To each of my sons as they arrive at the age of twenty-three years, or so soon thereafter as my said trustees shall deem it prudent or advisable so to do, they shall pay over one moiety of his share of the corpus of said estate and the accumulated income on said moiety, if any, and the remaining moiety upon his attaining the age of twenty-seven years, or so soon thereafter as they shall deem it advisable so to do:"—Held, that this direction did not give the trustees an absolute discretion as to the time of payment, but that the general rule, that every person of full age to whom a legacy is given is entitled to payment the moment it becomes vested, applied. *Lewis* v. *Moore*, 24 A. R. 393.

J. C., the elder, by deed of 30th January, 1862, conveyed the lands in question in the cause to his daughter, S. C.: "In trust from and after the death of the grantor until the youngest child of J. C. shall arrive at the age of twenty-one years, the proceeds arising from the use of the land shall be applied for the use and benefit of the said J. C., and his family, so far and in such a way as to the said S. C., her heirs or executors, shall seem right and proper; and after the said youngest child shall so arrive at the age of 21 years, it shall be the duty of the said S. C., her heirs or executors, to either divide the land between the said J. C. and his children, or sell and dispose of the same, and the proceeds of such sale to apply for the benefit of them, the said J. C. and his children, in such way or manner as to her or them may seem right and proper:"—Held, that under the deed, S. C. was a trustee to apply the proceeds of the land till the youngest child of J. C., living at the death of the grantor, attained 21, for the use and benefit of J. C. and his family, to the extent and in the manner S. C. might deem right and proper, the amount and mode of application being left entirely in her discretion; and after such child attained 21 either to divide the land amongst J. C. and his family, or to sell the same and apply the proceeds for the benefit of J. C. and his children, in such manner as to her should seem right and proper; but she was not at liberty to select one

child and give the whole proceeds to such one; the discretion vested in the trustee being as to the amount and mode of application—not as to the persons to be benefited; and this discretion within these limits the court would not control. *Coy* v. *Coy*, 25 Gr. 267.

**Division among Children and Grandchildren**—*Child Dead before Will Made.*]—A testator bequeathed to two of his grandchildren £500 each. By a subsequent clause he directed certain securities to be realized and invested to meet two annuities charged on his estate, and after these annuities should cease "to exist, then, and in that case, the money so to be invested to raise the sum to pay these annuities shall be divided equally among my children then living, share and share alike, or in case of any of their deaths, then to their children per stirpes, and not per capita." At the time of making his will, his daughter, the mother of the two legatees, had been dead for some time: — Held, that the children of such deceased daughter did not take any interest in the residuary estate. *Taylor* v. *Ridout*, 9 Gr. 356.

**Division of Estate**—*Right to Postpone.*]—T. F. F., who, in partnership with his brother J. F., carried on the business of manufacturing boots and shoes in Montreal, by his last will left all his property and estate to be equally divided between his two brothers, M. W. F., the appellant, and J. F., the respondent. The will contained also the following provision: "But it is my express will and desire that nothing herein contained shall have the effect of disturbing the business now carried on by my said brother Jeremiah and myself in co-partnership, under the name and firm of Fogarty & Brother, should a division be requested between the said Jeremiah Fogarty and Michael William Fogarty, should the latter not be a member of the firm, for a period of five years computed from the day of my death, in order that my brother, the said Jeremiah Fogarty, may have ample time to settle his business and make the division contemplated between him and the said Michael William Fogarty, and in the event of the death of either of them, then the whole to go to the survivor." T. F. F. died on the 29th April, 1889. On the 30th April, 1889, a statement of the affairs of the firm was made up by the book-keeper, and J. F. and M. W. F. having agreed upon such statement, the balance shewn was equally divided between the parties, viz., $24,146.34 being carried to the credit of M. W. F., in trust, and $24,146.34 being carried to J. F.'s general account in the books of the firm. At the foot of the statement a memorandum dated 12th June, 1889, was signed by both parties, declaring that the said amount had that day been distributed to them. On the 6th March, 1890, M. W. F. brought an action against J. F., claiming that he was entitled to $24,146.34, with interest from the date of the division and distribution, viz., 30th April, 1889. J. F. pleaded that under the will he was entitled to postpone payment until five years from the testator's death, and that the action was premature:—Held, that J. F. was entitled under the will to five years to make the division contemplated, and that he had not renounced such right by signing the statement shewing the amount due on the 30th April, 1889. *Fogarty* v. *Fogarty*, 22 S. C. R. 103.

**Division with all Convenient Speed.**]—A testator directed his executors, as soon as provision was made for the payment of the annuities given by his will, and upon payment of his debts, funeral and testamentary expenses, to divide with all convenient speed the residue of his estate amongst the persons mentioned in the will; and the executors, after having invested a sufficient sum to meet the annuities, and having paid the debts, funeral and testamentary expenses, divided a portion of the residue of the estate amongst the persons entitled to receive the same; but before the balance of the residue was divided one of the persons entitled to share therein died:—Held, that the share of the deceased vested at the time when under the will the distribution should have been made, and that the executors could not postpone the period of distribution; but that it was a question of fact whether the executors could with all convenient speed, after making the payments and provisions directed by the will, have divided the residue of the estate before the death had occurred; and directed a reference to ascertain this fact before it would determine to whom the balance of the share of the deceased person should go. *Jarvis* v. *Crawford*, 21 Gr. 1.

**Equal Division among Heirs.**]—A testator disposed of the residue of his estate as follows: "I give and bequeath the remainder of my personal and real estate to my legal heirs including my daughter Jemima Woodside, to be divided equally amongst them." He left three children and four grandchildren, the issue of two other of his children, who predeceased him:—Held, that a division per capita (not per stirpes) was proper. *Chadbourne* v. *Chadbourne*, 9 P. R. 317.

**Equal Division of Proceeds of Real Estate.**]—A testator by his will directed his real estate to be sold and the proceeds to be equally divided between his wife and his brother and sister:—Held, that the wife took a one-half share, and his brother and sister the other half share between them. *Hutchinson* v. *LaFortune*, 28 O. R. 329.

**Heirs and Assigns**—*Legatee Predeceasing.*]—The testator bequeathed an amount of personal estate to his brother John, "to have and to hold to him, his heirs and assigns for ever." John predeceased the testator:—Held, that the legacy lapsed, and that the next of kin of the legatee were not entitled. *Mealey* v. *Aitkins*, 27 Gr. 563.

**Illegitimate Child.**]—R. B. by his will devised his property to executors upon trust as follows: "Fifthly, in trust to pay to each of my two surviving children F. B. and M. A. B. the sum of $1,000," and the residue after the payment of his debts, &c., and the said legacies and an allowance to his executors, to his four sisters. F. B. and M. A. B. were illegitimate children, and M. A. B. married and died during the lifetime of the testator leaving children surviving. In a suit for administration and construction of the will:—Held, that the words "child or other issue" in R. S. O. 1877 c. 106, s. 25, mean legitimate child or other legitimate issue and do not apply to an illegitimate child, and that the legacy to M. A. B. lapsed. *Hargraft* v. *Keegan*, 10 O. R. 272.

**Legacies Payable at Specific Date**—*Division of Residue.*]—A testator gave two legacies to become due and payable in three and four years respectively from his decease,

and instructed his executors to invest the same and pay the interest to the beneficiaries, and directed the investment of two separate sums for the benefit of two other devisees (one of whom was his sister) with a direction to pay them the interest for their lives, and proceeded, "and should there be a residue or surplus after paying out the foregoing bequests I will that the same be equally divided between my sisters and S. J. B., or the survivors of them at the time of winding up the affairs:"—Held, that the time for the division of the residue was, when sufficient funds were invested to produce the legacies and fulfil the directions of the will, and that it was not postponed until the legacies were paid over or to any subsequent time. *Macklin* v. *Daniel*, 18 O. R. 434.

**Majority of Named Person.**]—Where an estate consisted in large part of personalty, and by the will of the testator the whole was to be divided among his children on the youngest attaining 21, all of whom took vested interests on their attaining majority, and in the event of the death of any before the period of distribution, leaving issue, the share of the one so dying was to go to his children, share and share alike:—Held, that until the youngest child attained 21, the adult parties were not entitled to call for a partition or distribution of the property. *Murphy* v. *Mason*, 22 Gr. 405.

**Mistake**—*Direction to Divide in Impossible Fractions.*]—A testator by his will directed: "When my youngest son is of the age of eighteen years, my estate shall be divided among my children then living, i. e., to each of my sons I leave two-thirds, and to each of my daughters one-third, of all my estate and effects." When the youngest son attained eighteen, there were then twelve children living, seven daughters and five sons:—Held, that the most reasonable and satisfactory construction of this clause, having regard to the words used, was that each child should have a share, but that each son's portion should be double that of a daughter. The principle of construction in such cases of mistakes in wills is that the "words are not corrected, but the intention, when clearly ascertained, is carried out notwithstanding the apparent difficulty caused by the particular words." *Lasby* v. *Crewson*, 21 O. R. 93.

**Named Members of Class.**]—A testator, by his will, devised as follows: "All and singular the rest, residue, and remainder of the estate and effects, real and personal, which I shall die possessed of, or to which at the time of my decease I shall be entitled, I do devise, bequeath, and order to be equally divided amongst my five sons above mentioned." One of the sons (A.) died during the lifetime of the father without issue:—Held, that the devise of the residue was not a devise to a class; and that by the decease of A., his share lapsed and descended to W., as heir-at-law of the ancestor. *McIntosh* v. *Ontario Bank*, 19 Gr. 155.

**Personalty to Legatees, "or their Heirs, Executors, or Assigns."**—*Death of Legatee in Lifetime of Testator.*]—A testator, by his will, after a provision in favour of his wife for life, directed that "at the death of my beloved wife . . . any money that may then be remaining . . . shall be equally divided and paid to" certain nephews and nieces, naming them, "or their heirs, executors, or assigns." One of the nieces predeceased the testator, leaving a husband and children:—Held, that the gift to the deceased niece did not lapse and that her heirs entitled to her share were those persons who would have taken her personal property under the Statute of Distributions in case of her dying intestate possessed of personal property. *Re Wrigley Estate*, 32 O. R. 108.

**Prior Life Estate**—*Personalty to "Heirs-at-Law."*]—By a will of personal estate, after a life estate had been given to the testator's widow, it was provided by a residuary clause that the property should be sold and the proceeds equally distributed among the testator's nephews and nieces, such bequests on the death of any of them entitled to the same previously to the period of distribution to go to their "heirs-at-law." At the time of this action, the widow of the testator was still alive, but some of the nephews and nieces had died:—Held, that the will gave a vested interest to such nephews and nieces as should be alive at the time of the testator's death, but the period of distribution was the death of the widow; and the bequest to the nephews and nieces was subject to be divested as to those of them who should die before the said period of distribution, in favour of their representatives, who were entitled to take in substitution for the original legatee, and, semble, for this reason it was to be inferred that by "heirs-at-law" the testator meant to express that the benefit was to go to the persons who would inherit the personal estate—that is to say, the next of kin. *Harrison* v. *Spencer*, 15 O. R. 632.

**Ratable Addition of Surplus to Legacies.**]—Among other bequests the testator declared as follows: "I bequeath to the worn-out preachers' and widows' fund in connection with the Wesleyan conference here, the sum of £1,250, to be paid out of the moneys due me by Robert Chestnut, of Fredericton. I bequeath to the bible society £150. I bequeath to the Wesleyan missionary society in connection with the conference the sum of £1,500." Then followed other and numerous bequests. The last clause of the will was:—"Should there be any surplus or deficiency, a pro rata addition or deduction, as may be, to be made to the following bequests, namely, the worn-out preachers' and widows' fund; Wesleyan missionary society; bible society." When the estate came to be wound up, it was found that there was a very large surplus of personal estate, after paying all annuities and bequests. This surplus was claimed, on the one hand, under the will, by these charitable institutions, and on the other hand by the heirs-at-law and next of kin of the testator, as being residuary estate, undisposed of under his will:—Held, that the "surplus" had reference to the testator's personal estate out of which the annuities and legacies were payable; and therefore a pro rata addition should be made to the three above-named bequests, Statutes of Mortmain not being in force in New Brunswick. *Kay* v. *Annual Conference of New Brunswick*, 6 S. C. R. 308.

**Realization Directed.**]—Where a testator directed his real and personal estate to be converted into money; the proceeds to be invested; such investments to be continued until the whole of his property should be realized; and from and out of the same, when so realized and invested in the whole, and thus available for division, and not before, to pay certain legacies:—Held, that mortgages pro-

perly secured, which the testator held, should for the purposes of the will be deemed to be realized and invested immediately after the testator's decease; that the period of payment was not to be extended beyond the time that the estate might, with due diligence, be realized, and that the trustee could not prolong the period by selling the real estate on time. *Smith* v. *Seaton*, 17 Gr. 397.

**Residue**—*Executory Devise—Event Happening in Part.*]—A testator by his will gave his wife a life interest in his estate, and at her death after giving some specific legacies the will provided: "The residue . . . I give, devise, and bequeath as follows, that is to say: it shall be equally divided between my . . . brothers;" (two) "or in case of their dying before my . . . wife it shall be equally divided between the heirs of my . . . brothers." One of the brothers died in the lifetime of the widow and the other survived her:—Held, that, as the event provided for, viz., the death of both brothers during the widow's lifetime, had not happened, the devise of the residue to them was not divested, and that the share of the brother first deceased passed under his will. *Re Metcalfe, Metcalfe* v. *Metcalfe*, 32 O. R. 103.

**Residue to be Divided among "Legatees."**]—A testator, after making sundry dispositions of his real and personal estate, proceeded to dispose of the residue as follows: "On the death of my said wife I order and direct my said executors and trustees to sell and dispose of all the rest, residue, and remainder of all the real and personal estate which I may die seised or possessed of, or in any way entitled, to the best advantage, and out of the proceeds thereof: 1. To pay Margaret Hope, $400. 2. To pay my nephews Thomas and Joseph Tease, $1,000 each. 3. To pay to Margaret Hulse, Robert Ramsay, George Ramsay, John M. Wood, and James W. Wood, $200 each. 4. To pay to my nieces Elizabeth, Amelia, Matilda, and Hannah, daughters of my said brother Thomas, $200 each. 5. To invest the sum of $600 on good security, and pay over the interest thereof to John Henry Wright, son of John Wright, during his natural life; and at his death I direct my executors to divide the said sum of $600 equally among the brothers and sisters of the said John Henry Wright, who may survive him. And as to all the rest, residue, and remainder thereof, I direct the same to be divided equally amongst all the legatees herein mentioned:"—Held, (1) that under this residuary bequest all the legatees named, including John Henry Wright, but not his brothers and sisters, were entitled to participate in the residue of the estate. (2) That John Henry Wright was entitled to the interest of the $600 during his life, and that only his brothers and sisters living at his death (though born after the date of the will), were entitled to share in the fund of $600. *Edwards* v. *Smith*, 25 Gr. 159.

By another clause of the will the testator bequeathed to Hannah Wright for her separate use a mortgage held by the testator against property of her husband, and all moneys secured thereby and unpaid at the testator's death:—Held, that she was a legatee, and as such entitled also to share in the residue. *Ib.*

The testator directed his executors "to cancel all claims I may have at the time of my death against my nephew H. T.; and to cancel all promissory notes I may have against my nephew, J. T.; and to cancel all claims I may have against A. H.; and such cancelling shall in no way be construed as satisfaction or part satisfaction of any legacies herein given:"—Held, that this constituted these three persons legatees, and as such they were entitled also to share in the residue. *Ib.*

The testator gave to M. E. R. the household furniture and other chattels remaining after the death of the widow:—Held, that she also as such legatee was entitled to share in the residue. *Ib.*

W. S. and J. S. were entitled to the interest of purchase money invested on the sale of land:—Held, that they were thus annuitants, that as such they fell within the definition of legatees, and therefore were also entitled to share in the residue. *Ib.*

The testator, amongst other bequests of personalty, directed his executors, "on the death of my said wife, to pay over to the Wesleyan Methodist superannuated ministers' fund, out of the pure personalty then in their hands, the sum of $800." There was no such charitable institution as the one named in Canada, but there was a society called "the connexional society of the Wesleyan Methodist church," one object of which was the maintenance of a fund called "the superannuated or worn-out preachers' fund:"—Held, that the testator having been resident in Canada, the presumption was, that it was a Canadian society he meant; that "the connexional society" was entitled to receive this bequest, as the one most nearly answering the description given in the will; that they were thus legatees, and as such, also entitled to share in the residue; such society being entitled to hold lands to the annual value of $5,000, and it was shewn that the lands held by the society did not exceed £1,000 a year; and therefore though the residue was composed of both realty and personalty, the Statutes of Mortmain did not apply to prevent the society sharing therein. *Ib.*

The devisee of real estate is not a legatee, and therefore where such an one claimed a share in such residue, the court refused him his costs. *Ib.*

**"Share and Share alike"**—*Period of Distribution—Overpayments.*]—The testator bequeathed his residuary estate, all other property, in lands, mortgages, and stocks to his grandchildren, "the children of J. C., and of my daughter A. J. B., wife of D. B. share and share alike, on their coming of the age of twenty-five years, to be finally determined and paid to them on the youngest coming to the age of twenty-five years. Provided, nevertheless, that each one on coming to the age of twenty-five years receive a portion of not more than half of what their share will be on the youngest coming of age." Then directions were given as to keeping books of account, and managing the estate. "And when the books so audited shew the revenue of my estate after paying the before mentioned bequests, taxes and other charges on the same, amounts to $500, then half of such revenue or income be divided, share and share alike, between the family of my son J. C., and the family of my daughter A. J. B." (The other half going into the estate):—Held, (1) that the children referred to, the grandchildren of the testator, took per capita, and not per stirpes. (2) That when the eldest attained the age of twenty-five years he was entitled to receive one-half of his share, payment of which could not be delayed, and that date must be

taken as a period at which those to take were to be ascertained and that any child born subsequent to the time the eldest child attained twenty-five was excluded and all born before that period were entitled to share in the estate. (3) That the children did not take vested interests, the gift to each being contingent on attaining twenty-five. (4) That twenty-five was the age at which the parties became entitled to an arrangement as to the amount of their shares. (5) That the trustees could charge the shares of any who had been underpaid with the excess of such payments. *Anderson* v. *Bell*, 29 Gr. 452, 8 A. R. 531.

**Survivorship** — *Accruer.*] — A testator gave a legacy of $500 to each of three grandchildren, and directed "the said moneys so bequeathed to be kept invested by my executors and the same with accrued interest to be paid over to the said grandsons on their attaining their majority, and the said legacy to my said granddaughter to be paid to her with the interest accrued thereon on her attaining her majority or on her marriage, whichever event shall first happen. In case of the death of any one of my said grandchildren the bequests and legacies to them in this my will contained shall be divided among and go to the survivors of them, share and share alike." One of the grandsons died under age and unmarried, and then the granddaughter died under age and unmarried. The other grandson attained his majority and the executor paid him the whole amount of the legacies. In an action by the personal representative of the granddaughter seeking payment by the executor of half of the legacy given to the grandson who died first and the accumulations thereon:—Held, that the share of the deceased grandson's legacy which accrued to the granddaughter on his death passed on her death to the surviving grandson, and that the plaintiff was not entitled to it. *Clifton* v. *Crawford*, 27 A. R. 315.

**Valuation and Division.**] — The will, amongst other things, directed as follows: "I will and order that the portion of my real estate and premises severally bequeathed to my two sons, and also the portion bequeathed to my four daughters, shall be severally and separately valued; and if either one shall be found to have a greater proportion or share thereof than the other, he or they shall pay back to the other in such manner such amount as will make each one of them equal sharer of my real estate." On a bill filed for a declaration of the rights of all parties under the will:—Held, that each child was entitled to an equal share of the estate devised. *Foster* v. *Lamarcson*, 5 Gr. 135.

**Vested Legacy**—*Payment at Majority.*] —Where a testator gives a legatee an absolute vested interest in a defined fund, the court will order payment on his attaining twenty-one, notwithstanding that by the terms of the will payment is postponed to a subsequent period. Rocke v. Rocke, 9 Beav. 66, followed. *Goff* v. *Strohm*, 28 O. R. 553.

*See*, also, sub-heads 5, 13 (e), 16, and 18.

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13. *Legacies.*

(a) *In General.*

**Administration Action** — *Parties.*]—Legatees are not necessary parties defendant in an administration suit. *Harrison* v. *Shaw*, 2 Ch. Ch. 44.

In a suit by a residuary legatee for the administration of an estate, the plaintiff represents all the residuary legatees; and the other residuary legatees are not entitled, as of course, to charge the general estate with the costs of appearing by another solicitor in the master's office. To entitle them to such costs, some sufficient reason must be shewn for their being represented by a separate solicitor. *Gorham* v. *Gorham*, 17 Gr. 386.

**Admission of Assets.**] — Payment of a legacy in full is a primâ facie admission of assets to pay all the legacies in full, because, if the assets are not sufficient for this purpose, all the legacies must abate in proportion; but it is open to explanation. *Coleman* v. *Whitehead*, 3 Gr. 227.

When an executor pays some legacies, and makes provision for the others, he has not conclusively admitted assets, because the provision which was made for the unpaid legacies must abate in proportion, but it is open to explanation. *Ib.*

Where two legacies were payable at the expiration of a year after the testator's death, and another legacy would not be payable for twelve years, and did not bear interest in the meantime, and the executor paid the legacies immediately payable—sufficient property to all appearance remaining to meet the future legacy—and let the residuary legatee into the enjoyment of the residue, on his undertaking to pay the legacy when it became due out of the assets, and subsequently, with the assent of the executor, a portion of personal residue was appropriated to the satisfaction of a devise of land worth a certain sum, or its proceeds:—Held, that the executor had not so admitted assets as to warrant a personal decree against him at once. *Ib.*

**Assent of Executor.**]—The assent of an executor to a legacy may be by implication as well as by express words, and in this case it was held to be sufficiently shewn by his conduct. *Honsberger* v. *Honsberger*, 5 O. S. 479.

In ejectment it appeared that C. died in 1851 intestate, seised of an unexpired term of years in the land, and leaving an only son, M., who remained in possession, and on his death, in 1857, devised it to his uncle, J. D., for his life, and then to the plaintiff, the testator's child. M. D., another uncle of the testator, was appointed executor. He saw J. D. in possession after M.'s death, and was himself living on the place, but in 1858, he, as executor, conveyed the term to one F.; and afterwards, in 1860, J. D. administered to C.'s estate, and as such administrator assigned his interest also to F. under whom defendant claimed. The court being left to draw the same inferences as a jury, and the defendant's claim appearing to be dishonest:—Held, that the plaintiff must succeed; that on the death of C., her only child, M., remaining in possession, became entitled, so that J. D.'s deed as administrator conveyed nothing; that there was sufficient evidence to infer an assent by M.'s executor to the bequest to J. D., which would extend to the subsequent devise to the plaintiff; and that his conveyance as executor was therefore inoperative. *Teahon* v. *Leamy*, 21 U. C. R. 216.

**Attachment of Legacies.**]—See *McLean* v. *Bruce*, 14 P. R. 190.

**Compensation to Executors by Legacy.**] — See EXECUTORS AND ADMINISTRATORS, VII. 2.

**Death of Legatee.**]—Where no letters of administration had been taken out, and a legatee was entitled to a very small sum, an order was made for payment of the amount to the solicitor of the legatee, without letters of administration, he undertaking to apply it as intended. *Ross* v. *Ross*, 4 Ch. Ch. 27.

**Deduction of Debt.**] — A testator bequeathed, "unto my sister M. J. such sum as will, together with what shall be at her credit in my books at Montreal, make $6,000." At the time of the making of the will there was $3,258.47 at M. J.'s credit, but subsequently the testator disposed of his business, and as part of the arrangement placed an additional sum of $2,000 to M. J.'s credit, making the whole sum at her credit $5,258.42; of this sum, $3,000 was placed on a special account at interest, $2,000 was agreed to be paid to her by the purchasers, and the balance $258.42, was paid in cash, and her account balanced in the books, leaving nothing at her credit:—Held, that M. J.'s legacy was to be reduced by the amount of testator's debt to her at the time of his death; that what had taken place amounted to payment of the debt; and that she was entitled to the legacy of $6,000. *Wilkes* v. *Wilkes*, 1 O. R. 331.

**Forfeiture of Legacy by Executor.**]—See *Kennedy* v. *Pingle*, 27 Gr. 305.

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

**Legacy in Court.**]—A legacy had been paid into court, and the will directed that it, together with a house and lot also devised to the same person, should be held for the legatee independently of her husband, she receiving the rents, interest and profits. On a motion to have the money paid out, or that it might be invested in the purchase of a farm for the legatee's benefit, the referee held it to be in the jurisdiction of the court to make such an order, and granted the application as to the purchase of the farm, refusing it as to the paying of the money to her absolutely. *In re Turner's Trusts, Ex parte Seaton*, 3 Ch. Ch. 259.

**Legacy Paid under Invalid Will.**]—The plaintiff as executor of one W., having paid money to defendant as a legatee under the will, and the will with the probate having been afterwards set aside by a decree of the court of chancery, the plaintiff was held entitled to recover back the money. *Haldan* v. *Beatty*, 40 U. C. R. 110.

**Mortgage to Pay Legacies.**]—A testator bequeathed to each of his children $100 on attaining majority, and the residue of his property to his widow for life, to be divided amongst his children according to her judgment; or at any time to give such a portion to each or either as she thought proper. Letters of administration were granted to the widow, and she, for the purpose of raising money wherewith to pay legacies, created a mortgage on the real estate, the equity of redemption in which was subsequently sold under execution at sheriff's sale, and the purchaser obtained by conveyance from the appointee of the widow the fee simple in the land:—Held, that the will operated as a devise of some estate to the widow, and made her a trustee of the realty, which she took charged with the legacies; that under the terms of the will and the Property and Trusts Act, 29 Vict. c. 28, s. 12, the widow had power to create the mortgage, and that the purchaser at sheriff's sale took subject thereto, and was bound to redeem or be foreclosed. *Landy* v. *Martin*, 21 Gr. 452.

**Note to Married Woman for Legacy**—*Action by Husband.*]—Defendant delivered to the deceased wife of the plaintiff, a note in payment of a legacy bequeathed to her, and she died before payment:—Held, that a plea, that the wife as payee of the note had died before the plaintiff had reduced the legacy or note into possession, and that he had not administered to his wife's estate, was a good answer to the husband's action on the note. *Robinson* v. *Cripps*, 6 C. P. 381.

**Overpayment.**]—Held, in this case that although the sums overpaid to some of the legatees had been so paid with the sanction of the court, but in a suit in which infants now claiming were not properly represented, that did not relieve the parties to whom such payments were made from refunding the amount, but under the circumstances the order for payment should arrange the mode thereof so as to be as little burdensome as should appear to be consistent with justice to the parties entitled to receive the money. *Anderson* v. *Ball*, 8 A. R. 531.

**Payment by Owner of Charged Land.**]—A testator, who died in 1820, devised his farm to trustees in trust to pay certain legacies, and divide the residue amongst his three sons. The trustees refused to act, and the eldest son, in consequence, on coming of age in 1823, sold portions of the land and applied the proceeds, or part of them, towards paying the legacies. After his death the surviving trustee executed a conveyance of the whole farm to the two surviving sons from misunderstanding the nature of the deed presented to him for execution. The two sons then sold what remained of the farm, and brought ejectment against the plaintiff, who had the parcels sold by the eldest son during his lifetime. The court restrained this action, declared the plaintiff entitled, as far as might be necessary for his protection, to stand in the place of the eldest son in regard to his undivided third of the whole property, and to his charge, for two-thirds of the legacies he had paid, on his brothers' undivided two-thirds of the estate, and decreed a partition and other inquiries to give effect to such declaration. *Hiscott* v. *Berringer*, 4 Gr. 296.

**Release.**]—J. B. being the owner of certain land, by his will, gave his son, M. B., a legacy of $150 and charged it on the land, which he devised to his son W. B., an infant; with a provision that his son J. B. should occupy it during the minority of W. B. and pay the legacy. The land was so occupied and the legacy paid, and a receipt for its

payment taken. W. B. subsequently sold the land to T. B., and T. B. sold it to J. C., who retained $150 of the purchase money because the legacy was not released; but by an agreement agreed to pay T. B. the $150 as soon as he should furnish a release duly executed by M. B. The right to receive the $150 under this agreement and any right he had to obtain this release was assigned by T. B. to M. K. M. K. having tendered a release for execution to T. B. who declined to execute it, brought a suit to compel him so to do:—Held, that, although the plaintiff was entitled to a judgment declaring that the legacy was paid, which might be registered, still as the defendant had done no wrong, and had given a receipt for the legacy when it was paid, he was not compellable to sign anything else, and should not be punished by being ordered to pay the costs for not doing that which he was not bound in law to do. The purchaser should not have objected to the title on account of the legacy if there was proof of its being paid. *Kaiser* v. *Boynton*, 7 O. R. 143.

**Residue to Legatees**—*Persons Entitled.*] See *Edwards* v. *Smith*, 25 Gr. 159, *ante* IV. 12.

**Succession Duty.**]—A testator devised and bequeathed all his real and personal estate to his executors and trustees for the purpose of paying a number of pecuniary legacies, some to personal legatees, and others to charitable associations, and provided that the residue of his estate should be divided pro ratâ among the legatees:—Held, that it was the duty of the executors to deduct the succession duty payable in respect of the pecuniary legacies, before paying the amounts over to the legatees, and they had no right to pay such succession duty out of the residue left after paying the legacies in full. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

(b) *Abatement.*

**Compensation to Executors.**]—Where a testator gives a legacy to his executors, expressly as a compensation for their trouble, and there is a deficiency of assets, such legacy does not in this country abate with legacies which are mere bounties, even though the legacy somewhat exceeds what the executors would otherwise have been entitled to demand. *Anderson* v. *Dougall*, 15 Gr. 405.

**Equality among Legatees.**]—A testator by his will directed that a farm should be sold and that his executors should "first out of the said proceeds set apart the sum of $2,000, and invest the same in some safe security for the benefit of and for the maintenance and education of" the testator's grandson, subject to certain provisions as to payment of the income and corpus, and he then further directed that "out of the proceeds of the sale of the land there shall be paid the following legacies" to three daughters and a son of the testator:—Held, that the general rule of equality among legatees applied, and that, there not being sufficient to pay all the legacies in full, the grandson's legacy should abate proportionately. *Lindsay* v. *Waldbrook*, 24 A. R. 604.

**Legacy to Widow in Lieu of Dower—***Right to Annual Specific Sum—Children of Deceased Child—Right to Parent's Share.*]—A testator by his will bequeathed to his wife $150 a year, payable half-yearly out of the rent of his farm until the sale thereof, when she was to be paid the interest on $2,500 at six per cent., or the $150. On the sale, $2,500 was to be left on mortgage or invested by the executors at interest payable half-yearly to the widow during her lifetime or widowhood, and such provision was to be in lieu of dower. Legacies were given to each of the testator's twelve children (one of whom was dead at the date of the will), to be paid out of the proceeds of the sale of the real estate. The residue of the deceased daughter's legacy was directed to be placed at interest and divided equally between her surviving children on their attaining twenty-one years, and in case any of the testator's children died before receiving their full shares, and leaving issue, the deceased child's share was to be equally divided between his or her children; if such deceased child died without issue, his or her share was to be divided equally between his or her surviving brothers and sisters. All the residue of the estate, not thereinbefore disposed of, he gave to his children, "and their issue as aforesaid provided for," to be divided equally between them from time to time as the money should become payable. The estate proved insufficient to provide for the annuity and payment of the legacies in full, and the annual interest obtainable on the $2,500 was less than $150:—Held, that there was a gift to the widow of $150 a year, and not merely of the annual interest derivable from the investment of the $2,500, and that she was entitled to have it paid out of the residue in priority to the other legatees. Held, also, that the deceased daughter's children were entitled to share in the residue. *Koch* v. *Heisey*, 26 O. R. 87.

**Provision for Widow.**]—The provision for the widow of a testator and certain legacies being charged upon real estate which it was apprehended might prove deficient, the legacies, not the provision for the widow, were in such case ordered to be abated ratably. *Becker* v. *Hammond*, 12 Gr. 485.

**Special Fund Set Apart.**]—See *King* v. *Yorston*, 27 O. R. 1, *post* IV. 20.

**Specific Legacies.**]—A testator out of the proceeds of his real and personal estate gave to one son $200, to another $100, and to the third $1,800, the balance to be equally divided between his daughters, six in number, naming them. By a codicil he revoked the bequest to the second named son of $100, and gave an additional sum of $100 to the first named son. The household furniture to be equally divided between his two daughters last named in the will:—Held, that these legacies were specific and not merely demonstrative, and if the fund was insufficient to pay them all, they must abate proportionally. *Becker* v. *White*, 23 Gr. 163.

(c) *Ademption and Substitution.*

**Annuity**—*Satisfaction.*]—Where a testator had bound himself by bond to pay to his mother £12 10s. annually, and devised part of his lands to his brothers, on condition that they should pay to his mother £12 10s. per annum, and pay all his just debts, and

made them his executors:—Held, that at law the legacy could not be considered as a satisfaction of the annuity in the bond, and that the mother was entitled to both. *Cole* v. *Cole*, 5 O. S. 744.

**Compensation to Executor.**]—The testator bequeathed to M., one of his executors, the interest due on the amount in the savings bank or building society after the death of his daughter B., and the interest annually on the mortgages till twenty-one years from the testator's death was given to him, "to recompense him for the trouble and expense of attending to this my will." In a subsequent clause $100 was given to him "as compensation for his coming from Hamilton quarterly, to submit the statements and accounts, and receipts and expenditure, and deposit receipts to the solicitor as above mentioned:"—Held, that these were not inconsistent bequests, the one being for the care and management of the estate; the other for a specific item of expense—the coming from Hamilton—and might both well stand together. But as M.'s care of the estate was by the will only to arise after B.'s death, and therefore might never come into operation, he was not entitled to claim the $100 until he did enter on the management. *Hellem* v. *Severs*, 24 Gr. 320.

**Farm Stock and Implements** — *Sale after Will.*]—A testator by his will dated 30th June, 1863, gave one-half of his farm to his widow during her widowhood for the maintenance of herself and children, "and with regard to the stock on the said lot at the time of the decease of my said wife, with any other personal effects or property in her possession, she is hereby empowered to make such distribution as to her shall seem best." In July of the following year the testator became insane, and a committee of his person and estate was appointed, who, under an order in lunacy, leased the lands and sold the farm stock and implements:—Held, that the order in lunacy and sale thereunder operated as an ademption of the legacy to his wife, so far as the farming stock and implements were concerned; but that under the power of distribution given by the will, she was empowered to make such distribution of the personal effects bequeathed to her as to her should seem best, not only as to the amounts to be distributed, but also as to the objects of the distribution. *Miller* v. *Miller*, 25 Gr. 224.

**Quebec Law**—*Usufruct—Substitution.*] —See *McGregor* v. *Canada Investment and Agency Co.*, 21 S. C. R. 499.

**Sale of Devised Properties**—*Residuary Legatee—Priority of Debts—Law of Quebec.*] —See *Jones* v. *Fraser*, 13 S. C. R. 342.

**Sale by Mortgagee**—*Charged Land.*]—Where land devised subject to the payment of legacies and to a life estate therein is, after the death of the testator, sold at the instance of a mortgagee, the money remaining after payment of the mortgage debt will be treated in the same manner as if it were the land itself, and, if insufficient to pay all, the tenant for life and legatees will be paid ratably after the value of the life estate has been ascertained. *Armson* v. *Thompson*, 25 Gr. 138.

**Specific Legacy and Residue.**]—One S. by his will directed his estate, real and personal, to be sold, except certain stocks, lands, and securities thereinafter specifically devised, and that his debts and "testamentary expenses" should be paid out of the first moneys that should come into the hands of his executors; and after making certain pecuniary bequests, which he charged primarily on the fund to be produced by the sale of his real estate as aforesaid, and secondarily on the proceeds of his personal estate, he directed that "as to the residue of my personal estate which may be exclusively devoted by me to charitable purposes. I bequeath the same to the churchwardens of the A. church, to be invested by them for the purpose of forming an endowment for the support of the said church." Afterwards, by a codicil, S. bequeathed to three persons named by him $30,000 as an endowment for the A. church, to be invested by them in their own names as trustees for the said church, and to be disposed of for the benefit thereof as therein mentioned, but in certain contingencies to merge in his residuary estate, and be disposed of under the last clause of his will, by which he devised all the rest, residue, and remainder of his estate of which he should die possessed to A. and L., to be equally divided between them, share and share alike:—Held, that on a proper construction of the will and codicil, $30,000 of the pure personalty was to be held by trustees on the trusts as defined for the benefit of the A. church; and as to the residue of that fund, it was to be held generally by the churchwardens for the support and maintenance of that church. A legatee is entitled to take both a pecuniary gift and a residue, whether given in a will or in a combined will and codicil, and the construction of a particular residuary gift is not affected by the presence or absence of a general residuary gift. *Ball* v. *Rector and Churchwardens of the Church of the Ascension*, 5 O. R. 386.

**Substitution of Mortgages.**]—A testator bequeathed to W. L. £1,500, "due to me by R. C., and secured by mortgage." After the making of this will, and in testator's lifetime, R. C. sold to one H. the property mortgaged, and the testator, to facilitate the sale and secure the debt due him, took from H. a mortgage of this and other property, and a covenant to pay the amount; retaining the mortgage from R. C., under which he held the legal estate in the land, and the bond originally obtained from R. C. for the debt. The testator died without altering his will in regard to this legacy:—Held, that the legacy was not adeemed. *Loring* v. *Loring*, 12 Gr. 103.

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(d) *Interest.*

**Direction to Sell.**]—A testatrix by her will directed that a legacy should be paid out of the proceeds of the sale of lands, and that the lands should be sold at any time within two years after her death:—Held, that interest upon the legacy should be allowed from the day when the two years expired; or, if the lands were sooner sold, from the date of sale. *Re Robinson, McDonell* v. *Robinson*, 22 O. R. 438.

Where land was directed to be sold within three years from the testator's death, it was

held that legacies bore interest from the date when the lands should have been sold. *McMylor* v. *Lynch*, 24 O. R. 632.

**Indemnity.**] — By an agreement entered into between the executors of an estate in Lower Canada, and the residuary legatees, the former agreed to settle a particular legacy, and indemnify the residuary legatees from it. According to the laws of that Province, interest is not recoverable upon a legacy until suit brought therefor, without an express promise; and the legatee referred to sued there for the legacy, alleging an express promise by both executors and residuary legatees to pay such interest, in which action the executors denied such promise, and got a verdict, but the residuary legatees allowed judgment by default, and afterwards filed a bill in the court of chancery to compel the executors to indemnify them against the liability they had incurred. The court, under the circumstances, dismissed the bill with costs. *Crooks* v. *Torrance*, 6 Gr. 518, 8 Gr. 220.

**Limitation Act** — *Arrears* — *Express Trust.*]—See *Loring* v. *Loring*, 12 Gr. 374.

**Maintenance.**] — A testator bequeathed $4,000 to his grandson, payable on his attaining twenty-one, and in case of his death before that period the amount was to revert to the residuary estate, and it had been decided, 25 Gr. 253, that in the events that had happened the grandson was absolutely entitled to one-half of the residuary estate, the income of which was amply sufficient for his maintenance:—Held, that although the testator had been in loco parentis to the infant, the infant was not entitled to claim interest on the legacy for his maintenance; but that being entitled to one half of the residue as next of kin, and there being a quasi intestacy as to the interest on the legacy, one-half of it should be paid into court to the credit of the infant; the legacy itself to be paid into court upon the trusts of the will. *Rees* v. *Fraser*, 26 Gr. 233.

**Recovery back**—*Interest on Overpayments — Account.*] — Where a testator bequeathed a legacy to be paid by the devisee of certain lands, through the executor, in twenty semi-annual instalments, with interest at the rate of six per cent., payable at the time of each instalment on the amount of such payment, to be computed from the time of his decease; and, by mutual error, interest was paid with each instalment upon the whole amount of principal then remaining unpaid, which payments of interest were consumed by the legatee as income, while he invested the instalments of principal, and the legatee now brought this action against the executor and devisee claiming an instalment as still due, the defendants alleging that he had been overpaid, and asking an account:—Held, that the overpayments were made under a mistake of fact, and might be recovered or set off; but, that an account should be taken, and that all the payments made should be brought into account and applied, but without addition of interest, to the aggregate of the amounts properly due and payable under the will, and any balance due to the plaintiff ascertained. Corham v. Kingston, 17 O. R. 432, and United States v. Sanborn, 135 U. S. 271, specially referred to. *Barber* v. *Clark*, 20 O. R. 522, 18 A. R. 435.

*See Toomey* v. *Tracey*, 4 O. R. 708; *Munsie* v. *Lindsay*, 11 O. R. 520.

*See Miller* v. *Miller*, 25 Gr. 224; *Fuller* v. *Macklem*, 25 Gr. 455; *Sovereign* v. *Freeman*, 25 Gr. 525; *Smith* v. *Seaton*, 17 Gr. 397; *ante* INTEREST, II.

*See*, also, sub-head 12, *ante*.

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(e) *Out of What Fund Payable.*

**Agreement to Pay Legacy as Purchase Money.**]—A., by agreement, disposed of all his real estate to B., his son-in-law, who agreed to pay to A. an annuity for life, and after A.'s death to pay the purchase money in equal annual instalments to A.'s daughters. A., by his will, made some years after, assumed to grant a legacy to his wife out of the real estate, directing the same to be deducted from the payments to be made to his daughters:—Held, that the agreement was complete, and the proceeds of the realty could not therefore be charged. *Honsberger* v. *Martin*, 8 Gr. 361.

**Charge on Land**—*Registration of Will—Notice — Priority of Legatees over Mortgagees.*]—A testator by his will devised land to his son James, subject to the payment of an annuity to his widow for her life, after the expiration of a lease given by the testaror; and directed his executors to apply the rent derived from the land so devised in payment of an incumbrance thereon, "so that my son may have the said property, at the expiration of the said lease, free from all incumbrance;" and he then directed that his son James should pay one-half of the sums thereinafter bequeathed to each of his daughters, as soon as his son Daniel should attain the age of twenty-one; and to the latter he devised other land, and directed him also to pay one-half of the bequests to the daughters. Then followed the bequests to his daughters, with names and amounts, to be paid to them in equal shares by his sons James and Daniel on the latter attaining the age of twenty-one. The will was entirely silent as to the debts of the testator. James adopted the devise to him, took possession of the land, and dealt with it as his property for many years:—Held, that the one-half of the legacies to the daughters was charged upon the land devised to James. Robson v. Jardine, 22 Gr. 420, followed. The will was duly registered prior to the dates or registry of certain mortgages created by James upon the land devised to him: — Held, that the mortgagees must be taken to have had, at the time of advancing these moneys, full notice of the will and its contents; and were bound to see to the application of the moneys advanced by them; and that, not having done so, the legatees were entitled to priority. Held, also, that that part of s. 22 of R. S. O. 1887 c. 110 which provides that the four preceding sections "shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies," is of general application, and applies to wills coming into operation as well after as before the 18th September, 1865. Held, lastly, that s. 8 of R. S. O. 1887 c. 110 (s. 15 of R. S. O. 1887 c. 102) did not apply; because the money was not money payable upon an express or implied trust, or for

a limited purpose, within the meaning of the section. McMillan v. McMillan, 21 *Gr.* 504, and Moore v. Mellish, 3 O. R. 174, distinguished. *Gray* v. *Richmond*, 22 O. R. 256.

——— *Sale by Executors in Order to Pay the Legacy.*]—A testator devised to his daughter a lot of land charged with a legacy. The daughter predeceased the testator, leaving two children, to whom the lot descended. On an application by the executors at the instance of the official guardian, it was held, that it was the duty of the executors to sell the land and pay the legacy. *Re Eddie*, 22 O. R. 556.

——— *Right to Purchase—Legacies to be Paid by Purchaser.*]—See *Re Curry*, 23 Gr. 277, *post* IV. 20.

**Control for Life**—*Farm Stock and Implements.*] — The testator bequeathed to his wife "the full control of all my real and personal estate, stock and implements, during her lifetime," and willed that at his wife's decease "all the stock of whatever kind, with the farming implements on the farm at my wife's decease shall be equally divided between my sons:"—Held, that the bequest to the widow of the stock and farm implements was specific, and therefore exempt from the payment of the pecuniary legacies. *Augustine* v. *Schrier*, 18 O. R. 192.

**Devise after Payment of Legacies.**]—A testator after devising certain pecuniary legacies and a home to two of his children until they became of age, provided as follows: "And I will and bequeath unto my daughter C. J., all my real estate and the remainder of my personal estate after the above legacies are paid:" — Held, that the legacies were charged upon the real estate. *Johnson* v. *Denman*, 18 O. R. 66.

**Devise of Real Estate** — *Payment of Legacy out of Annual Produce.*] — A testator, after a bequest of a legacy to the plaintiff amongst others, devised to a daughter "my two farms," describing them, and desired his executors to pay the said legacies out of "the annual produce of the farms, or as to them should seem best." The executors renounced, and no one administered. The daughter took possession of the whole estate, paid the debts and received the rents and profits of the farms which she subsequently mortgaged, and they were sold by the first mortgagee, under his power of sale, and after satisfying his claim, the balance of the purchase money was paid into court, and was claimed by a subsequent mortgagee:—Held, that the plaintiff's legacy was a charge upon and payable out of the annual produce of the farms, and that the charge was not affected by the subsequent words, "or" as to the executors "should seem best:" that the fact that sufficient annual produce of the farms had been received which, if set apart, would have paid off the legacy, was no answer to plaintiff's claim, for it could not be set up by the daughter by virtue of her possession and receipt, and her grantees or mortgagees could be in no better position; that if necessary a receiver of such annual produce should be appointed until payment of the legacy with interest not exceeding six years' arrears, that the balance of purchase money should remain in court as indemnity to the purchaser against the plaintiff's claim; and that subject thereto the subsequent mortgagee was entitled to it. *Callaghan* v. *Howell*, 29 O. R. 329.

**Devise Subject to Payment of Legacies.**] — A testator devised his real estate and chattel property (excepting some bequests to his wife) to his son Robert, subject to the payment of his just debts, funeral expenses, and certain specified legacies, which legacies he directed his executors to pay. By a codicil he directed the chattel property (except the specific bequests to his wife) to be sold, and the proceeds equally divided amongst all his children: — Held, that the specific legacies were a charge on the real estate. *Stewart* v. *Dick*, 10 P. R. 411.

**Direction for Payment of Debts** — *Cattle.*]—By the first clause in his will, a testator directed that his executrix should pay his debts out of his personal estate, and then proceeded to leave to his wife, whom he named as his executrix, certain lands subject to incumbrances, and all his stock, cattle, &c., upon the said lands, and then devised the residue of his real and personal estate (after payment of his just debts and funeral expenses) and all the rents and issues thereof to a brother and sister for their lives, to be equally divided between them, share and share alike, and after their death, to their children, their heirs and assigns for ever, share and share alike. The brother predeceased the testator. The widow now brought this action for the construction of the will:—Held, that the bequest of the stock, cattle, &c., to the testator's wife was a specific legacy, and was not subject to the testator's debts, notwithstanding the first clause of the will. Held, also, that the gift of the residue to the brother and sister was a gift to them as tenants in common, but that the brother having predeceased the testator, there was an intestacy as to his share. *Rudd* v. *Harper*, 16 O. R. 422.

**Implied Charge.**]—A testator bequeathed to his wife maintenance or an annuity, at her option, to be furnished or paid by his sons R. and G., and gave divers legacies, some of which he directed his executors to pay; and as to others, including the legacy to the plaintiff, he did not say how they should be paid. He then devised his farm to his sons R. and G., subject to his wife's maintenance, and subject to the maintenance of his younger children, and subject also to the legacies and bequests therein before contained:—Held, that the plaintiff's legacy was a charge on the farm. *Jones* v. *Jones*, 15 Gr. 40.

A testator devised a portion of his real estate to his widow and eldest son James, jointly, and his heirs, "My wife Jane to have and to hold the aforesaid premises as long as she remains my widow, for my wife Jane Clark's support and my small children's support . . . and after her death my wife's part will belong to my son James Clark aforesaid . . . My son James Clark will pay my daughters, naming them, $200 each when they become of the age of twenty-one years, that is, each as she becomes of the age of twenty-one years:"—Held, that the legacies to the daughters were payable out of the corpus of the estate devised to James. *Clark* v. *Clark*, 17 Gr. 17.

A testator devised all his estate, real and personal, to his wife, for life, and after her

death the real estate was to be equally divided between one of his sons and one of his daughters; the daughter to have all his personal estate also. In the event of the death of either without heirs, his or her share was to be divided between the other children of the testator. Several pecuniary bequests were made, which were to be paid by the son and daughter, by instalments, commencing one year after they should "have come into possession hereby given." The daughter married and died during the life of the widow, leaving her husband tenant by the curtesy, but no child. The widow subsequently died, and thereupon the tenant by the curtesy recovered possession of his deceased wife's share in ejectment. More than a year after the death of the widow, a daughter of the testator, one of the legatees named in his will, filed a bill for the payment of the arrears of her legacy:—Held, in the events that had happened, that there was no merger of any portion of her legacy, by reason of her interest in the deceased daughter's share; that the devisees took the land subject to and charged with the payment of all the legacies which were not personal or general charges against the devisees; and the defendants—the son and the tenant by the curtesy — having resisted the claim of the plaintiff, were ordered to pay the costs of the suit, there being no assets of the testator out of which they could be paid, and the questions raised not being those of construction within the rule allowing the costs of their solution to be charged on the estate of the testator. *Robson* v. *Jardine*, 22 Gr. 420.

The testator directed that his grandson F. should be sent to college and his expenses paid for out of his estate by his executors. The estate consisted of land only, after taking out a specific bequest of the furniture and the expenses of the funeral:—Held, that the land was charged with the bequest. *Hellem* v. *Seeers*, 24 Gr. 320.

**Mixed Fund** — *Interest.*] — A testator, after directing payment of his debts out of his personal property, or if that should prove insufficient, then, that so much of his real estate as would supply the deficiency might be sold for that purpose, went on to direct that his land should be sold, and the income of the capital arising from the sale be paid yearly to his wife, for her maintenance during her natural life, after which he gave a number of charitable bequests and pecuniary legacies, but made no residuary gift:—Held, that the testator had created a mixed fund to answer the purposes of his will, and if the personalty was not sufficient for the payment of the debts, the legacies were payable out of the land; if it was sufficient, they were payable out of the mixed fund; but so far as the charitable bequests were payable out of the land they were void. *Toomey* v. *Tracey*, 4 O. R. 708.

Held, also, that interest was payable on the legacies from a year after the testator's death, in accordance with the general rule, in any event; and this, although as the whole interest of the proceeds of the land was given to the wife, for life, the capital had to be kept invested by the executors; and, consequently, there was no fund for the payment of legacies until her death. *Ib.*

**Mixed Residue.**]—Legacies directed to be paid out of a mixed residue are a charge on land. *Young* v. *Purvis*, 11 O. R. 597.

**Payable out of Personalty.**]—A testator, by his will, gave to his widow an annuity of $4,000 in lieu of dower. His will contained certain devises, and gave other legacies and annuities, which the testator charged on the whole of his estate not before devised, and he empowered his executors to sell any of his property which they should think necessary. The widow elected to take the annuity:—Held, that the legacies and annuities were payable primarily out of the personal estate. *Davidson* v. *Boomer*, 18 Gr. 475.

**Payment out of Estate.**] — A testator, after directing that his funeral charges and debts should be paid by his executor, disposed of his real and personal estate as follows: "First, he gave and bequeathed certain legacies "to be paid out of my estate," and then he gave the residue and remainder of his estate, real and personal, to his son W. absolutely, and he nominated W. sole executor:—Held, that the legacies were by the will, charged upon the estate, real and personal, and failing personal estate became a charge on the land; and that W. had power to sell the land, and a purchaser from him was not bound to see to the application of the purchase money. *Moore* v. *Mellish*, 3 O. R. 174.

**Personalty Insufficient to Pay Legacy** —*Real Estate Devised to Legatee and Others.*] —A testator by his will, after directing payment of his debts by his executors, gave his personal estate and the dwelling house with the land occupied therewith, to his daughter M., and gave M. a legacy of $2,000. He then devised the residue of his real estate to his executors in trust, to lease the same and pay the interest to his wife for life, and after her death to sell the same and divide the proceeds between his children, share and share alike. At the time of the testator's death, the personal estate was of small value, and was exceeded by the amount of the debts; and it did not appear whether, when the will was made, the testator had sufficient personal estate out of which the legacy could be paid:—Held, that M. could not claim to have the $2,000 paid out of the proceeds of the real estate devised to the executors, but that there should be no deduction from her share by reason of the real estate devised to her. Held, also, that the children of a deceased child took the share of the proceeds of the real estate which their parent was entitled to. *Totten* v. *Totten*, 20 O. R. 505.

**Real and Personal Estate.**] — Where debts and legacies are charged on real and personal estate, and there is no direction to sell the real estate, the personalty is the primary fund to pay, and the realty is liable only in case of a deficiency. *Davidson* v. *Boomer*, 17 Gr. 509.

A testator by his will bequeathed certain legacies of different amounts to his sons and daughters, and directed his "real and personal property" to be sold by auction, and then added, "And the household furniture also to be sold by auction, and the proceeds of the sale to be equally divided amongst my daughters:"—Held, that the legacies to the sons and daughters were payable out of the mixed fund of real and personal estate. *In re Gilchrist, Bohn* v. *Fyfe*, 23 Gr. 524.

——— *Marshalling.*]—See *Cook* v. *Noble*, 5 O. R. 43, *post* IV. 17.

**Sale to Pay Legacies.**]—Held, that the legacy in the will set out in the report of this case, as well as the debts of the testator, were a charge on his real estate, and that the administrator with the will annexed had power to sell the real estate, no question being raised as to the personal estate being insufficient to satisfy the debts and legacies. *In re Eaton Estate*, 7 P. R. 396.

**Share in Partnership.**]—A testator by his will directed that "$5,000 of the money to which I may be entitled as my share of the partnership business now carried on at," &c., under the name of E. H. & Co., should be invested by his executors at interest, and that the income derived therefrom should by them be paid over, as received, to his daughter M., for her maintenance until she attained twenty-one, when she should be entitled to $5,000; and if the interest in any year from the investment should fall short of $400, the difference to make up that sum should be paid by his executors out of the interest or profits derived from the remainder of her estate. Subject as aforesaid, he gave the residue of his estate, real and personal, to his executors in trust for his son. Subsequently to the making of the will the partnership of E. H. & Co. was dissolved, and the testator until his death carried on the business alone, but under the name of E. H. & Co., his interest in the partnership having been realized by him and carried into his new business:—Held, that the legacy of $5,000 was demonstrative and not specific, and that the legatee was entitled to be paid the same out of the general estate. *Day v. Harris*, 1 O. R. 147.

**Specific Fund.**]—A testator gave £3,000 to Trinity College, and £1,000 to Trinity Church, both to be paid out of certain gas stock. By a codicil he reduced the latter bequest to £500, and gave to two other churches a further sum of £500:—Held, that this sum was to come out of the gas stock. *Smith v. Seaton*, 17 Gr. 397.

**Trust**—*Claim on Assets—Priority—Charge on Realty.*]—T. H. and his brother were partners in business, and the latter having died, T. H. became by will his executor and residuary legatee. A legacy was left by the will to E. H., part of which was paid and judgment recovered against the executor for the balance. T. H. having incumbered both his own share of the partnership property and that devised to him, one of his creditors, and a mortgagee of the property, obtained judgment against him, and procured the appointment of receivers of his estate. E. H. then brought an action to have it declared that his judgment for the balance of his legacy was a charge upon the moneys in the receivers' hands in priority to the personal creditors of T. H.:—Held, that it having been established that the moneys held by the receivers were personal assets of the testator, or the proceeds thereof, E. H. was entitled to priority of payment, though his judgment was registered after those of the other creditors. Held, also, that the legacy of E. H. was a charge upon the realty of the testator, the residuary devise being of "the balance and remainder of the property and of any estate" of the testator, and either the words "property" and "estate" being sufficient to pass realty. This charge upon realty operated against the mortgagees, who were shewn to have had notice of the will. *Cameron v. Harper*, 21 S. C. R. 273.

*See*, also, sub-head 12, *ante*.

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14. *Personalty.*

**Bequest of Interest on Named Amount.**]—The will of a testator contained the following clause: "To my daughters Ellenor and Mary Maria I give, devise, and bequeath the interest of three thousand dollars each per annum, to be paid to each of them half yearly:"—Held, that the devisees took an absolute interest in the $3,000 given to each of them. Elton v. Sheppard, 1 Bro. C. C. 532, followed. *Morrow v. Jenkins*, 6 O. R. 695.

**Farm Stock and Implements.**]—A testator who died in February, 1869, by his will, amongst other things, gave legacies payable in eight and thirteen years, and devised lot 8 to his son R., and lot 9 to his son D., subject to charges, the devisees to get possession thereof when his youngest child attained twenty-one. At that time D. and R. were to get one-half of the stock and implements which would then be on the said lots, the other half to be divided amongst other legatees. The youngest child had not yet attained twenty-one. The master at Hamilton directed an account to be brought in of the stock and implements at the time of the reference on said lots, being the proceeds of the old stock left thereon by the testator, and also those subsequently produced from the produce of the said lots; and also an account of the stock or implements left by the testator which still remained on the land. The defendants appealed on the ground that if any further account was to be furnished, it should be only of stock and implements purchased with the proceeds of the sale, or obtained by the exchange of the stock or implements left by the testator; which appeal was dismissed with costs. *Davidson v. Oliver*, 29 Gr. 433.

**Law Applicable.**]—The will in this case having directed the whole estate to be converted into personalty, the testator's grandchildren domiciled without the Province of Ontario, could not be affected by any Act of the legislature of this Province—the locality of all rights to personal or movable property being at the domicile of the person entitled to it; and that, therefore, the contingent interest of the grandchildren was not "property or a civil right" within the Province. *Re Goodhue, Tovey v. Goodhue, Goodhue v. Tovey*, 19 Gr. 366.

**Legacy in Common.**]—A testator bequeathed personal estate to his two sisters, M. and S., and to their children, all to share alike if living:—Held, that the sisters and their children took as tenants in common, sharing per capita and not per stirpes. *Bradley v. Wilson*, 13 Gr. 642.

**Letter Modifying Will.**]—Testator by his will gave all his property, real and personal, to trustees, directing that his wife should receive all rents and interest during widowhood, and until his youngest child should come of age; that in case of her death or marriage before the youngest child came of age, his property should be divided

equally among his children on their respectively coming of age, and in case all his children should die under age without issue, their portions should be divided equally among his brothers and sisters. A letter was found among his papers, addressed to his wife, saying that he had made two wills, "one before I was married, which is to be considered void, but the other I wish to modify, as it was written in a hurry. I wish my dear wife and our children to have all my property, to be divided equally, my wife to have the use of the whole until the children are of age. In case of death of my children my wife to have the use of the property in her lifetime, and then to go to my brothers and sisters." The testator left two children, who both died under age unmarried, their mother surviving them:—Held, reversing 29 Gr. 274, that the will and letter must be read together, and that the will must stand except so far as "modified;" that the "death of my children" referred to their death under age without issue before his wife; and therefore that she took the personalty (which alone could be affected by the letter) for life, and after her death it would go to testator's brothers and sisters. *Dumble* v. *Dumble*, 8 A. R. 476.

**Life Estate with Power of Disposition.**]—A testator by his will devised the real estate of which he should die possessed to his wife, "to hold the same for ever, and to dispose of it in any manner she may think proper," and further "the residue of my estate both real and personal I give to my beloved wife, to have and to hold the same for her sole use and benefit, during the term of her natural life, and that she may dispose of the whole or any part of the said personal estate, as she may think proper, and at her death the residue of my real estate or personal estate, if any," he gave to other parties:—Held, that the widow took an estate for life in the residue of the personal estate, with an absolute power of disposition; but that the deposit in a bank to her own credit of the proceeds of notes and mortgages which the widow had collected was not such a disposition thereof as to withdraw them from the residue of the estate and give her an absolute title thereto; but that the same remained to be administered as part of the testator's estate. *Green* v. *Carley*, 20 Gr. 234.

**Life Estate.**]—A testator bequeathed to his two daughters (both of whom were married and had children at the time of his will) the sum of $1,000 each, charged upon his realty, which he devised, such sums to be invested in bank stock, and the interest accruing thereon to be paid to his daughters during their natural lives, and after their decease directed these sums to be equally divided amongst their heirs. By a codicil, the testator directed that, should his real estate be sold, the $2,000 might remain on mortgage at interest, payable half yearly to the daughters, and when the mortgage should be paid, his executors were to have full power to invest that sum in homesteads for his daughters, should they desire to do so:—Held, that the daughters took a life estate, with remainders to their heirs as purchasers. *Rogers* v. *Lowthian*, 27 Gr. 559.

Where a will creates a life estate in chattels the executor is discharged when he hands over such chattels to the tenant for life. The tenant for life, and not the executor, then becomes liable for them to the person entitled in remainder. *Re Munsie*, 10 P. R. 98.

**Maintenance.**]—Testator by his will, after devising a farm to defendant, his son, in fee, directed that he should support his mother, "and that she shall have one horse, and my buggy, cutter, and harness, to be kept on the place," &c., "and the house and one acre of ground with the orchard all round the house her lifetime:"—Held, that she took the goods mentioned absolutely, not for life only. *McCrary* v. *McCrary*, 22 U. C. R. 520.

**Money, Mortgages, and Notes.**]—Where money, mortgages, and promissory notes, were bequeathed to a legatee, for life, it was held that she was not entitled to the possession and disposition of the same, but to the income only; though of farming stock and implements given for life by the same clause she was to have the use in specie. *Thorpe* v. *Shillington*, 15 Gr. 85.

**Power to Dispose of Personalty**—*Gift over if "not Disposed of"—Furniture Unaccounted for.*]—A testator by his will, as construed by the court, gave to his widow his real and personal estate for life, with power to dispose of the personal estate at her own discretion during her life; and whatever of it remained at her death not so disposed of went to a residuary legatee. The testator also authorized his widow and co-executors to lay out such sums as might be deemed necessary for the carrying on of his business as a distiller:—Held, that the widow was not bound to convert the personalty into money; that her estate was not liable for debts due the testator, which she had neglected to collect, and was not accountable for the testator's furniture, which was not forthcoming at her death; nor for hay, grain, fuel, cart, and horses, left by the testator and used by the widow in continuing the business. The widow improved the property:—Held, that she was entitled to credit for so much only as was expended in completing work commenced by the testator. *McLaren* v. *Coombs*, 16 Gr. 602.

**Premium on New Stock.**]—A will directed an executor to pay A. for life "the interest, dividends, and profits of certain stock, and of the moneys into which the said stock might be changed." Subsequently new stock was issued at par and eighteen shares allotted to the executor. Not being accepted, these new shares were sold and produced a premium, which was credited to the executor:—Held, that the premium was principal, and that A. was entitled only to the interest on it during her life. *Re Smith*, 8 P. R. 384.

**Use of Furniture for Life**—*Attempted Sale.*]—A devise of the use, possession, and occupation of a dwelling house and premises, with land attached, together with furniture, plate, linen, china, library and other effects therein at the time of the death of the testator, to occupy, possess, and enjoy the said house, land, furniture, and premises, during the natural life of the devisee, does not enable the devisee to dispose absolutely by will of the personal property so devised; and the executor of the testator, giving notice to the executors of the devisee, may, at a sale of such property (by the executors of the devisee,) purchase, and subsequently on an action brought resist payment. *Dickson* v. *Street*, 1 U. C. R. 180.

**Words of Limitation in Tail.**]—A testator bequeathed personal estate to his wife, "to have and to hold unto her and the heirs of her body through her marriage with me, their, and each of their sole and only use for ever;"—Held, that the wife was entitled to the personalty absolutely, there being nothing to shew that the testator meant the words, "heirs of her body through her marriage with me," should import anything different from their ordinary, natural meaning. Crawford v. Trotter, 4 Madd. 361, distinguished. *Fuller* v. *Anderson*, 20 O. R. 424.

*See*, also, sub-heads 5, and 12.

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15. *Power of Appointment.*

**Absolute Interest.**]—A testator by his will, after making sundry devises and bequests, directed the residue of his estate to be applied by his trustees, "unto and to the uses following: First, in case my dear mother survives me, and my nephew S. M. attains the age of twenty-three years, then all my residuary estate is to be valued by my executors, and divided into five equal shares, and one equal share is to be paid to my mother, or in case of her death before such division, then to be paid over or transferred to such person or persons or in such manner as she may by her last will and testament direct." The testator's mother survived him, but died before the estate had been divided or valued:—Held, that she took an absolute interest in the property so thereby given to her, and not a power of appointment merely; and that the same passed under the residuary clause in her will. *Becher* v. *Miller*, 25 Gr. 528.

**Appointment by Deed Required.**]—A mortgage to secure $800 on certain lands was made by T. K. to his father. The proviso for payment was that the $800 was to be paid to the mortgagee's executors or administrators in eight annual instalments of $100 each, the first payment to be made one year after the mortgagee's decease, upon trust to pay the same to such person or persons as the mortgagee should, by deed indorsed on the mortgage, or otherwise by deed, direct and appoint; and in default of appointment to his children other than his son John, &c. No appointment was made by deed indorsed on the mortgage, or otherwise by deed. The mortgagee by his will directed that the $800 should be payable, as follows, $200 to each of his three daughters A., M., and B., and $100 each to his granddaughter K. and his widow, to be paid forthwith after his death:—Held, that the will constituted a valid appointment under the proviso in the mortgage, and that the legatees or appointees under it were entitled to the sums bequeathed to them; but that the time for the payment of the money must be in accordance with the terms of the mortgage. *McDermott* v. *Keenan*, 14 O. R. 687.

**Attempt to Evade Restrictions.**]—The testator, under the provisions of his father's will, had the power of appointing his share of his father's estate among his children or to his brother or sister. By his will the testator gave portions, about one-fourth of his estate, to two of his children, and as to the residue he appointed the same to his brother C. T. B., desiring him to pay first his (testator's) indebtedness to his father's estate, and to release his policy of life insurance from such indebtedness, and then gave and bequeathed to a stranger the policy of assurance upon his life for $3,000, and all moneys arising therefrom:—Held, that, as to the portions of his estate given to his two children, the will was valid; but as to the appointment to his brother, the same was void as being a fraudulent exercise of the power of appointment; and therefore that as to the residue after payment of the amounts given to the two children the will was inoperative and void, and that as to so much there was an intestacy. *Bell* v. *Lee*, 8 A. R. 185.

**Conditional Power of Appointment.**]—A testator devised all his property to his widow for life, remainder to his two daughters and niece, with a power of appointment. By a codicil he revoked that part giving these parties the power of disposing of their portions, and declared that they should "not have the power of willing the same, saving and excepting they shall be married and have a child or children; and further should any or either of the aforesaid parties depart this life previous to their obtaining their various legacies, then and in such case the share or shares of the parties so departing this life shall go and devolve to the child or children of W. A. C. that shall be then alive at such decease:"—Held, that the daughters and niece took no interest until the death of the tenant for life, but that they had a power of appointment in the meantime, in the event of their marrying and having children. *Christie* v. *Saunders*, 5 Gr. 464.

**Delegation**—*Power of Revocation.*]—By a marriage settlement lands were conveyed to the use of the settlor, the mother of the intended husband, for life, and after her death in trust to pay the rents to the intended wife and, in case of her death before her husband, upon certain trusts in favour of the husband and the children of the marriage; but if he should die in her lifetime then in trust for such persons as he by any deed with power of revocation and new appointment, or by his will, should direct and appoint, and in default of appointment in trust for his right heirs. Before the 1st of January, 1874, the husband predeceased his wife, leaving no children. By his will he devised as follows: "I give unto my wife all my real and personal estate whatever and wheresoever to hold unto her and her heirs, &c., absolutely for ever. I do also transfer unto her all the powers vested in me to bequeath, convey or execute by will or otherwise all or any of the properties conveyed to her under the settlement of Bathsheba Smith." The settlor was then dead. The wife, assuming to execute the power contained in the settlement, by deed not containing a power of revocation appointed the lands to her own use absolutely and then contracted to sell a part of them in fee:—Held, sub nom. *Smith* v. *McLellan*, 11 O. R. 191, that the power was not executed by the will. (2) That there was a valid delegation of the power to the wife by the will. (3) That the deed executed by her was not a valid execution of the power because not made with power of revocation and new appointment, and that the purchaser could not be compelled to accept the title because of the revocable character of any valid appointment by deed. On appeal:—Held, that the donee could not by his will delegate the execution of the power to his wife, and therefore that she could not under any

circumstances, make a valid appointment thereunder. *Smith* v. *Chishome*, 15 A. R. 738.

**Devise to Heirs and Assigns of Living Persons.**]—A testator gave one-fifth of his residuary estate, real and personal, to the heirs and assigns of A. and his wife, who were both living:—Held, that A. took no interest or power of appointment, but that their children living at testator's death were entitled absolutely. *Levitt* v. *Wood*, 17 Gr. 414.

**Devise to Persons not within the Power.**]—The testatrix, under a power in her marriage settlement, appointed to a daughter certain moneys "the interest thereof to be for her sole use during her life, and the principal to be left to all or any of her children she may have at her death." By the settlement the power of appointment was only among children, grandchildren not being objects of the settlement:—Held, notwithstanding, that the appointment was not absolute in favour of the appointee; that she took only the interest of the fund during her life, and that the principal went to the residuary appointee. *Deedes* v. *Graham*, 20 Gr. 258.

**Indefinite Trust**—*Power of Appointment—Disposition by Will.*]—A wife having a power of appointment under her husband's will in the words "my said wife shall have full power to dispose of by will or otherwise," by her will devised all her real and personal estate to executors "in trust to convert the same into cash" and pay legacies, and as to the rest and residue to convert into cash and "divide the proceeds among friends, relatives and labourers in the Lord's work according to the judgment of my executors:"—Held, that the disposition made clearly indicated an intention to take the property dealt with out of the instrument containing the power for all purposes, and not only for the limited purpose of giving effect to the particular disposition expressed; but that the residuary bequest was void as too indefinite, and that the executors took the property in trust for the next of kin of the appointor and not beneficially. *Re Wilson, Reid* v. *Jamieson*, 30 O. R. 553.

**Intention to Exercise.**]—The donee of a power of appointment made a will, not referring to the power, disposing of "the moneys now or at my death invested in mortgages or otherwise." The settled estate was invested in mortgages, and the donee had no other mortgages:—Held, that the intention of the testatrix to appoint the settled estate sufficiently appeared. *Deedes* v. *Graham*, 16 Gr. 167.

**Limited Right of Disposal.**]—A testator devised to his wife all his property, real and personal, "as long as she, my said wife, shall exist; and at her decease the said property to be at her sole disposal unto any one or other of my descendants, so as the property and land shall be entailed in the family, from one generation to another:"—Held, that a devise by her in fee was an excessive execution of the power, and therefore void. *Seane* v. *Hartwick*, 11 U. C. R. 550.

**Mode of Exercise.**]—A deed of trust provided that certain lands should go to the settlor's three children in default of appointment by deed. Afterwards he made his will, under seal, whereby he devised "all the rest of my estate, real and personal, to which I shall be entitled at the time of my decease," to one of the three children:—Held, that this residuary devise could not be regarded as an execution of the power of appointment, nor even as such a defective execution as equity would aid, at any rate at the suit of the plaintiff, who, as an illegitimate child of the testator, was only a stranger. *Shore* v. *Shore*, 21 O. R. 54.

A father conveyed lands to his daughter by deed with habendum "to have and to hold the same unto . . . and the heirs of her body lawfully begotten, to and for their sole and only use for ever . . . to and for the sole and separate use and benefit of (grantor) for and during the term of her natural life, and after her death then to the heirs of her body lawfully begotten for ever. Provided always, however, that it shall and may be lawful for (grantor) to direct and appoint, either by deed or her last will and testament, which or in what manner her said heirs shall have the lands and premises hereby granted, should circumstances at any time render it necessary, of which circumstances she shall and may be sole judge." She died leaving her husband and several children surviving her, and by her will devised and appointed the lands to her eldest son, with instructions to dispose of the same between her husband and children in the proportions mentioned in her will:—Held, that the daughter took an estate in fee tail general, and that her husband was tenant by the curtesy. Held, also, that the provisions of the will were not a valid exercise of the power. *Archer* v. *Urquhart*, 23 O. R. 214.

**Power to Appoint to Heirs.**]—A testator devised certain property to his son A., and to the heirs of his body lawfully to be begotten, with power to appoint any one or more of such heirs to take the same:—Held, that A. took an estate tail, and there was no trust in favour of his children. *Trust and Loan Co.* v. *Fraser*, 18 Gr. 19.

**Power to Appoint Trustees.**]—See *McLachlin* v. *Usborne, Magee* v. *Usborne*, 7 O. R. 297.

**Quebec Law**—*Substitution—Mandatory.*]—See *Dorion* v. *Dorion*, 20 S. C. R. 439.

**Restriction against Appointment Except by Will**—*Covenant not to Alter Will.*]—M. D. by her will devised certain land to trustees upon trust to hold one part to the use of her son C. S. C. for his life, and after his decease to convey the same to his children or to such of the testatrix's other three sons or their children as C. S. C. might by his last will appoint; and the other part to the use of her son W. D. in precisely the same way. C. S. C. and W. D. each appointed his parcel to the other by will duly executed, and each conveyed to the other his life interest, and covenanted in the conveyance not to revoke the appointment made by the will. They then contracted to sell both parcels to a purchaser:—Held, that C. S. C. and W. D. each took under the will a life estate with a power to appoint the inheritance in fee by will amongst the specified objects, and that such a power could not be executed except by will; the intention being that the donee of the power should not deprive

himself until the time of his death of his right to select such of the objects of the power as he might deem proper; and notwithstanding the covenants here given not to revoke the appointments, a subsequent appointment by will to one of the other objects of the power would be a good execution of it, and the covenants would not affect the title of the subsequent appointee, for he would take the estate under the original testatrix and not under the devisee for life. Held, also, that the position of C. S. C. and W. D. was not aided by s. 19 of R. S. O. 1887 c. 100, which gives to the donee of a power the right to release or to contract not to exercise it; by so doing they could not confer upon themselves the right to give the purchaser a good title. *Re Collard and Duckworth*, 16 O. R. 735.

**Time of Exercise.**]—A testator devised certain lands to his wife, "to be held and enjoyed by her so long as she shall live and remain unmarried. After my decease and after her decease, or in the event of her marrying again, then from and after such second marriage, I will and devise the same unto my son, who shall be named by my said wife, by deed under her hand and seal, and to his heirs and assigns for ever." The widow married again, without having executed the power:—Held, that there being no specific limitation as to time, the whole period of the life of the donee was allowed for the execution of the power, and it did not cease upon her second marriage. Quære, whether she could exercise it till after her second marriage. *Cowan v. Bessrer*, 5 O. R. 624.

**Trust.**]—A will gave land to testator's heir-at-law for life, with power to appoint the same to one or more of his sons; and declared that the devisee (his heir) was not to alien or mortgage the lot; and that it was not to be attachable by his creditors:—Quære, whether this power was a naked power, or created a trust in favour of devisee's sons. *McMaster v. Morrison*, 14 Gr. 138.

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16. *Powers and Interest of Executors and Trustees.*

**Advancing Legatee's Share.**]—M., who was a merchant, by his will gave special directions for the winding-up of his business and the division of the estate among a number of his children as legatees and gave to his executors among other powers, the power "to make, sign and indorse all notes that might be required to settle and liquidate the affairs of his succession." By a subsequent clause in his will he gave his executors "all necessary rights and powers at any time to pay to any of his said children over the age of thirty years the whole or any part of their share in his said estate for their assistance either in establishment or in case of need, the whole according to the discretion, prudence and wisdom of said executors," &c. In an action against the executors to recover the amount of promissory notes given by the executors and discounted by them as such in order to secure a loan of money for the purpose of advancing the amount of the legacy to one of the children who was in need of funds to pay personal debts:—Held, that the two clauses of the will referred to were separate and distinct provisions which could not be construed together as giving power to the executors to raise the loan upon promissory notes for the purpose of advancing the share of one of the beneficiaries under the will. *Banque Jacques Cartier v. Gratton*, 30 S. C. R. 317.

**Beneficial Interest.**]—When property is bequeathed to executors on trusts which are too uncertain for execution, the executors are not beneficially entitled. *Davidson v. Boomer*, 15 Gr. 1.

Where a will does not dispose of the whole personalty, the executors are trustees for the next of kin, unless the will expressly shews that the testator intended they should take the residue beneficially. *Thorpe v. Shillington*, 15 Gr. 85.

Testator directed as to the residue of his property: "I give, devise, and dispose thereof as follows, that is to say: my will is, that my wife, S. W., shall have full power and control over all my freehold and personal property; that she, my executrix, her assigns for ever, may have unlimited power to deed, bargain, alienate, or transfer, for ever, all or any part of my said property; and further, any deed, transfer, or conveyance, made by my said executrix for my said property, or any part thereof, shall be valid and sufficient to the purchaser or purchasers, his or their heirs and assigns, for ever," and nominated his wife sole executrix of his will:—Held, that the widow took the residue beneficially. *Lyon v. Blott*, 16 Gr. 368.

A testator devised to four nephews and a grandnephew, their heirs, executors, administrators, and assigns, all his real and personal property, share and share alike, upon trust, that they, or the survivors or survivor of them, should out of the same "suitable and well" support his wife during her natural life in as comfortable a position as she was then in with him. He appointed his said four nephews executors of his will. The plaintiff and the defendants, including the said devisees, were all nephews and nieces of the testator and would have been entitled to share in the estate in case of the testator dying intestate. The testator's wife died before him:—Held, that the devisees took the beneficial interest in the estate, real and personal, share and share alike. *Ballard v. Stover*, 14 O. R. 153.

*See Re Wilson, Reid v. Jamieson*, 30 O. R. 555, *ante* IV. 15.

**Bequest to Executor**—*Forfeiture by Renunciation.*] — A testator devised his estate to W. P., a resident of Scotland, and to two others, residents of Canada, in trust to convert and divide the same; and appointed the same parties executors of his will. To W. P. he bequeathed $5,500, and to the two others $1,500 and $500 respectively over and above any expenses to be incurred in the nature of travelling expenses or expenses incident thereto, and generally in the management of his estate. For the convenience of the other executors, W. P. renounced probate of the will:—Held, that by such renunciation he had forfeited the bequest in his favour. *Paton v. Hickson*, 25 Gr. 102.

**Carrying on Testator's Business.**]—A testator's direction to his executors to continue to carry on business with his surviving partners, for the benefit of his wife and family,

does not authorize the executors to embark any new capital in the business. *Smith* v. *Smith*, 13 Gr. 81.

**Cutting Timber.**]—A testator devised his farm ultimately to minor children, and directed that his executors should rent the same for the benefit of his wife, who was an executrix, and children; and that the timber from his farm should be used only for the use of the premises during his wife's widowhood; and that the executors should have full power to carry the will into effect:—Held, that it was the duty of the executors to prevent the executrix from cutting the timber for other purposes. *Stewart* v. *Fletcher*, 18 Gr. 21.

**Devise to Convey.**]—A devise to trustees to convey gives a fee simple in joint tenancy, without words of inheritance. *Doe d. Berringer* v. *Hiscott*, M. T. 3 Vict.

**Devise to Sell.**]—The will provided that all lands remaining unsold at testator's death should continue unsold in care of his executors until they should see fit to sell, and the proceeds of sale should be divided as directed. Then executors were appointed, "with full power to act beyond the day limited by law, and until such time as the same shall have been fully executed, hereby to the intent thereof divesting myself of all and singular any estate, debts and property, real and personal, to them in trust to and for the fulfilment, intent, and purposes of this my last will:"—Held, to operate as a devise of the land in fee in trust to sell, &c. *Patulo* v. *Boyington*, 4 C. P. 125.

A. devised as follows: "I give and bequeath to my wife, after my decease, the proceeds of one-half of all my lands, cattle, and other effects of every kind whatsoever to me belonging at the time of my decease; and the other half of my said lands, cattle, and effects of every kind whatsoever, I leave in the hands of my executrix and executors, to pay all my just debts, &c.:—Held, that the estate passed to the executors to sell, and not only a mere power to sell. *Dowling* v. *Power*, 5 C. P. 480.

"I give and bequeath to my wife after my decease the proceeds of one-half of all lands, cattle, and other effects of every kind whatsoever to me belonging at the time of my decease, and the other half of my said lands, cattle, and effects of every kind whatever, I leave in the hands of my executrix and executors, to pay all my just debts," &c.:—Held, that the executors took a power of sale, and not the fee. *Moore* v. *Power*, 8 C. P. 109.

**Direction to Raise Money.**]—The powers of a trustee, who is directed to raise or to pay money out of rents and profits, to sell the trust estate, considered and acted on. *Sproatt* v. *Robertson*, 26 Gr. 333.

**Direction to Sell.**]—A testator, in an unartificially drawn will, directed his debts to be paid, and bequeathed to his wife £125, to be paid her from the sale of his farm, which he required his executors to advertise and sell for the best price that could be obtained for it, and also to retain possession if she thought fit, in lieu of all dower and thirds, to have and to hold to her heirs and assigns for ever. After giving legacies to his children, adding to each "to have and to hold to him, his heirs, executors, administrators, and assigns, for ever"—the testator willed and devised, that, should any assets remain in the hands of his executors after paying the foregoing devisees, the same should be equally divided between his sons and daughters named, share and share alike:—Held, that the direction to sell was for the benefit of all the legatees, and not of the wife only. *Smith* v. *Bonnistcel*, 13 Gr. 29.

A testator devised all his estate, real and personal, to trustees upon trust so soon after his death as might be expedient to convert into cash so much of his estate as might not then consist of money or first-class mortgage securities, and to invest the proceeds and apply the corpus and income in a specified manner. A later part of the will contained the following provision: "In the sale of my real estate or any portion thereof I also give my said trustees full discretionary power as to the mode, time, terms, and conditions of sale, the amount of purchase money to be paid down, the security to be taken for the balance, and the rate of interest to be charged thereon, with full power to withdraw said property, from sale and to offer the same for resale from time to time as they may deem best:"—Held, that the later clause merely gave a discretion as to the details and conditions of the sale, and did not qualify or override the specific direction to sell as soon after the testator's death as might be expedient. *Lewis* v. *Moore*, 24 A. R. 393.

**Discretionary Power of Sale.**]—A testator devised all his real and personal estate to trustees, and declared that it should be lawful for them, or the survivor of them, or the heirs, executors, and administrators of such survivor to make sale and dispose of all or any part of the said farms, lands, &c., either together or in parcels, and either by public auction or private contract, and for such price and prices as to them or him should seem fit and reasonable, and to lay out and invest the money to arise from such sale or sales in the purchase of stocks, government or real securities, in the Province of Canada:—Held, that the power or trust was discretionary, not only as to the time of sale, but also as to whether there should be a sale at all or not, and that it operated no conversion of the land into personal estate until exercised. *Rowsell* v. *Winstanley*, 7 Gr. 141.

If under a will a trustee has a discretion to sell or not to sell real estate, the court will not interfere by its advice or direction, but will leave the trustee to exercise his discretion. *In re Parker Trusts*, 20 Gr. 389.

A tenant for life is bound to keep the premises in repair; and the court will not apply the undisposed of personalty in effecting such repairs. The fact that the tenant for life (the widow) has not the means of making the repairs, and that the premises are deteriorating in consequence of non-repair, are proper matters for trustees with power of sale to take into consideration in determining whether or not they will sell. *Holmes* v. *Wolfe*, 26 Gr. 228.

A testator devised to his wife for life a parcel of land "with the power of sale at any time during her life, subject to the consent of my executors." Three executors were appointed by the will, one of whom died. A contract for sale of part of the land having

been entered into, it was objected by the purchaser that the consent of the two surviving executors was not sufficient:—Held, that in the conflicting state of the authorities upon the question, the title was not one which the court would force upon a purchaser. Held, also, that under such a power the land could be sold in parcels. *Re MacNabb*, 1 O. R. 94.

**Dower Action.**]—Held, that the defendants, executors under the will of N. S., devising "all and every the messuages and tenements whatsoever, whereof or wherein I have or am entitled to any estate of freehold or inheritance, by virtue of any mortgage or mortgages, unto and to the use of my executors (the defendants) to the intent," &c., took such an estate as to make them liable in an action for dower. *Low* v. *Sparks*, 14 C. P. 25.

**Estate with Direction to Sell.**]—Testator appointed his wife and two others, "trustees of my property, to be held in trust for the benefit of my said wife and children." He directed that they should hold one farm for the use of his daughters, notwithstanding they might marry, and two other farms for any child born after his decease—devised his homestead to his eldest son—and added, "I will and devise that the 500 acres of wild land," describing it, "to be sold, and the proceeds to be divided among my said sons and daughters in equal proportions, share and share alike, when the youngest comes of age:"—Held, that the trustees took a fee in the wild land, not a mere power to sell. *Young* v. *Elliott*, 23 U. C. R. 420.

**Farm Stock**—*Substitution.*]—The claimant was widow of one Teal, deceased, who died over twelve years before action, having devised his real and personal estate to his widow, as executrix in trust for his mother, widow and children. She never obtained probate. Two years after the death of the testator she married the judgment debtor, R., who lived upon and worked the farm and took care of the property, sometimes treating it as his own, and sometimes as the property of the devisees. He kept up the quantity of the stock to its original quantity and value, and sold horses, cattle, &c., no account being kept of the estate, nor of the farm. When he married the widow he had real and personal estate worth about $600, which he disposed of for the general benefit of the family and himself. He became embarrassed, and having arranged with testator's mother to pay her a stated annuity, was obliged to incur a liability with the judgment creditors, merchants, who supplied her with goods in lieu of the annuity, at his request. The plaintiffs sued him in the division court, and caused the bailiff to seize the goods and cattle found upon the farm. His wife claimed all the property seized, as executrix and trustee under the will of T. He owned some property in his own right. Nearly all the property of the estate had been sold, or died, or was killed, but had been replaced by R. No proper evidence was offered to trace it as distinctly belonging to the judgment debtor or to the estate:—Held, that the claimant ought to have obtained and produced probate of the will, not the will itself, in proof of the trust. (2) That property of the estate might (if bonâ fide) be kept up at its original value. (3) That evidence should be given distinctly shewing what property was that of the estate and what that of the judgment debtor; and in the absence of an account being kept and shewn, each article must be traced as having its source in the property of the estate, or as the proceeds of the labour of the judgment debtor. *Paton* v. *Ramsay*, 10 L. J. 277.

**Guardian and Manager.**]—A testator, after bequeathing to his wife his dwelling house and furniture and an annuity, continued as follows: "I give and bequeath unto G. B., and her children, the dwelling house they now occupy, . . . the wife of C. R. B., and his children, appointing C. R. B. and G. B. joint guardians for the children above mentioned, and $500, all transactions to be null and void unless sustained in writing by both guardians." And in the 10th clause of his will he said: "I will and bequeath unto each of my grandchildren living at my death $100." C. R. B. was a son of the testator, and had children living at the testator's death:—Held, that the children meant were those of C. R. B. and G. B., and there was a simple gift to G. B. and her children, who took concurrently; and C. R. B. and G. B. were, by the above clause, made trustees for their children, and could give a good acquittance and discharge for the $500, but they were not authorized to receive, and could not give a good acquittance for, the moneys bequeathed to their children in the 10th clause. *In re Biggar, Biggar* v. *Stinson*, 8 O. R. 372.

In another clause of his will, the testator willed and bequeathed "unto G. G. B.'s wife, E.B., $5,500. This bequest is under the joint management of G. G. B. and his wife for their heirs, should there be none, then at their death to revert back to my heirs to be equally divided:"—Held, that there was a trust of the $5,500 reposed in G. G. B. and E. B.; that E. B. was entitled to the benefit of the trust during her life, and upon her death the benefit of it would go to any children there might be of G. G. and E. B., or any descendants there might be answering the description "their heirs," and if there were no such children or descendants, then to the heirs of the testator, to be equally divided amongst them. *Ib.*

Another clause was as follows: "I will and bequeath unto M. R. B.'s wife and his heirs $5,000, and appoint M. R. B. as guardian and manager of this bequest:"—Held, that a trust of the $5,000 was thereby reposed in M. R. B., and "heirs" was merely descriptive of the legatees intended. M. R. B. was entitled to receive the fund and hold it in trust. During his life his wife would be entitled to the whole benefit arising from the fund, and on his death there would be a distribution of it amongst his wife, or her representatives, as the case might be, and those persons who would answer the description of heirs of M. R. B.; and M. R. B., as such trustee, was entitled to receive, and could give a good acquittance and discharge for the money. *Ib.*

**Implied Power to Sell.**]—A testator by his will devised as follows: "Also, it is my will, that when the aforesaid property be sold, that the interest be put to the clothing and schooling of my children, and to the support of my wife, so long as she remains my widow;" and by a subsequent clause named certain persons executors of his will; "and of the aforesaid estate and effects, and to apply the same according to the directions in the said will:"—Held, that the executors had full power to sell and convey the lands in fee, and that a child of the testator, born after the making of the will, was not a necessary

party to the conveyance. *Glover* v. *Wilson*, 17 Gr. 111.

It is not settled whether, under a will that went into effect before 29 Vict. c. 28, s. 15, a charge of debts on real estate by the will gave executors an implied power to sell. *Grummet* v. *Grummet*, 14 Gr. 648.

*See S. C.*, 22 Gr. 400.

A testator devised his lands, charged with payment of debts, to his wife for life, and in the event of her death or marriage, to his children, "to be held for them till they come of age by the executors hereinafter named, to be applied for their use and benefit in the way and manner as the said executors shall see best, and when the above children shall come of age the residue of the above property shall be given to the children in equal shares." The executors were not expressly authorized to sell, but the testator had directed that his wife should not have power to dispose of any part of the property without the consent of his executors:—Held, (1) that the necessary implication from these words was, that she had power to sell with their assent; and the executors and executrix—the widow—having sold the real estate and applied a large portion of the proceeds in the support and maintenance of the children, held (2) that the sale was valid, and that the executors were entitled to be allowed the amount so expended for maintenance, which was moderate, in passing their accounts in the master's office; and semble, that the fact of the debts having been charged on the lands, implied a power in the executors to sell. *Grummet* v. *Grummet*, 22 Gr. 400.

*See S. C.*, 14 Gr. 648.

**Incapacity.**]—Where lands are devised to A., B., and C., as trustees, and C. is incapable of taking, the estate may nevertheless vest in A. and B. *Doe d. Vancott* v. *Read*, 3 U. C. R. 244.

**Indefinite Disposition** — *Trust—Power of Appointment.*]—The testator died a bachelor, leaving no relations nearer than first cousins. By his will he gave certain specific legacies, one of which was, by clause 7, "to each of my cousins" the sum of $1, and proceeded:—"9. I desire that my executors . . . shall have full power to make such and any disposition of the residue . . . of my . . . estate as they, in their judgment, may deem best, and to make due inquiry into the financial and social standing of my relations in Ireland, and, after an investigation and a proper knowledge is obtained, to make such grants and disposition of a portion of my estate and property as they, in their judgment, consider best, to such relations. 10. I also give my said executors power and desire them to dispose of any balance of my estate . . . to the best of their judgment, where they may consider it will do the most good and deserving. 12. I also give my executors power to hold property in trust for any of my friends whom they may think proper." By clause 1 he appointed certain persons "executors and trustees" of his will:—Held, that the word "cousins" in clause 7 must be taken to mean first cousins only. (2) That no trust was created in favour of the relations in Ireland; the power given by clauses 9 and 10 was a general power over the residue, without the creation of a trust; it was an absolute power of appointment, which the executors might exercise in favour of themselves or any other person or persons; and the heirs or next of kin could not successfully, as upon an intestacy, make any claim upon the residue, unless in case of default of appointment. (3) That the expressions used in clauses 1 and 12 did not shew that the residue was held by the executors in trust or that there was any trust connected with the power given. *Higginson* v. *Kerr*, 30 O. R. 62.

**Mortgage to Pay Debts.**]—The testatrix after a direction to him to pay her debts, devised land to her executor and trustee, and his executors and administrators, upon trust to retain it for his own use for life, and directed that, after his decease, his executors or administrators should sell the land and divide the proceeds among her children:—Held, that this was a devise of the land out and out as to the legal estate—the words "and his executors and administrators" being equivalent to "heirs and assigns:" the executor had the right by virtue of s. 16 of the Trustee Act, R. S. O. 1897 c. 129, to mortgage the entire fee for debts; and the mortgagee in such a mortgage, made within eighteen months of the death, was exonerated from all inquiry by s. 19. In re Bailey, 12 Ch. D. 268, and In re Tanqueray-Willaume and Landau, 20 Ch. D. at p. 476, followed. The Devolution of Estates Act, R. S. O. 1897 c. 127, does not apply to a case where the executor derives his title to the land from, and acts under, the will and the provisions of the Trustee Act. *Mercer* v. *Neff*, 29 O. R. 680.

**Mortgage to Pay Legacies.**]—A testator bequeathed to each of his children $100 on attaining majority, and the residue of his property to his widow for life, to be divided amongst his children according to her judgment; or at any time to give such a portion to each or either as she thought proper. Letters of administration were granted to the widow, and she, for the purpose of raising money wherewith to pay legacies, created a mortgage on the real estate, the equity of redemption in which was subsequently sold under execution at sheriff's sale, and the purchaser obtained by conveyance from the appointee of the widow the fee simple in the land:—Held, that the will operated as a devise of some estate to the widow, and made her a trustee of the realty, which she took charged with the legacies; and that under the terms of the will and the provisions of the Property and Trusts Act, 29 Vict. c. 28, s. 12, the widow had power to create the mortgage, and that the purchaser at sheriff's sale took subject thereto, and was bound to redeem or be foreclosed. *Lundy* v. *Martin*, 21 Gr. 452.

**Naked Power of Sale.**]—A testator desired that his executors should sell and dispose of his land, and then appointed them to execute any deeds that might be necessary to the purchaser:—Held, that the executors took no interest but a mere power, and consequently that they could not distrain for rent accruing in their own time, before the land was sold. *Nicholl* v. *Cotter*, 5 U. C. R. 564.

Where the testator directs his executors, as soon as convenient, to make sale to the best advantage of his estate, first for the payment of his debts, and then to divide the surplus proceeds among his children, the executor takes no estate but merely a naked power to sell, the fee in the meantime descending to the children. *Gregory* v. *Connolly*, 7 U. C. R. 500.

In 1848 J. H., by her will, devised as follows:—"The charges of my declining days and my funeral first to be paid, after which I give and bequeath all my real estate, known as, &c., to be sold to the best advantage, and which is to be divided in manner and form as follows." Certain legacies were granted to children and grandchildren, and the remainder of the estate was directed to be equally divided between two daughters of the testatrix. The will concluded thus—"for the execution of this my last will and testament, and I hereby nominate and appoint A. B., S. H., and W. H., joint executors, hereby giving them full power to settle all business by me kept unsettled, hereby revoking all other and former wills by me at any time heretofore made:"—Held, that the executors took a power, not a legal estate. *Hopkins* v. *Brown*, 10 U. C. R. 125.

A. C., by his will, dated in 1803, directed that his debts should be paid by his executors out of his real and personal estate, and that as soon as necessary or convenient such of his executors as should prove should sell his real estate and invest one-half of the proceeds or amount of sale thereof, and apply the product interest for the support of his wife during her life. This one-half of the amount of sale he devised to her for life for that purpose, and after her death he bequeathed it equally among his four children. The "remaining half of the proceeds or amount" of his real and personal estates he devised to the said children, share and share alike. The widow and two sons were named as executors, but the widow alone proved in 1810. The land in question was never sold by her under the power in the will, and in 1817 she died, leaving all her real and personal estate by will to the two surviving children, J. C. and E. C.:—Held, that the widow took a power to sell only, not a fee in the land; that the legal estate passed by the devise to the legatees and devisees of the testator, and did not descend upon the heir. *Casselman* v. *Hersey*, 32 U. C. R. 333.

A will, after giving several pecuniary legacies, contained this direction: "When my lands are sold and all the legacies paid, the money remaining is to be divided" in the manner therein stated. There was no other residuary clause. The testator named two executors, adding: "In them I repose full confidence that they will act fair and consistent:"—Held, that all the lands were to be sold; and that the executors had power to sell them, although they had not the legal estate. *Woodside* v. *Logan*, 15 Gr. 145.

**Payment of Debts.**]—Lands were devised to trustees to carry out the will of testator, who reserved six lots, which he desired should be sold for payment of debts, not charged on lands; the residue to his grandchildren:—Held, that the trustees had a right to sell the whole of such property for payment of debts left unpaid by the personal estate and the lots specially appointed to be sold for that purpose; and that a purchaser who had not notice that all the debts not charged on lands were paid, would be justified in assuming that the trustees were properly proceeding to a sale. *Duff* v. *Mewburn*, 7 Gr. 73.

——— *Implied Power of Sale.*]—B. bequeathed to his wife, A., the land in question, "to be at her disposal, if agreeable to the executors," of whom she was not one, "so long as she remains a widow," adding, "I wish and desire the disposal of my lawful debts, and the residue accruing therefrom to be laid out in the payment or part payment of another for the support of my family." He then directed that his two eldest sons should have the property when they came of age, after his wife's death, if she should remain a widow, and if she should marry they were to come into possession when of age, and that these two sons were to pay to the other children a proportion equal to their part of the property, adding, "all the above to be done to the wishes of the aforementioned executors." None of the executors proved or acted, and in 1851 letters of administration, with the will annexed, were granted to the widow, who in the same year conveyed to defendant, describing herself in the deed as "sole devisee (with power of sale for purposes set forth) under the will of," &c. She married again about 1853. This sale she swore was made in order to pay the testator's debts, and the purchase money so applied:—Held, that the sale directed by the will being for the payment of debts, the power to sell was vested by implication in the executors: that she did not take it as administratrix: that on her marriage her own interest was at an end: and that the sons could, therefore, eject defendant without any notice to quit or demand of possession. *Banting* v. *Gummerson*, 24 U. C. R. 287.

——— *Delegated Power.*]—After devising all his real and personal estate to his executors in fee in trust for sale to pay debts, by a subsequent clause the testator directed that all his real estate, not specifically devised or required to pay debts, should be sold by his executors as they thought best, and the moneys arising from the sale and from other sources should after payment of debts be invested by them:—Quære, whether a mere power was created by this clause of the will, and if so, whether it was well executed by a delegated power; or whether a similar estate might not be deemed to be continued in the executors for the objects of the second as well as for those of the first clause. *Burke* v. *Battle*, 17 C. P. 478.

——— *Lands Specifically Devised.*]—Testator devised land to his wife for life, remainder to his nephew T. in fee. He then devised specific land to be disposed of by his executors for the payment of his debts, and added "and I also do hereby acknowledge and authorize them to sell, grant and convey, in full and proper manner, any, all, or such of my real estate as may be necessary to the payment and liquidation of any and all such just debts as may be due by me and not otherwise provided for:"—Held, that the executors had power to sell the land in question. They conveyed to one P., a creditor, who was to pay the widow a certain sum for her dower, and the residue to other creditors. Held, that the legal estate passed, whether the sale could be impeached in equity or not. Executors in such a case are not bound to sign the deed in presence of each other, as arbitrators executing an award. *Little* v. *Aikman*, 28 U. C. R. 337.

A. McD., in 1864, describing himself as of the north half of lot twenty-seven, fifth concession of Nottawasaga, bequeathed "the

above mentioned property in the following manner to my wife (the plaintiff) and family." The will then authorized the executors to cause the proceeds of the said property to be used for the support and keeping of his wife and family for a term of twenty years, and directed them to pay his debts, but did not devise the property to them. The will further directed that, after the said twenty years, his son Ronald (the defendant) was to have the south part of the above land, which he was to pay for, and the remainder was devised to another son, who was directed to pay legacies to his sisters. Subsequently Ronald obtained a patent from the Crown of the land devised to him, habendum, "subject nevertheless to the terms and conditions of the last will and testament" of the testator, A. McD.:—Held, that the words, "I bequeath," &c., "in the following manner," &c., "to my wife and family," carried the estate direct to them, notwithstanding the direction to the executors. Held, also, that the defendant holding the legal estate under the patent, and having a beneficial interest in his own right as one of the family, the plaintiff could not maintain ejectment against him. *McDonald* v. *McDonald*, 34 U. C. R. 369.

**Personal Discretion.**]—A testator devised real estate to his granddaughter; and, in case of her dying without lawful issue, he directed the property to be sold by his executors; and from the proceeds of this and his other property he directed certain legacies to be paid, and the remainder to be applied at the discretion of his executors to missionary purposes:—Held, that these provisions shewed a personal trust in the executors for the purposes specified, and that the contemplated "dying without issue" was a dying without issue living at the granddaughter's death. *Re Chisholm*, 17 Gr. 403, 18 Gr. 467.

——— *Appointment of Valuator—Death of One Executor.*]—See *Re Curry*, 23 Gr. 277, *post*, IV. 20.

**Possession.**]—Where a will, which was treated by the parties as devising the testator's farm to his executors, gave his widow all the rents, issues, and profits thereof, after deducting all the necessary expenses thereout to be paid by his executors . . . to his widow by half-yearly payments during the residue of her natural life, but devised the dwelling house on the farm to herself directly and not to the trustees; gave them power to lease and keep under lease the farm with the exception of the dwelling house; directed them to sell the stock, crops, and farming implements, and to permit the widow to take firewood from the bush part of the farm for the use of the dwelling house; it was held that the widow was not entitled to the personal possession of the farm. *Whiteside* v. *Miller*, 14 Gr. 393.

The rule is that when property is devised in trust to pay the rents and profits to the cestui que trust, the cestui que trust is entitled to the possession. *Ib.*

This rule applies though there are charges on the property; proper terms being in that case imposed by the court as the condition of giving possession. But the court will not give possession to the cestui que trust where it sees that doing so would do violence to the intention of the testator. *Ib.*

**Power to Lease.**]—A testator devised his lands to trustees, to distribute and divide the same amongst his wife and children, so soon as the youngest surviving child attained twenty-one. The trustees, professing to act in pursuance of the powers given by the will, put up portions of the property at auction for an absolute term of twelve years, at the expiration of which the youngest child would attain twenty-one, with a privilege to the lessee of removing any buildings upon the premises at the expiration thereof; or if he declined purchasing stipulated that the improvements would be paid for by the lessors. On a bill filed by the trustees to enforce specific performance of this contract:—Held, that the agreement was ultra vires, and the bill was dismissed but without costs, the defendant having set up several grounds of defence which entirely failed. *Dalton* v. *McBride*, 7 Gr. 288.

**Power to Mortgage.**] — See *London and Canadian Loan and Agency Co.* v. *Wallace*, 8 O. R. 539; *Gordon* v. *Gordon*, 11 O. R. 611, 12 O. R. 593.

**Power Coupled with an Interest.**]—A testator, J. C., by will "authorized and empowered" his executrix and executors, or a majority of them (naming five, of whom his wife, E. C., was one) to sell and convey certain lands, the lot in dispute among others, and to apply the proceeds to a specific purpose; and left all the rest and residue of his estate to his wife E. C., to be disposed of by her as she should see fit. E. C. subsequently sold to one J. W. the land in question for a valuable consideration, which consideration was applied according to the terms of the will. The plaintiffs claimed title through the will of J. W. The other four executors of J. C. refused to act, except on one occasion, when it was proved that being sued they joined in a deed of conveyance (not of the lot in dispute in this action.) It was further proved that J. T. C., one of the defendants, had recovered a judgment in ejectment against N. and O., two of the plaintiffs. The defendant J. T. C. claimed title as heir-at-law of A. C., who was heir-at-law of J. C., and insisted that the conveyance of E. C. being void for want of power to convey, he was entitled to succeed as heir-at-law of J. C.:—Held, that E. C. having a power coupled with an interest, the conveyance was good, and the plaintiffs were entitled to prevail. *Wessels* v. *Carscallen*, 10 C. P. 215.

——— *Survivor.*]—The testator devised lot A., with power "to the executors herein mentioned" to sell and invest the proceeds, the devisee to receive the interest during his life, and after his death the proceeds to be divided among the testator's family; and in the clause appointing two executors were added the words "to see my will carried into effect:"—Held, that this was not a bare power in the executors, but a power coupled with an interest, vested in them in the character of executors, and that the surviving executor could make a good title to the land." *Re Ford*, 7 P. R. 451.

**Power of Sale**—*Administrator with the Will Annexed.*]—Replevin for iron ore taken from land in the Province of Quebec. It appeared that R., the patentee of the land, by his will, made in 1829, authorized his executors to sell and convey all his estate, real and personal, for such considerations, upon

such terms, and in such manner as they might judge best, and bequeathed the proceeds to different persons. Four executors were named, of whom only two proved the will, and the last of these two died in 1861. Administration with the will annexed was granted on the 20th May, 1873, to E. S., who conveyed to the plaintiff on the 31st May:—Held, that under 36 Vict. c. 20, s. 40 (O.), E. S. clearly had power to sell to the plaintiff. Before the execution of this deed the ore in question had been severed from the land, but the deed purported to convey not only the land, but all iron and other ores which might have been at any time severed from the land:—Held, that the ores passed by this conveyance; for though a chattel, and the conveyance would not, except in equity, pass the legal title to it, yet the heir in whom it was vested would be a trustee for the administrator, the donee of the power, and it might be presumed that such donee, as cestui que trust, had authority from the heir as trustee to dispose of it. *Stuart* v. *Baldwin*, 41 U. C. R. 446.

——— *Advice of Court.*]—A testator authorized his executors to sell his real estate, consisting of his homestead and property in St. Thomas, but stated that it was not his will to have his property in St. Thomas disposed of until the proceeds of it could be laid out in real estate to a fourth better advantage and with the consent of the heirs. On a bill filed to have the rights of the parties declared and the affairs of the estate wound up, the court referred it to the master to inquire as to the propriety of selling both the homestead and the St. Thomas property. *Travers* v. *Gustin*, 20 Gr. 106.

——— *Approval of Court or Guardian.*]—Where a will devised lands to the executors on trust to sell the same:—Held, that the case was not within s. 8 of the Devolution of Estates Acts, and the approval of the official guardian or an order of the court was not necessary to a sale. *Re Booth's Trusts*, 16 O. R. 429.

*See Moore* v. *Mellish*, 3 O. R. 174; *Heffernan* v. *Taylor*, 15 O. R. 670.

——— *Charge of Debts.*]—A testator directed his executors to pay all his "funeral charges and just debts." The residue of his estate and property not required for that purpose he disposed of as follows: To his wife all his household furniture, his pew in a named church, and all cash in hand at his decease, also to his wife the entire, exclusive and undivided use of his house, situate, &c., to hold the same during her natural life, then the proceeds to be equally divided, &c., he also gave and bequeathed the proceeds of the homestead to be equally divided, &c. There were other lands not mentioned in the will:—Held, that nevertheless the executors could give a good title to them to the purchaser, for the above words clearly imported an intention that the debts should be paid first out of the estate and property of the testator; this created a charge of debts upon his lands; and the mere failure of the testator to enumerate all his lands in the subsequent part of the will, by which there was an intestacy as to the part in question in this action, did not detract from the conclusion that all the lands were so charged. The direction that his debts should be paid by his executors conferred an implied power of sale upon them for the purpose of paying the debts out of the proceeds. Held, also, that apart from the above R. S. O. 1877 c. 107, s. 19, covered the case. The testator had not indeed within the meaning of that section devised the real estate charged in such terms as that his whole estate and interest therein had become expressly vested in any trustee, but he had devised it to such an extent as to create a charge thereon which the Act in effect transmutes into a trust and thereupon clothes the executor with power to fully execute that trust by conveying the whole estate of the testator. *Yost* v. *Adams*, 8 O. R. 411, 13 A. R. 129.

——— *Consent.*]—The testator devised lot B to his son T. on condition that he should support his mother during her life, and if the executors should think best, and his mother agree to it, they might sell the lot. The mother died, having been supported by T. during her life:—Held, that on her death, the power, which could only be executed with her consent, became extinct, and T. having the fee could make a good title to a purchaser. *Re Ford*, 7 P. R. 451.

J. C. died in 1867, having by will provided as follows: "And whereas trouble . . . may arise among my family with regard to the property . . . on account of its being out of the power of my trustees to sell or dispose of the property, I hereby order, direct, and fully authorize at and after twenty years after my death, my trustees . . . to absolutely sell and dispose of my said property in T. to the best advantage, provided only that it be the wish of a majority of my heirs who may then be living, to do so and not otherwise, &c." In 1887, a meeting of a large majority of those interested was held, and it was decided to sell by public auction. On an application by the plaintiffs, who were trustees for one of the heirs and represented only a one-sixth share of the property, for the usual order for partition and sale, which was resisted by a majority of the heirs:—Held, that the land in question was vested in the trustees on the express trust to sell at the end of twenty years from the testator's death, provided a majority of the heirs were in favour of a sale, which was proved, and that the jurisdiction to partition was ousted. *Re Dennis, Downey* v. *Dennis*, 14 O. R. 267.

——— *Purchaser's Duty.*]—A testator devised all his real and personal estate to his executors in fee, in trust for sale to pay debts:—Held, that a bonâ fide purchaser for value was not bound to inquire whether there were debts which authorized the executors to sell. *Burke* v. *Battle*, 17 C. P. 478.

——— *Renunciation.*]—Testator directed "that no real estate be sold without the unanimous consent and direction of all my executors;" and also gave them power to buy and sell, give and take titles in fee simple in as full manner as if he were living, and appointed his widow executrix, and F. and H. executors. F. and H. renounced probate, and the widow alone proved the will:—Held, that the powers conferred by the will were personal, and could not be exercised by the widow alone: that being personal, they had become extinct; and that the division of the estate having been postponed only for the sake of the powers, its distribution was accelerated by their extinction. *Kerr* v. *Leishman*, 8 Gr. 435.

A testator directed his executors to get in all his outstanding estate, and after payment of debts and funeral expenses to expend the proceeds in building on his property, and also after two years, with the consent of his widow, authorized them to sell his homestead in village lots, and to invest the proceeds in land or government stock as his widow might desire; and the yearly income of all his estate, real as well as personal, he gave to his wife for her support and that of his children, for her natural life, provided she remained his widow, but no longer than during the minority of his children if she should marry again; nevertheless she was to be guardian of the children during their minority, and receive said income for their support until each became of age, and when the youngest became of age then the property was to go share and share alike, between his surviving children or their heirs: — Held, that the children took estates tail, with cross-remainders in the realty. (2) That the widow had the power of making the estate realty or personalty at her discretion. (3) That the power of sale having been given to the executors quâ executors, and not by name, they could not, after having once renounced, execute such power. *Travers* v. *Gustin*, 20 Gr. 106.

——— *Specific Devise.*]—A testatôr by his will directed his executors to pay all his debts, &c., out of his estate. Then followed specific devises of his estate to his wife, children and nephews, and a direction to his executors to sell the chattels, excepting the household furniture bequeathed to his wife, and out of the proceeds to pay the debts and to invest the balance for the benefit of the wife and children. By a codicil he directed his executors, if necessary, to sell in the first place lot A, specifically devised as aforesaid, to pay off any debts or incumbrances against his estate; and in the event of such sale being insufficient to pay said debts, &c., then in the next place to sell and dispose of lot B, also so specifically devised. The executors before disposing of lots A and B, sold to defendant the growing timber on lot C, a lot specifically devised to the plaintiffs, the defendant purchasing in good faith and on his solicitor's advice that the executors had the right to sell to pay debts; and defendant entered and cut down and carried away the timber. Subsequently the defendant purchased the land from the mortgagees thereof, the land having been mortgaged by testator. The plaintiffs, at the testator's decease, were under age, and did not become of age until after the trespass complained of, when they brought trespass against defendant claiming as damages the value of the timber so cut. There was no entry or possession taken by plaintiffs before action commenced:—Held, (1) that the general language of the will was controlled by the codicil, and so the debts were not charged on the unappropriated estates; and therefore the executors had no power to sell the timber on the land in question. (2) That if a power of sale was given to the executors it could not be exercised until after the lands specifically appropriated had been sold. (3) That the purchaser, not shielded by s. 30 of 29 Vict. c. 20 (O.), was bound to see that the power was rightly exercised. *Baker* v. *Mills*, 11 O. R. 253.

——— *Time.*]—A testator directed all his estate, real and personal, to be sold for the purpose of dividing the proceeds amongst his children, which sale was to take place in eighteen months from his death; but the will empowered the executors to withhold the sale of the estate, "real and personal, more than what is necessary to defray the above mentioned charges, if they should deem it for the benefit of my heirs, provided such sale shall not be delayed longer than five years from my decease." The real estate was not sold within the five years:—Held, notwithstanding, that the trustees could make a good title, the limitation of the time being only directory. *Scott* v. *Scott*, 6 Gr. 366.

**Probate to One of Two Executors**—*Right to Sell Land.*]—A testatrix devised and bequeathed all her real and personal property to two executors in trust to carry out the provisions of her will, directing payment of her debts out of the estate, with full power in their discretion to sell all or any of her property, and to invest the proceeds, as they might deem best, and to pay the income thereof to the husband during his lifetime, and after his death to sell the property and divide the same equally between her children. One of the executors renounced probate, which was granted to her husband, the other executor, who, some years after, without having registered a caution, contracted to sell certain of the lands to pay debts:—Held, that he had power to make a valid sale, and that the devise being to the executors, s. 13 of the Devolution of Estates Act, which requires a caution to be registered, in no way interfered with such power. In re Koch and Wideman, 25 O. R. 262, followed. *In re Hewett and Jermyn*, 29 O. R. 385.

**Receiving Payment.**]—Devisees in trust for sale of real estate must jointly receive or unite in receipts for the purchase money, unless the will provides otherwise, and the case is not affected by the property being charged with debts and the power of sale being to the executors eo nomine. *Ewart* v. *Snyder*, 13 Gr. 55.

Where a mortgage was taken and the mortgagees were therein described as executors and devisees in trust, payments to one were held not to be thereby authorized. *Ib.*

**Sale on Credit.**] — Under a certain will the executors were directed to sell and dispose of a farm "either at public or private sale as to them may seem best for the price, and on the most advantageous terms that reasonably can be obtained for the same:"—Held, that the power to sell involved a power to secure part of the price by means of a mortgage on the property sold, the manner of sale being left to the discretion of the trustees. *Re Graham Contract*, 17 O. R. 570.

**Special Direction as to Investments.**]—The testator, a resident of Ontario, but temporarily resident in New York, was possessed of real and personal property in Ontario, and also of personal property invested in United States securities. By his will he named one resident of the United States (his brother-in-law) and two persons residents of Ontario, as his executors, to whom he bequeathed all his personal estate, upon trust as soon as conveniently might be to sell, call in and convert into money such part of his estate as should not consist of money, and thereout to make certain payments, and invest the balance of such moneys in or upon any of the public stocks or funds of the

Dominion of Canada, of the Province of Ontario, or upon Canadian government or real securities in the Province of Ontario, or in or upon the debentures of any municipality within the Province of Ontario aforesaid, or in or upon the shares, stocks, or securities of any bank, incorporated by Act of parliament of Canada, paying a dividend, with power to vary the said stocks, funds, debentures, shares and securities: "And as respects my American securities, having the fullest confidence in the judgment and integrity of the said W. E. C., my brother-in-law and trustee, I direct my trustees to be guided entirely by his judgment as to the sale, disposal and reinvestment thereof or the permitting of the same to be and remain as they are, until maturity thereof, and I declare that my said trustees or trustee shall not be responsible for any loss to be occasioned thereby:"—Held, that this did not authorize the reinvestment of moneys realized on the sale or maturing of any of these securities in the United States, but that the executors were bound to bring them into this country, and invest them in one or other of the securities enumerated by the testator. *Burritt* v. *Burritt*, 27 Gr. 143.

**Statute of Uses.**]—To an action for rent defendant pleaded on equitable grounds that W., by his will, devised all his lands to the plaintiffs in trust for the sole benefit of J. during her life, under which she claimed and received from them the rent:—Held, that by the devise, as stated in the plea, the legal estate in the land was vested in J. under the Statute of Uses. *Fair* v. *McCrow*, 31 U. C. R. 599.

**Taking as a Class.**]—Where a testator, after devising certain lands to "my trusty friends J. L. and R. M." on certain trusts for the maintenance and education of his son, J. E., and devising the residue, real and personal, to the said "J. L. and R. M., or the survivor of them," in trust to sell and distribute the proceeds in payment of certain legacies, therein specified, continued, "should there ultimately be any residue, I direct my said trustees, or the survivors of them, to divide and pay the same to and among my legatees hereinbefore named and my said trustees, or the survivor of them, in even and equal shares and proportions:"—Held, that the trustees took as a class, i.e., one share between them, equal to the shares taken respectively by the legatees; for looking at the whole will, it appeared that the testator was speaking of the trustees in their official capacity, and regarding them as one legal person. *Boys' Home* v. *Lewis*, 4 O. R. 18.

**Trust to Pay Annuities** — *Power to Lease.*]—A testator bequeathed an annuity of £50 to his wife and another of £40 to his daughter, and after other bequests and devises he proceeded: "I give, devise, and bequeath to my executors hereinafter named, their heirs and assigns for ever, the (naming certain lands in Chinguacousy and a house and lot in Clinton), upon trust for the benefit of the several devisees hereinbefore and hereinafter mentioned. First, to sell and absolutely dispose of my said village lot and house in Clinton, and invest the proceeds for the benefit of my four grandchildren hereinafter named; also, to collect the balance due upon a certain mortgage made by one C. and wife, and invest the same for the benefit of my said grandchildren. Second, to lease the said lots or farms (in Chinguacousy) and to keep the same leased out for ever, and the said lands in no case to be sold or mortgaged; the rental of the said farms, after paying thereout the said annuities of £40 and £50 to my daughter and to my wife as hereinbefore provided, to be held in trust by my said executors for the benefit of my four grandchildren hereinafter named, and to be invested for the said grandchildren and allowed to accumulate for twelve years from the day of my decease, and then to be paid over to the devisees entitled thereto, and thereafter to become payable to said devisees annually. I give, devise and bequeath unto my grandchildren (naming them) the rentals issuing out of the said farms in Chinguacousy, the moneys arising out of the sale of my house and lot in Clinton, and the balance due or to grow due on the mortgage made by C. and his wife to me, in equal parts, share and share alike." The will contained a residuary clause, as follows: "I give, devise, and bequeath to my executors hereinafter named all the rest, residue, and remainder of my real and personal estate, to be by them turned into cash, and invested for the benefit of my said grandchildren hereinbefore named, subject, however, to the maintenance and support of my wife and daughter S. for one year from the day of my decease, without reference to and over and above and beyond any provision hereinbefore made for them or either of them:"—Held, that the widow and daughter were not entitled to any estate in the lands in Chinguacousy; and that the executors held the same as trustees, subject to the said annuities, for the benefit of the four grandchildren in fee, who had a right to call upon the trustees to convey in such manner as they saw fit. (2) That the power given by the will "to keep the same leased out for ever" must necessarily terminate when the cestuis que trust were in a position to call for a conveyance, otherwise it would be void. (3) That the charge of the annuities on these lands did not necessarily imply a power to sell, and in this case it was clear it did not, as the testator expressly prohibited selling or mortgaging, which prohibition was a qualification of the powers of the trustees only, and did not apply to the equitable estate in fee of the grandchildren, as in that case it would be repugnant and void. *Crawford* v. *Lundy*, 23 Gr. 244.

**Trustees to Hold until Condition Fulfilled.**]—R. died in 1847, having devised to T., defendant's son, the land in question. He also devised to one B. another lot of land not quite paid for, declaring it as his wish that the land devised to T. should remain in the hands of his executors until a deed should be obtained for the lot left to B., and the executors were to make the necessary payments from the rents of his real and personal estate. It was proved that the land devised to B. had been paid for, but the deed had not been obtained, as there were rival claimants, and the vendor required indemnity:—Held, that the land devised to T. would vest on payment of the money for B.'s lot, though the deed had not been executed. *Beckett* v. *Foy*, 12 U. C. R. 361.

**Unexercised Power of Sale.**]—J. by his will devised to H., his wife, all his real estate in L. "during her natural life, for the use and support of herself and family, and in case H. should at any time think proper to sell my said estate, it shall be the duty of my

executors to sell the same with her consent, and the proceeds thereof to be distributed as follows," &c.: "But if H. should not think proper to sell my said estate, then the same shall be divided amongst my children, their heirs or assigns, after the death of H., share and share alike." He then nominated P. executor of his will, "with full power and authority to act in the same." J. died in 1838, leaving H. and three children him surviving. P. took out probate. In 1846 H. by deed conveyed her estate in the lands for £150 to P. Under this deed P. obtained possession, which he retained till his death in 1882, when he devised the land to K. in trust for the purposes of his will, of which he made K. executor. H. died in 1872, and this action was commenced in 1883, by one of J.'s children, claiming an account against K. of the profits of the lands, and to have the same sold, and the proceeds distributed according to J.'s will:—Held, that P. could not be said to have been an express trustee within R. S. O. 1877 c. 108, s. 30, and that being so, the plaintiff's action was barred by the Statute of Limitations. The proper construction to be placed on the will was, that a life estate was given to H. with a power of sale to P. during her lifetime with her consent, and the remainder in fee to the children in the event of non-execution of the power: that unless and until the consent of the widow was given, the power of sale did not exist, and the executor had no duty to perform in relation to the lands; and he did not take, nor was it necessary for him to take, the legal estate; that as he never was required to execute the power, he never became trustee. *Johnson* v. *Kramer*, 8 O. R. 193.

*See*, sub-heads, 12, 13.

*See* also DEVOLUTION OF ESTATES ACT — EXECUTORS AND ADMINISTRATORS.

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17. *Provisions for Support and Maintenance.*

**After Born Child.**]—A testator, by his will, gave to each of his children (naming them) $200 a year until twelve, and thereafter $400 a year until eighteen, in case of daughters, and twenty-one in case of sons. After his death his widow gave birth to a son, and on a petition being presented to the court on his behalf, he was ordered to be allowed the same amount as the other sons out of his contingent share of the residue of the estate which the testator directed to be divided amongst all his children on the youngest attaining twenty-one; it appearing that the share of the infant in such would be ample to pay the allowance named. *Aldwell* v. *Aldwell*, 21 Gr. 627.

**Amount More than Required.**]—A testator, amongst other things, devised certain lands to each of his two children, and directed that the rents should be and remain to his widow or executors for the education and upbringing of the devisees respectively until they were 21, &c.; and he also left all the dividends and profits of his bank stock, &c., to his widow and executors for the same purpose. The residue of his estate was to be divided equally amongst all his children. The rents of the lands devised to one of the younger children were alone more than sufficient for his education and maintenance: — Held, notwithstanding, that he was entitled to a share of the dividends bequeathed; that the whole income derived from the stocks being given, the gift could not, in favour of the residuary legatees, be construed as conditional on being needed for the purpose specified. *Denison* v. *Denison*, 17 Gr. 219, 18 Gr. 41.

**Charged on Land.**]—A testator devised land to his wife for life, "subject to the conditions of supporting and educating therefrom my children until they are of age respectively," and after her decease, and his youngest child having attained eighteen, he devised the same land to his son, J. L. The widow died, and J. L. also died before the youngest child attained eighteen:—Held, that J. L. did not take the estate charged with the support or education of the younger children, nor was it chargeable in the hands of J. L. with arrears therefor, which had accrued during the life estate of the widow. *Perry* v. *Walker*, 12 Gr. 370.

A testator, amongst other things, devised to his wife the proceeds of all his rentable property, after paying necessary outlays for the maintenance and support of herself and six infant children, and gave certain parts of his estate to his children to be conveyed to them on the death of their mother; and the will further provided that the widow should have the power, with the approval and consent of the executors and trustees, of whom she was one, to put any of the said children into possession of the real or personal property bequeathed to them after attaining the age of twenty-one:—Held, that the property was subject, as a first charge thereon, to make good any deficiency there might be in the amounts derived from other properties, to afford a proper sum for the maintenance of the infants; and a reference was directed to the master to ascertain the proper sum to be allowed, also what had been received on account thereof; and as T., a purchaser of the property, had resisted the right of the plaintiffs to this account, although he shewed himself to be a purchaser for value without notice, the court refused him costs also. *Collingwood* v. *Collingwood*, 21 Gr. 102.

Where lands are devised subject to the payment of annuities, such lands will be charged in the hands of a purchaser, but not where there is also a charge of debts. Where, therefore, a testator devised to his daughter all his "real and personal estate of every description, subject to the payment of my just debts, and on condition that my son M. be supported and taken care of as hitherto by her, to have and to hold the said real and personal property on the condition aforesaid to her, her heirs and assigns forever," and appointed her sole executrix:—Held, that the devisee could make a good title freed from the charge for the support of the son M. *McMillan* v. *McMillan*, 21 Gr. 594.

A testator made his will as follows: "I leave to M. the west half of lot 9 during her natural life. I leave to my son A." (an imbecile) "his board and lodging with £5 per year during his natural life, to be given as hereinafter mentioned. I leave to B." (certain other lands) "under the following restriction: i.e., he is to pay A. £3 every year during his natural life. I leave to R. the west half lot 9,

after his mother's death, on the following condition: i.e., £2 in each year to be paid by him to A., and to keep A. in board and lodging during his natural life." The devise to R. failed, he being an attesting witness:—Held, that A.'s maintenance as from the death of the testator, and not as from the death of M., was a charge on the west half lot 9 in the hands of the heirs; and the land having, for some time after the testator's decease, been occupied under mistake of title by R. and his assigns, who had paid for A.'s maintenance, the heirs could not enjoy the land without making good the charge thereon to those who had thus exonerated them. *Mussie* v. *Lindsay*, 11 O. R. 520.

*See*, also, *S. C.*, 10 P. R. 432.

**Charged on Shares.**]—Where a testator gave the residue of his real and personal property to his executors and trustees in trust to sell the same, and, after satisfying certain charges, to expend and apply, for the maintenance and education of his minor children, such sums as they thought necessary for this purpose, and in subsequent clauses of the will provided that such children were to draw, or be entitled to, equal shares of his estate, and that each should receive his or her share of the proceeds of the real estate, on marrying or arriving at maturity; and that until then the shares of such children should be invested and paid out as they required the same as aforesaid:—Held, that their maintenance and education were a charge on their own shares only, and not on the whole residue. *Gibson* v. *Annis*, 11 Gr. 481.

**Direction to Work Farm** — *Right to Proceeds.*]—A testator directed his son to work his farm of 100 acres, worth £50 or £100 a year, and pay one-third of the produce to his widow. The widow and son, and an infirm daughter, lived together on the place until the death of the son, all receiving their support from the farm, the widow for part of the time doing work equivalent to the support she received, but making no demand for her one-third of the produce, and there being no agreement between them on the subject. A bill by the widow against her son's representatives for an account of her share of the produce, was dismissed with costs. *Gilmore* v. *Gilmore*, 14 Gr. 57.

——— *Surplus Proceeds.*]—A testator devised a portion of his real estate to his widow and his eldest son J., jointly, and his heirs, "my wife J. to have and to hold the aforesaid premises as long as she remains my widow for my wife J. C.'s support and my small children's support, to be accepted by her in lieu of dower; and after her death my wife's part will belong to my son J. C., aforesaid. . . . My son J. C., aforesaid, will pay to my daughters (naming them) $200 each when they become of the age of twenty-one years, that is, each as she becomes of the age of twenty-one years." The testator then devised other real estate to his four younger sons, and proceeded to direct that his five sons should "remain on the old farm (the land devised to the widow and eldest son) and work together, and the proceeds of their work, except what is necessary for the maintenance of the family, that is, for food and clothing, is to pay for the land already purchased . . . and if any of my sons aforesaid does not conform to this proviso . . . then the property I have given and devised to him or them shall be sold by my executors hereinafter named, and the proceeds of the sale aforesaid shall be paid upon the land I have willed to those of my sons who fulfills this last provision:"—Held, that J. took an estate in fee in one moiety of the land devised to him and his mother; that the widow took an estate during widowhood in the other moiety, with remainder to J. in fee, the whole being charged with the maintenance of the testator's widow and such of the children as continued to live on it; and with the payment of the purchase money payable on the lands devised to the sons who remained on and worked the farm; both charges being on the annual profits, not on the corpus; J., however, being entitled to insist that the lands devised to any of the sons who abandoned the farm should be sold and the produce applied in payment of lands devised to those who remained, and that any surplus of the produce not required for maintenance, and to pay off purchase moneys, was divisible between J. and his mother in equal moieties. *Clark* v. *Clark*, 17 Gr. 17.

**Discretion**—*Right to Account.*]—The testator devised certain lands to his widow, to have and to hold the same for the following uses: "To sell and dispose of the same as she should think proper and right, and the moneys thereupon coming and arising to use and apply for the payment of my just debts, and for the maintenance of herself and my minor children, and the education of such children as she may see to be fit and necessary," and he authorized his wife to convey the said lands in fee simple to the purchasers and directed that in the event of any of the said lands remaining unsold at the time when his youngest surviving child should attain twenty-one, then the above devises and powers should cease, and the lands be subject to the trusts of his will previously declared, under which the lands were ultimately to be divided among his children. The testator was twice married:—Held, that the children and grandchildren of the testator's first marriage had no right to demand an account of the lands sold under the above provisions, or investigate the amount used for maintenance. Semble, that the widow took absolutely the balance of the proceeds of sale not required for debts. In the case of separate devises, though the wife may be barred of her dower in one, she is not therefore barred of her dower in the others. *Cowan* v. *Bessarer*, 5 O. R. 624.

**Discretion of Executors.**]—A discretion given to executors to apply the interest of a legacy to the maintenance and education of the legatees, nephews and niece of the testator, is not subject to the control of the court, where there is no charge of fraud, or the like, against the executors. *Foreman* v. *McGill*, 19 Gr. 210.

**Dower and Maintenance.**]—A testator devised all his real and personal estate, to trustees to sell the realty and get in the personalty, the proceeds of which, after payment of the debts, they were to invest in their names upon trust to pay the annual income to his two sons in equal moieties, they maintaining their mother during life; and after

the death of each of the sons the trustees to hold one moiety of the trust moneys upon trust to pay and divide and transfer the same equally between and amongst such of his children as should be living at his decease, and the issue then living of such children as should be then dead, as tenants in common in the course of distribution, according to the stocks, and not to the number of individual objects, and so that the issue of any deceased child should take by way of substitution, amongst them, the share or respective shares only, which the deceased parent or parents would, if living, have taken:—Held, that the widow was not put to her election, but was entitled to dower as well as the provision made for her by the will; and it being alleged that the sons had not provided for her maintenance, a declaration was made that she was entitled to such maintenance, and a reference was directed to find what would be a proper sum for that purpose; that a complete conversion had been effected by the trust for sale in the will, so that the interests of the son should be ascertained as if the will consisted of personal estate only; and that the sons took life estates therein only; and one of the sons having died without children that there was an intestacy as to his share, subject, however, to a proportion of the charge for the maintenance of the widow. *McGarry* v. *Thompson*, 29 Gr. 287.

**Duration.**]—Every gift for maintenance, imports maintenance during minority. *Bigelow* v. *Bigelow*, 19 Gr. at p. 555.

A testator by his will, dated 31st May, 1872, after several specific bequests, gave the residue of his real and personal estate to his trustees upon trust to pay to each of his daughters, J. and L., for life, the annual allowance of $800 each, which they were then receiving, to be paid to them semi-annually, and to pay for the education, maintenance and ordinary requirements of his son G., and then proceeded: "And I direct my trustees in their discretion, if they find my son G. deserving of the same, to make such annual allowance to him as to them may seem warranted by the proceeds of the income of my estate, and if my said trustees are satisfied as to his steadiness they are to treat my said son G. in respect to the said allowance in the same manner as my said daughters, J. and L. . . . It is my will that in the case of each of my said daughters the capital sum necessary to produce the allowance made to her be paid after her death to such person or persons as she may by will direct:"—Held, that George was only entitled to his maintenance and education during minority, for there was nothing in the will to indicate an intention to extend the trust for maintenance and education beyond that period. Held, also, that George was not entitled to any annual allowance in addition to his maintenance and education during his minority, and the amount which might be paid him after attaining majority, as an annual allowance, rested on what the trustees in their discretion might deem warranted by the estate. For by treating G. in the same manner as J. and L. the testator referred only to the mode of payment, and the power of disposing of the principal, not to the amount of the allowance. *Macdonald* v. *McLennan*, 8 O. R. 176.

A testator gave to his executors and trustees, of whom his wife was one, all his real and personal estate, with a direction to convert his personal estate into money, pay debts, and invest the balance. He directed them to pay his wife from time to time such money as might be sufficient to support, maintain, and educate his family, and to maintain his wife in a manner suited to their condition in life, and for that purpose gave his wife power to collect money and to take therefrom enough to maintain his family and herself. And he directed his sons to pay her $150 a year after they received their lands, charging it on his lands, but they were not to pay it so long as she and the family were maintained out of the estate. The trustees were to pay $1,000 to each of the daughters as they attained twenty-one, and if there was not sufficient personal estate to pay them, the balance was to be a charge on the real estate; the real estate was to be divided between the sons when the eldest attained twenty-five, and then the trustees were to give him $2,000. The balance of the personal estate was to be divided between the sons, the eldest being charged with his $2,000. The testator's widow married again:—Held, that the children were only entitled to maintenance until they attained their majority. Held, also, that the widow was entitled to maintenance until the provision as to the $150 came into operation which would be when the sons respectively attained twenty-five. Although the maintenance was to be made from the personal estate, and no part of the rents were assigned for that purpose, as the devisees of the real estate were not entitled until they attained twenty-five, the intermediate rents not being disposed of descended to the heirs-at-law, i. e., the children, and might be applied for their maintenance if the personal estate was insufficient. *Cook* v. *Noble*, 12 O. R. 81.

When a testator has himself specified the time for the duration of maintenance, that will be observed; but the right to maintenance and support, when given in general terms, will cease with the marriage or forisfamiliation of a child. Knapp v. Noyes, Amb. 682; Gardner v. Barber, 18 Jur. 508; and Wilkins v. Jodrell, 12 Ch. D. 564, considered and commented on. *Ib.*

The personal estate turned out insufficient to pay the legacies of which the one of $2,000 was first payable out of those remaining unpaid:—Held, if the $2,000 legacy to the son absorbed all the personal estate, the daughters would get none of it as their legacies were charged on the land, and that the $2,000 legacy and the legacy for maintenance must abate proportionately, and that there was no ground for marshalling. *Ib.*

C. devised the residue of his real estate to his executors in trust for his four children (naming them) "until they or the survivor or survivors of them shall have attained the age of twenty-one years, said real estate to be divided amongst the said four children, share and share alike, and in case any of them shall have died leaving issue, the said issue shall take the share which otherwise would have gone to his, her, or their parent." He also directed that his executors should provide for the maintenance, support and education of the said four children during their minority out of the income to be derived from time to time out of his real and personal property not otherwise devised and bequeathed by his will:—Held, that J. P. C., one of the four children who had attained twenty-one, was not entitled to maintenance

after that age. *Ryan* v. *Cooley*, 14 O. R. 13, 15 A. R. 379.

Where a provision is made for maintenance the duration of which is defined by the testator, it will go on for the prescribed period notwithstanding the death of the beneficiary, because to avoid an intestacy the court will adjudge it to the representatives of the deceased. *Dawson* v. *Fraser*, 18 O. R. 696.

**Equitable Title.**]—Under the following devise: "To my dearly beloved wife, C. C., it is my will and desire that of what property I possess she shall have her lawful support in food and clothing during her natural life, in such manner as she received while I was yet with her:"—Held, that lands of which the testator had only the equitable title were charged with her support and maintenance. *Campbell* v. *Campbell*, 6 Gr. 600.

**Expenditure for Improvements.**]—The court, under special circumstances, allowed money to be expended on improvements on a certain property of a testator who had directed by his will that the rents and profits of all his property should be expended in payment of debts, and in the support of his wife and children until the youngest child should come of age. *Re Bender*, 8 P. R. 399.

**Interest during Minority.**]—A testator, after giving certain personal estate to his wife, and devising his lands to his two sons and his daughter, (all minors), subject to a life estate to his wife, directed the residue of his personal estate to be equally divided between his two sons on their attaining twenty-one; and further, that if any of his children should die before attaining that age, then his or her share should be equally divided among the survivors; and if all should die, he gave the whole on his wife's death to her other relatives, whom he specified:—Held, that the two sons were entitled to the interest on the residuary personal estate for their maintenance during minority. *Spark* v. *Perrin*, 17 Gr. 519.

**Joint Benefit.**]—A testator made his will as follows: "I therefore will unto my beloved wife A. M., for the benefit of herself and children jointly, two life policies for each $1,000, and their premium dividends, to have and to hold for their joint and mutual benefit, and to be by her spent in the most judicious and beneficial manner for all; also whatever interest I may have in the business of E. & D., and, in the arranging of it, I trust much to my long and well tried partner, A. W., in giving a just return to my heirs, for long and faithful services rendered by me in the business, there being no written agreement of the partnership:"—Held, that the widow took no absolute interest: that she and the children took jointly both the policies and the testator's interest in the partnership, and shared the same equally; that the widow was entitled, during the minorities of the children, to receive the income of their shares, in trust, to apply the same as one fund, as she might think most beneficial for the maintenance and education of the whole family; and that each child on attaining twenty-one was entitled to receive his or her share. *Rose* v. *Edsall*, 19 Gr. 544.

——— *Execution against One Beneficiary.*]—A testator bequeathed the income of his estate to his son and his son's wife for the support of themselves and their family "in a fit and suitable manner," and after the death of the son and his wife the corpus was to be divided among their children. On a bill filed by an execution creditor of the son seeking equitable execution against his interest, the court directed a reference to the master to inquire what would be a sufficient sum for such support of the wife and children, the excess to be applied in payment of the plaintiff's judgment and costs of suit. *Buchanan* v. *Brooke*, 24 Gr. 585. Overruled by *Fisken* v. *Brooke*, 4 A. R. 8.

——— *Receiver against One Beneficiary.*]—Under a devise of land to a father "during his life for the support and maintenance of himself and his (three) children, with remainder to the heirs of his body, or to such of his children as he may devise the same to," there is no trust in favour of the children so as to give them a beneficial interest apart from and independent of their father, but the children being in needy circumstances will be entitled as against the father's execution creditor who has been appointed receiver of his interest to have a share of the income set apart for their maintenance and support, and in arriving at the share it is reasonable to divide the income into aliquot parts, thus giving one-fourth to the receiver. *Allen* v. *Furness*, 20 A. R. 34.

A testator devised land to one in trust, first, to permit his nephew and his wife and children to use it for a home, and, second, to convey it to such child of the nephew as the latter should nominate in his will. The nephew and his family were living upon the land at the time of the making of the will and at the death of the testator, when there were two dwelling houses thereon. Afterwards the trustee and the nephew's father-in-law, at their expense, improved and altered the property so that the number of houses was increased to seven. The nephew lived with his family in one and received the rents of the others. In an action by judgment creditors of the nephew and his wife, seeking the appointment of a receiver to receive the rents in satisfaction of the judgment:—Held, that the judgment debtors took no estate in the land under the will, and nothing more than the right to call upon the trustee to permit them to use the land for "a home," which expression, however, meant more than simply a house to live in; that they were entitled to the advantage of the increased value of the land; and that their right to the use of the land for a home could not be reached through a receiver so as to make it available for the satisfaction of the plaintiffs' claim. Allen v. Furness, 20 A. R. 34, distinguished. *Cameron* v. *Adams*, 25 O. R. 229.

**Medical and Funeral Expenses of Beneficiary.**]—A testator by his will provided as follows: "I will and devise that my said executors and trustees shall comfortably provide for and maintain and clothe my father and mother during their lifetime, and that the same shall be a charge upon my estate." The father and mother died, and during their last illness certain expenses were incurred for medical attendance, nurses, &c., and after their death for funeral expenses and English solicitor's fees in endeavouring to col-

lect the several accounts for the same:—Held, that the expenses were covered by the provision for maintenance, and an order was made for their payment out of the testator's estate. *Howe* v. *Carlaw*, 15 O. R. 697.

**Mother and Children**—*Determination of Mother's Rights by Second Marriage.*]—The testator by his will devised the proceeds of certain real estate to his daughter-in-law, E. D., widow of his son, W. D., deceased, to her use and support of his son W. D.'s children during her natural life or so long as she remained his widow; and in the event of the death of his said daughter-in-law, then to his grandchildren so long as they remained minors. He then devised the land to his grandson P. D., in fee, but subject to the above devise. After the testator's death E. D. married again, and was still living:—Held, that the intent of the testator was, that in any event the minors were to have the support out of the land during minority, and therefore were so entitled during such minority, upon the determination of the mother's estate by marriage as well as by death. *Neary* v. *Gillecce*, 31 C. P. 243.

**Option to Pay Specific Sum in Lieu of Share** — *After Acquired Property.*] — A testator, in 1849, devised all the income of his estate to his widow until his eldest son attained twenty-one, for the support of herself, and the maintenance, education, and support of all his children during their minority; and as each attained twenty-one he or she was to be allowed a portion of the annual income, after making ample provision for the support of his wife during her widowhood; and after the youngest child attained twenty-one, and the death or marriage of the widow, he gave all his estate, real and personal, amongst all his children in equal proportions; and should any child die without issue and under age, such child's share to be divided amongst the others. The testator further directed that, should a majority of his sons think proper to pay to each of his daughters the sum of £500 currency in lieu of their share of the estate, the payment thereof should be taken by them in full of their respective shares of the property devised to them. After the death of the testator, one of his daughters died intestate, and without issue, after having attained the age of twenty-one. Subsequently to the making of this will the testator acquired real estate of considerable extent and value:—Held, that in the absence of any act whereby the right was lost, the time for the majority of the sons to exercise the option of paying the daughters the £500 each, was the period of distribution of the corpus or principal; and that in the meantime the daughters were entitled to their shares of the actual income of the estate, and that this option on the part of the sons applied to the share of the deceased daughter as well as to the shares of the other daughters. Held, also, that the after acquired realty was not affected by the provisions of the will, and that the same was to be partitioned amongst the several parties interested therein. *Laidlaw* v. *Jackes*, 22 Gr. 171.

**Products and Services Charged on Land**—*Refusal to Accept—Compensation.*] —A testator by his will devised his farm to his grandson charged with the supply of certain products and personal services in favour of a daughter and granddaughter. On a disagreement between the parties, a tender of the products and services was made and refused, and an action was brought to have them declared a charge on the land and for a money compensation:—Held, that the refusal of the products did not deprive the plaintiffs of the right to recover their value, but that they were not entitled to compensation for the personal services proffered and refused. *Murray* v. *Black*, 21 O. R. 372.

**Residence with Named Persons.**]—A testator devised certain lands to his two sons, declaring that the legacies thereinafter mentioned should be a charge thereon. He then bequeathed certain pecuniary legacies to his daughters, adding, "I give and devise also unto (his said daughters) their support and maintenance so long as they or either of them, remain at home with (his two sons):" and he gave his personal property to his two sons in equal shares:—Held, that the support and maintenance of the plaintiffs was, by the will, made a charge upon the lands; and they might for sufficient reasons cease to live at home, and yet still be entitled to such support and maintenance. *Swainson* v. *Bentley*, 4 O. R. 572.

**Resort to Corpus.**]—Where a testator bequeathed part of his residuary estate to two infant legatees, directing the interest to be applied to their support and education until twenty-one years of age, or such previous time as the trustees might see fit to pay over the same to the legatees; and that in case of death of either, the whole should be paid to the survivor; the will containing no gift over in case of the death of both:—Held, that the trustees and executors had a discretion to apply part of the principal to the support and education of the legatees. *In re McDougall*, 14 Gr. 609.

In such a case the executors and trustees presented a petition under 29 Vict. c. 28, s. 31; and it appearing that the parents of the legatees had abandoned them, that the legatees had no other means of support, and that the interest on their share of the residuary estate was inadequate for their support, the court made an order approving of the application of part of the principal to supply the deficiency. *Ib.*

**Right to "a Home."**] — A testator bequeathed to his daughter "a home as long as she may remain single" in his dwelling house:—Held, that though in the case of an infant "home" would probably include maintenance, yet that the legatee in this case being of age, and there being no express words giving her maintenance after majority, she was not entitled to maintenance under the above bequest. *Augustine* v. *Schrier*, 18 O. R. 192.

**Right to Remain and Live on "Place" while Unmarried.**]—A testator by his will devised as follows: "I will, devise, and bequeath to my wife S. J. all my real and personal property during her natural life, and that my daughter S. J. shall remain and live on said place as long as she remains unmarried." The only real estate or "place" the testator owned was his farm, on which his widow remained with the daughter until the former's death:—Held, that the daughter had the right, after the mother's death, to live on the property so long as she remained unmarried, and that she had an estate in and was entitled to the use of it, as she might choose

to use it, for that period. *Judge* v. *Splann*, 22 O. R. 409.

**Subrogation by Person Supporting Widow.**]—A testator left certain real estate, which he authorized his executor, with the assent of his widow, to sell, and apply the proceeds in her maintenance, and the balance to be distributed. H., an adopted son of the testator, supported the widow for several years, but no sale of the lands was effected during her life. In a suit to administer the estate of the testator:—Held, that H. was entitled as a first charge on the real estate (there being no personalty) to be paid the amount expended in the maintenance of the widow; or, in other words, that he was entitled to be subrogated to the rights of the widow, and thereby would have had the power of calling upon the executor to exercise the authority given him to sell the real estate for payment of his claim. *Re Howey, McCallum* v. *Pugsley*, 21 Gr. 485.

**Trust for Daughter and her Children for Life.**]—Where a testator gave certain estates to trustees, in trust as to the income for the separate use of his daughter and her children for life, with directions to pay the same to her, and in trust as to the capital after her death, to divide the same equally amongst her children: — Held, that she was entitled during her life, for her separate use, to an equal share with each of her children; that the residue of the income was to be paid to her for their benefit; and that her own individual share was alone liable to her debts. *Crawford* v. *Calcutt*, 13 Gr. 71.

**Trust for Joint Benefit** — *Corpus.*]—G. H. Z. in his will provided, with respect to a certain mortgage, "I give and bequeath out of the proceeds of said mortgage to each of my daughters (naming them) the sum of $200, to be paid to them respectively when the youngest reaches the age of twenty-one, and if any of them shall not have been married before that time the child or children being then unmarried shall not receive their shares until such times as she or they shall marry. Provided that my executors may pay such part or parts of said legacies to my married daughters before the youngest attains twenty-one if they can do so without interfering with the proper support of my wife and family. Provided if any of my daughters die without issue the legacy bequeathed to them shall be divided among their surviving sisters. The balance of the proceeds of said mortgage I give and bequeath to my said wife, to have and to hold the same for her use and benefit, and for the use and benefit of the unmarried members of my family, during the natural life of my said wife, after which my will is, that the balance of proceeds of said mortgage still remaining be equally divided among my daughters then surviving:"—Held, that the widow held in trust during her life for herself and her unmarried daughter, and that she was bound during her life to apply the proceeds of the mortgage for the proper support of herself and that daughter while unmarried, treating the principal and interest of the mortgage as a blended fund, and what remained was to be divided; and that the widow had the right to draw bonâ fide from the proceeds of the mortgage even if it consumed the whole of the corpus. *Barclay* v. *Zavitz*, 8 O. R. 663.

**Widow's Support.**]—Under a will directing that testator's estate should be charged with the support of his wife during her life or widowhood, and devising it to his sons in fee, "subject to the devise hereinbefore contained in favour of my dear wife:"—Held, that the widow took no legal estate. *Gilchrist* v. *Ramsay*, 27 U. C. R. 500.

**Widow and Children.**] — A testator willed as follows: "I give, devise, and bequeath to my executor and executrix" (of whom one was the plaintiff, the testator's widow), "all my real and personal property of every kind whatsoever, for the benefit of my children, share and share alike, and to my wife while she continues my widow, and I give to my said executor and executrix power to sell any part or the whole of my real property for the support and maintenance of my children and my wife while she remains my widow:"—Held, in an action brought by the widow, that under the above will, she and the children took the real and personal property jointly, she during widowhood, and they share and share alike absolutely; that she did not take an immediate estate in the whole with reversion to her children. Held, also, that a reference might be directed similar to that in Maberly v. Turton, 14 Ves. 499, to ascertain whether it would have been reasonable and proper in the trustees to apply any or what part of the land, having regard to the situation and circumstances of the children, to their support and maintenance; and a declaration made that the sum which the master should find to have been properly expended by the mother in past maintenance formed a charge upon the inheritance of the children respectively in the land, but as the directions of the will had not been observed, the inquiry must be at the expense of the mother. *Donald* v. *Donald*, 7 O. R. 669.

**Widow's Marriage.**] — A widow ceases to be entitled to support and maintenance upon marrying again. Quære, as to her rights if she should again become a widow without means of support. *Cook* v. *Noble*, 12 O. R. 81.

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18. *Residue.*

**Direction to Sell Lands** — *Residuary Gift.*]—Where there was no special devise of the testator's real estate, but only a direction to the executors to sell and pay legacies, it was held that the land and rents arising therefrom belonged to the widow, under the general residuary gift to her, and that the executor had no power to lease. *McMylor* v. *Lynch*, 24 O. R. 632.

**Implied Gift of Residue.**]—The testator, after devising a parcel of land to each of his three sons, directed his executors to collect the debts due to him, and thereout to pay his debts, funeral and testamentary expenses and legacies; and he charged the deficiency on two of the parcels which he had devised. By a subsequent part of his will, he gave his household furniture, and other personal chattels, to his wife, for her own use, except the piano, which he gave to one of his daughters; there was no other residuary clause in the will:—Held, that the whole of testator's residuary estate, except the debts due to him and the piano, went to the wife, exonerated from testator's debts. *Scott* v. *Scott*, 18 Gr. 66.

**Pro Rata Distribution.**] — Where the residue of an estate is directed to be divided pro ratâ among prior legatees, they take such residue in proportion to the amount of their prior legacies. *Kennedy* v. *Protestant Orphans' Home*, 25 O. R. 235.

**Quebec Law**—*Heir—Universal Legatee.*] —R. A., who died in Montreal in 1896, had, by his will made there in 1890, bequeathed to M. A. and her heirs, one-fourth of his residuary estate. M. A. died in 1895, leaving a will appointing five of her children her universal legatees. R. A. subsequently took communication of the will of the deceased M. A., and made a codicil to his own will in the terms following: "With respect to the share of the residue of my property which I bequeathed by my will to my sister, the late M. A. . . . my will and desire is that her said share of said residue shall go to her heirs:" — Held, that under the provisions of the civil code of Lower Canada, the words "her heirs" in the codicil must be construed as meaning the persons to whom the succession of M. A. devolved as universal legatees under her will. *Allan* v. *Evans*, 30 S. C. R. 416.

**Specific Devise for Life**—*General Residuary Clause.*]—Testator, after leaving his homestead to his wife for life, devised to his executors "the residue of my real estate of which I shall die seised or possessed," in trust to sell such portion as should be sufficient to pay his debts, giving them power, in order to effectuate his intention, "to dispose of said real estate in fee simple, or for a term of years, for the purpose aforesaid." And he directed that his executors, after payment of the debts, should hold said real estate in trust to convey such portion thereof as might remain to his nephews in fee. It did not appear whether testator had any other land besides the homestead or not: — Held, that the reversion in the homestead passed to the executors, under the residuary devise. *Swart* v. *Gregory*, 15 U. C. R. 335.

**Specifically Described Lands.**] — Although a will speaks from the death of the testator, and so would carry after acquired lands, yet where a testator devised all the remainder of his real estate to his wife, and then proceeded to enumerate the lands comprised in such remainder:—Held, that after acquired lands did not pass as part of the residue. *Crombie* v. *Cooper*, 22 Gr. 267, 24 Gr. 479.

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19. *Special Words and Expressions.*

**General Rule.**]—It is a principle of construction that the same meaning shall, as far as possible, be given to the same words in the same will. *Boys' Home* v. *Lewis*, 4 O. R. 18.

**"All the Proceeds" of a Farm.**]—See *Brennan* v. *Munro*, 6 O. S. 92.

**Birth of Issue.**]—A., being seised in fee, devised as follows: "I give and bequeath to my wife (naming her) all that piece of land (in dispute) as long as she may remain a widow, unless it should please God in his mercy within the next three months to give me issue by my wife, now pregnant, in which case I bequeath the above to my said issue, whether male or female." 2. "In case there should be no issue, or in case my wife should marry again, I give and devise to my youngest brother S. K., &c., all the above property, subject to my wife's dower, and in case of his death to the next of kin in my own family." 3. "In case of the death of my wife whilst a widow, and without any issue as aforesaid, I also give and bequeath all my real estate to my youngest brother S. K., aforesaid, and failing him to my next of kin as above." A son was born the day after the will bore date, (23rd July, 1855), and died on the 25th October, 1855. A., the testator, died 23rd August, 1855, and his widow 30th January, 1856, there being no other issue, and she not having married again:—Held, that the son took the estate, which on the son's death vested in the widow of the testator, and the limitation over to S. K. was defeated. *King* v. *Dougherty*, 11 C. P. 481.

**"Children"**—"*Heirs.*"]—A testator died in 1847 leaving a will in which, after devising his farm to his wife for life, and at her decease to be divided by his executors between his sisters F. and H. in certain proportions, he continued: "and in case either or both of my sisters F. and H. die previous to my decease, then my will is that each of their portions devised to them respectively, shall be by my executors divided between their and each of their heirs, share and share alike, that is each sister's share to each sister's children, to them their heirs and assigns for ever." The testator's sister H. predeceased him, leaving children, who survived him, and having had also a daughter, who predeceased her, leaving a son, H. H.:—Held, that H. H. took no share of the devise to H., for it was clear the testator was using "heirs" in a colloquial and not a technical sense, as meaning "children," and the legal construction of the word "children" accords with its popular signification, viz., as designating immediate offspring. *Paradis* v. *Campbell*, 6 O. R. 632.

——— *Grandchildren — Issue — Legacy—Period of Vesting.*]—A testator devised and bequeathed his real and personal estate to his wife for life, or until remarriage, with powers of disposal; and by a residuary clause devised the residue — not specifically devised or bequeathed, and not sold or disposed of by his said wife—immediately after her death or remarriage, to his executors to sell and convert the same into money, and out of the proceeds pay a specific sum to each of his five sons, and to divide the balance, share and share alike, between his three daughters, and if his said daughters should die before him, or before said distribution, leaving issue, the share or shares of his said daughters so dying should be divided ratably and proportionately amongst the child or children of said daughter or daughters living at the time of said distribution, so that the issue of any of his said daughters who might be dead should receive her or their parents' share. The widow survived the testator and died without having remarried. A son, C. K. R., and a daughter, M., also survived the testator, but died prior to the widow, the son leaving no issue, and the daughter a son, F., and a daughter, M. C., the said last named daughter having also died leaving two children:—Held, that the word 'children" here must be taken in its primary sense, i. e., the immediate children of the testator, and excluded grandchildren, so that F. took the whole of his mother's share to the exclusion of the children of the daughter M. C.; and that the legacy to C. K. R. became

vested on testator's death, payable on the widow's death, and that his personal representatives were entitled thereto. *Rogers* v. *Carmichael*, 21 O. R. 658.

*See McPhail* v. *McIntosh*, 14 O. R. 312.

"**Children by First Marriage**"—*Testator Thrice Married.*] — A testator, after making sundry dispositions of his estate, devised a portion of it to executors to sell, and the proceeds, after payment of debts, "to divide equally between my said son C. W. S. and my daughters by my first marriage." The testator had been thrice married. Of the first marriage there was no issue living at the date of the will—several years after the death of his first wife. By the second marriage he had issue, one son, C. W. S., and four daughters, all surviving. By his third wife, who survived him, he had issue, one son, J. S., and four daughters: — Held, that the daughters by the second marriage sufficiently answered the description in the will, who, with their brother (C. W. S.), were entitled per capita; not that C. W. S. was entitled to one moiety, and the daughters, as a class, to the other moiety. *Ling* v. *Smith*, 25 Gr. 246.

"**Child or Children.**"]—See *Stobbart* v. *Guardhouse*, 7 O. R. 239.

"**Death Unmarried or without Leaving Issue**" — *Codicil*—"*Equal Shares.*"]—A testator devised property "equally" to his two sons J. S. and T. G. with a provision that "in the event of the death of my said son T. G. unmarried or without leaving issue" his interest should go to J. S. By a codicil a third son was given an equal interest with his brothers in the property on a condition which was not complied with and the devise to him became of no effect:—Held, that the codicil did not affect the construction to be put on the devise in the will; that J. S. and T. G. took as tenants in common in equal moieties, the estate of J. S. being absolute and that of T. G. subject to an executory devise over in case of death at any time and not merely during the lifetime of the testator. Cowan v. Allen, 26 S. C. R. 292, followed. Held, also, that the word "equal" indicated the respective shares which the two devisees were to take in the area of the property devised and not the character of the estates given in those shares. *Fraser* v. *Fraser*, 26 S. C. R. 316.

"**Die without Heirs.**"]—A testator, by his will, provided as follows: "I leave and bequeath to my lawful wedded wife, M. E., all my personal property, as also the sole control and management of my real estate . . said estate being composed . . I leave and bequeath the aforesaid estate to my son J. C., after my wife's death . . and the said estate is not to be sold or mortgaged by my son J. C., but is to belong to his heirs. Should my son J. C. die without heirs the estate . . my daughters shall get their maintenance off said estate during . . I also bequeath the sum of eighty dollars to each of my daughters . . to be paid out of the said estate by my said son J. C.":—Held, that J. C. took an estate in fee tail in remainder after an implied life estate in his mother, M. E., subject, however, to the charges of the several legacies to each of the testator's daughters. *Re Collilon and Landergan*, 15 O. R. 471.

*See Ray* v. *Gould*, 15 U. C. R. 131; *Jardine* v. *Wilson*, 32 U. C. R. 498; *Dale* v. *McGuinn*, 15 Gr. 101; *Tyrwhitt* v. *Dewson*, 28 Gr. 112.

"**Die without Issue.**"]—A will provided, after making several devises and bequests: "Should either of my two sons die without issue, I wish that their shares should be divided equally among my surviving children:"—Held, that the sons took an estate tail, and not a fee simple subject to an executory devise over. *Little* v. *Billings*, 27 Gr. 353.

A testatrix devised separate lots of land to each of her two daughters, A. and B., and then provided that if "either of my daughters die without lawful issue, the part and portion of the deceased shall revert to the surviving daughter, and in case of both dying without issue, then I authorize" . . . naming her executors and other living persons to subdivide the estate among her relatives as they should deem right and equitable. B. conveyed the lot devised to her to a purchaser, through whom, in B.'s lifetime, title was sought to be made:—Held, that B. took only a defeasible fee simple with a devise over to her sister and her heirs in case B. should die leaving no issue at her death. B. being still alive, it was impossible to say that a conveyance from her passed a good title. Little v. Billings, 27 Gr. 353, followed. Ashbridge v. Ashbridge, 22 O. R. 146, not followed. *Nason* v. *Armstrong*, 22 O. R. 542, 21 A. R. 183. Reversed on another point in the supreme court, 25 S. C. R. 263.

*See*, also, *Sisson* v. *Ellis*, 19 U. C. R. 559; *Scott* v. *Duncan*, 29 Gr. 496.

——— "*Survivor*"—*Estate Tail.*"] — The testator died in 1845, and by his will devised a farm to his two sons, without words of limitation, to be equally divided between them, adding: "And in case either of my sons should die without lawful issue of their bodies, then his share to go to the remaining survivor:"—Held, that the gift in the earlier part of the devise, though without words of limitation, was sufficient to carry the fee to the sons, unless a lesser estate appeared to be intended on the face of the will. Both sons outlived the father; one died in 1874 leaving issue; the other died without issue in 1890:—Held, that the son who first died had an estate in fee simple absolute in one-half of the land; and, as the other left no survivor, he was not within the words of the will, and nothing had happened to divest him of the estate in fee given by the earlier part of the will, and therefore he also died seised in fee simple of one half of the land. The word "survivor" is to be read as meaning "longest liver," not "other." The words "die without issue" do not mean an indefinite failure of issue which would give rise to an estate tail. *Ashbridge* v. *Ashbridge*, 22 O. R. 146.

——— *Share.*]—A testator, dying in 1833, by his will, made in the previous year, gave to his two sons, after a life estate to his wife, certain lands, habendum to his two sons "as tenants in common, their heirs and assigns for ever, subject, however, to this proviso, that if either of my aforesaid sons should die without legitimate issue, his share as aforesaid shall revert to and become vested in the other son united with him in the aforesaid devise." One son died unmarried in 1843. The other son married and had children, and in 1847 sold the whole property and conveyed it as in fee simple to the purchaser, who failed to

observe the provisions of the Act as to entails by registering his conveyance within six months:—Held, that the devise was of a defeasible fee, which in the event became absolute in the surviving son. Although the words "die without issue" pointed to an indefinite failure of descendants, the context was sufficient to restrict the interpretation. Ree d. Sheers v. Jeffery, 7 T. R. 589, and Greenwood v. Verdon, 1 K. & J. 74, followed. Chadock v. Cowley, 3 Cro. Jac. 695, distinguished. Little v. Billings, 27 Gr., at p. 557, commented on. *Van Tassel* v. *Frederick*, 27 O. R. 646.

——— *Annuity during Widowhood.*]—A testator divided his real estate among his three sons, the portion of A. C. the eldest son being charged with the payment of $1,000 to each of his brothers and its proportion of the widow's dower. The will also provided that "should any of my three sons die without lawful issue and leave a widow, she shall have the sum of fifty dollars per annum out of his estate so long as she remains unmarried, and the balance of the estate shall revert to his brothers with the said fifty dollars on her marriage." A. C. died after the testator, leaving a widow but no issue:—Held, reversing 23 A. R. 457, that the gift over in the last mentioned clause was intended by the testator to take effect on the death of the devisee without issue at any time and not during the lifetime of the testator only; that it was no ground for departing from this primâ facie meaning of the terms of the gift that very burdensome conditions were imposed upon the devisee; and that no such conditions would be imposed on the devise to A. C. by this construction as the two sums of $1,000 each charged in favour of his brothers were charged upon the whole fee and if paid by him his personal representatives on his death could enforce repayment to his estate. Held, also, that the widow of A. C. was entitled to the dower out of the lands devised to him, notwithstanding the defeasible character of his estate; that she was also entitled to the annuity of $50 per annum given her by the will, it not being inconsistent with her right to dower, and she was therefore not put to her election; that the limitation of the annuity to widowhood was not invalid as being in undue restraint of marriage; and that she could not claim a distributive share of the devised lands under the Devolution of Estates Act, which applies only to the descent of inheritable lands. *Cowan* v. *Allen*, 26 S. C. R. 292.

——— *Acquiring Vested Interest.*]—A testator devised all his lands to trustees, and, after providing for certain events, directed that, "immediately thereafter, or as soon thereafter as my trustees can conveniently, they, my said trustees, or the survivors or survivor of them, shall, with all care and to the best of their knowledge and ability, divide all the rest, residue, and remainder of my real and personal estate into three equal portions; and do and shall, by proper deed, declaration, or other instrument in writing, under their hands and seals, convey and assure," to each of his three sons one of such portions, to be held "by my said sons severally, as fully as I myself could and would have done had I been then living and in like estate." A subsequent clause of the will was as follows: "And I do hereby further direct and declare, and my will is, that if any of my said sons shall die without issue, and without having acquired a vested interest in my said estate, that the share or shares of him or them so dying shall go and belong to the survivors or survivor of my said sons hereinbefore named. . . And I do hereby further direct and declare, and my will is, that if any of my said sons shall die without having acquired a vested interest in my said estate aforesaid, and leaving issue, such issue shall be entitled, if only one child, to the whole, and if more than one child, then equally—of the share or portion of his father or their father so deceased, under this my will, as fully and effectually in all respects as if his, her, or their father had lived and received the same:—Held, that the dying without issue here mentioned must be construed as dying without children. (2) That the "vesting" referred to meant a vesting in interest and not a vesting in possession. (3) That the children of a son who died after the testator took under their father, and not directly under the will of the testator. *Stinson* v. *Stinson*, 21 Gr. 116.

A testator in 1842 devised certain real estate to his granddaughter; and in case of her dying without lawful issue he directed the property to be sold by his executors; and from the proceeds of such sales, and from such other of his property as might be then remaining in their hands, he directed certain legacies to be paid, and the remainder to be applied at the discretion of his executors to missionary purposes:—Held, that the contemplated "dying without issue" was a dying without issue living at the granddaughter's death. *Chisholm* v. *Emery*, 18 Gr. 467; affirming *Re Chisholm*, 17 Gr. 403.

**"Die without Leaving Living Issue."**]—A testator by his will devised to his son and "to the heirs of his body" a part of his real estate, and to his daughter and "to the heirs of her body" the remainder of the property, and if "either . . . should die without leaving heirs of their body," the share of the deceased to the survivor, and "to the heirs of their body," . . . and should both die "without leaving living issue" then over in fee simple. The daughter died in the lifetime of her brother without issue. The son married and had living issue, and conveyed in fee:—Held, that an estate tail vested in the son, and that there was nothing in the will to give the words "die without leaving living issue," the meaning of "an indefinite failure of issue," and that the ultimate remainder in fee simple expectant on the estate tail, could be barred by the son. *Re Fraser and Bell*, 21 O. R. 455.

**Double Condition.**] — The testator devised his land to his son, an only child, for ever, the testator's wife to have it as long as she lived or remained his widow, and then proceeded: "And if my son die and she marry, all to come to my brothers and sisters equal share alike." The widow married during the lifetime of the son, who subsequently, without ever having married, died intestate:—Held, that the estate given to the son was not taken from him by her marriage, and that the widow took the property as heir of the son. *Snell* v. *Davis*, 23 Gr. 132.

**Dying without Leaving Issue.**]—A testator directed his executors to sell and realize all his estate in such manner as they

should think proper, and the residue, after sundry devises and bequests, he desired them to apportion into certain shares, one of which he directed to be equally divided among the daughters of his son, S. V., deceased, to be paid to them on attaining twenty-one, or sooner if the trustees should think it for their advantage; and in the event of the death of any of his said granddaughters without leaving issue, her or their shares to be equally divided among their surviving sisters or their heirs:—Held, that this operated as a conversion of the estate into personalty, and the words "dying without leaving issue" referred to the period of distribution—that is, when the legatees attained twenty-one; and, therefore, that the share of one of them who had died without issue after the testator, and after having attained twenty-one, went to her personal representative. And the court being of opinion that the difficulty was occasioned by the testator, independently of the fact that the bequest was of residue, ordered the costs of all parties to be borne by the estate. *Gould* v. *Stokes*, 26 Gr. 122.

**Dying without Leaving any Lawful Heirs.**]—Section 32 of R. S. O. 1897 c. 128, is to be construed strictly, and is confined to cases in which the word "issue," or some word of precisely the same legal import, is used; and does not extend to cases in which the word "heirs" is used. Where a testator devised to his grandson, his heirs and assigns for ever, certain land with the qualification that in case of his "dying without leaving any lawful heirs by him begotten" the land was to go to other persons named, the section was held not to apply, and that the grandson took an estate tail. *Re Brown and Campbell*, 29 O. R. 402.

**"Effects."**]—See *Hammill* v. *Hammill*, 9 O. R. 530.

**"Family."**]—Held, in this case to include the widow. See *Dawson* v. *Fraser*, 18 O. R. 496.

**"Family Now at Home"**—*Death of Beneficiary.*]—Where a testator provided by his will: "that the farm be kept till the youngest surviving child comes of age, at which time I would desire the property to be sold and the proceeds to be divided equally between all my children and my wife. . . My will is, that I would like the farm rented to some good tenant, on the best terms possible, the rent to be used in the support and maintenance of the family now at home." The farm referred to was the only real property possessed by the testator either at the time of making his will or at his death. One of the testator's children, though living on the farm at the time of the testator's death, afterwards left it, and went to reside elsewhere:—Held, that the words "family now at home" were designatio personarum, and that the child in question did not forfeit her vested right to share in the rents by afterwards leaving the home. She afterwards died intestate, before the testator's youngest surviving child came of age:—Held, that her share of the rents devolved on her personal representatives. *Dawson* v. *Fraser*, 18 O. R. 496.

**"Freely to be Possessed and Enjoyed."**]—See *Iler* v. *Elliott*, 32 U. C. R. 434.

**General Provisions**—*Specific Enumeration.*]—A testator gave to his wife the house which he possessed, with all the appurtenances thereof, and the house and town lot in, &c., "and sixteen cords of good sound firewood yearly during her lifetime;" such houses and lot to go to his only brother after the decease of his wife. He also bequeathed to his wife the interest of all the money and securities for money that he might be possessed of at his death, after payment of debts and funeral expenses; and the value of one-third of his personal property, being composed of . . and all other implements and utensils of husbandry; and after his wife's death directed his money to be divided among his cousins, viz., the family of his uncle J. F., the family of J. S., &c. He then devised certain lands to his brother, being the only wooded lands he was possessed of; and by a codicil left $200 to his wife in addition to the legacy given by the will. On a bill filed to obtain a construction of the will:—Held, that the annual supply of firewood did not form a charge upon any of the lands of the testator, but was to be provided for the widow out of the personalty; that the widow took absolutely one-third share of all the personal property other than money and securities for money, and not one-third of the enumerated articles only; and that the income of the other two-thirds up to the period of division belonged to those who were or might become entitled to the property. *Ferguson* v. *Stewart*, 22 Gr. 364.

**"Having no Issue"**—*Numbered Paragraphs.*]—A testator died in 1856 having previously made his last will divided into numbered paragraphs by which he devised his property amongst certain of his children. By the third clause he devised lands to his son F. on attaining the age of twenty-one years—"giving the executors power to lift the rent, and to rent, said executors paying F. all former rents due after my decease up to his attaining the age of twenty-one years," and by a subsequent clause he provided that "at the death of any one of my sons or daughters having no issue, their property to be divided equally among the survivors." F. attained the age of twenty-one years and died in 1893, unmarried and without issue:—Held, that neither the form nor the language used in the will would authorize a departure from the general rule as to construction according to the ordinary grammatical meaning of the words used by the testator, and that, as there would be no absurdity, repugnance or inconsistency in such a construction of the will in question, the subsequent clause limiting the estates bequeathed by an executory devise over must be interpreted as referring to the property devised to the testator's sons and daughters by all the preceding clauses of the will. Held, further, reversing 22 A. R. 307, and restoring 25 O. R. 635, that the gift over should be construed as having reference to failure of issue at the death of the first devisee who thus took an estate in fee subject to the executory devise over. *Crawford* v. *Broddy*, 26 S. C. R. 345.

**"Heirs."**]—Testator devised his farm to G., directed that if G. should die without heirs the land should be sold and legacy paid, and that if testator's widow should die or marry before G. should have paid $2,000, the balance should be equally divided among the testator's heirs:—Held, that the word "heirs"

in the bequest of the balance, did not include the widow; and the same construction was put upon the word "heirs" in a residuary clause contained in the subsequent part of the will. *Bateman* v. *Bateman*, 17 Gr. 227.

——— *Change in Law.*]—A testator, who owned lands in England and Ontario in fee simple, devised the same to his wife for life, and after her decease gave and devised them unto his "right heirs for ever:"—Held, that 14 & 15 Vict. c. 6, C. S. U. C. c. 82, under which defendants claimed to share in the property, did not apply, and therefore the eldest son took the estates here as in England. *Tylee* v. *Deal*, 19 Gr. 601.

Held, also, that even if the Act did apply, the common law heir was the party to take the estates under the words of this devise. *Ib.*

A testator, by his will, made on the 14th August, 1850, devised certain land to his widow for life, and after her death, to two nephews, and in the case of the death of them, or either of them, in his own lifetime, he devised the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her or their heirs and assigns. The Act commonly known as the Act abolishing primogeniture, 14 & 15 Vict. c. 6, was passed on the 2nd August, 1851, and came into force on the 1st January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866, and his widow in 1870:—Held, affirming 16 O. R. 341, that the Act abolishing primogeniture did not apply, (1) because the will was made before it was passed or took effect; and (2) because the land had been lawfully devised by the person who had died seised, and therefore that the eldest son of the deceased nephew, as his common law heir, was entitled to the remainder in fee expectant upon the death of the widow. Tylee v. Deal, 19 Gr. 601, approved. *Baldwin* v. *Kingstone*, 18 A. R. 63. Affirmed on this point by the Judicial Committee.

A testator, who died on the 8th November, 1867, by his will, made on the 15th October, 1867, devised lands in Ontario to his wife until her death or marriage, and upon her death or marriage to his son, "should he be living at the happening of either of said contingencies," and if not then living "unto the heirs of the said (son)." The son died in July, 1885, intestate and unmarried, and the widow died in February, 1887:—Held, that the Act abolishing heirship by primogeniture, 14 & 15 Vict. c. 6, applied, and that all the brothers and sisters of the son were his "heirs" and entitled to take under this devise. Tylee v. Deal, 19 Gr. 601, and Baldwin v. Kingstone, 18 A. R. 63, distinguished. *Sparks* v. *Wolff*, 25 A. R. 326, 29 S. C. R. 585.

*See In re Biggar, Biggar* v. *Stinson*, 8 O. R. 372; *Scott* v. *Gohn*, 4 O. R. 457; *Harrison* v. *Spencer*, 15 O. R. 692.

**"Heirs-at-Law."**]—The father of the plaintiff's deceased husband, by his will, left all his property to trustees, of whom the defendant was the survivor, in trust to convey and transfer it, after the death of his wife, unto all his surviving children, share and share alike, and their heirs for ever; and, by a codicil, directed that the share of the plaintiff's husband should not be paid over or conveyed to him, but kept invested by the trustees, and the income paid to him during his life for his sole benefit, and after his death that such share should be paid over or conveyed to those "who may then be the heirs-at-law of my said son," share and share alike. The property in the hands of the defendant, as surviving trustee, at the time of the death of this son, was all real estate:—Held, that the words above quoted signified those who would take real estate as upon an intestacy. Coatsworth v. Carson, 24 O. R. 185, followed. *Stephens* v. *Beatty*, 27 O. R. 75.

**"Heirs and Next of Kin."**]—A testator by the residuary clause in his will gave and bequeathed "all the remainder of my real and personal estate whatsoever of which I may die possessed or be in any way entitled to, to my dear wife A., and on her decease the same to go [to] my heirs and next of kin:"—Held, that the son of a deceased daughter, who had predeceased the testator, was entitled to a share in such residue (personal as well as real), notwithstanding the fact that under the will such grandson was entitled to a legacy of $4,000. *Rees* v. *Fraser*, 25 Gr. 253, 26 Gr. 233.

**"Heirs and Representatives."**]—Where a testator, by his will, in which he used the words "executor" and "executrix" several times, made a residuary bequest and devise to "the heirs and representatives of M. B.:"—Held, that, having regard to the context, the next of kin according to the Statute of Distributions, and not the executor of M. B., were entitled to take under the above words. The weight of decision shews that the word "representatives," when standing alone, means "executors or administrators," but that very slight expressions in the context have turned the meaning in the other direction, to that of "next of kin." *Burkitt* v. *Tozer*, 17 O. R. 587.

**"Heirs of the Body."**]—See *Re Cleator*, 10 O. R. 326.

**"Home."**]—See *Augustine* v. *Schrier*, 18 O. R. 192; *Cameron* v. *Adams*, 25 O. R. 229, *ante* IV. 17.

**"I Have already Given."**]—The words, "I have already given to my son J. lot number one," do not constitute a devise. *Doe d. Smith* v. *Meyers*, 2 O. S. 301.

**"I Wish and Desire."**]—See *Baby* v. *Miller*, 1 E. & A. 218.

**"In Case of Death of my Children."**]—See *Dumble* v. *Dumble*, 8 A. R. 476.

**"Issue."**]—See *Re Hamilton*, 18 O. R. 19; *King* v. *Dougherty*, 11 C. P. 481.

**"My Own Right Heirs."**]—A testator by his will directed that his trustees should, in certain events, after the death of his wife and daughter, sell all his estate, real and personal, and divide the same equally amongst his "own right heirs" who might prove their relationship, &c.:—Held, that the conversion directed created a blended fund derived from realty and personalty, to be distributed equally among the same class of persons, and that the words "my own right heirs" signified those who would take real estate as upon an intestacy, and not next of kin, and that children

of any deceased heirs-at-law were entitled to share per stirpes. *Coatsworth* v. *Carson*, 24 O. R. 185.

Upon appeal from the master's report on a reference for the administration of the estate of the testator whose will was construed in Coatsworth v. Carson, 24 O. R. 185:—Held, having regard to the judgment in that case, that the "right heirs" were to be ascertained at the date of the death of the testator's daughter, and among them the whole of the estate was to be divided equally, share and share alike. The expression "per stirpes" in the former judgment was improvidently used, due weight not having been given to the word "equally." *In re Ferguson, Bennett* v. *Coatsworth*, 25 O. R. 591. See the next case.

——— *Condition Precedent.*]—A testator, who left him surviving his widow and one daughter, devised specifically described property to his daughter, and the residue of his estate to his executors upon trust for his widow and daughter in certain events with limited power to the daughter to dispose thereof by will. He then directed that "in case my daughter shall have died without leaving issue her surviving and without having made a will as aforesaid, my trustees shall (after the death of my wife if she survive my said daughter) sell all my estate, real and personal, and divide the same equally amongst my own right heirs, who may prove to the satisfaction of my said trustees their relationship within six months from the death of my said wife or daughter, whichever may last take place." The daughter died unmarried in her mother's lifetime, having made a will assuming to dispose of the residue:—Held, that the daughter was entitled to take as the "right heir" of the testator. Bullock v. Downes, 9 H. L. C. 1; Re Ford, Patten v. Sparks, 72 L. T. N. S. 5; Brabant v. Lalonde, 26 O. R. 379; and Thompson v. Smith, 23 A. R. 29, referred to. Judgments in Coatsworth v. Carson, 24 O. R. 185, and In re Ferguson, Bennett v. Coatsworth, 25 O. R. 591, reversed. *In re Ferguson, Bennett* v. *Coatsworth*, 24 A. R. 61.

Under a devise to the testator's "own right heirs" the beneficiaries would be those who would have taken in the case of intestacy unless a contrary intention appears, and where there was a devise to the only daughter of the testator conditionally upon events which did not occur, and, under the circumstances, could never happen, the fact of such a devise was not evidence of such contrary intention and the daughter inherited as the right heir of the testator. *In re Ferguson, Turner* v. *Bennett, Carson* v. *Coatsworth*, 28 S. C. R. 38.

**"My Lawful Heirs"**—*Period of Ascertainment.*]—The general rule that where a testator devises property to his "heirs" the heirs are to be ascertained at the time of his death, is not affected by the fact that the person answering that description is the taker of a preceding particular interest under the will. Where, therefore, a testator after a gift to his wife and only child for their joint lives and to the survivor for life directed that "at the decease of both, the residue of my real and personal property shall be enjoyed by and go to the benefit of my lawful heirs," the child was held entitled to the residue. Re Ford, Patten v. Sparks, 72 L. T. N. S. 5, applied. Judgment below, 25 O. R. 652, reversed. *Thompson* v. *Smith*, 23 A. R. 29. Affirmed by the supreme court, 27 S. C. R. 628.

**"Nearest of Kin"**—*Period of Ascertainment—Tenants in Common—"Then."*]—In the absence of any controlling context, the persons entitled under the description "nearest of kin" in a will are the nearest blood relations of the testator at the time of his death in an ascending and descending scale. And where the testator devised his farm to his only child, a daughter, giving his widow the use of it until the daughter became of age or married, and provided that in the event of the latter dying without issue, "then in that case" it should be equally divided between his "nearest of kin;" and the daughter died while still an infant and unmarried:—Held, that although the persons intended by the description took only in defeasance of the fee simple given to the daughter alone in the first instance, she was nevertheless entitled as one of the "nearest of kin;" and the widow, as heiress-at-law of the daughter, and the father and mother of the testator, were each entitled to an undivided one-third in fee simple as tenants in common. Bullock v. Downes, 9 H. L. C. 1; Mortimore v. Mortimore, 4 App. Cas. 448; and Re Ford, Patten v. Sparks, 72 L. T. N. S. 5, followed. The word "then," introducing the ultimate devise, was not used as an adverb of time, but merely as the equivalent of the expression "in that case," which followed it, and did not affect the construction of the will. The widow remained in possession after the death of the testator, with her infant daughter, whom she supported out of the rents, until an order was made under R. S. O. 1887 c. 137 permitting her to lease the farm, to retain one-third of the rents for herself as dowress, and to apply the remaining two-thirds in supporting the infant:—Held, that she was put to her election by the terms of the will, but that she had not elected to take under it, and was therefore entitled to dower out of the farm in addition to the one-third in fee simple. *Brabant* v. *Lalonde*, 26 O. R. 379.

**"Next of Kin."**]—See *Mays* v. *Carroll*, 14 O. R. 699.

**"Now Reside Upon."**]—See *Hatton* v. *Bertram*, 13 O. R. 766.

**"Offspring."**]—See *Sweet* v. *Platt*, 12 O. R. 229.

**"Or," read "And."**]—See *Doe d. Forsyth* v. *Quackenbush*, 10 U. C. R. 148; *Farrell* v. *Farrell*, 26 U. C. R. 652; *Forsyth* v. *Galt*, 21 C. P. 408; *Re Babcock*, 9 Gr. 427.

**"Revert in the same Way."**]—Held, to mean "shall follow in like manner." *Jardine* v. *Wilson*, 32 U. C. R. 498.

**Survivorship.**]—Testator devised real estate to his wife for life, with remainder to A., B. and C., or the survivors or survivor of all of them, their heirs and assigns, for ever:—Held, that the clause of survivorship meant the survivors at the death of the tenant for life, and not of the testator. *Peebles* v. *Kyle*, 4 Gr. 334.

——— *Failure of Issue.*]—A testator devised land to his two sons, their heirs or assigns, or the survivor of them, when they attained twenty-five, to hold the same share and share alike for ever, and directed that if the two sons should die without issue before they inherited the property devised, their share should go to the survivors of the testator's children living at that time. One of the sons died under twenty-five, without issue:—Held, that the surviving son, who attained twenty-five, took the whole property. *In re Charles McIntosh*, 13 Gr. 309.

——— *Surplus after Annuity.*]—R. bequeathed an annuity of $500 to her brother J. A. W., and at his decease she gave and devised all the real estate to which she might be entitled to her two nephews as tenants in common. The residue of her personal estate she gave and bequeathed to her executors, in trust to pay out of the same the said annuity to J. A. W., and to equally divide yearly between her brother G. W. and her sister S. R. D., or the survivor of them, the surplus of interest and rents remaining after payment of the said annuity of $500 to J. A. W., "and at his decease equally to divide share and share alike all moneys and securities for money in their hands between my brother G. W. and my sister S. R. D. or the survivor of them," after payment of all proper expenses of carrying out the will. S. R. D. died in August, 1870, and G. W. died in September, 1873, by his will disposing of all his interest in the estate of his sister R. W. J. A. W. was still living when a bill was filed by the executors of G. W. for a construction of the will of R. W.:—Held, that G. W. took the whole of the surplus income of R. W.'s estate beyond J. A. W.'s annuity. *Allan* v. *Thompson*, 21 Gr. 279.

**"The Above Described Land."**]—See *Campbell* v. *Fretwell*, 10 U. C. R. 328.

**"To be Equally Divided."**]—See *Woodhill* v. *Thomas*, 18 O. R. 277.

**Ultimate Remainder to Nearest of Kin**—*Life Tenant.*]—J. C. died leaving a wife, and E. C., a daughter. By his will, after giving all his property to his executors to pay the whole income to his wife for life or during widowhood, and after her death or second marriage, to pay the said income to his daughter, E. C., yearly, if she had attained the age of twenty-one, for her life . . . , he provided as follows: "And I hereby empower her, my said daughter, if she come into possession of the said income, and have lawful issue, to make a will bequeathing my said property absolutely to any or all of her said children in such manner as she may think best. And if she have no children, then the said property to fall to my next of kin who may be living on this continent," and further provided, "In case . . then notwithstanding anything heretofore provided, I will and direct that neither she (Ellen) nor any of her children shall receive any portion of my property, and in such case my whole property shall be given to my said wife absolutely, or if my said wife at that time be dead, then the property to go to my nearest of kin as above provided." The wife died and the daughter, E. C., attained twenty-one, came into possession of the income and died unmarried without issue, having made a will appointing the plaintiff her executor. In an action by the plaintiff, M., as executor of the daughter, E. C., against W. C. and F. McQ. as executors of the testator, J.C., for the property, which the defendants resisted on the ground that the next of kin of the testator, other than E. C., were entitled to it:—Held, that the "next of kin" must be ascertained at the death of the testator, J. C., and not at the death of his daughter, E. C., and as E. C. was sole next of kin, being tenant for life, she had also a remainder in fee expectant on her own death, and contingent upon her dying without issue, and that this was such an interest as would pass by her will, and the plaintiff, as her executor, was entitled to the property. *Mays* v. *Carroll*, 14 O. R. 699.

**"Worldly Estate."**]—See *Town* v. *Borden*, 1 O. R. 327, IV. 5, *ante*.

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20. *Miscellaneous Cases.*

**After-born Son.**]—A testator devised certain lands to trustees for and on behalf of his two sons, W. and J., "and any other son or sons to be hereafter lawfully begotten by me," with right of survivorship as between W. and J., without providing for any such right as to an after-born son in case of his dying. Another son was born to the testator, who died after his father, under age and without issue:—Held, as to the deceased son's share, that the brothers and sisters took equally as his heirs. *Dobbie* v. *McPherson*, 19 Gr. 262.

**Application to the Court.**] — Where a person, in addition to a declaration of the true construction of a will, is entitled to ask as consequential relief the administration of the estate, the case is within general order 538; and the court will make a decree declaring the proper construction of the will without directing the administration of the estate. *Murphy* v. *Murphy*, 20 Gr. 575.

**Debts Charged on Real Estate.**]—Where a testator directed his debts to be paid out of his "estate" and then bequeathed to his widow an annuity of £100, to be paid out of the proceeds of his "estate," and also bequeathed to her all his personal property; and further directed that the whole of his property should be sold by his executor at the death of his widow; and finally empowered his executor to sell such portions of his property as he might think best, to liquidate any just claims due by the testator, at any time the executor might find it necessary to do so:—Held, that the debts were charged upon the real estate as the primary fund. *Harrold* v. *Wallis*, 10 Gr. 197.

**Election**—*Taking under Will.*]—A testator devised his farm to a grandson, and directed the same to be rented during his minority; and that the testator's widow should be comfortably supported from the proceeds of the farm during his life. He also directed his chattels to be sold, and the proceeds placed at interest to support his widow and defray all necessary expenses. The widow after his death asserted a life interest in the property, and rented it:—Held, that the widow had elected to take under the will, and that she was not entitled to any benefit in the personalty other than the interest to accrue on the

money produced by sale thereof; the corpus of the personalty being distributable amongst the next of kin. *Montgomery* v. *Douglas*, 14 Gr. 268.

——— *Separation Deed—Benefits under Husband's Will.*]—A husband in a separation deed covenanted to pay his wife an annuity of $200 as follows: $100 on the 1st June and December in every year; and charged it on certain land, the wife accepting it in full satisfaction for support, maintenance, and alimony during coverture, and of all dower in his lands then or thereafter possessed. The husband by his will, subsequently executed, directed his executors to pay his wife $400 annually: $200 on the 1st June and December in each year during her life: and added, "which provision in favour of my said wife is made in lieu of dower:"—Held, that the wife was not put to her election between the benefits under the deed and the will, but was entitled to both. *Carscallen* v. *Wallbridge*, 32 O. R. 114.

——— *Gift and Share of Insurance.*]—Testatrix by her will left all her property, by general words, to her executors, upon trust, inter alia, (5) to set apart $4,500 and pay the income to the plaintiff, one of her sons; (6) to realize on all the residue of the estate, and, after providing for maintenance of unsold portions, to pay $1,400 to a second son and $2,000 to a third, and, when all the residue should be realized, to divide it equally between these two; (7) after the death of the plaintiff, to divide the $4,500 among his children, adding—"It is my will that my son Robert" (the plaintiff) "is to get no benefit from my estate except as provided in this will, the provision herein made being in lieu of any share in the insurance on my life." Two policies of insurance on her life formed part of the estate of the testatrix, and she had besides effected an insurance for $2,000 on her life payable to the three sons, which was in force at the time of her death:—Held, that the plaintiff was not put to an election between the benefits given to him by the will and his share of the $2,000 policy, under the powers conferred by R. S. O. 1887 c. 136, s. 6 (1), and amendments, so as to exclude the plaintiff or put him to his election. Held, further, that in the event of the assets not being sufficient to admit of the setting apart of the $4,500 and the payment of the two legacies of $1,400 and $2,000, the $4,500 was first to be provided for without abatement, and the other two legacies were to come out of the residue and abate in the event of a deficiency. *King* v. *Yorston*, 27 O. R. 1.

——— *Period of Accounting—Interest.*]—Testator by his will left the income of his estate to his wife for life, and directed that after her death it should be disposed of as set out in a codicil, not to be opened until after her death. By the codicil he disposed of all his estate among his children, giving to two of them, after the death of his wife, a certain property which in reality belonged to her. His widow, without proving the will, received all the income of the estate for five years, after the lapse of which the will and codicil were proved. She then elected against the will:—Held, that her election related back to, and she was liable to account from, the date of the testator's death; but, as she was not called upon to elect until this action was brought, she should not be charged with interest in the meantime. *Davis* v. *Davis*, 27 O. R. 532.

——— *Dower.*]—See DOWER, IV.

**Hotchpot**—*Advancement.*]—A child, who has been advanced, is bound to bring into hotchpot that wherewith he has been advanced only when it has been so expressed in writing, either by the parent or the child so advanced. *Filman* v. *Filman*, 15 Gr. 643.

——— *Devises in Common and Severalty.*]—A testator devised a property to three granddaughters, as tenants in common in equal shares, and then devised to one another property in severalty, adding, "providing alway . . that the said last mentioned property so solely devised to my said granddaughter A., shall be valued by my executors hereinafter named, or the survivor of them, and shall be deducted from her one-third proportion of the said lands hereinbefore devised to my said three granddaughters, in proportion to the value which my said executors or the survivor of them shall put upon said first-mentioned land: and in case I shall sell any or all of said first-mentioned lands, or that after my decease, my said three grandchildren shall sell the same, then and in that case the value aforesaid of the said residence and premises, hereinbefore devised to my said granddaughter A., shall be deducted from her one-third proportion of the proceeds of the sales of the said first mentioned land:"—Held, that the above clause did not constitute a hotchpot clause; that the rents of the lands devised in severalty were not to be accounted for by A., but that she was only entitled to the same proportion of the rents of the land held in common as she was entitled to of the land itself after deducting the value of the land specifically devised to her. *Phillips* v. *Yarwood*, 21 Gr. 622.

**Inconsistent Clauses**—*Executory Devise—Failure of Issue.*]—A testator, by the third clause of his will, devised a lot of land to a son, "his heirs and assigns for ever," and in the fourth clause stated it to be "my will and desire, provided my (said) son shall have no lawful heir or children, that the above mentioned tract of land, after his death, that (the plaintiff) shall have it with all the right and title that my (said) son had to it heretofore." By the fifth clause he gave to his wife "the use" of half the lot, "during life; after her decease my will is that the same shall belong to my (said) son, his heirs and assigns for ever." The son died after the testator without having had any children:—Held, that the fifth clause removed from the operation of the third and fourth clauses one-half of the lot which vested in the son subject to the mother's life estate, while as to the other half the son had under the third clause an estate in fee simple subject under the fourth clause to an executory devise over in favour of the plaintiff, which, in the events which had happened, had taken effect. Judgment below, 30 O. R. 627, affirmed. *McMillan* v. *McMillan*, 27 A. R. 209.

**Law Applicable.**]—Held, upon the facts set out in the judgment in this case, that although a testator's original domicile was in Ontario, he had changed it to the United States, which was his domicile at the time of

his death, and his will therefore must be construed according to the laws of Minnesota, U. S., so far as regards all his personal estate, and his real estate there; according to the laws of Manitoba as regards his lands there; and as to the Ontario lands they devolved on his executors. *McConnell* v. *McConnell*, 18 O. R. 36.

**Lunacy of Testator** — *Rents between Date of Will and Testator's Death.*] — The testator devised a lot of land to his son J., his heirs and assigns for ever:—Held, notwithstanding the subsequent lunacy of the testator, that the devisee was not entitled to the rents of the estate prior to the decease of the testator. *Miller* v. *Miller*, 25 Gr. 224.

The testator devised to another son another portion of his farm, with a direction that the rents thereof should be set apart from the date of the will until the son attained the age of 21 to enable him to erect suitable buildings thereon. The court, in order to carry out the manifest intention of the testator, clearly expressed in his will, directed an allowance to be made to the son out of the surplus handed over by the committee to the executors, of a sum equal to the amount of such rents from the date of the will until the son attained 21; and directed a reference, if necessary, to ascertain the amount. *Ib.*

**Master's Office.**] — To avoid expense, questions which arise in the master's office on the construction of a will should, where practicable, be left for decision by the court on further directions, instead of being brought before the court by way of appeal from the master's report. *Scott* v. *Scott*, 18 Gr. 66.

**Petition.**]—The court cannot, on a petition under s. 31 of the Act to amend the law of property and trusts (29 Viet. c. 28), make a declaration as to the construction of a will. *In re Williams*, 1 Ch. Ch. 372.

On a petition to obtain the opinion of the court on the construction of a will, under 29 Viet. c. 28, s. 31:—Held, that the court could not give any opinion on such a point upon petition; and the court declined to make an order saying whether a bill would be proper. *In re Cæsar's Will*, 13 Gr. 210.

A matter involving the proper construction of a will cannot be brought up on petition under R. S. O. 1877 c. 107, s. 35. *Barclay* v. *Zwaitz*, 8 O. R. 663.

**Precatory Trusts.**]—A testator, by his will, made an absolute gift of all his property to his wife, subject to the payment of debts, legacies, funeral and testamentary expenses, and by a subsequent clause provided as follows: "And it is my wish and desire, after my decease, that my said wife shall make a will dividing the real and personal estate and effects hereby devised and bequeathed to her among my said children in such manner as she shall deem just and equitable:"—Held, affirming 17 O. R. 548, that this did not create a precatory trust, and that the wife took the property absolutely. If the entire interest in the subject of the gift is given with superadded words expressing the motive of the gift, or a confident expectation that the subject will be applied for the benefit of particular persons, but without in terms cutting down the interest before given, it will not now be held, without more, that a trust has been thereby created. In re Adams and Kensington Vestry, 27 Ch. D. 394, and In re Diggles, Gregory v. Edmondson, 39 Ch. D. 253, specially referred to and followed. *Bank of Montreal* v. *Bower*, 18 O. R. 226.

**Right to Purchase.**]—The testator gave his sons the option of purchasing the shares of his daughters in the real estate after marriage or death of the widow for the sum of £500 each:—Held, that the fact of the sons having, during the lifetime of the widow, joined in leases naming all the children, sons as well as daughters, as lessors—some of the sons being then infants—was not such an act as deprived the sons of the right of afterwards exercising the option of purchasing the interest of the daughters. *Laidlaw* v. *Jackes*, 25 Gr. 293.

A testator directed that "in case any one of the above named three legatees be able and willing to buy the farm, as aforesaid, at the price of $4,000, my executors hereafter named shall so sell said farm." Each of the three legatees claimed the right to purchase the farm:—Held, under these circumstances, that the executors were precluded from carrying out this direction of the will, and that they must sell the estate and divide the proceeds between the parties interested, according to another provision of the will. *Jeffrey* v. *Scott*, 27 Gr. 314.

The testator was seised of certain lands which were subject to incumbrances, and by his will directed the same to be sold if his sons in succession should not redeem. One of the sons, R., to whom the first privilege of redeeming was given, availed himself thereof, and redeemed the property, which was subject to certain charges imposed by the will, in addition to the incumbrances:—Held, that the right to redeem was in effect a right to purchase, as the mortgages and charges created by the will amounted to about as much as the land was worth; and that R. had acquired a good title free from any claim of his brothers; and, his brothers having instituted proceedings against him claiming an interest in the estate, that he was entitled to recover his costs, not out of the estate of the testator but from the plaintiffs personally. *Stevenson* v. *Stevenson*, 28 Gr. 232.

**Solicitor's Ambiguities.**] — Where a will, though prepared by a solicitor, was so inconsistently worded that but little benefit could be derived from his labours in construing it, the court thought that as liberal an interpretation should be made of the language, in order to ascertain the intentions of the testator, as if he had been in fact inops consilii. *Hellem* v. *Severs*, 24 Gr. 320.

**Substitution**—*Will Giving Share of Residue—Codicil Giving Specific Land.*]—A testator gave the residue of his real and personal property to his daughter, the lands to be held by her in fee tail; and in a subsequent part of the will added, "I wish and desire that my daughter shall make a competent provision for my niece, Mrs. B., at Hamilton." By a codicil on the same day as the will, after making alterations in his will, he added, "And I do hereby devise to my niece, Mrs. B., of Hamilton, the lot containing one-fifth of an acre fronting on School street, in the town of Kingston:"—Held, that the words "I wish and desire" were not precatory merely, but

directory, and formed a charge upon the residuary estate, and that the devise in the codicil was cumulative, and not substitutional. *Baby* v. *Miller*, 1 E. & A. 218.

A testator, after making certain bequests to his wife, directed that after her death, his executors should sell all his estate, real and personal, and after providing for certain pecuniary legacies, should give the legal interest on one-fourth of the remaining proceeds of his estate to his daughter E., to be paid to her yearly during her life, and after her death to be divided among her surviving children. By a codicil he willed to "E. and her heirs that share or division of my estate, as referred to in a former will, in land composed of the north-east part of lot 7, concession 3, Markham." It appeared that the testator had put E. in possession of the said fifty acres some time before his death and that the said fifty acres were about equal to one-fourth of the whole residue of his estate:—Held, that the devise to E. in the codicil was substitutional to her for the bequest to her in the will. Held, also, that under the codicil E. took an estate in fee, and not one subject to the incidents of the original gift in the will. In no case of substitutional gifts has it been held that the subsequent gift is to go to the parties entitled under the subsequent limitation of the former gift. The word "heirs" may sometimes mean "children," both in regard to personal and real estate, but that meaning will only be given to it when it is clear that the property was intended to go to the children. *Scott* v. *Gohn*, 4 O. R. 457.

**Trust Estate.**] — Where a testator held certain lands as a trustee, to secure a debt due him, and devised the residue of his property to his executors, except such parts thereof as might at his decease be vested in him upon any trusts or by way of mortgage, and then, by a subsequent devise, all the residue of his estate, real and personal, to J. M. (whom he also appointed one of his executors), and his heirs absolutely:—Held, that under the second devise the legal estate in the property held in trust passed to J. M. Held, also, that J. M. and the executors could by their deed pass all the legal and equitable interest in the trust estate sold. *Re Charles*, 4 Ch. Ch. 19.

**Valuation**—*Successive Right to Take—Legacies—Trust.*]—A testator, who died in 1834, devised certain lands to his wife for life, and after her death to his "children, sons and daughters, their heirs and assigns for ever; to be equally divided among them, to share and share alike, after the said premises shall have been valued or appraised by two respectable and disinterested persons to be chosen by my executors hereinafter named, and after such valuation I give, and it is my desire that the preference of the aforesaid premises shall be to the eldest of my sons, and should he not wish to take it, then to the next eldest, and so on until the youngest—for it is my most sincere desire that the paternal farm shall not be sold to any strangers—that after the valuation of the said premises, whomsoever of my sons who takes the possession shall and will well and truly pay to all my children their respective shares, to commence one year after my decease, and so on until they are all paid, beginning with the eldest and finishing with the youngest . . . And whoever of my sons which will possess the farm aforesaid or paternal farm, shall or will pay or cause to be paid to each of his sisters which are now living the full sum of £25 currency, in good and merchantable produce." After making certain other specific devises and bequests the will concluded, "I do hereby give full power and authority to my executors hereinafter named to convey, execute any deed or other necessary writings, for giving or granting any lands to my sons which I have heretofore mentioned." By a codicil to the will the testator bequeathed to each of his daughters who should be living at his decease, and to a grandchild, the sum of £75 to be paid before the general division should take place between all his children as stated in the will. The testator named his wife and his son L., executrix and executor to his will. The widow died in 1839, and in the autumn of that year L. nominated two persons to appraise the land, and in compliance with such direction a valuation was then made, and one of the sons (A.) having accepted the offer of the land as directed by the will, immediately thereupon agreed to sell, and did sell the same to L. and another brother, who subsequently assigned or released his interest to L., and L. in the spring of 1840 went into possession, paid most, if not all his brothers and sisters their shares, and remained in undisturbed possession until 1874, when he sold and conveyed to C., who, in 1875, filed a petition for the purpose of quieting his title under the Act:—Held, that the acceptance by A. of the land according to the provisions of the will must be considered as a purchase by him under the scheme detailed in the will, and that it was not nominal and his brothers substituted for him. (2) That the direction to convert the real estate did not give the land the character of personalty till actually turned into money, and that the effect of the will was to create an express trust of the proceeds for the legatees. (3) That even if the effect of the will was to constitute the son taking the land an express trustee thereof for the brothers and sisters, the conduct of the beneficiaries in lying by so many years, receiving payment from the brother, and in other ways recognizing his right to the estate, and allowing him without objection to deal with it, was such as to preclude them from now asserting any claim, even although the Statute of Limitations did not apply; but that, (4) the facts stated shewed an actual sale by A. to his brothers in 1839; and then the Statute of Limitations began to run. (5) That the power of appointing persons to value the estate given by the will to the executors was not an arbitrary power depending on personal confidence, and that it was properly exercised by the surviving executor. (6) That the legacies given by the codicil did not form a charge upon the lands; and, (7) that the circumstances were such as warranted the court in quieting the title under the Act, without requiring the applicant to file a bill for the purpose of litigating the matters in question or obtaining the opinion of the jury thereon. Quære, in whom did the legal estate vest under the will? Semble, that it did not pass to all the children. In proceeding to quiet the title the evidence established that in 1850 L. made a conveyance to one of his brothers of certain land, not that in question here, in which he described himself as surviving executor and trustee of his late father, as he was in fact:—Held, that this was not suffi-

cient to render him liable as trustee for the contestants—his brothers and sisters, and those claiming under them—and he could not in any view be considered a trustee of the land for his brothers and sisters; and that in the absence of any proof of fraud the court would not, after so great a lapse of time, open up the family arrangements on the ground of mere inadequacy of value. *Re Carey*, 23 Gr 277.

**Vendor and Purchaser.**]—In an application under the Vendors and Purchasers Act, R. S. O. c. 109, it is only necessary that the same parties should be represented who would be parties in a suit for specific performance with a reference as to title. On such an application the court will construe the will or other instrument on which the vendor makes his title. *In re Eaton Estate*, 7 P. R. 396.

The rule which authorizes the payment out of the estate of the costs of all parties interested in obtaining the construction of a will, does not apply to a case where a purchaser refuses to complete his purchase of lands from a person claiming title under such will. In such a case the purchaser, if the question is decided against him, will, as in ordinary cases, have to pay the costs of the litigation necessary for obtaining the decision of the court upon the question of title. *Smith v. Coleman*, 22 Gr. 507.

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V. PROMISES TO DEVISE.

**Adopted Child**—*Specific Performance.*]—An agreement to make a will in favour of an adopted child may be enforced against the personal representatives of the obligor. *Roberts v. Hall*, 1 O. R. 388.

**Advancement.**]—The evidence of acts or declarations of a father to rebut the presumption of advancement must be of those made antecedently to or contemporaneously with the transaction; or else immediately after it, so as in effect to form part of the transaction; but the subsequent acts and declarations of a son can be used against him and those claiming under him by the father, where there is nothing shewing the intention of the father, at the time of the transaction, sufficient to counteract the effect of those declarations. *Birdsell v. Johnson*, 24 Gr. 202.

A testator devised to his grandson A., an infant, thirty acres, part of his farm, and the remainder thereof he devised to his eldest son, the father of A. By the evidence of the father it was shewn that on A. coming of age, by agreement between them, his father conveyed to him fifty acres of equally valuable land in lieu of the portion devised to him, the father at the time saying that he would charge him with the difference in value as an advance; and that it was supposed by the parties that no conveyance from A. to his father was necessary, as he being the heir-at-law of the testator, all that was necessary was to destroy the will, which was done. Up to the time of his death A. never made any claim to the thirty acres; on the contrary, it was proved that on several occasions he admitted the fact of the exchange: —Held, under the circumstances stated, sufficient appeared to shew that the conveyance to A. had been by way of an exchange of lands, and not as an advancement by the father to his son. *Ib.*

**Bond not to Alter Will.**]—The defendant gave to the plaintiff a bond conditioned not to alter his will, by which, as recited in the bond, he had devised to the plaintiff certain land. He afterwards sold and conveyed the land to one C.:—Held, that the condition was broken. *McCormick v. McRae*, 11 U. C. R. 187.

**Liability Incurred on Faith of Promise** — *Corroboration.*]—The testator, father of the plaintiff's wife, suggested to him to purchase a lot of land which was subject to a mortgage, saying that if he would do so and have the property conveyed to his (plaintiff's) wife he would pay off the incumbrance. The plaintiff in consequence made the purchase, and had the property conveyed as suggested, but the testator refused to pay the mortgage, and the plaintiff was compelled to pay it himself. The testator subsequently expressed his regret at having thus acted, and promised the plaintiff that he would do better for them; that he would pay plaintiff $150 a year for ten years, and bequeath to his wife $1,000. By the will, however, only $100 was left to her, and the plaintiff instituted the present suit against the representative of his father-in-law to enforce such second agreement or for payment of damages by reason of the breach thereof. The only direct evidence was that of the plaintiff. At the hearing there were produced two receipts signed by the daughter for $260 and $200, respectively, expressed to be on account of money left her by her father's will; and the witnesses swore that the testator had told them that he had agreed to pay for the place if the plaintiff would take out the deed in the wife's name, and that he was making the payments as the plaintiff had so taken the deed:—Held, that there was sufficient corroboration of the evidence of the plaintiff as required by R. S. O. 1877 c. 62, and that the second agreement or promise by the testator was not voluntary, the former promise, even if barred by the statute, being a sufficient consideration, as well as a conveyance to the daughter made in pursuance of it; and a decree was made for payment of the legacy of $1,000, less the two sums of $260 and $200, with interest from one year after the death of the testator on the balance. *Halleran v. Moon*, 28 Gr. 319.

**Promise Acted upon by Promisee.**]—The owner of property may make a representation in respect of giving the same so as to form a contract sufficient to bind him to carry it out, although the representation is, that the property is to be given by a revocable instrument; and the more so, if in consequence of the representation the person to whom it is made changes his condition. Where, therefore, a father wrote to his son stating that he had devised to him certain portions of his real estate, and expressed a wish for his son to leave his then residence and settle beside the father, and that if he did so he would leave the land to the son at his death, and his son acting upon this, left his residence and went to live beside his father:—Held, that from that time the will was no longer revocable. *Fitzgerald v. Fitzgerald*, 20 Gr. 410.

**Remuneration for Maintenance** — *Implied Promise—Annual Payments.*] — The

plaintiff sought to recover from the executors of the will of a deceased person the whole of his estate, upon the strength of an oral agreement which she alleged was made between her and the deceased. Her evidence was that he said: "You give me a home as long as I live, and when I die you have what is left;" to which she answered "all right;" and he then said, "That is an agreement." The same story was repeated by the daughter and son-in-law of the plaintiff, who said they were present when the agreement was made. Two other witnesses swore that the deceased told them that he had agreed to leave the plaintiff his property when he died. He was maintained by her for eight years after the alleged agreement was made, but made his will in favour of other persons:—Held, that, apart from the Statute of Frauds, the evidence was not such as the court could act upon by decreeing specific performance of the alleged agreement in substitution of the actual will of the deceased, duly executed, and admitted to probate without objection from the plaintiff or any one else. Such an agreement must be supported by evidence leaving upon the mind of the court as little doubt as if a properly executed will had been produced and proved before it. Held, however, that the plaintiff was entitled, under the circumstances, to remuneration for the board, lodging, and care of the deceased for six years, as upon an implied promise to pay a reasonable sum per annum. Such a promise was not a special promise to pay at death, and did not give the plaintiff a right to recover more than six years' arrears. *Cross* v. *Cleary*, 29 O. R. 542.

**Specific Performance** — *Uncertainty — Implied Contract.*]—Where a contract on the part of a testator, founded upon a valuable and sufficient consideration, that he will leave by his will to the other contracting party a sum of money as a legacy, is clearly made out, the representatives of the testator may be compelled to make good his obligation. But where the testator, the grandfather of the plaintiff, promising to make the same provision for her by will as he should make for his own daughters, took her from the home of her parents at the age of twelve, adopted her, and maintained her, while she worked for him, for nine years, but, although he made his daughters residuary devisees, left the plaintiff nothing by his will, and paid her nothing for her services, and she sued his executors for specific performance of the contract or promise and in the alternative for wages:—Held, that the case did not fall within the rule, the promise made and the consideration for it being both of too uncertain a character to enable the plaintiff to come to court for specific performance; but that the circumstances gave rise to an implied contract for the payment of wages, and took the case out of the ordinary rule that children are not to look for wages from their parents, or those in loco parentis, in the absence of special contract, whilst they form part of the household. *Walker* v. *Boughner*, 18 O. R. 448.

S., a girl of fourteen, lived with her grandfather, who promised her that if she would remain with him until he died, or until she was married, he would provide for her by his will as amply as for his daughters. She lived with him until she was twenty-five, when she married. The grandfather died shortly after, leaving her by his will a much smaller sum than his daughters received, and she brought an action against the executors for specific performance of the agreement to provide for her as amply as for his daughters, or, in the alternative, for payment for her services during the eleven years. On the trial of the action it was proved that S., while living with her grandfather, had performed such services as tending cattle, doing field work, managing a reaping machine, and breaking in and driving wild and ungovernable horses:—Held, that the alleged agreement to provide for S. by will was not one of which the court could decree specific performance, but held, further, that S. was entitled to remuneration for her services, and $1,000 was not too much to allow her. *McGugan* v. *Smith*, 21 S. C. R. 263. See *S. C.*, sub nom. *Smith* v. *McGugan*, 21 A. R. 542.

M., on his father's death at the age of three years, went to live with his grandfather, W., who sent him to school until he was sixteen years old, and then took him into his store, where he continued as the sole clerk for eight or nine years, when W. died, and M. died a few days later. Both having died intestate the administratrix of M.'s estate brought an action against the representatives of W. for the value of such services rendered by M. and on the trial there was evidence of statements made by W. during the time of such service to the effect that if he (W.) died without having made a will, M. would have good wages, and if he made a will, he would leave the business and some other property to M.:—Held, that there was sufficient evidence of an agreement between W. and M., that the services of the latter were not to be gratuitous but were to be remunerated by payment of wages or a gift by will to overcome the presumption to the contrary arising from the fact that W. stood in loco parentis towards M. There having been no gift by will, the estate of W. was therefore liable for the value of the services as estimated by the jury. McGugan v. Smith, 21 S. C. R. 263, followed. *Murdoch* v. *West*, 24 S. C. R. 305.

**Statute of Frauds**—*Execution of Will—Working Farm.*]—C. C., the plaintiff, alleged that A. C., his father, being the owner of certain land, induced him to abstain from enforcing a certain claim, and also to work on the land, by representing that he would devise the land to him, which he afterwards represented that he had done; and A. C. being dead, C. C. now claimed the land as against one to whom A. C. had devised it by a later will, revoking the former one. The execution of the former will was proved as alleged:—Held, that this was not such part performance as to take the case out of the Statute of Frauds, for the execution of the former will was the act of the person whose estate it was sought to charge, and not of the person seeking to enforce the contract, and, moreover, did not import a contract, but only indicated a benevolent intention displayed by the testator in the execution of an instrument essentially of a revocable nature. Quære, whether if it had been proved, which it had not, that A. C. had, by his representations that he had devised the land to C. C., induced him to forego his claim, and to work on the land as alleged, this would have entitled C. C. to succeed. *Campbell* v. *McKerricher*, 6 O. R. 85.

VI. Proof of Wills.

**Affidavits.**]—On the investigation of title between vendor and vendee, under the ordinary jurisdiction of the court, affidavits are admissible for some purposes. Where, however, an affidavit was offered to prove the loss of a will, which had been proven in a surrogate court in New York, but had never been registered or proved in Ontario, and there was some reason for apprehending that there existed no legal means of proof of the will by the purchaser, should he be compelled to accept the title, the affidavit was held insufficient evidence. *Brady* v. *Walls*, 17 Gr. 690.

**Certified Copy.**]—The probate produced had a memorandum at the foot thereof, namely, "Xd. W. G., deputy registrar," and at the end of the last page and annexed thereto was a certificate properly stamped with the seal of the court, and duly signed and certified, of the probate being a true copy of the will:—Held, that the probate produced was a copy stamped with the seal of the surrogate court granting the same, within the meaning of the statute, and was therefore primâ facie sufficient. *Dehart* v. *Dehart*, 26 C. P. 489.

**Copy of Probate**—*Admission in Pleadings.*]—In an action for the recovery of land, the plaintiffs claimed title under a deed from the executors of one S., but the only evidence of the will produced by them was the copy of the probate from the registry office, with the affidavit of verification attached:—Held, that this was not proper evidence of the will. The plaintiffs, however, sought to support their case by reference to a certain statement in the defendant's pleading, in which, besides denying their right to recover, she herself also claimed title under a deed from the executors of S.:—Held, that they could not take that part of the pleading which suited their purpose and reject the rest: that they could not use a scrap of it to eke out the insufficiency of their own evidence. *Barber* v. *McKay*, 17 O. R. 562.

**Date.**]—The fact that a will bears date thirty years before action is not alone sufficient under all circumstances to prove that that is the real age of the writing, even if it comes from the proper custody; but some proof must be given of a concurrent possession of the property consistent with it, or of the existence of the will for thirty years. *Doe d. Stevens* v. *Clement*, 9 U. C. R. 650.

**English Probate.**]—The words "Her Majesty's possessions out of Upper Canada," used in 16 Vict. c. 19, s. 5, (C. S. U. C. c. 32, s. 11,) include England:—Held, therefore, that the probate of a will executed there, under the seal of the prerogative court of Canterbury, was properly received in evidence. *Coltman* v. *Brown*, 16 U. C. R. 133.

**Evidence of Death.**]—Where a probate is used as evidence under C. S. U. C. c. 16, it is evidence of the testator's death as well as of the will. *Davis* v. *VanNorman*, 30 U. C. R. 437.

**Lower Canadian Will.**]—A will devising land in Upper Canada having been made in Lower Canada, where testatrix lived, and being duly proved and enrolled among the records of the court of King's bench, and copies thereof directed to be given to the parties legally entitled thereto:—Held, that an office copy of such will, duly certified, &c., was equivalent to letters probate in Upper Canada, and could be registered as such. *Patulo* v. *Boyington*, 4 C. P. 125.

**Memorial.**]—In ejectment it was proved that defendant had the will, on which plaintiffs' title depended, in his possession when it was last seen, and that notice to produce it and a subpœna duces tecum had been served upon him. Defendant not having produced it, the registrar of the county produced a memorial of it, which was proved by one of the witnesses thereto, who also swore that he saw one McA. draw the will, and the latter swore that the memorial was a true copy of the will, which had been executed in his presence and that of another:—Held, that this evidence was properly admitted. *Hamilton* v. *Lightbody*, 21 C. P. 126.

*See*, also, *Hayball* v. *Shephard*, 25 U. C. R. 536.

In ejectment, in proof of the existence of a will, one H. swore that he saw the will, giving an explicit statement of its contents, and it also appeared that the devisees, of whom the heir-at-law was one, all submitted to and acted upon it:—Held, sufficient evidence of the existence of the will. Held, also, that the will was sufficiently proved by the execution and registry by the heir-at-law of a memorial of the will, it being a declaration against his proprietary interest, and he being dead at the time of the trial. Semble, it was, on this ground, good primary evidence, not only against the heir-at-law and those claiming under him, but against third parties. *Brown* v. *Morrow*, 43 U. C. R. 436.

A registered memorial twenty years old of a will executed by a devisee when possession of the land has been consistent with the registered title, is good evidence of the devise therein contained. Gough v. McBride, 10 C. P. 166, specially referred to. *McDonald* v. *McDougall*, 16 O. R. 401.

**Notice.**]—A notice, under C. S. U. C. c. 32, s. 9, of the intention to use the probate of D.'s will was served ten days before the actual day of trial, though not before the commission day of the assize; but a similar notice for the preceding assizes was admitted to have been served in time:—Semble, that the first named notice was served in time, but that the plaintiff could avail himself of the other notice, for such a notice for one assize need not be repeated. Held, that the fact of the last named notice stating the copy of probate to be stamped with the seal of the surrogate of Ontario instead of the county of York, did not invalidate it. *Dehart* v. *Dehart*, 26 C. P. 489.

Where probate of a will is produced at the hearing, in pursuance of notice served under 22 Vict. c. 93, and the opposite party does not serve notice of an intention to dispute the validity of the alleged devise, the probate will be sufficient evidence of such will and of its validity and contents; but if the notice to dispute has been served, and the will does not appear to be duly executed, the court will give liberty to adduce further evidence, by affidavit or otherwise, to shew that the several requisites of 4 Wm. IV. c. 1, as to

the execution of wills, have been duly complied with. *Stewart* v. *Lees*, 24 Gr. 433.

**Proof of Loss.**]—It appeared that search for the will was made in the office in which it would have been had it been admitted to probate; in the different registry offices of the counties in which the several parcels of land, of which the testator died seised, were situate; among the papers of the owners of the several parcels; among the papers of the only executor of three named in the will who could be found; among the papers of the draftsman of the will, and among those of several of the devisees:—Held, sufficient to let in secondary evidence of the will. Held, also, that plaintiff's case was within s. 26, c. 51, R. S. O. 1877, under which they had served notice. *Brown* v. *Morrow*, 43 U. C. R. 436.

**Second Trial.**]—A notice of intention to give a probate in evidence as proof of the will under C. S. U. C. c. 32, s. 9, is available at any trial of the cause, and not merely at the first trial after the giving of the notice. *Wilson* v. *Baird*, 19 C. P. 98.

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VII. Registration of Wills.

**Beneficial Interest.**]—A will disposed of the beneficial interest in land, but left the legal estate to descend to the heir:—Held, that lapse of time falling short of the statutory bar, was no defence by a purchaser from the heir-at-law. *Smith* v. *Bonnistecl*, 13 Gr. 29.

**Change in Description.**]—It is no objection to holding lot 22 to pass under a will, instead of lot 26, mentioned in it by mistake, that the registration of such a will thus changed in its most material contents, can afford no information on its face as to the lands affected by it. *Doe d. Lowry* v. *Grant*, 7 U. C. R. 125.

**Destruction of Will** — *Inevitable Difficulty—Notice.*]—The widow kept possession of the will for eleven months after the death of the testator, when she burned it for the purpose of enabling her to borrow money on the property devised, and she subsequently sold her interest under the will—an estate for life—and the only child professed to convey, as heir-at-law, to one R., who created a mortgage, under which the property was sold to D., a bonâ fide purchaser without notice, who afterwards agreed to sell to R. for the amount of his purchase money, interest and costs:—Held, that there was not any such inevitable difficulty as afforded a reason for the will not being registered within twelve months after the death of the testator, and that therefore D. was entitled to the protection of the registry laws (R. S. O. 1877 c. 111, s. 75), as against the infant devisees; but it appearing that R. had notice of the will when he purchased from the widow and heir-at-law, the court declared the infants entitled to redeem. *Re Davis*, 27 Gr. 199.

**Failure to Register.**]—Semble, that a will is sufficient to give an estate, although not registered under 35 Geo. II. c. 5. *Doe d. Link* v. *Ausman*, Tay. 300.

**Inevitable Difficulty**—*Notice.*]—By the will the plaintiffs were to come into possession when they should become of the age of twenty-one years, not being less than twelve years from the date of the testator's death, and they were infants of tender years at the time when, after the death of H. O'N., the defendant A. O'N., their father and guardian, agreed with the other heirs-at-law for the purchase of their shares, on the assumption that H. O'N. had died intestate, and obtained conveyances from them. A. O'N. and the other heirs-at-law were at this time aware of the facts in regard to both the wills, and were also aware that, after probate of the will of the 23rd April had been refused, it was the opinion of the solicitor for the estate that the will of the 17th April was properly executed and that probate might be obtained:—Held, that the plaintiffs' rights were not defeated or prejudiced by the agreement and conveyances referred to; nor were the plaintiffs' rights defeated by the registration of the conveyances to A. O'N. and his assignment and mortgage to O.; for A. O'N. had actual notice and knowledge of the plaintiffs' rights; and that the plaintiffs, who were not guilty of any wilful neglect or default, were prevented from registering the will by "irevitable difficulty" or "impediment" within the meaning of R. S. O. 1877 c. 111, s. 75. *O'Neill* v. *Owen*, 17 O. R. 525.

**Infancy.**]—Infancy is not an inevitable difficulty within s. 15 of the Registry Act, 35 Geo. II. c. 5, so as to preclude the necessity of an infant devisee registering the will within six months, to avoid a conveyance by the heir-at-law. *McLeod* v. *Truax*, 5 O. S. 455. Approved of in *Mandeville* v. *Nicholl*, 16 U. C. R. 609.

**Person Dying Abroad.**]—By the Registry Act, 35 Geo. III. c. 5, s. 15, the devisee claiming under a will made abroad, and where there had been no "inevitable difficulty" in the way of registering, was not allowed six months to register the will. Quære, as to effect of that Act in registering the wills of persons dying abroad. *Doe d. Eberts* v. *Wilson*, 4 U. C. R. 386.

**Purchaser for Value.**]—A person who purchases land from the heir with notice of the terms of the will, but under an erroneous supposition that, according to the true construction of the terms, the land was not affected by it, cannot set up, as against claimants under the will, the defence of a purchaser for value without notice. *Smith* v. *Bonnistecl*, 13 Gr. 29.

**Time.**]—By 9 Vict. c. 34, all devisees without exception were allowed twelve months to register the will. *Doe d. Eberts* v. *Wilson*, 4 U. C. R. 386.

**Title not Registered**—*Bonâ Fide Purchaser.*]—Under 9 Vict. c. 34, the objection that the will was not registered within six months after the death of testatrix, nor previous to a conveyance by the heir-at-law, is not valid, when the grantee in such conveyance is not a bonâ fide purchaser for value, nor where, when the will was made, the title was not a registered title. *Doe d. Ellis* v. *McGill*, 8 U. C. R. 224.

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VIII. Revocation and Revival.

**Codicil**—*Appointing New Executor.*]—A. made his will in 1843, and in 1846 added a

codicil, merely appointing a new executor "of his said will," as written above:—Held, that the codicil was a confirmation not a revocation of the will, which must be considered as made and executed in 1843. *Doe d. Baker* v. *Clark*, 7 U. C. R. 44.

Where by a codicil dated the 21st July, 1887, expressed to be a codicil to his will of the 17th July, 1880, the testator confirmed the said will, and it appeared that the said will consisted not merely of the document of the 17th July, 1880, but also of an intermediate codicil revoking a particular bequest therein:—Held, that, though a reference simply to the date of the earlier document was not sufficient in itself to restrict the confirmation to that particular document, yet other words and surrounding circumstances could and did convey such an intention with reasonable certainty, and accordingly the will of the 17th July, after confirmation, was no longer affected by the partial revocation made by the intermediate codicil. *McLeod* v. *McNab*, [1891] A. C. 471.

The testator made a will on the 14th May, 1880, disposing of all his estate, giving to certain charities specific proportions of the residue, and naming three persons executors. In January, 1891, he made another will revoking all previous wills and making a number of specific devises and bequests, but leaving a large residue undisposed of. In March, 1891, he executed a codicil, in which, after stating that "I will and devise that the following be taken as a codicil to my will of the 14th day May, 1880," he revoked the appointment of one of the named executors in that will "to be one of the executors of this my will," and in his stead appointed another person "with all the powers and duties . . . in my said will declared." The attestation clause stated that this was signed, &c., by the testator "as a codicil to his last will and testament":—Held, that there was shewn in this codicil an intention to revive the revoked will within the meaning of s. 24 of the Wills Act, R. S. O. 1887 c. 109. Held, also, that the will so revived took effect as at the date of the codicil, and that, for the purpose of deciding as to the validity of the charitable bequests, it must be treated as if executed at that date. Holmes v. Murray, 13 O. R. 756, and cases of that class, where the codicil in question refers to an existing will, distinguished. *Purcell* v. *Bergin*, 20 A. R. 535. Reversed by the supreme court, 23 S. C. R. 101, *sub nom. Macdonell* v. *Purcell*. See the next case.

——— *Intention to Revive — Reference to Date — Removal of Executor.*]—A will which has been revoked cannot, since the passing of the Ontario Wills Act, R. S. O. 1887 c. 109, be revived by a codicil, unless the intention to revive it appears on the face of the codicil, either by express words referring to the will as revoked and importing such intention, or by a disposition of the testator's property inconsistent with any other intention, or by other expressions conveying to the mind of the court, with reasonable certainty, the existence of the intention in question. A reference in the codicil to the date of the revoked will, and the removal of an executor named therein and substitution of another in his place, will not revive it. *Macdonell* v. *Purcell*, *Cleary* v. *Purcell*, 23 S. C. R. 101.

——— *Revocation of Bequest.*]—A testatrix by the third clause of her will bequeathed to S. the interest on the sum of $3,000 for life, and after his death directed the $3,000 to be divided among his children, and by a subsequent clause she directed her executors to deduct out of the $3,000 all payments made to S. after the date of the will. By a codicil she directed that the bequest number three, bequeathing to S. the interest on $3,000, be revoked, and in lieu thereof the sum of $500 be paid to him, or his heirs, and that the direction as to payments made after the date of the will should apply thereto:—Held, that the effect of the codicil was to revoke the whole of the third clause. *Edwards* v. *Findlay*, 25 O. R. 489.

**Dealings with Property Devised.**]—A. devised to B., his son, a certain parcel of land not less than sixty acres, nor to exceed 100, bounded, &c., giving a description not sufficiently precise to mark out any certain piece of land. By a deed some years afterwards, for a consideration of £50, he bargained and sold to B. eighty acres of the same lots of land under a description which would include at least sixty acres of that which had been devised to B.:—Held, that the deed revoked the devise to B., who could hold only what the deed covered. *Doe d. Marsh* v. *Scarborough*, 5 U. C. R. 499.

One S. died in 1867, leaving his next of kin, who, believing that S. died intestate, obtained administration. G. afterwards found an agreement and will under seal of S. in the same paper, in the possession of F., the only witness to the execution. By it S. agreed to convey part of a lot of land to G. on certain conditions. S. owned at the date of the paper the other half of the same lot, and also some personalty. By this paper, in case the conditions were performed, S. devised all his real and personal estate to G. and his heirs. Some years after the date of the paper, S. conveyed the other half of the lot to G., and took a mortgage for part of the purchase money:—Held, that this paper was a will and not a deed, and therefore was revocable, but although the subsequent conveyance to G. and reconveyance by mortgage to S. might revoke pro tanto the will relating to the realty—yet it would not as to the personalty. Held, also, that it was a good will of the personalty, notwithstanding it devised real estate and there was only one witness to its execution. Held, also, that the letters of administration must be brought in and cancelled, and the paper admitted to probate. *In re Snider*, 5 C. L. J. 101.

A testator devised 200 acres to one of his sons, a minor, and the remainder (100 acres) to testator's wife. The husband and wife afterwards agreed to live apart; that her 100 acres should be given to her at once; and that, in consideration of this, she should release her dower in the rest of his land. To effect this object, both joined in a deed of the 200 acres to a trustee; the trustee conveyed to the wife her 100 acres, and declared that he held the rest in trust to convey as the grantor should appoint:—Held, that the deed operated as a revocation of the will in equity, as well as at law. *Loughead* v. *Knott*, 15 Gr. 34.

A testator devised all his estate, real and personal, to his wife. He was the lessee, with

a right of purchase, of certain lands on which he afterwards paid the balance of purchase money and obtained a conveyance thereof:—Held, that the subsequent acquisition of the fee was not a revocation of the devise, and that the widow was beneficially entitled to the land so purchased; but that the legal estate therein had passed to the heirs-at-law. *Sinclair* v. *Brown*, 17 Gr. 333.

A testator devised his real estate and personal property to two persons. Afterwards he contracted to sell a portion of the real estate, but the contract was never carried out, and, after his decease in October, 1862, the parties interested under the contract agreed to rescind the same, which was done accordingly:—Held, that the contract operated in equity as a revocation of the will as regarded the beneficial interest in the real estate; that the interest in the contract passed to the legatees under the residuary clause; that the devisees being also legatees of the personal estate were entitled to the land, and that it did not go to the heirs-at-law. *Ross* v. *Ross*, 20 Gr. 263.

**Destruction**—*Birth of Child.*]—Held, under 32 Vict. c. 8, that a will is not revoked by destruction by the direction of the testator, unless the destruction take place in his presence. (2) The birth of a child after the making of a will does not revoke the will. *Re Tobey*, 6 P. R. 272.

**Partial Destruction.**] — See *O'Neill* v. *Owen*, 17 O. R. 525.

**Subsequent Agreement with Devisee.**] — The testator by his will, made in July, 1877, devised to his son G., certain real estate and brewery, expressing that "this devise be accepted by and to be in full discharge of any and every claim he shall have against my estate at the time of my decease." In a subsequent clause, "L." the testator declared that in the event of selling lands specifically devised, the proceeds were to be substituted for the lands by charging the proceeds against the real estate of the testator. The testator was indebted to G. in the sum of $36,146.86, and on the 8th of October, 1879, the parties met and agreed that the testator should sell part of the lands devised to him, including the brewery, to G. for $27,000, and the brewery plant for $6,587.20, which was credited on G.'s claim against the testator. G. subsequently, under clause "L" claimed against the estate of the testator payment of the amount for which the brewery premises and plant were sold, he swearing that he was ignorant of the contents of the will. Thereupon the plaintiffs, two of the executors and trustees, instituted proceedings seeking to obtain a construction of the will:—Held, that the agreement entered into between the father and son superseded the devise to the son. *Archer* v. *Severn*, 8 A. R. 725. Reversed by the supreme court, *Cassels' Dig.* 875.

**Subsequent Invalid Will.**]—Section 5 of the Wills Act of 1868, which provides that no will shall be revoked otherwise than by "another will or codicil executed according to law, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is by law required to be executed," means a will, codicil or other writing executed with the same formalities as are required in the case of the will or codicil which it purports to revoke. See R. S. O. 1877 c. 106, s. 22. *In re Parker Trusts*, 20 Gr. 389.

Where a testatrix, having duly made and published her will, subsequently executed a testamentary paper, not, however, so as to pass real estate:—Held, that the disposition of personalty made thereby was substituted for the disposition made of it by the will, but the disposition made of the realty by the will was not affected. *Ib.*

**Tearing off Name**—*Intention.*]—Where A., meaning to make a new will, and having the draft with him for that purpose, cancelled the first will, not by obliterations and alterations, but by tearing off his name and seal, and then died suddenly before executing the other will:—Held, that A. died intestate. Held, also, that the heir-at-law finding such old will cancelled, and the draft with it, was not called upon in the absence of any imputation of fraud, to account for the cancellation of the old will. Quære, when the name and seal of a testator appear to have been struck out of a will, should the animus cancellandi be still left as a question for the jury. *Doe d. Crooks* v. *Cummings*, 6 U. C. R. 305.

**Weight of Evidence.**] — In ejectment, where the jury found that a will had been revoked by burning it and the execution of a subsequent deed, upon very conflicting evidence, the weight of which in the opinion of the Judge who tried the cause was against the finding, the court refused a new trial. *Doe d. Magher* v. *Chisholm*, Dra. 216.

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## IX. Miscellaneous Cases.

**Acceptance of Devise.**]—Where one to whom a devise primâ facie beneficial to him is made, neither accepts nor rejects the same, but remains passive, he will be presumed to accept. *Re Dafoe*, 2 O. R. 623.

**Agreement for Distribution of Estate.**]—J. S. C. died in the State of New York, leaving a will, which the courts there declared void as having been improperly attested, and thereupon letters of administration of his effects in Ontario were granted to his widow by the proper court; and she and the next of kin—all of whom were of age—made an agreement for a distribution of all the assets, whereupon she filed a bill in this court to have such agreement established and the intended will declared invalid, with a view of estopping the intended legatees thereunder from afterwards attempting to set up the same. The court under the circumstances, and in view of the fact that the intended legatees were not parties and that no controversy was shewn to exist, refused to make any declaration, and dismissed the bill; but—as the defendants were all assenting parties to the course pursued by the plaintiff—without costs. *Clarke* v. *Cook*, 23 Gr. 110.

**Alternative Devise.**] — The plaintiffs claimed title under a will, by which the testator devised to his widow "1,000 acres of land in Walsingham; and if he had less than 1,000 acres there, then that quantity to be made up to her out of his Zorra lands." The defendants shewed no title, but contended that to succeed the plaintiffs must prove that the

testator died seised of 1,000 acres more than the land in question in Walsingham, and that the plaintiffs should be nonsuited. Upon a motion made on leave reserved:—Held, that the nonsuit should be entered. *Miller* v. *Anger*, 8 C. P. 80.

**Bequest of Partnership Business to Partner.**] — J. and his brother carried on business in partnership for over thirty years and the brother having died his will contained the following bequest: "I will and bequeath unto my brother J. all my interest in the business of J. & Co. in the said city of St. Catharines, together with all sums of money advanced by me to the said business at any time, for his own use absolutely for ever, and I advise my said brother to wind up the said business with as little delay as possible:" —Held, that J. on accepting the legacy was under no obligation to indemnify the testator's estate against liability for the debts of the firm in case the assets should be insufficient for the purpose and did not lose his right to have the accounts taken in order to make the estate of the testator pay its share of such deficiency. *Robertson* v. *Junkin*, 26 S. C. R. 192.

**Execution against Beneficiary.**]—One W. devised his personal estate to three trustees, of whom his widow was one, in trust to call in and convert the securities into money, and, when received, to invest the same and pay the interest and produce to the widow during her life, for the maintenance of herself and children. The widow, after the testator's death, remained on his farm, and in possession of the stock and some personal property, some of which she sold, and the stock had been added to by breeding. Semble, that the property was liable, in the widow's hands, to an execution against her, which, for all that appeared, might have been for a debt contracted for the support of herself and family. *Peers* v. *Carroll*, 19 U. C. R. 229.

**Expenditure under Void Will.**] — M. H. (the executrix under a will which was subsequently set aside), having expended $536.35 in repairs to the real estate, and the testator's will having given her a life estate in all the real estate, and having also given her "the income of all investments of which I may be possessed for her own use, and also the principal of such investments as she may require to use for her own benefit:"—Held, that the $536.35 was properly allowed her. *Bell* v. *Hill*, 6 O. R. 244.

**Lot Specifically Devised Dealt with as Part of Residue**—*Compensation.*] — A testator devised to his son a certain named lot; the residue of his estate, after other specific devises, he directed to be divided between his two brothers and sister. After his death the property was so divided, but in the division by mistake the lot devised to the son was included, and allotted to one of the residuary devisees as part of his share, who devised the same to his sons, and who, on discovering the mistake, applied to those interested in the residuary estate to have the mistake rectified, when it appeared that some of the other residuary devisees had sold portions of the shares allotted to them by reason of which a re-division was impossible; and a bill was thereupon filed praying for compensation for the loss sustained by reason of the mistake. The court ordered a valuation to be made of the residuary estate, at its present value, one-third of which, with interest from the date the first division was made, to be contributed ratably by the other residuary devisees, or their representatives, or, if desired by either of the parties, with an account of rents and profits received. *Stinson* v. *Moore*, 10 Gr. 94.

**Parties** — *Action against Executor for Legacy.*]—A testator gave legacies to three grandchildren, to be paid at majority or marriage, and provided: "In case of the death of any one of my said grandchildren, the bequests . . shall be divided among and go to the survivor or survivors of them, share and share alike." All three survived the testator, but two died before marriage or majority, and the executor paid all three legacies to the survivor. The plaintiff, the personal representative of the grandchild who was the second to die, brought this action against the executor to recover one half of the legacy of the grandchild who died first:—Held that, as a determination of the proper construction of the will was necessary to entitle the plaintiff to succeed, it was not an improper exercise of discretion to require the surviving grandchild, or his representative, to be added as a party, so as to prevent an adjudication being had as to his rights under the will behind his back, and to have the question decided in one action. *Clifton* v. *Crawford*, 18 P. R. 316.

**Pleading.**]—In setting out a will in pleading there is no necessity to aver that all the solemnities of the statute have been observed in regard to its execution; the averment that it was made and published as by law is required for the passing of real estate, is sufficient. *Walton* v. *Hill*, 8 U. C. R. 562.

**Renunciation by Devisee.**]—One of the devisees in trust under a will refused to accept the trust:—Held, that he was not a necessary party plaintiff in an action for rent of the premises devised, although his formal renunciation in writing was not made until after the rent in question had accrued due. *Hughes* v. *Brooke*, 43 U. C. R. 609.

**Solicitor's Duty** — *Drawing Will.*] — Where a solicitor, when receiving instructions for the preparation of a person's will, is made aware of the object the testator has in view, but the language used will not effectuate that end, it is the duty of the solicitor to call the testator's attention to the fact, and to point out to him wherever the words used fail in carrying out the known intentions of the testator. It is erroneous to suppose that the solicitor properly discharges his duty by simply taking down the directions given by the testator, without reference to their effect upon the provisions it was alleged the testator desired to make with regard to his family and estate. *Wilson* v. *Wilson*, 22 Gr. 39.

**Unpaid Legatee**—*Contribution by Other Legatees.*]—Legatees entitled to a share of the residue of an estate are not bound by the accounts and proceedings in an administration action, instituted by other residuary legatees, in which they have not been added as parties, and of which they have received no notice. The judgment for administration in such an action, however, enures to their benefit, and makes a fresh starting point in their favour as against the defence of the Statute of Limitations. In the absence of reasonable efforts

by the executors of an estate to discover the whereabouts of certain persons entitled to share in the residue, other persons who have received a share of the residue must refund, for the benefit of the persons whose claims have been ignored, the amount received in excess of the sum payable if the division had been properly made. *Uffner* v. *Lewis*, *Boys' Home* v. *Lewis*, 27 A. R. 242.

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*See* COSTS, IV. — DEVOLUTION OF ESTATES ACT — DISTRIBUTION OF ESTATES — EXECUTION, III. 2 — EXECUTORS AND ADMINISTRATORS—INSURANCE, V. 3—REGISTRY LAWS, I. 3 (f)—TRUSTS AND TRUSTEES, II. 3.

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## WINDING UP.

*See* BANKS AND BANKING, VII.—COMPANY, X.

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## WITNESS.

*See* COSTS, IV.—CRIMINAL LAW, VI. 2.

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## WITNESSES AND EVIDENCE.

*See* EVIDENCE, XIV.

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## WORDS AND TERMS.

### A.

"A HOME."—See *Cameron* v. *Adams*, 25 O. R. 229.

"ABSCONDED."—See *Coffey* v. *Scane*, 25 O. R. 22.

"ABSOLUTE PURCHASE." — See *Ridout* v. *Harris*, 17 C. P. 88.

"ABSOLUTELY."—See *Re Walker and Drew*, 22 O. R. 332.

"ABSOLUTELY DISPOSE OF."—See *Smith* v. *Spears*, 22 O. R. 286.

"ACCIDENT."—See *Bobier* v. *Clay*, 27 U. C. R. 458.

"ACCIDENT BY TEMPEST."—See *Thistle* v. *Union Forwarding Co.*, 29 C. P. 76.

"ACCORDING TO THE PRESENT PRACTICE OF THE COURT OF CHANCERY." — See *Barker* v. *Furze*, 9 P. R. 83.

"ACCORDING TO THE VERY RIGHT AND JUSTICE OF THE CASE."—See *Peterkin* v. *MacFarlane*, 9 A. R. 429.

"ACCUSES."—See *Regina* v. *Kempel*, 31 O. R. 631.

"ACQUIRED."—See *Re Central Bank, Canada Shipping Co.'s Case*, 21 O. R. 515.

"ACQUIRED IN ANY OTHER WAY." — See *Dominion Loan and Investment Company* v. *Kilroy*, 14 O. R. 408.

"ACT OF GOD."—See *Garfield* v. *City of Toronto*, 22 A. R. 128.

"ACTION."—See *Price* v. *Wade*, 14 P. R. 351; *Hogaboom* v. *Gillies*, 16 P. R. 402; *Re McCabe* v. *Middleton*, 27 O. R. 170.

"ACTUAL AND CONTINUED CHANGE OF POSSESSION."—See *Gillard* v. *Bollert*, 24 O. R. 147; *Hogaboom* v. *Graydon*, 26 O. R. 298.

"ACTUAL FIRST COST."—See *Black* v. *Toronto Upholstering Co.*, 15 O. R. 642.

"ACTUAL OCCUPATION."—See *Regina ex rel. Jouinsse* v. *Mason*, 28 O. R. 495.

"ACTUAL SETTLERS FOR AGRICULTURAL PURPOSES."—See *Hoggan* v. *Esquimalt and Nanaimo R. W. Co.*, 20 S. C. R. 235.

"ADJOINING MUNICIPALITY."—See *Re Galerno and Township of Rochester*, 46 U. C. R. 279.

"ADJUNCTS OF THE CANAL." — See *McQueen* v. *The Queen*, 16 S. C. R. 1.

"ADULT."—See *Warnock* v. *Pricur*, 12 P. R. 264.

"ADVANCEMENT."—See *Re Lewis*, 29 O. R. 609.

"ADVANCES."—See *Goulding* v. *Deeming*, 15 O. R. 201.

"ADVERSE CLAIM."—See *O'Grady* v. *McCaffray*, 2 O. R. 309.

"AGAINST ALL CASUALTIES."—See *Dixon* v. *Rochdale Navigation Co.*, 18 S. C. R. 704, 15 A. R. 647.

"AGENT." — See *Moshier* v. *Keenan*, 31 O. R. 658; *Regina* v. *Hynes*, 13 U. C. R. 194; *Regina* v. *Armstrong*, 20 U. C. R. 245.

"AGENT FOR THE SALE OF CROWN LANDS." —See *Srigley* v. *Taylor*, 6 O. R. 108.

"AGENTS FOR PERSONS NOT RESIDENT WITHIN THE DISTRICT."—See *Regina* v. *Marshall*, 12 O. R. 55.

"ALL" construed "ANY." — See *Gilmore* v. *Lockhart*, H. T. 6 Vict. R. & H. Dig. 265.

"ALL COSTS INCIDENTAL TO THE ARBITRATION."—See *Re Bronson and Canada Atlantic R. W. Co.*, 13 P. R. 440.

"ALL DAYS EXCEPT SUNDAY."—See *Attorney-General ex rel. Hobbs* v. *Niagara Falls, Wesley Park and Clifton Tramway Co.*, 19 O. R. 624.

"ALL JUDGES, &C., OF THE COUNTY COURT." —See *In re Parker*, 19 O. R. 612.

"ALL JUDGMENTS AND ALL EXECUTIONS NOT COMPLETELY EXECUTED BY PAYMENT."—See *Abraham* v. *Abraham*, 19 O. R. 256.

"ALL NECESSARY ACCOMMODATION." — See *Bickford* v. *Chatham*, 16 S. C. R. 235.

"ALL PARTIES CONCERNED." — See *Burford School Trustees* v. *Township of Burford*, 18 O. R. 546.

"ALLOW AN APPEAL." — See *Vaughan* v. *Richardson*, 17 S. C. R. 703.

"ALTERED."—See *Regina* v. *Plunkett*, 21 U. C. R. 536.

"AN ISSUE."—See *Price* v. *Wade*, 14 P. R. 351.

"AND" construed "OR" in a statute.—See *Boag* v. *Lewis*, 1 U. C. R. 357.

"AND OTHER MATTERS OR THINGS WHERE THE RIGHTS IN FUTURE MIGHT BE BOUND."—See *Stevenson* v. *City of Montreal*, 27 S. C. R. 187.

"ANNUAL INSTALMENTS."—See *Re Babcock* v. *Ayers*, 27 O. R. 47.

"ANNUAL RENTS."—See *Rodier* v. *Lapierre*, 21 S. C. R. 69.

"ANNUAL RENTS OR OTHER MATTERS OR THINGS WHERE RIGHTS IN FUTURE MIGHT BE BOUND."—See *Banque du Peuple* v. *Trottier*, 28 S. C. R. 422.

"ANY CLAIM AGAINST THE CROWN."—See *City of Quebec* v. *The Queen*, 24 S. C. R. 420.

"ANY JUDGE OF A COUNTY COURT."—See *Re County Courts of British Columbia*, 21 S. C. R. 446.

"ANY OTHER RELIEF OVER."—See *Confederation Life Association* v. *Labatt* (*No. 2*), 18 P. R. 266.

"ANY PARTY TO A CAUSE."—See *Darling* v. *Sherwood*, 2 C. L. J. 130.

"ANY PERSON."—See *Chaput* v. *Robert*, 14 A. R. 354; *Abbottson* v. *Henry*, 8 O. R. 625.

"ANY PERSON CLAIMING RIGHT THERETO." See *Oliver* v. *Lockie*, 26 O. R. 28.

"ANY PERSON OR PERSONS."—See *Munro*, v. *Waller*, 28 O. R. 29.

"ANYTHING DONE UNDER THIS ACT."—See *Grant* v. *Culbard*, 19 O. R. 20.

"APOTHECARY."—See *Regina* v. *Howarth*, 24 O. R. 561.

"APPEAL BROUGHT."—See *Regina* v. *McGauley*, 12 P. R. 259.

"APPEAL FROM A SINGLE JUDGE." — See *Wilson* v. *Manes*, 17 P. R. 239.

"APPEAL SHALL BE BROUGHT."—See *In re Hunter* v. *Griffiths*, 7 P. R. 86.

"APPLY AT CHAMBERS."—See *In re Selby*, 8 P. R. 342.

"APPRENTICES."—See *Welch* v. *Ellis*, 22 A. R. 255.

"APPROACHES," — See *Traversy* v. *Township of Gloucester*, 15 O. R. 214.

"APPURTENANCES."—See *McNish* v. *Munro*, 25 C. P. 290; *Harris* v. *Smith*, 40 U. C. R. 33.

"ARISING UNDER ANY LAW OF CANADA."—See *City of Quebec* v. *The Queen*, 24 S. C. R. 420.

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"ARREARS."—See *Corbett* v. *Taylor*, 23 U. C. R. 454.

"ARREARS OF RENT DUE . . . . FOR THREE MONTHS FOLLOWING THE EXECUTION OF SUCH ASSIGNMENT."—See *Lazier* v. *Henderson*, 29 O. R. 673.

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"AS SOON AFTERWARDS AS PRACTICABLE." —See *Parsons* v. *Queen Insurance Co.*, 43 U. C. R. 271.

"AS SOON AS POSSIBLE."—See *Mann* v. *Western Assurance Co.*, 19 U. C. R. 314; *Cammell* v. *Beaver and Toronto Mutual Fire Insurance Co.*, 39 U. C. R. 1; *The Queen* v. *The Beatrice*, 5 Ex. C. R. 9.

"ASCERTAINED BY THE SIGNATURE OF THE DEFENDANT."—See *Re Sawyer-Massey Co. and Parkin*, 28 O. R. 662.

"ASSETS IN ONTARIO WHICH MAY BE RENDERED LIABLE TO THE JUDGMENT." — See *Purves* v. *Slater*, 11 P. R. 507.

"ASSIGNMENT FOR THE GENERAL BENEFIT OF CREDITORS UNDER THIS ACT."—See *Anderson* v. *Glass*, 16 O. R. 592.

"ASSIGNS."—See *Barry* v. *Anderson*, 18 A. R. 247; *Re Abbott and Medcalf*, 20 O. R. 299; *McKibbon* v. *Williams*, 24 A. R. 122.

"ASSUMED TO PURCHASE."—See *Owston* v. *Grand Trunk R. W. Co.*, 28 Gr. 428.

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"BAGGAGE." — See *Dixon* v. *Richelieu Navigation Co.*, 18 S. C. R. 704.

"BANKRUPTCY AND INSOLVENCY." — See *Clarkson* v. *Ontario Bank*, 15 A. R. 191.

"BARGE."—See *Steinhoff* v. *Royal Canadian Insurance Co.*, 42 U. C. R. 307.

"BE THE SAME MORE OR LESS."—See *Nelles* v. *White*, 29 Gr. 338.

"BEING WITHIN THE JURISDICTION OF SUCH JUSTICE."—See *Regina* v. *Bachelor*, 15 O. R. 641.

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"BEYOND THE SEAS."—See *Boulton* v. *Langmuir*, 24 A. R. 618.

"BLACKMAIL."—See *Macdonald* v. *World Newspaper Co.*, 16 P. R. 324, 32 O. R. 163.

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"BONA FIDE POSSESSOR OF LAND."—See *Stuart* v. *Baldwin*, 41 U. C. R. 446.

"BRANCH."—See *City of Kingston* v. *Canada Life Assce. Co.*, 18 O. R. 18.

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"BRICK HOUSES."—See *Stevenson* v. *McHenry*, 16 O. R. 139.

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"BROADER AND MORE COMPREHENSIVE CLAIMS."—See *Withrow* v. *Malcolm*, 6 O. R. 12.

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"BUILDING."—See *Mitchell* v. *City of London Fire Ins. Co.*, 12 O. R. 706; *Carr* v. *Life Assurance Association*, 14 O. R. 487; *Regina* v. *Labadie*, 32 U. C. R. 429.

"BUILDINGS."—See *Adamson* v. *Rogers*, 22 A. R. 415.

"BUILDINGS AND ERECTIONS."—See *Adamson* v. *Rogers*, 26 S. C. R. 159; *Butchart* v. *Doyle*, 24 A. R. 615; *Re Brantford Electric and Power Company and Draper*, 28 O. R. 40, 24 A. R. 301.

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"BUSINESS OF THE DEFENDANT."—See *Marshall* v. *McRae*, 16 O. R. 495.

"BY CONTRACT."—See *McBrian* v. *Ottawa Water Commissioners*, 40 U. C. R. 80.

"BY DEED OR CONVEYANCE."—See *Doe d. Baker* v. *Clark*, 7 U. C. R. 44.

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"BY REASON OF THE RAILWAY."—See *McArthur* v. *Northern and Pacific Junction R. W. Co.*, 15 O. R. 733; *May* v. *Ontario and Quebec R. W. Co.*, 10 O. R. 70; *Conger* v. *Grand Trunk R. W. Co.*, 13 O. R. 160.

"BY WAY OF GAMING OR WAGERING."—See *North American Life Assurance Co.* v. *Craigen*, 13 S. C. R. 278.

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"CANADIAN POLICY." also "POLICIES IN CANADA."—See *Re Briton Medical and General Life Association* (2), 12 O. R. 441.

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"CAPABLE OF RAISING A WEIGHT OF 2,000 LBS. WITHOUT RISK."—See *Hamilton* v. *Myles*, 24 C. P. 309.

"CAR LOAD." — See *Hanley* v. *Canadian Packing Co.*, 21 A. R. 119.

"CARRYING GOODS FOR SALE."—See *Regina* v. *Coutts*, 5 O. R. 644.

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"CLERKS AND OTHER PERSONS HAVING BEEN IN THE EMPLOYMENT OF THE COMPANY IN OR ABOUT ITS BUSINESS OR TRADE."—See *Re Ontario Forge and Bolt Co.*, 27 O. R. 230.

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"COMMENCED."—See *Ontario and Sault Ste. Marie R. W. Co.* v. *Canadian Pacific R. W. Co.*, 14 O. R. 432.

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"COMMERCIAL MATTERS."—See *Forget* v. *Baxter*, [1900] A. C. 467.

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"CONCERNED."—See *Nicnol School Trustees* v. *Maitland*, 26 A. R. 506.

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"CONCERNING ANY BOUNDARY."—See *Manary* v. *Dash*, 23 U. C. R. 580.

"CONDITIONAL LIMITATION."—See *In re Melville*, 11 O. R. 626.

"CONDITION OF RE-ENTRY."—See *In re Melville*, 11 O. R. 626.

"CONNECTED IN ANY WAY."—See *Roper* v. *Hopkins*, 29 O. R. 580.

"CONSECUTIVE YEARS."—See *City of Three Rivers* v. *Banque du Peuple*, 22 S. C. R. 352.

"CONSTITUTION OF THE CONGREGATION."—See *McRae* v. *McLeod*, 26 Gr. 255.

"CONSTRUCTION."—See *Sage* v. *Township of West Oxford*, 22 O. R. 678.

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"CONTRIBUTORY."—See *Re Macdonald and Noxon Bros. Manufacturing Co.*, 16 O. R. 368; *In re Central Bank of Canada, Yorke's Case*, 15 O. R. 625.

"CONVENIENTLY."—See *Hastings* v. *Summerfeldt*, 30 O. R. 577.

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"CONVEYING TRAVELLERS."—See *Attorney-General* v. *Hamilton Street Railway Company*, 24 A. R. 170.

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## G.

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## H.

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## I.

"ILLEGAL AND PROHIBITED ACTS IN REFERENCE TO ELECTIONS."—See *Brockville (Prov.)*, *Flint* v. *Fitzsimmons*, H. E. C. 139; *North York (Prov.)*, *Gorham* v. *Boultbee*, H. E. C. 62; *Brockville (Prov.)*, 32 U. C. R. 132.

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"NEGOTIATION."—See *Halsted* v. *Bank of Hamilton*, 24 A. R. 152; *Dominion Bank* v. *Oliver*, 17 O. R. 402.

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"WITHOUT PREJUDICE."—See *Omnium Securities Co.* v. *Richardson*, 7 O. R. 182.

"WITNESS."—See *Moffatt* v. *Prentice*, 9 C. L. J. 159.

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# WORK AND LABOUR.

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## I. CONTRACT.

### 1. *Extras.*

**"Beside" or "under" Contract.**] — As to what is extra work under a contract, and extra work beside a contract. *Ritchey* v. *Bank of Montreal*, 4 U. C. R. 459.

**Building**—*Alterations—Provision as to Writing—Addenda to Specifications.*]—A contract for the erection of a church accord-

ing to certain plans and specifications, provided that if defendants should at any time desire to make any alterations or additions, plaintiff should erect the church with such alterations and additions as defendants or one S. should direct, by writing under his or their hand. Certain extra work was done at the desire of the defendants, though not expressed in writing under their hand:—Held, that plaintiff was entitled to recover therefor, for the contract did not provide that no such work was to be allowed or paid for, unless ordered in writing, which would have prevented the plaintiff's recovering, but merely that plaintiff was bound to execute such extra work as defendants or S. should direct in writing to be done. Other work, also claimed as extras, was contained in the addenda, which were annexed to the specifications before plaintiff signed the contract:—Held, that such work was included in the contract, and could not be allowed as extras. *Diamond* v. *McAnnany*, 16 C. P. 9.

——— *Special Orders of Owner—Disregarding Architect.*]—Defendant employed the plaintiffs under a building contract, in which it was stipulated that there should be no charge for extra work, unless specially ordered in writing by the architect employed. The defendant himself having requested the plaintiffs to do a certain work on the building, and desired the plaintiffs' men to take their orders from him and not from the architect:—Held, that for this work the plaintiffs might recover on the common counts, without reference to the contract. *Melville* v. *Carpenter*, 11 U. C. R. 128.

**Crown** — *Actions against.*]—See CROWN—PETITION OF RIGHT.

**Deviation from Contract**—*New Agreement.*]—Held, that under the agreement and facts proved, the extra work claimed for by the plaintiff must be considered not as extra work done under the contract, but under a subsequent new agreement, wholly deviating therefrom, and not as upon the same terms either as to time or mode of payment; and that the plaintiff might recover for such work under the account stated. *Watson* v. *O'Beirne*, 7 U. C. R. 345.

**Drainage**—*Profiles—Alteration of Depths —"Necessary" Work.*]—A by-law, founded on the usual petition, was passed by defendants for the drainage of certain lands in the township, and a contract therefor, under defendants' corporate seal, entered into with plaintiff for the construction of the drain. The depths required were marked on the profiles forming part of the contract. Between certain points, where the deepest excavation was required, the drain was to be tiled and covered. After the plaintiff had proceeded some distance between these points, the defendants' engineer, under whose personal direction the work was being done, discovered that the depths were inaccurately given, and that the drain was not deep enough between the said points, and he directed the drains to be deepened and the tiles, so far as laid, to be taken up and relaid at the increased depth, thereby occasioning to the plaintiff considerable work beyond that provided for by the contract. By amendments to the Municipal Acts, councils, in the case of drainage works, are authorized to make an assessment upon the property of those benefited when the means provided are not sufficient; and any damages recovered in proceedings respecting such works are to be charged against the lands benefited. It was proved that without the work the drain would have been useless. No formal resolution of the council was passed authorizing this work to be done, nor was there any contract therefor under the corporate seal. In an action against defendants to recover the value of such work:—Held, reversing the judgment in 15 O. R. 506, that the work was work that the plaintiff was bound to perform under the contract itself. Quære, whether the work was in any event "necessary" in such a sense as to impose liability for payment therefor upon a municipal corporation without an express contract. *Green* v. *Township of Orford*, 16 A. R. 4.

**Railway**—*Sub-contractor — Directions of Engineer—Reference to Principal Contract.*]—Defendants, with others, had agreed under seal with the Great Western Railway Company to make and complete certain sections of the railway. Their agreement was to do the several descriptions of work in accordance with the plans and specifications furnished by the company's engineer, and for the prices contained in a schedule, all annexed to the agreement. In these were contained, among other things, a full detail of the manner in which the culverts were to be made, and the kind of stone to be used, &c. It was also provided that, if the engineer should so direct, embankment might be substituted for trestle work or piling, at any point, and vice versâ, without any extra allowance therefor. The plaintiff afterwards agreed under seal with defendants to furnish all materials necessary to build and complete all the arched culverts required on one of the sections included in their contract with the company; "and that the same shall be done in strict accordance with the plans, specifications, and directions of the engineer of the Great Western Railway Company having charge of the same." This agreement was signed "S. Farewell & Co." by Farewell, one of the defendants. The plaintiff was proceeding with the construction of the culverts, when the company's engineer in charge decided upon having a description of mason work superior to and different from that specified in defendants' original contract with the company; and one of the defendants then desired the plaintiff to go on with the work as required, and promised to pay the additional expenses incurred by the change. The plaintiff sued on the common counts for the value of the work done upon that undertaking, not under the contract:—Held, that, although it was stipulated that he should abide by the directions of the engineer, the plaintiff might refer to the defendants' original contract with the company, to shew what kind of work was contemplated by his agreement, and that he was entitled to recover under the common counts for extra work; for, as the plaintiff's contract was evidently made with reference to that under which the defendants were acting, it would be impossible, without looking at both, to put a just construction on their agreement. *Logan* v. *Stranahan*, 12 U. C. R. 15.

*See McGinnis* v. *Village of Yorkville*, 21 U. C. R. 163, *post* VI. 4; *Wright* v. *County of Grey*, 12 C. P. 479, *post* VI. 4; *Oldershaw* v. *Garner*, 38 U. C. R. 37, *post* VI. 4; *Ross* v. *County of Bruce*, 21 C. P. 41, *post* VIII.;

*Goodwin* v. *City of Ottawa*, 28 C. P. 561, *post* V. 2; *McNamara* v. *Skain*, 23 O. R. 103, *post* 2.

2. *Special Contracts.*

**Abandonment** — *Valuation of Work Done.*]—In an action for building part of a house, it appeared that the work had been done under a special agreement, the terms of which had not been complied with, but the defendant, having sold the property, did not supply certain joists which he had to furnish, and he and the plaintiff together employed a person to value the work done. The plaintiff then left the work, and sued on the common counts:—Held, that the action was well brought. *Aitkin* v. *Malcolm*, 2 U. C. R. 134.

**Authority of Agent** — *Ratification — Dismissal of Contractor—Payment for Work Done—Damages.*]—The statutory agent and managing director of a railway company entered into contracts in his own name, acting for and on behalf of the company, for the construction of the road, erection of station houses, and maintenance of way, at certain prices set forth in the schedules, under which the contractor entered upon the execution of the works, constructed the road and some of the station houses, and during the progress of the work had been paid large amounts on account of his work, according to the scheduled prices, after which the company refused to allow him to complete the contracts, alleging that the prices agreed to be paid were exorbitant, and that the agent had not been authorized to enter into them. On a bill filed for that purpose, the court of chancery declared the company bound by the contracts, on the ground of ratification and acquiescence therein, and that the contractor was entitled to be paid for all the work that had been done according to the schedule of prices; and also to be paid for any loss he could shew he had sustained in consequence of not being allowed to proceed to a completion of the contracts. On appeal the decree was varied in so far as it allowed damages for not being allowed to complete the same. *Buffalo and Lake Huron R. W. Co.* v. *Whitehead*, 8 Gr. 157.

**Building Contract** — *Delay — Time — Liquidated Damages.*]—Under a building contract, in writing, the contractor agreed that, subject to any extensions of time by the architect, the building should be finished by a named day, and that in default he would pay $50 a week as liquidated damages. It was also provided that all extras, &c., should form a part of the contract, if authorized by the architect, who was first to fix the price, and grant such extension of time therefor as he thought necessary, and power was also given him to extend the time for completion in case of a strike. The building was not completed for over four months after the time fixed, and this action for the balance of the contract price was commenced within the time the final payment was made payable under the contract. Although some extras were done, and there was evidence as to delay by strikes, the architect was not asked for, and did not grant, any extension of time:—Held, that the contract must govern, and that the defendants were entitled to recover, by way of counterclaim, the sum provided by the contract as liquidated damages. If a claim to liquidated damages by a defendant is pleaded by way of counterclaim the plaintiff may reply matters arising subsequent to action brought. The plaintiff was allowed to reply that the final payment under the contract had accrued due after action brought. Aliter, if pleaded by way of set-off. Toke v. Andrews, 8 Q. B. D. 428, followed. *McNamara* v. *Skain*, 23 O. R. 103.

——— *Dismissal of Contractor—Authority of Architect—Notice—Time.*]—A building contract provided that in case the works were not carried on with such expedition and with such materials and workmanship as the architect might deem proper, then, with the special and written authority of the proprietor, he should be at liberty, after giving him seven days' notice in writing, to dismiss the contractor, and employ other persons to finish the works, &c.:—Held, that such special authority meant an authority to be acted upon with reference to some individual contractor, and not a general authority "to dismiss in his discretion any workman or contractor." (2) That the notice should intimate to the contractor in what respect the architect was dissatisfied, and what he required to be done, so that during the time mentioned in the notice the contractor might have an opportunity of removing the objection, in default of which the architect might dismiss him at the expiration of the time, but not before. Quære, whether such provision could be acted upon after the time fixed by the contract for the completion of the work. Another condition provided that the architect might dismiss any workman who might be disapproved of:—Held, that this clearly applied only to a workman as distinguished from a contractor. *Smith* v. *Gordon*, 30 C. P. 553.

——— *Dismissal of Contractor—New Contract—Incorporation of Clauses.*]—Where a contractor for the building of a house made default in carrying on the work, and, in consequence, the owner, acting under a clause in the contract to that effect, dismissed him, and agreed orally with a sub-contractor who had been employed by the contractor, that if the sub-contractor would go on and finish the work he, the owner, would pay him:—Held, that the sub-contractor was entitled to a lien for all work done under such agreement as a "contractor," and as to such work he was no longer in the position of a sub-contractor. Held, also, that the sub-contractor acting under such an agreement, was not bound by clauses contained in the original contract with the dismissed contractor, providing for forfeiture, &c. *Petrie* v. *Hunter*, *Guest* v. *Hunter*, 2 O. R. 233. See *S. C.*, 10 A. R. 127.

——— *Dismissal of Contractor—Right to Remove Material and Plant—Demand—Conversion.*]—By a contract for the erection of certain buildings the contractor was to supply all labour, material, apparatus, scaffolding, utensils, and cartage of every description needful for the performance of the work; and was to deliver up to the owner the work in perfect repair, &c., when complete, and was not to sublet any part of the works without the architect's consent; and all work and material as delivered on the premises was to form part of the works and be considered the property of the owner, and not to be removed without his consent; the contractor to have liberty to remove all surplus material

after he had completed the works. Without the architect's consent the contractor entered into a sub-contract with the plaintiff for the excavation, brick and masonry work, and the plaintiff commenced work under his sub-contract, and continued to work for some time, when he was ordered to discontinue by the architect:—Held, that the plaintiff was entitled to remove from the premises (premises meaning what the parties treated as such) material placed there after he was directed to discontinue, and also material delivered off the premises, as well as plant constituting the fixtures and the apparatus, &c., necessary for carrying on his business, or to recover from the owner the value of any material used by him in the buildings; but that the plaintiff was not entitled to remove any material placed there before he was ordered to discontinue; and that no demand was necessary; it appearing that the owner was using the same, and thus committing an act of conversion. *Ashfield* v. *Edgell*, 21 O. R. 195.

——— *Payment for Material—Owner—Acceptance of Order.*]—One M., by a written contract, agreed with the defendant for the erection of a dwelling house in two months from date, and if M. neglected to build the house defendant was to be at liberty to purchase material and employ workmen to finish it, and deduct the cost of the material, &c., out of the price. The plaintiff agreed to supply M. with lumber to be used in the building, and M., after a portion of the lumber had been placed in the building, gave plaintiff an order on defendant for the sum of $351.46, expressed to be "for lumber used in your house one month after the building is finished," which the defendant accepted. M. failed to complete the building, and the defendant employed a third party to do so in accordance with the terms of the agreement:—Held, that the defendant was liable to pay the plaintiff, notwithstanding that M. did not complete the building. *Garner* v. *Hayes*, 10 A. R. 24.

**Conditional Contract**—*Condition not Fulfilled—Performance of Work.*]—Plaintiff entered into an agreement in writing with defendants to do certain work under a provisional by-law, which agreement contained this clause: "Notwithstanding anything hereinbefore contained to the contrary, this agreement . . is made subject to the final passing of the said by-law . . and in the event of the said by-law not being passed . . . then this agreement shall be null and void . . ." The by-law was never finally passed, and the agreement was produced at the trial by defendants to prevent the plaintiff recovering as on a quantum meruit:—Held, that the defendants were bound by the contract, and that the plaintiff on shewing the approval of the engineer, as provided by the agreement, was entitled to a mandamus to the defendants to raise the money. The stipulation as to the final passing of the by-law should receive a reasonable construction and could only be invoked when the work was not properly performed. *Quaintance* v. *Township of Howard*, 18 O. R. 95.

**Failure to Perform**—*New Contract—Incorporation of Provision as to Damages.*]—Plaintiffs on the 31st May, 1871, contracted to make and complete the iron work upon a building put up for defendant, by 1st July, 1871, and to pay $50 per week as liquidated damages for every week the same should remain unfinished after that time. Defendant had not the building ready to receive the iron work for nineteen weeks after the 1st July, but the plaintiffs did not finish their work for more than seven weeks after they were enabled to begin:—Held, that such a special provision as that for liquidated damages would not be considered as incorporated in the new contract under which the work was done after 1st July, though the plaintiffs might be liable for the delay in an action for damages. *Hamilton* v. *Moore*, 33 U. C. R. 520.

——— *Period of Credit.*]—Where work has been agreed to be done upon a certain credit, and the party, by failing to perform it within the time agreed upon, has disabled himself from suing upon the special contract, he cannot therefore recover on the common counts before the expiration of the credit under the agreement. *McMahon* v. *Coffee*, 1 U. C. R. 110.

——— *Periodical Payments—Independent Covenants.*]—The plaintiff sued in assumpsit for work and labour, and at the trial put in a sealed agreement under which he had agreed to perform the work, by which it appeared that defendant was bound to pay for the work at stated periods. The work was not done according to the contract, and the plaintiff subsequently sued in assumpsit, but was nonsuited at the trial, on the ground that the covenants in the sealed instrument were independent, and that he could have sued on the agreement for the money although the work was not performed:—Held, that the nonsuit was wrong. *Barton* v. *Fisher*, 3 U. C. R. 75.

——— *Prevention — Indivisible Contract.*]—In November, 1853, plaintiff agreed to clear and fence twenty acres of defendant's farm, to be cleared fit for seed by the 10th September, and all to be completed by the 20th; £30 to be paid in advance, and £30 on the 15th October. In the following spring a fire took place on the land occupied by defendant, and ran over a part which plaintiff had chopped; he told defendant that this would probably prevent him from finishing the job in time, and that he wished to give it up, but the defendant pursuaded him to continue, and he went on until the autumn, when he went off altogether, alleging as a reason that he had heard defendant intended to claim damages from him for not having finished in time. About fifteen acres were then cleared, which defendant had put in crop:—Held, that the plaintiff was not entitled to recover upon the common counts for the work performed, the contract being indivisible and defendant not having prevented its performance. *Orser* v. *Gamble*, 14 U. C. R. 576.

——— *Sealed Contract—Work Done in Part—Remedy.*]—The plaintiff agreed under seal with defendant to manage, cultivate, and improve the defendant's farm for one year, and do whatever work defendant should require during that period, in consideration of the sum of £95, payable at the expiration of the said term; plaintiff to have the use of the house on said farm, during the term, pasture for two cows, and half an acre of land for a garden. The plaintiff served the defendant until within three weeks of the end

of the term; and then left the farm at the defendant's request, and upon defendant's promise, if he would do so, to pay or settle with him:—Held, that the plaintiff could not declare in assumpsit for work and labour generally, because the work was done under a sealed contract, which he had not performed. Quære, whether he had any remedy at law. *Parnell* v. *Martin*, 5 C. P. 475.

**Farming on Shares**—*Lease or Hire of Labour.*]—P., owning land, agreed with M. and B. that he should furnish a team of horses and the farming implements required, together with the seed, and they agreed to do the work as he should direct, and harvest the grain raised; each party was to pay for the threshing of their respective share of the grain; M. and B. were to keep up the fences, and to draw and sow the plaster required, which P. was to furnish; they also agreed to board all threshers engaged on the place, to dig all the root crops, and to house P.'s share, and to do the haying, and put two-thirds of all the produce in the barn for P., and not to leave the place while their labour was required there; the bargain to be for the summer and fall, and cease when the fall work was done. For the next year there was a parol agreement, varied in this, that P. was not to find the horses, and they were to have one-half instead of one-third of the crops:—Held, not a letting of the land on shares, giving to M. and B. a term and possession, but a contract for remuneration for their care and labour, to be performed as P. directed. *Park* v. *Humphrey*, 14 C. P. 209. See *Draper* v. *Holborn*, 24 C. P. 122.

**Payment in Work**—*Demand.*]—Where an action was brought on notes payable in work:—Held, that the plaintiff could recover without proving a demand and refusal to do some specific work, it being incumbent on defendant to offer to perform work for the plaintiff. *Teal* v. *Clarkson*, 4 O. S. 372.

When a plaintiff fails to recover upon a special agreement to pay the plaintiff a certain sum in work, still open and executory, from not having made a legal demand upon the defendant to do the work agreed upon, he cannot recover upon the common counts. *Downs* v. *Macnamara*, 5 U. C. R. 333.

**Postponement of Work by Consent**—*New Agreement.*]—In March, 1852, the plaintiff and defendant made an agreement in writing, by which the plaintiff was to build a cottage for the defendant, and to complete it by the 1st November, for £212 10s., of which part was to be paid on the completion of the building, and the remainder at the times specified in the agreement. The defendant requested the plaintiff to postpone the work, and it was in consequence not commenced until August, 1853, and finished in March, 1854. It was not shewn that any new agreement had been made; but it appeared that, as wages and materials had increased in price, the plaintiff, when asked to proceed with the work in 1853, objected to being bound by the old agreement, and the defendant then promised to pay £100 at the completion of the building, and the whole sum if he could, saying he would probably pay the whole:—Held, that the first contract was clearly at an end, and that the plaintiff was not bound to declare specially on the subsequent promise, but might sue upon the common counts. *Havill* v. *Freeman*, 12 U. C. R. 223.

**Rescission**—*Proof of.*]—When there is a special contract for work and labour, it must be distinctly shewn that such contract has been rescinded before a recovery can be allowed upon the common counts for work specified in it. *Tyrrell* v. *Gamble*, 12 U. C. R. 669.

**Road Making**—*Payment by Tolls.*]—Defendants, being a joint stock road company, under C. S. U. C. c. 49, contracted with plaintiff to build for them four additional miles, an extension of the road originally contemplated, and to pay him by the tolls to be collected there and on three other miles of the road. This mode of payment was not authorized by the Act (s. 32), but the plaintiff built the road, defendants accepted it, and levied tolls upon it, and after handing them over to him for some time, refused to allow him to receive more, or to pay him for the work done:—Held, that they were liable upon the common counts. *Thornton* v. *Sandwich Street Plank Road Co.*, 25 U. C. R. 591.

**Sewers**—*Construction of—Dismissal of Contractor—Time—Specifications.*]—A contract for the construction of a sewer made between the corporation of a town and the plaintiff, payment for which was to be made by items according to schedule prices, provided for its completion within a limited time, which was extended by resolution of the council and again informally extended for a further period. The contract provided that if the contractor neglected or refused to prosecute the work to the engineer's satisfaction, the corporation might employ and place on the work such force of men and teams and procure such materials as might be deemed necessary to complete the work by the day named for completion, and charge the cost thereof to the plaintiff; and by the specifications, which were made part of the contract, the same powers were conferred without any restriction as to time. The work not having been proceeded with to the engineer's satisfaction, the corporation, before the expiration of the second extension of time, exercised the powers above conferred:—Held, that under the contract the power conferred could only be exercised during the time fixed for the completion of the work or the extension thereof, but under the specifications thereafter; and therefore, even if the corporation could not under the contract avail themselves of the second extension as granted informally, the powers were properly exercised under the specifications. *Mangan* v. *Town of Windsor*, 24 U. R. 675.

**Wrecking Contract**—*Liability—Arbitration—Negligence.*]—Defendants and another company had insured a vessel, which was sunk while being towed by the plaintiffs for her owners. An agreement was then entered into between the plaintiffs and the insurance companies, by which, after reciting that the liability for raising the vessel was undetermined, the plaintiffs undertook to raise her for a sum named, and it was agreed to submit to arbitration by whom such sum, and the other expenses of repairing the vessel, should be borne. After this the owners sued the plaintiffs for negligence in sinking the vessel, and recovered. The defendants refused to arbitrate, and the plaintiffs then sued them for work and labour:—Held, that they could not

recover, for defendants had agreed only to pay in the event of the arbitrators deciding that they were liable, and it was not certain whether the plaintiffs were entitled to be paid at all. The question as to the plaintiffs' negligence was left to the jury, and found in their favour:—Held, that such question could not be tried in this action; and semble, that on the evidence the verdict was wrong. *Calvin* v. *Provincial Insurance Co.*, 27 U. C. R. 403.

*See Canada Bank Note Co.* v. *Toronto R. W. Co.*, 22 A. R. 462, *ante* CONTRACT, II, 4; *Stock* v. *Great Western R. W. Co.*, 7 C. P. 526, 9 C. P. 134, *post* III.

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3. *Tenders and Specifications.*

**Alteration** — *Notice — Inspection — Jury.*]—One L. advertised for tenders for an addition to a store, intending to furnish the bricks for the work himself. He afterwards decided that the contractor should furnish the bricks, and the architect notified the persons tendering by leaving a written notice on his desk where the specifications were put for their inspection, but no notice of the alteration was made in the specifications. The plaintiff, it was shewn, tendered for the work, but the defendant's tender was accepted, and the plaintiff sub-contracted under him. Upon an action brought by the sub-contractor against the contractor for the price of the brick, the Judge left the question on the contract to the jury, who found for the plaintiff:—Held, that upon the ordinary reading of the contract the plaintiff was bound to furnish the brick, but a new trial was granted because the construction of the contract had been left too much to the jury. *Ireson* v. *Mason*, 12 C. P. 475.

**Proviso in Contract**—*Signing of Specifications—Omission—Excuse for Non-performance.*] — Declaration, that the defendant by indenture covenanted to do "all the work included in certain specifications" required for the erection of a building on Wellington street, in the city of Toronto, but did not perform the same. Plea, that by the indenture it is declared that the works to be performed were the works represented and specified in certain plans and specifications thereof prepared for said work and signed by one L., an architect, and the defendant, and that said works should in all things be performed according to said plans and specifications, and defendant says that no specifications of said work were prepared therefor and signed by said L. and the defendant, and by the want of such specifications the defendant was prevented from performing the works. Replication, that said plans and specifications were prepared for said work, as defendant, when he executed said indenture, well knew, and were the same specifications mentioned in the declaration, and the defendant was not, by the want of such specifications, prevented from performing said works:—Held, plea good, and replication bad; for that the specifications, signed by L. and by the defendant, were an essential part of the contract, and as they had not been signed the contract was not perfect. *Gooch* v. *Snarr*, 34 U. C. R. 616.

——— *Signing of Specifications—Omission of—Payment—Quantum Meruit.*]—The plaintiff agreed in writing, on the 19th February, to build a house for the defendant according to the plans and specifications of one R., with alterations made by L., for $25,000. Afterwards some alterations were agreed upon, and on 30th April a contract was executed by plaintiff and defendant by which the plaintiff was to build the house for $26,596, and this contract recited that the plaintiff had agreed to do all the work required according to certain plans and specifications prepared by R., with certain suggestions and amendments made by L. and signed by the plaintiff, subject to the various stipulations and conditions mentioned in the contract. The plans were signed by the plaintiff, but not the specifications; but he finished the building according to the specifications prepared, and from time to time obtained certificates for payment from the architect for the work executed as under the contract, in accordance with its provisions, by which the money was to be paid on such certificates, no extra work was to be paid for without a written order, and in the event of any dispute the architect was to be the sole and final judge:—Held, that the plaintiff's omission to sign the specifications could not entitle him to set aside the contract as not complete, and to claim for the work done as upon a quantum meruit, without the architect's certificates. *Gearing* v. *Nordheimer*, 40 U. C. R. 21.

*See Mangan* v. *Town of Windsor*, 24 O. R. 675, *ante* 2; *Diamond* v. *McAnnany*, 16 C. P. 9, *ante* 1.

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II. EFFECT OF ACCEPTANCE OF WORK.

**Municipal Corporation**—*Public Building—Novation—Executed Contract—Seal.*]—The defendants passed a by-law, approved of by the ratepayers, reciting that there was "an urgent necessity for a building to be used by the municipal corporation as a lock-up, fire hall, council chamber, and public hall," for the purpose of acquiring the land and erecting such a building at a cost of $4,500, for the raising of which sum provision was therein made. B.'s tender for carpenter work, &c. (including a shingle roof), was accepted, but at a special meeting of the council, at which only three of the councillors, with B. and L., the plaintiff, were present, an arrangement was made by which B. threw off $4 a square, and was relieved of the roof part of his contract, and L. agreed to put on a metallic roof at $6 a square, and it was resolved by the council that "iron shingles instead of wooden shingles be put on the roof of the new town hall." All this was done subject to the approval of the reeve, who was not present, but who afterwards approved of it, and at whose instance L. ordered the material and did the work. L. received a payment on account, but on the discovery of some defects in B.'s work, the defendants refused, although they had taken possession of the building, to pay the balance, on the ground that the roof was not properly done, and that L. was a sub-contractor under B., and that there was no contract under seal with him:—Held, that the legal effect of this was to consummate a tripartite agreement, by which B. was to give up part of his contract, and L. was to do the work for a specified price; that between the plaintiff L., the defendants, and B. there was

a novation of contract so far as the roof was concerned, and as to that L. became the principal and only contractor. Held, also, that the taking possession, payment on account, &c., was sufficient evidence to justify a finding of an acceptance of the work as an executed contract, or a case "of an actual and de facto performance of the contract by one party, of which the other party has taken, received, and enjoyed the benefit." Mayor, &c., of Kidderminster v. Hardwick, L. R. 9 Ex. 18, followed. Munro v. Butt, 8 E. & B. 738, distinguished. A municipal corporation are liable on an executed contract for work done by their order, on their behalf, and for their benefit, though there be no agreement under seal, if the thing done were urgently required for the purposes of the corporation, and especially so where the price to be paid is not of large amount. Robins v. Brockton, 7 O. R. 481, referred to. *Laurence v. Village of Lucknow*, 13 O. R. 421.

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III. Evidence in Actions for Work and Labour.

**Acknowledgment of Balance.**]—Under a bill of particulars for work and labour, the plaintiff may give in evidence an acknowledgment of the specific balance due therefor. *Drummond v. Bradley*, Dra. 243.

**Agreement**—*Production of.*]—In assumpsit for work and labour, when there is a written agreement fixing the price, such agreement must be produced on the trial of the cause, unless it has been rescinded. *Wallen v. Mapes*, 5 O. S. 96.

**Denial of Special Contract**—*Adducing in Answer to Alternative Claim.*]—The plaintiff entered into an agreement (not sealed by defendants) for the performance of certain work at specified prices, with a condition that the defendants should have the right of stopping the work at any time, paying plaintiff for the damage thereby occasioned. Detentions were made, which the company's engineer swore were allowed for in the estimates and certificates. The plaintiff sued specially on this agreement, and on the common counts. At the trial defendants' counsel contended (successfully) that the plaintiff could not recover under the special contract. Each item was left specifically to the jury, who found for the plaintiff for the demurrage, irrespective of other claims. On a motion for a new trial on the law, evidence, and for misdirection:—Held, that the defendants, having denied the contract upon which the plaintiff's first count was based, could not invoke its aid to defeat the plaintiff's claim upon the common counts, or for the recovery of damages. A new trial was, however, granted on payment of costs, on the ground of excessive damages. *Stock v. Great Western R. W. Co.*, 7 C. P. 526.

*See*, also, *S. C.*, 9 C. P. 134.

*See Logan v. Stranahan*, 12 U. C. R. 15, *ante* I. 1.

**Parol Evidence**—*Parties to Contract—Liability.*]—In an action for work and labour against A. and B. the plaintiff put in an agreement headed, "An estimate for the carpenter and joiner work of a brick cottage, to be done by Mr. William Walker" (defendants' father). Then followed the specifications, and an agreement by plaintiff to do the work. Receipts were indorsed, signed by the plaintiff, but not saying from whom the money was received. The plaintiff was not to find materials, and no time was mentioned for completion of the work:—Held, that parol evidence was admissible to shew that defendants were liable on the contract. *Hubbard v. Walker*, 13 U. C. R. 205.

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IV. Parties and Pleading in Actions for Work and Labour and for Breach of Contract.

1. *Liabilities and Rights of Parties.*

**Liability of Defendants** — *Joint Contract.*]—The defendants' architects having by the defendants' instructions advertised for tenders for the construction of two wholesale stores, the plaintiff tendered for the excavation and brick and stone work, &c., of the two stores at an entire sum of $5,768, which was accepted by the architects; and an agreement was then drawn up, purporting to be between the plaintiff of the one part, and the defendants of the other part, under which the plaintiff was to erect and build the two stores for the sum of $5,768, which the defendants covenanted to pay in the proportion of eighty-five per cent. as the work progressed, on the architects' certificate, and the remainder in one month after completion. This agreement was executed by the plaintiff, but not by the defendants. The plaintiff then entered upon the work, and from time to time during its progress received from the architects certificates addressed to the defendants jointly, of the sums payable on the whole work, and not on each building separately, which plaintiff took to defendants, and each paid half. On the completion of the contract, the plaintiff obtained from the architects separate statements of the amounts due from each defendant, and after allowing a set-off which each defendant had against him, took their several notes for the balance due from each. The plaintiff swore that he thought it was a joint contract, and had no intimation that defendants were not jointly interested in the stores, while the architects stated that they had no instructions to draw a joint contract, and did not consider that this was one. In an action against both defendants on the common counts:—Held, that the contract was a joint and not a several contract, and that the fact of plaintiff's dealings with the defendants under it, as above stated, could not alter its legal effect. *Herbert v. Park*, 25 C. P. 57.

——— *Owner—Sub-contractor.*] — One S. had contracted to build a house for defendant, and had employed the plaintiff under an agreement to do a portion of the work. The plaintiff complained that S. did not pay him as he had undertaken to do, and was unwilling to proceed, and after some negotiation the following paper was signed: "Stratford, 21st May, 1858—$198—Good to P. A. Loftus (the plaintiff) or bearer, for $198, payable so soon as Loftus completes and finishes his contract at U. C. Lee's dwelling house in Stratford. Alex. Scrimgour." This was indorsed by defendant Lee, and at the foot was written as follows:—"£56. A further sum of fifty-six pounds will be due to Loftus, being balance of contract, three months after said contract is completed and accepted by the archi-

tect. This sum I secure to Loftus for account of Scrimgour. U. C. Lee. A. Scrimgour." The work had been completed and certified; it was proved that before the writing was signed defendant had told the plaintiff that if he would wait he would be answerable for the whole amount due him, and defendant had paid the plaintiff $115, for which a receipt was indorsed on the paper. The first count of the declaration alleged that in consideration that the plaintiff, at defendant's request, would proceed with the work, defendant promised to pay him the £56, &c.; the other counts were for work and materials, and on account stated:—Held, that the plaintiff was entitled to recover the £56, but not the balance of the $198. *Loftus* v. *Lee*, 18 U. C. R. 195.

——— *Owner—Sub-contractor—Statute of Frauds.*]— One A. had contracted to build certain houses for defendant, and the plaintiff agreed with A. to do the brick work; but having some doubt as to A.'s ability to pay, the plaintiff hesitated to go on. The defendant told the plaintiff that he would see him paid, whereupon the plaintiff proceeded and finished the work:—Held, that the defendant's promise was within the statute, and, being oral only, the plaintiff could not recover for A.'s liability to the plaintiff continued, and defendant's only liability arose from this promise. *Bond* v. *Treakey*, 37 U. C. R. 369.

——— *School Trustees — Covenant — Unnamed Covenantor.*]—The agreement sued on was headed "Specification of schoolhouse in school section No. 4, Tilbury East." Then followed in detail the size of the building, and the work and material to be employed, and it concluded: "The whole to be of good material, and to be finished in a good workmanlike manner, and to be finished on the 1st July, 1873. In consideration the parties of the first part agree to pay the party of the second part the sum of $708, one-half on the 15th May, and the other half when the said schoolhouse is completed." Then followed the signatures of the three school trustees, with their corporate seal, and the signature of the plaintiff. It bore no date, but was proved to have been executed by the parties about the 1st March, 1873. It referred to no plan, but the trustees furnished the plaintiff with a plan to work by, and they paid to him $400 on account. They refused to pay the balance, or to accept the building, alleging that it was not properly constructed, but the trial Judge found for the plaintiff for the balance of the $708:—Held, that it was sufficiently clear from the instrument itself, and the acts of the parties, that defendants were the parties covenanting with the plaintiff, and that the instrument was intended so to operate; and the verdict was upheld. *Coghlan* v. *Tilbury East School Trustees*, 35 U. C. R. 575.

**Right of Plaintiff to Recover**—*Joint Contract.*]—In an action for work and labour against the executors of Z., it appeared that the work was done under two sealed contracts, entered into originally by Z. with one B., who had sublet one of these contracts to plaintiff and M., and the other to the plaintiff and D. The plaintiff had, by subsequent agreement with M. and D., respectively, acquired the sole interest in each of these contracts; but after he had done so, on each contract between B. and his sub-contractors an agreement under seal was indorsed, by which B. assigned all his interest in these contracts respectively to Z., and the sub-contractors—the plaintiff and M. in the one case, and the plaintiff and D. in the other—agreed to accept Z. in the place of B., and Z. agreed to assume the contracts, as if originally made by him with the sub-contractors. The agreement indorsed on the contract between B. and the plaintiff and D. was not executed by D:—Held, that the plaintiff could not recover alone, the liability being to himself jointly with A. and D. respectively on the respective contracts. The plaintiff also sued on account stated, and relied upon an account made out by defendants' book-keeper, headed as an account of the plaintiff with the estate of Z., including this work, and shewing a balance due to him; but the book-keeper stated that it was made out at the plaintiff's request, and on account of the sealed contracts:—Held, not sufficient to give a right of action to the plaintiff alone. *Zimmerman* v. *Woodruff*, 17 U. C. R. 584.

*See Hubbard* v. *Walker*, 13 U. C. R. 295, *ante* III.; *Brougham* v. *Balfour*, 3 C. P. 72, *post* 2 (a); *Cowan* v. *Goderich Northern Gravel Road Co.*, 10 C. P. 87, *post* V. 2; *Standing* v. *London Gas Co.*, 21 U. C. R. 209, *post* VI. 4.

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2. *Pleadings and Forms of Action.*

(a) *Common Counts—Right to Recovery on.*

**Value of Materials.**]— On counts for work and labour and goods sold and delivered, the value of the materials found and provided for carrying on the work cannot be recovered. *Wilson* v. *De la Hooke*, 6 O. S. 317.

**Value of Work**—*Acceptance—Recovery—Bar.*]—Where the terms of a sealed contract have been so far departed from as to prevent the contractor from suing upon it, but his employers have accepted the work, he may sue on the common counts for the value of the work done. Semble, that a recovery on the common counts for work and labour, or for any part of the value of the work, would be taken to preclude any other action for the same work. *Turley* v. *Grafton Road Co.*, 8 U. C. R. 579.

——— *Improvements by Tenant—Partnership—Goods Sold—Settlement.*]—A. and B. being partners, A. alone orally leased certain premises for a place of business, for five years, at a given rent. A. and B. went into possession. A memorandum for a lease was prepared by A., but never signed by the lessor. It was orally agreed between the lessor and A. that A. should erect a granary, &c., on the premises, the lessor to furnish the lumber and pay for the improvements at the end of the term. The lumber was furnished and the buildings erected with partnership funds. In the meantime the lessor ran an account at the store for goods. A. and B. afterwards dissolved, and B. released and assigned to A. all his right to debts, &c. A. then took C. into partnership, with whom the lessor settled the accounts for the goods, by allowing an alleged set-off. A. afterwards brought an action against his lessor for the goods sold and the value of the granary, &c.:—Held, that B. should have joined in such an action. (2) That the settlement with C. was not bonâ fide as against A. (3) That, no lease having been executed, upon the facts A. was a tenant at will, and that it might be orally agreed that

he should make improvements and be paid for them, and that plaintiff might sue for them in his own name though made with partnership funds. Quære, should the action be for work, labour, and materials, or upon the special agreement. *Brougham* v. *Balfour*, 3 C. P. 72.

——— *Improvements by Tenant—Equivalent of Rent—Remedy.*]—Where, under a parol agreement for a lease, made between defendant and plaintiff for ten years, on the terms of the plaintiff clearing or paying a rental either in clearing or in money, the plaintiff entered into possession, and after clearing a certain number of acres the defendant sold the lot, and the purchaser ejected the plaintiff:—Held, that the plaintiff could not recover under the agreement, not being in writing; nor under the common counts for the value of his services, for the clearing of the land was not the primary service for which the lease was, after the performance of the work, to be given as a mode of compensation; but the lease was the primary thing contracted for, and the work was reserved as a rent from year to year. Semble, that the plaintiff's remedy, if any, was for specific performance of the agreement against the purchaser, who had purchased with notice of the plaintiff being in possession. Semble, that if the bargain had been for work to be done by plaintiff in clearing the land, to be paid for by allowing him to occupy, and defendant had prevented the occupation, the plaintiff might have recovered the value of the work. *Draper* v. *Holborn*, 24 C. P. 122.

——— *Making of Tombstone — Sale of Chattel.*]—One W. during her lifetime orally ordered from the plaintiffs a tombstone, to be put up by them at the grave of her late husband. It was begun before and completed by them after her death, and they sued her administrator, on the common counts, for the price:—Held, that the plaintiffs' claim was for the sale of a chattel, not one for work and labour, and, there being no contract within the Statute of Frauds, that the plaintiffs could not recover. Lee v. Griffin, 3 B. & S. 272, followed. *Wolfenden* v. *Wilson*, 33 U. C. R. 442.

*See ante* I. 2.

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(b) *Other Pleadings.*

**Declaration** — *Necessary Averments.*]—Held, on demurrer to the declaration on a special contract by defendant to build a house for plaintiff, that it was unnecessary to set out the specifications in the declaration; but that the approbation of the architect should have been averred, or the omission of it sufficiently excused; and that the breach stated was insufficient, in making no mention of defendant's agreement to convey certain land in part payment. *Melville* v. *Carpenter*, 11 U. C. R. 130.

Declaration on a contract, for non-payment for work done, for refusal of the engineer to give explanations, and for wrongfully dismissing the plaintiff. The breaches assigned were held bad on various grounds. *Moore* v. *Great Western R. W. Co.*, 10 U. C. R. 243.

Declaration, that by an agreement, after reciting that it had been agreed that the plaintiff should make certain improvements in a house for defendants for £260, in consideration that the plaintiff did thereby covenant to make said improvements before the 15th May then next, defendants covenanted to pay therefor at the rate of £50 every three months from the 1st February then last; and it was further agreed that the plaintiff was to allow defendants the value of the fronts taken out of said house out of the £260, at a fair valuation by disinterested persons to be chosen by each party; that the plaintiff had always been ready to allow defendants the value of the said fronts out of the said £260 at a fair valuation; yet that 15 months had elapsed since the said 1st February, and the defendants had not paid the several sums of £50, to be paid every three months, amounting to £250, or any part thereof:—Held, on demurrer, declaration bad, because it was not shewn that any of the work had been performed, and therefore defendants could not be called upon to pay; and because it should have been averred either that the window fronts were valued, or that the plaintiff had appointed an arbitrator and called upon defendants to do the same. *Elliott* v. *Hewitt*, 11 U. C. R. 292.

The work was to be done at such places as should be pointed out by the plaintiff:—Semble, that in declaring on this contract it should have been averred that he did point out such places, or asked defendant to go with him for that purpose, and was refused, not merely that he was ready and willing to point out. *Saxton* v. *Ridley*, 13 U. C. R. 522.

Held, that the declaration was not bad for averring a promise by testator to perform certain work, and afterwards by defendants, as executors, to finish the same, testator having died before the time for completion expired. *Leonard* v. *Northey*, 22 C. P. 11.

Declaration on a deed, set out in it, by which plaintiff was to do all the work on an extension of defendants' railway. By the 17th clause of the deed defendants covenanted to provide all the rails required for the extension and works connected therewith, and further, when required by plaintiff, to supply him with engines, &c., for the purpose of ballasting, &c. By the 19th clause defendants agreed to pay the plaintiff for the work and materials the scheduled prices by monthly payments in certain proportions specified, and within a time named after the giving of a certificate by defendants' engineer. Clause 20 provided that the plaintiff would accept, during the first five months, defendants' notes at three months in payment, defendants agreeing to place at the order of the plaintiff, till the notes were paid by them, defendants' bonds to the value of said notes, such bonds being estimated at 85 per cent. of their face value, and after the first five months defendants agreed to pay cash. Clause 22 declared time to be of the essence of the contract. The declaration averred that "the plaintiff did all things necessary on his part to entitle him to have the said contract performed by defendants, and the time for so doing has elapsed." The breaches assigned were, that the plaintiff duly performed work in accordance with the contract to the amount of $204,000, and received $154,000, but that defendants had not paid the balance; that the plaintiff did large quantities of rock excavation and extra work, and was entitled to $50,000

therefor, which defendants had not paid; and that defendants did not provide iron rails, &c.:—Held, that the general allegation would only cover acts to be done by the plaintiff, and therefore sufficiently averred the request by the plaintiff to provide the engines, &c., but not that the engineer had granted the certificates; but that this defect was covered by defendants pleading over. *Shanly* v. *Midland R. W. Co.*, 33 U. C. R. 604.

**Plea** — *Deduction for Delay.*]—Debt for work and labour. The defendants pleaded, as to part of the sum demanded, that the work was done and materials provided under a certain contract between the plaintiffs and defendants, by which it was agreed that in case all the work should not be done on the day appointed in the agreement therefor, to wit, on the 15th February, 1851, the plaintiffs would permit the defendants to deduct and retain the sum of £6 per week from the money agreed upon to be paid for every week beyond the time allowed; that the plaintiffs did not complete the work until thirty weeks had elapsed beyond the time appointed, wherefore the defendants became entitled to deduct a sum exceeding that in the introductory part of the plea mentioned:—Held, plea bad, for the different reasons given by the court. *Worthington* v. *County of Haldimand*, 10 U. C. R. 217.

——— *False Representation.*]—Action for work and labour in cutting and sawing timber for defendants. Equitable plea, false representation by plaintiff as to his title to the land on which the timber was cut, whereby defendant was induced to purchase said land, and suffered loss, exceeding plaintiffs' claim, &c. *Lapp* v. *Firstbrook*, 24 C. P. 239. See *Georgian Bay Lumber Co.* v. *Thompson*, 35 U. C. R. 64.

——— *Leave and License—Acceptance of Work.*]—As an answer to the declaration for breach of contract set out in this case, in not building a marine engine and boiler for plaintiff's testator, defendants pleaded (3rdly) that their testator, and defendants as executors, since his death, made all the variations from the plans and contracts in the declaration mentioned by the leave and license of plaintiff and his agent:—Held, bad, among other reasons, because leave and license cannot be pleaded to a breach of contract. Fifth plea, that as to so much of the declaration as referred to alleged imperfections of material and workmanship, after the occurrence thereof, and before suit, said boiler and engine were taken by plaintiff from defendants, as executors, whereby, and by force of the contract set out in the declaration, defendants ceased to be liable to damages in respect of the causes of action to which the plea was pleaded:—Held, good. The 7th plea stated that, after testator's contract and promise, it was agreed between him and plaintiff that he should not perform them, but, instead, testator should deliver to the plaintiff, who was to accept, a different boiler and engine, larger and more valuable, requiring longer time for construction, and afterwards, before action, testator in his lifetime, and defendants, as executors, did make and deliver to plaintiff, who accepted same upon such terms, and paid the price thereof:—Held, bad. *Leonard* v. *Northey*, 22 C. P. 11.

——— *Not to Whole Breach.*]—Assumpsit on a contract to make and furnish a steam engine and boiler, and that the said boiler should be made of good and sufficient materials, and should be reasonably fit and proper for the said engine, and the reasonable and proper working and use thereof. Breach, that the boiler furnished was not so made, and was not reasonably fit and proper. Plea, that the said boiler was made of good and sufficient materials:—Held, plea bad, as not answering the whole breach. *Abel* v. *Leonard*, 12 U. C. R. 192.

Declaration on a building contract. Breach, that neither the work done nor the materials were to the satisfaction of the architect named in the agreement. Plea, that plaintiff himself superintended, &c.; and that certain of the work and materials provided by defendants, under the superintendence of plaintiff, were subsequently disapproved of by the architect:—Held, bad, as professing to answer the whole breach, but pleading only to a part not specified or defined. *Melville* v. *Carpenter*, 4 C. P. 159.

——— *Setting out Contract.*]—The plaintiffs declared on a building contract under seal, by which they covenanted to do certain work for defendants, to be paid for as the work should progress upon the written certificates of the overseer in charge; and they averred that defendants covenanted by it that the overseer should give such certificates when the plaintiffs were entitled thereto, alleging a breach of this covenant by defendants. Defendants pleaded that the agreement was as follows, setting it out verbatim, and making no further averment; to which the plaintiffs demurred:—Held, that defendants had taken the right course in so pleading; that the plaintiffs by demurring had admitted the contract declared on to be as alleged in the plea; and that the question whether it sustained the declaration, was thus properly raised. *Kempster* v. *Bank of Montreal*, 32 U. C. R. 87.

——— *Settlement of Accounts—Willingness to Pay.*]—In assumpsit for work and labour, it is sufficient to plead that after the accruing of the causes of action in the declaration mentioned, and before the commencement of the suit, the plaintiffs and defendants accounted together of and concerning the causes of action in the declaration mentioned, and of and concerning certain other demands of the defendant against the plaintiffs; and upon that accounting a sum of £50, and no more, was found to be due from defendant to plaintiffs, which he, the defendant, then promised to pay to the plaintiffs, and which he hath always been willing to pay. *Melville* v. *Carpenter*, 11 U. C. R. 132.

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## V. Performance of Work.

### 1. *Completion.*

**Building**—*Delivery before Payment.*]—Where A. contracted to build a house for B., and to deliver possession thereof when finished, upon which he was to be paid:—Held, that no action would lie to recover the price until an absolute and unreserved delivery of the house had taken place, and that he had not a right to withhold the key of the house until he received payment, though B. had not acquired any title to the land on

which it was built. *Johnson* v. *Crew*, 5 O. S. 200.

**Part Performance**—*Payment—Bar.*]—Upon a contract extending over several years for work and labour to be paid for by instalments, defendants admitted part performance, and pleaded general non-performance to the satisfaction of their officer named in the contract, and that complete performance was a condition precedent to payment:—Held, that by payment in part they were not barred from claiming such full performance. *Coatsworth* v. *City of Toronto*, 10 C. P. 73.

**Payment**—*Failure to Prove Completion according to Contract.*] — L. sued N. et al. to recover from them the balance of account due under and in pursuance of an agreement under seal providing that "L. was to run according to his best art and skill a tunnel of 200 feet for the sum of $4 per running foot; that $150 should be advanced on account of the contract; the balance to be paid on the satisfactory completion of the work." L. made five tunnels, none of which was 200 feet, but alleged that he had done in all 204 feet. In addition to the count on the agreement the plaintiff inserted in his declaration the common counts for work and labour:—Held, that there was not a sufficient fulfilment of the agreement; and, inasmuch as L. had given no particulars nor any evidence under the indebitatus counts, the rule absolute of the court below, ordering judgment to be entered for the defendants, should be affirmed and the appeal dismissed with costs. *Lukin* v. *Nuttall*, 3 S. C. R. 685.

*See Orser* v. *Gamble*, 14 U. C. R. 576, *ante* I. 2; *Barrie Gas Co.* v. *Sullivan*, 5 A. R. 110, *post* VI. 5.

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2. *Departure from Contract.*

**Acceptance of Work, notwithstanding.**]—Where defendant had ordered iron castings of a specified thickness, and the plaintiffs made them much thicker; but defendant, notwithstanding, allowed them to be put up in the building for which they had been made, without objection, and the plaintiffs obtained a verdict for their full value, the court refused a new trial. *Good* v. *Harper*, 3 U. C. R. 67.

——— *Substantial Performance.*]—Defendant signed a writing, not under seal, addressed to the plaintiffs: "We, the undersigned, understanding that you have resolved to build a church 30x40 feet, at a cost of $1,000, in the village of B., do hereby covenant and promise to pay you the several sums opposite our respective names, to assist you in the erection of the said church, and we bind ourselves to pay a fourth of said subscription every three months, and that the whole be paid on or before the 1st October, 1849." The plaintiffs built a church at the place named, 36x48, and of the value of $1,200, with which defendant found no fault, but had a pew therein cushioned for his own use, which he had always occupied:—Held, that the church built was a substantial performance of the agreement. Held, also, that by the acquiescence and acceptance of the work by the defendant a new contract might be inferred on which he would be liable for work and labour and materials provided. *Baker* v. *Vanluven*, 14 C. P. 214.

**Acquiescence** — *Notice to Discontinue—Quantum Meruit.*]—By an agreement between the parties, dated 21st October, 1872, plaintiffs, who were advertising agents, agreed to place defendant's cards in the top space of their advertising frames in 100 railway stations, specified, and to hang his cards in all the railway stations under their control where it did not appear in the frames, for five years, the defendant to pay therefor $200 per annum, by quarterly payments. The plaintiffs only inserted the cards in frames at 99 stations, and not in all cases, though usually, at the top, and hung them up separately in 144 stations; but they did not properly maintain the cards, there being, in 1875, 16 places where cards were not in the frames, and about 40 where they were not at the top, and similar defaults occurred in 1873. Defendant made the first quarter's payment, but refused to pay more, on the ground that the contract was not performed, but it was proved that, though he was aware that the plaintiffs were not literally performing the contract, he never notified them to discontinue the advertisements:—Held, that plaintiffs might recover the actual value of their services on a quantum meruit, the defendant, if damnified, being entitled to claim a reduction from the contract price for the default, or to bring a cross-action therefor. *Foster* v. *Wilson*, 27 C. P. 543.

**Authority of Engineer of Company.**]—An agreement was entered into between a gravel road company and W., to construct a gravel road at a certain price and on a certain route, which route was afterwards deviated from by the company, and their engineer instructed the plaintiffs (who were the subcontractors of W.) to construct the extra portion created by the deviation:—Held, that the plaintiffs could not maintain an action against the road company, the company not having contracted with the plaintiffs, and their engineer having no authority to bind defendants by an agreement with the plaintiffs. *Cowan* v. *Goderich Northern Gravel Road Co.*, 10 C. P. 87.

**Authority of Members of Municipal Council** — *Alteration of Prices — New Contract.*]—On 7th November, 1871, plaintiff executed two similar contracts to build two bridges, which, though purporting to be, were not executed by defendants, agreeing to do the work in accordance therewith, and with the descriptions in the specifications attached, at certain stated prices, with a drawback of fifteen per cent. to be retained till after completion. The contracts contained clauses that the same prices were to apply to any change or alteration of the work duly authorized by the board of works; that the whole work was to be executed to the satisfaction of defendants' engineer in charge and of the board of works; and that in case of dispute the engineer's decision was to be final. The plaintiff put in a superior class of masonry work to that called for by the specifications, without the authority of the engineer or board of works, but he did so, as he stated, from encouragement received from individual members of the council, that the city would not let him lose thereby. In September, 1872, in consequence of the plaintiff's representation of

the general increase of cost, defendants paid plaintiff the drawback. Subsequently he wrote to the council complaining of the loss he had sustained by the increase in the price of iron, and by putting in the better materials, and requested to be paid on a valuation. The defendants refused to assent to this, but agreed to pay for the increased price of the iron on plaintiff and his sureties agreeing, except as to the iron, to complete the work at the contract prices. On 4th July, 1873, an agreement to this effect, under seal, reciting the two previous contracts, was executed by both the plaintiff and defendants, and defendants paid the plaintiff $20,000, which he was then out of pocket on the iron. The work proceeded, and plaintiff was paid from time to time on the engineer's certificates until December, 1873, when he again wrote asking for a valuation for the same reasons as before, but nothing was done on this. Subsequently the engineer granted his final certificate, on which plaintiff was paid. It appeared that the engineer had omitted a sum of $1,882.00, which he had agreed the plaintiff should be paid, and which another engineer appointed by defendants to make certain measurements and valuations found to be due to the plaintiff. On a reference to arbitration the arbitrator found that plaintiff was entitled to this sum, as also to $6,808 for the superior masonry work:—Held, on appeal from the award, that the plaintiff was entitled to the first item, but not to the last; for that there was no evidence of any agreement to pay other than the contract prices; and that what took place with the individual members of the council could not affect the matter, nor could plaintiff set up the defendants' non-execution of the contract, at all events after the agreement of 1873. *Goodwin* v. *City of Ottawa*, 28 C. P. 561.

**Condition Covering Deviation** — *Subcontractor—Reference to Main Contract.*]—Declaration, that section 59 was laid out on a certain portion of the O. S. and H. Railway, and the defendant had contracted with the contractors with the company for making the said road; and, in consideration that the plaintiff would do certain work on said section at certain prices and rates, defendant promised the plaintiff that he should, in a reasonable time after making his contract, have possession of the said section, to enable him to go on with his work; that the plaintiff commenced the work and did a large portion thereof, and frequently requested the defendant to put him in possession of the remaining portion of said section to enable him to complete his contract. The breach assigned was, that it was not in the power of defendant to give the plaintiff possession when so requested, and that the railway company changed and altered the line of road, so that the said section was located at a place and on a line different from that on which it had theretofore been — Held, on demurrer, declaration bad; for it appeared that the change of line had been made by the company, and the plaintiff's agreement with the defendant was subject to the conditions of the defendant's original contract. *Summers* v. *Geary*, 11 U. C. R. 134.

**Effect on Operation.**] — Remarks as to the circumstances under which a building contract is or is not rendered inoperative by departure from its terms. *Kesteven* v. *Goodcham*, 20 U. C. R. 500.

*See Leonard* v. *Northey*, 22 C. P. 11, *ante* IV. 2 (b); *Logan* v. *Stranahan*, 12 U. C. R. 15, *ante* I. 1; *Melville* v. *Carpenter*, 4 C. P. 159, *post* 5.

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3. *Destruction of Work while in Progress.*

**Fire**—*Possibility of Delivery before Destruction.*]—Defendant agreed with the plaintiff to saw for him at a certain price whatever logs should be delivered at defendant's mill. plaintiff to draw away the lumber as soon as possible after it was cut; defendant also agreed to deliver at Port Perry, within a reasonable time, any lumber cut by him under the agreement after the 1st March. Some lumber was cut before the 1st March and drawn away by the plaintiff; some was also cut after the 1st March, and this was destroyed at the mill by an accidental fire in June following. In an action for non-delivery the jury found that of the latter portion defendant might have delivered about 40,000 feet before the fire:—Held, that the plaintiff was entitled to recover the value of lumber so destroyed and which might have been delivered, and that defendant was entitled to be paid for sawing this lumber as well as that drawn away by the plaintiff. *Schofield* v. *Town*, *Town* v. *Schofield*, 12 U. C. R. 439.

——— *Work Done before.*]—Held, that, under the facts of this case, the destruction of the building by fire before completion of the plaintiff's work, could not defeat his claim for what he had already done. *Hubbard* v. *Walker*, 13 U. C. R. 205.

**Vis Major**—*Effect on Contract.*]—Where an executory contract is entered into respecting property or goods, if the subject matter be destroyed by the act of God or vis major, over which neither party had any control, and without either party's default, the parties are relieved. *McKenna* v. *McNamee*, 14 A. R. 339, 15 S. C. R. 311.

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4. *Penalties or Damages for Non-performance.*

**Measure of Damages.**] — The plaintiff agreed to complete and set up by a certain day a steam engine and machinery in defendant's mill, in which he had previously been using water power, but failed to complete it for some time afterwards. The master, in estimating defendant's damages, allowed him, for loss of profits, in addition to rental of the mill and interest on the value of the machinery and of logs waiting to be sawed, $118. On appeal from the report, the court made an order declaring "that the true measure of damages the defendant is entitled to claim is the amount which would have been earned by the mill in the ordinary course of employment," and referred it back to the master to review his report. On appeal the judgment was reversed; the court being of opinion that the master had been sufficiently liberal in his allowance of damages to the defendant for breach of the contract; and that had any greater amount of damages been given it could have been allowed as speculative damages only. The right to recover for loss of profits discussed. *Corbet* v. *Johnson*, 10 A. R. 564.

*See McGinnis* v. *Village of Yorkville*, 21 U. C. R. 163, *post* VI. 4; *Fisher* v. *Berry*, 16 C.

P. 23, *post* 7; *Beckett* v. *Cockburn*, 31 U. C. R. 610, *post* 7; *Simpson* v. *Kerr*, 33 U. C. R. 345, *post* 7; *Hamilton* v. *Moore*, 33 U. C. R. 520, *ante* I. 2; *S. C., ib.* 100, *post* 5; *S. C., ib.* 275, *post* 5; *Scott* v. *Dent*, 38 U. C. R. 30, *post* VI. 1; *Chatterton* v. *Crothers*, 9 O. R. 683, PENALTIES AND PENAL ACTIONS, I. 1 (a).

5. *Performance Prevented or Rendered Impracticable by Employer.*

**Breach**—*Action for — Plea — Argumentativeness.*]—To a declaration in assumpsit for breach of an agreement to clear a piece of land, defendants pleaded that after the making of the agreement, and before suit, to wit, on, &c., defendants entered upon the work, and partly performed the same, and would have completed the agreement with plaintiff, had not plaintiff, against the will and without the consent of the defendants, wrongfully entered and expelled them from the land, and prevented defendants from completing their agreement:—Held, bad, as being argumentative and not shewing the alleged wrongful act of plaintiff to have been committed before defendants were guilty of a breach of the agreement. *Patterson* v. *Ross*, 6 C. P. 194.

**Damages for Prevention**—*Action for—By-law—Illegal Contract.*]—S. & Co., contractors for the erection of a building for the respondent in the city of St. John, N.B., brought an action for damages for having been prevented by respondent from carrying out their contract. The declaration also contained the common counts, part of the work having been performed. By the terms of the contract the building, when erected, would not have conformed to the provisions of a by-law of the city passed under authority of an Act of the general assembly of New Brunswick, 41 Vict. c. 7) two days after the contract was signed:—Held, that the by-law of the city of St. John made the said contract illegal, and therefore the plaintiffs could not recover. Walker v. McMillan, 6 S. C. R. 241, followed. *Spears* v. *Walker*, 10 S. C. R. 113.

**Delay**—*Action for—Plea.*] — Declaration for liquidated damages fixed by contract for not finishing by the day named the carpenter's, joiner's, and tinsmith's work, required to complete a house to be erected by defendants for the plaintiff. Plea, that defendants would have completed the work within the time specified therefor, but were delayed by the masons employed by the plaintiff to build the brick work of said house, and were thereby, without any default on their part, hindered and prevented from completing said work within such time:—Held, plea good, for, although it was not stated in the declaration that the plaintiff was to do the brick work, yet nothing appeared necessarily inconsistent therewith, and it was distinctly averred in the plea, so that an issue taken thereon must have led to a determination of the case on the merits. Held, also, that the defence set up was clearly good. *Papps* v. *Melville*, 16 U. C. R. 123.

Declaration for not completing certain work within the time specified. Plea, that before the time limited for the completion of the work, &c., had expired, plaintiff required certain alterations and variations, which said alterations, variations, and additions were made by defendants, and defendants were thereby delayed and hindered from the performance of the work within the time limited. The plaintiff in his declaration having alleged certain alterations and variations, but not in delay of the work, the plea was held bad, as attempting to alter the terms of the covenant declared on by matter subsequent to the covenant, and not shewing that the defendants were bound to do the work so required. *Melville* v. *Carpenter*, 4 C. P. 159.

**Failure to Perform in Time**—*Action for Price—Acceptance of Work—Award.*]—The first count alleged that by an indenture, dated 2nd December, 1853, and made between plaintiffs and defendant, plaintiffs agreed to provide materials, &c., and do certain work on certain sections of the Toronto and Hamilton railway, the work to be finished according to plans and specifications, and to the satisfaction of the defendant, and of the chief engineer of the railway company, to be completed by the 15th November, 1854. And defendant agreed to pay plaintiffs in certain manner and proportions, retaining a percentage till it amounted to £6,000, which sum was to remain in defendant's hands till the completion of the work, with a further agreement that if at any time it should appear that the progress was not such as to ensure the completion thereof within the time limited, defendant might take the same out of the plaintiffs' hands and re-let the same or employ additional men, &c., and complete the same, in which event plaintiffs were to forfeit the percentage; and also that defendant should have power to alter the course of the railway, &c. Averment, that plaintiffs commenced the work, and before completing it, by agreement dated 16th December, 1854, between plaintiffs and defendant, after reciting the former agreement, and that every stipulation, covenant, and agreement therein should remain in force, &c., the plaintiffs promised in all respects to execute the works on the sections by certain days therein specified; and if plaintiffs were not authorized, before the 1st January then next, by defendant's agent to proceed with certain work therein mentioned, a certain extension of time should be allowed therefor. Averments, that plaintiffs immediately proceeded to the performance of the contract, and were then prepared to execute and complete the same, but were stopped by defendant in the exercise of the power in him vested, whereby plaintiffs were hindered, &c. Further averment, that after the execution of the agreement, and before the time limited, &c., defendant unnecessarily, wrongfully, and fraudulently hindered and delayed plaintiffs, &c., by means of which plaintiffs were put to great extra trouble and expense, yet they performed the work in accordance with the plans and specifications, &c., and defendant accepted and received the same from the plaintiffs. And the engineer, &c., wrongfully and fraudulently gave wrong monthly estimates, &c., and defendant wrongfully procured false and untrue final estimates to be given. Averment, that more than ten days before the commencement of the suit the sum of £10,000 was due from defendant to plaintiffs for work, and £2,500 bonus mentioned in the agreement, whereof defendant had notice, &c. Pleas, never indebted, payment, set-off; that the defendant did not hinder and delay; and not guilty. A verdict was taken by consent for £8,000, subject to arbitration. The arbitrators awarded non-performance by plaintiffs of the work by

the time specified; that the amount paid by defendant exceeded the amount of the engineer's estimates and bonus of £2,500; and that defendant had not paid the amount due before the commencement of the suit. Upon reference to the court by the arbitrators upon the facts:—Held, that, if the plaintiffs were claiming damages because of the wrongful and fraudulent acts, the award had rejected such claims. Held, also, that the second contract did not alter or annul the condition precedent to the plaintiffs' right to be paid on the first contract; and the arbitrators having found that the plaintiffs did not complete the work within the time specified, defendant was entitled to a verdict upon the first count; but that the subsequent acceptance of the work by defendant entitled the plaintiffs to recover on the common counts. *Brown* v. *Wythes*, 11 C. P. 561.

*See Beckett* v. *Cockburn*, 31 U. C. R. 610, *post* 7.

——— *Action for Price—Delay Caused by Defendant—Pleading.*]—In an action on the common counts for work, defendant pleaded that the work was done under an agreement set out, and that the plaintiffs, in violation of the agreement, and without any default of the defendant, did not complete the works by the day appointed, and that defendant, under the agreement, was entitled to deduct $1,207 for the delay. The plaintiffs joined issue:—Held, that the plaintiffs, under this issue, could not shew that the delay was caused by the defendant or by other workmen of his; but a new trial was granted, with leave to amend; and semble, that the plaintiff should reply specially the nature of the delay caused by defendant. *Hamilton* v. *Moore*, 33 U. C. R. 109.

Declaration on common counts for work and labour, &c., (being certain iron work on an unfinished building). Plea, as to $1,207, that the work was done under an agreement, by a provision in which defendant had a right to deduct $50 per week for every week after 1st July, 1871, during which the work remained unfinished; that it remained unfinished twenty-four weeks and one day, whereby defendant became entitled to deduct from the contract price $1,207. Replication, that defendant had not the buildings ready for the plaintiffs to do their work, without averring that the plaintiffs were ready and willing to complete it in time:—Held, replication good. Semble, that it would have been necessary to aver such readiness by the plaintiffs, if the action had been on the contract for not allowing plaintiffs to proceed with the work, &c. *S. C., ib.* 275.

——— *Action for Price—Delay Caused by Other Contractors.*]—Declaration on a contract, by which the plaintiffs agreed to do the carpenter's and joiner's work in erecting a house, &c., for defendant, as shewn on the plans prepared by defendant's architect, and to complete the work by the 1st November, of which house defendant was to complete the residue. It was alleged that it was defendant's duty and he promised to prosecute his part of the work so as to allow the plaintiffs to complete theirs by the day named, but that defendant delayed so long with the stone work, &c., that a large portion of plaintiffs' work had to be done in the winter, at great additional expense; and further, that defendant did not construct his part of the work according to the plans, so that the timbers provided by the plaintiffs became useless, &c. Plea (in substance), as to the charge that defendant was to make the residue of the house, and defendant's promise to proceed with the stone work, and the alleged causes of action in respect thereof—that the defendant employed an architect to invite tenders for the various descriptions of work, and each person tendering was aware that the work not taken by himself was to be tendered for and done by other contractors, not by the defendant; and that the plaintiffs tendered and contracted for their work, being aware that the tenders of other persons for such other work had been accepted; and so the defendant says he did not contract as alleged:—Held, that the plea shewed no defence, for the defendant must be treated as having impliedly undertaken to do what was necessary to enable the plaintiffs to proceed with their contract, and the fact of the defendant having with their knowledge employed others, against whom they were without remedy, could make no difference. *Yates* v. *Law*, 25 U. C. R. 562.

*See Summers* v. *Geary*, 11 U. C. R. 134, *ante* 2; *Havill* v. *Freeman*, 12 U. C. R. 223, *ante* I. 2; *Greer* v. *Gamble*, 14 U. C. R. 576, *ante* I. 2; *Lake* v. *Cameron*, 18 U. C. R. 622, *post* VI. 4; *McGinnis* v. *Village of Yorkville*, 21 U. C. R. 163, *post* VI. 4; *Leonard* v. *Northey*, 22 C. P. 11, *ante* IV. 2 (b); *McBrien* v. *Shanly*, 24 C. P. 28, *post* VI. 5; *McDonell* v. *Canada Southern R. W. Co.*, 33 U. C. R. 313, *post* 7; *Smith* v. *Gordon*, 30 C. P. 553, *ante* I. 2; *Clayton* v. *McConnell*, 15 A. R. 560, *post* VIII.

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6. *Proper Performance.*

**Stopping Work**—*Recovery on Quantum Meruit—Award.*]—P. was a contractor with the government of Canada for building a post office, and K. was sub-contractor to do the mason and brick work for a lump sum, the sub-contract consisting simply of an offer to give the work for the sum named and acceptance by K. P., being dissatisfied with the work done by K., took the contract out of his hands before it was completed, and finished it himself. K. then brought an action for the value of the work done by him, and on reference by the court to arbitration an award was made in K.'s favour. The court of appeal set aside the award and remitted the case to the arbitrator for further consideration, holding that, though the contract did not authorize P. to take over the work and finish it at K.'s expense, and the latter was therefore entitled to recover on the quantum meruit, yet the cost of completing the work was considerably in excess of the contract price:—Held, reversing that judgment, that, as it appeared from the evidence that the arbitrator fully understood the matter and got all the information that could be obtained on the subject, and as no impropriety or mistake was shewn to have been committed by him, no benefit could result from sending the award back for reconsideration, and the decree of the court of appeal was not justified. *Kennedy* v. *Pigott*, 18 S. C. R. 699.

*See Quaintance* v. *Township of Howard*, 18 O. R. 95, *ante* I. 2.

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7. *Time for Performance and Payment.*

**Agreement to Take Promissory Note**—*Premature Action.*]—Plaintiff agreed to do

certain work for defendants, for which he was to be paid half in cash on completion of the work, and half by a bankable note at three months, defendants to pay the bank charges and interest, and note to be renewed, if required, for two months longer. Plaintiff on 30th July, 1862, sued for the work done. The evidence shewed that the work was not completed until the 2nd May:—Held, that the action was brought too soon. *Fee* v. *White*, 13 C. P. 83.

**Non-completion in Time** — *Acceptance—Waiver.*]—Declaration, that the plaintiffs agreed to construct an engine for defendant, and to put the same into a certain steamer ready for service by the 1st April, 1871, the plaintiffs to pay $100 a day if not completed by the 15th; and defendant agreed to pay therefor certain sums in cash, and to give indorsed notes for other sums, the last note to be payable on the 1st July, 1872. And the plaintiffs averred that they did not complete the work by the 1st April, nor until a short time after the time fixed by the agreement, but that they did complete it within such further period, and defendant accepted and has since enjoyed and used it, and with this exception all things were performed. &c.; and, although defendant paid the sums payable in money, yet he had not given the note to fall due on the 1st July, 1872:—Held, declaration good, for that the acceptance enabled the plaintiffs to sue upon the agreement, and not upon the common counts only. Semble, that it would have been better to aver a dispensation or waiver of the time fixed. *Beckett* v. *Cockburn*, 31 U. C. R. 610.

——— *Continuation thereafter—Notice Terminating Contract—Cause of Delay—Prices.*]—The plaintiff contracted with defendants by deed to do certain work in the construction of their railway by the 1st January, 1872. The contracts contained a provision that if, in the opinion of defendants' engineer, there were just grounds for apprehension that the work would not be completed in the manner and within the time in the contract specified, it should be the duty of the engineer to serve a written notice upon the plaintiff, setting out the grounds of his apprehension, and specifying the manner, together with a reasonable time in which the plaintiff might cause such grounds to be removed, and if at the expiry of such time such grounds of apprehension were not removed, then the engineer should have full power to declare the contract forfeited by notice in writing. The work was not completed by the time specified in the contract, but the plaintiff continued beyond that time, receiving estimates and payments under the contracts; and on the 16th April, 1872, the engineer served a written notice purporting to be under the provision above set out, stating that in the engineer's judgment there were grounds for apprehension that the work to be done under the contract would not be completed in the manner and within the time specified; that the grounds were that the plaintiff had abandoned the work, and before abandonment sufficient men, &c., had not been employed; that such grounds might be removed by resuming work in five days, with a force sufficient to complete the work contracted for in sixty days from the date of the notice; and that unless such grounds of apprehension were removed in five days in the manner specified, the engineer would be at liberty to declare the contract forfeited. And by a subsequent notice the engineer declared the contracts forfeited accordingly. The plaintiff thereupon brought his action on the common counts for work and labour and on the contract, &c. The case was referred to an arbitrator, and in answer to questions submitted by him to the court by a preliminary award:—Held, (1) that the contracts could be put an end to under the above condition after the day fixed in them for the completion of the work, the parties having continued the work according to the contract, and as if the contract still governed. (2) That the engineer had no power to decide conclusively whether the plaintiff's delay of which he complained was caused by defendants' acts and omissions, and that it was still open for plaintiff to prove before the arbitrator that it was so caused, as an answer to a plea setting up a determination of the contract by defendants' engineer under the provision. (3) That the reasonableness of the time given by the engineer by his notice, was not a matter for him conclusively to determine, but was open to the consideration of the arbitrator. (4) That the contract prices would govern even for work done after the 1st January, 1872, unless the plaintiff could shew distinctly that the work was worth more after that date, that the delay was not caused by his fault, and that he had not assented to such prices. (5) That the plaintiff could recover for no work not certified and estimated for by the engineer (the contracts providing that payments should be made on such certificates and estimates), except that for work done after the 1st January the estimate might be dispensed with, if a higher price could properly be charged. *McDonell* v. *Canada Southern R. W. Co.*, 33 U. C. R. 313.

*See Lake* v. *Cameron*, 18 U. C. R. 622, *post* VI. 4.

——— *Deduction from Price—Pleading.*]—An agreement by plaintiff to do certain work specified contained the following clause, "the whole of the work to be completed and the mill in good running order by the 15th April next, under a penalty of $10 per day, from that day until completion, as and for liquidated damages, and to be deducted from the price to be paid for such work:"—Held, that it was not necessary to plead the right to make this deduction, but that as a deduction it was admissible in evidence under non assumpsit. *Fisher* v. *Berry*, 16 C. P. 23.

——— *Part Payment—Waiver.*]—A., under a special agreement dated 7th July, 1871, contracted with B. to finish a house and barn on or before the 10th August then next, under a penalty of £5 a day after that day, &c. A. did about two-thirds of the work, but did not finish it by the 10th August, or at any time afterwards. B., after default, took possession of the buildings, did work on them towards their completion, and paid a large portion of the price:—Held, that the special agreement was annulled by the default of A. and the subsequent conduct of B.; and that A. might recover on the common counts. *Hamilton* v. *Raymond*, 2 C. P. 392.

——— *Provision for Deduction — Architect's Certificate—Waiver.*]—Declaration for work and materials in construction of a house for defendants. Sixth plea, that by deed, dated 31st July, 1871, plaintiff covenanted to finish the works before the 31st October, 1871, under a forfeiture of $20 per week for every

week the work was left unfinished after that day; that the plaintiff did not complete the works till 20 weeks after said date, and thereby $400 became due from plaintiff to defendants, which defendants are willing to set off. Fourth replication, on equitable grounds, that by the said deed the work was to be done to the satisfaction of S. & G., architects, and if any dispute arose between the parties touching the works or the meaning of the contract, it should be referred to S. & G., whose award should be final; that by the said deed defendants agreed to pay the plaintiff $3,037, on the certificate of S. & G., 80 per cent. on the work and materials as done and provided, and the balance one month after the whole had been completed, subject to any detraction for the non-fulfilment of the terms of the deed; that the plaintiff completed said works to the satisfaction of S. & G., without objection as to the time within which it was to be done, either from the architects or the defendants; that the architects certified from time to time, as provided in said deed, and on completion certified that the whole had been completed, and that the plaintiff was entitled to be paid for the same; that more than a month had elapsed after the last certificate was given; that no complaint was made by defendants after or before that certificate, or before suit, that the work had not been completed in time, and no detraction was sought to be made for non-fulfilment of the contract; that defendants by parol waived and discharged the plaintiff from the performance of the alleged covenant, and on completion of the work promised to pay the plaintiff notwithstanding anything in the said indenture to the contrary contained; and that upon the faith of said promise the plaintiff delivered possession of the premises to defendants, who accepted the same. Fifth replication, on equitable grounds, that, after the breach in the plea alleged, the defendants, for good and sufficient consideration, by parol, discharged the plaintiff from the performance of the covenant and damages for the breach thereof:—Held, (1) fourth replication bad, for it disclosed no equity, and was multifarious, inconsistent, and embarrassing; that the architects could only certify subject to defendants' right of deduction; that the omission to complain was immaterial; that the parol waiver after breach, and without consideration, could not avail; that the promise to pay as alleged, might mean subject to the deduction; and that the delivering possession to the plaintiffs of their own building, as stated, could form no satisfaction. (2) That the fifth replication was good. *Simpson* v. *Kerr*, 33 U. C. R. 345.

*See Hazill* v. *Freeman*, 12 U. C. R. 223, *ante* I. 2; *Ferguson* v. *Town of Galt*, 23 C. P. 95, *post* VI. 4.

## VI. Remuneration.

### 1. *Deduction.*

**Architect** — *Negligence — Loss to Employer.*]—In an action by the plaintiff, an architect, on the common counts, for services in preparing plans and superintending the erection of a house for defendant:—Held, that defendant was entitled to deduct from the amount which the plaintiff could otherwise claim, any loss which defendant had sustained through the plaintiff's negligence, in certifying for too much for contractors who afterwards failed, in consequence of which defendant was compelled to have the work done by others at a much higher price. *Irving* v. *Morrison*, 27 C. P. 242.

*See*, also, *Badgley* v. *Dickson*, 13 A. R. 494.

**Penalty for Delay** — *Pleading.*]—Plaintiff, by deed, agreed to build a house for defendant for $1,150 by a day named, and that for each day that should elapse after that day until completion, defendant might deduct $5 from the contract price:—Held, that the sum of $5 per day was liquidated damages, not a penalty, and that it might be deducted from the contract price, without pleading it specially by way of set-off. *Scott* v. *Dent*, 38 U. C. R. 30.

*See Worthington* v. *County of Haldimand*, 10 U. C. R. 217, *ante* IV. 2 (b); *Fisher* v. *Berry*, 16 C. P. 23, *ante* V. 7; *Foster* v. *Wilson*, 27 C. P. 545, *ante* V. 1; *Canty* v. *Clark*, 44 U. C. R. 222, *post* 4; *McNamara* v. *Skain*, 23 O. R. 103, *ante* I. 2.

### 2. *Interest.*

**Demand**—*Written Contract.*]—Under s. 267, s.-s. 2, of the C. L. P. Act, R. S. O. 1877 c. 50, where a claim is payable otherwise than by a written contract, interest may be allowed from the date of a demand therefor in writing. Where interest was claimed on a sum of $96, admitted to be due before action commenced for extra work and materials furnished by the plaintiff, but not under a written contract, and no demand of interest was proved:—Held, that the claim for interest could not be allowed. *Inglis* v. *Wellington Hotel Co.*, 29 C. P. 387.

**Fixed Rate of Payment** — *58 Vict. c. 12, s. 118 (O.).*]—On a reference in an action in which money is claimed for work and services agreed to be paid for at a fixed rate, the referee may under 58 Vict. c. 12, s. 118 (O.), allow interest on the amounts claimed from the times they became payable. *McCullough* v. *Newlove*, 27 O. R. 627.

### 3. *Special Mode of Payment.*

**Debentures**—*Demand.*]—Plaintiff having contracted with defendants to perform certain works to be paid for monthly, in debentures made by defendants, on the estimates of their engineer; — Held, that on completion of the work and acceptance by the engineer of the defendants, the payment therefor became immediately due on request, and no demand was necessary. *Willson* v. *Counties of Huron and Bruce*, 10 C. P. 498.

**Division of Land**—*Parent and Child—Rescission of Agreement.*]—Defendant agreed with his son that if he would remain and work with him, so as to assist in paying for a lot of land which he had purchased, he should be paid for his services by the property being divided with him. The son remained, worked upon the land for several years, and died. After his death, defendant stated that he "had a conversation in his family, and he and his wife agreed to buy the land, keep the family together, and, when the land was paid for, divide the property among his sons:"—Held, that neither this conversation, nor a

subsequent offer on defendant's part to pay plaintiff, as administratrix of the son, $800 in satisfaction of the action, amounted to a repudiation or rescission of the only bargain between the father and son, which was to divide the land; and that, therefore, indebitatus assumpsit for the son's work and labour would not lie. *McClarty* v. *McClarty*, 19 C. P. 311.

**In Kind** — *Increase of Animals — Replevin.*]—A. agreed to manage B.'s farm, for which B. agreed to give him, among other things, one-third of the increase of young stock raised. B. left the country and died, and A. sold all the stock upon the farm:—Held, that he had no right to do so, and that B.'s administratrix might recover in replevin from the vendees. *Duffill* v. *Erwin*, 18 U. C. R. 431.

**Legacy** — *Relative.*]—Where services are performed by a relative or other person upon a mere reliance that the party serving will share his bounty under his will, such services will not support an action as upon an implied assumpsit to pay in money. *Whyatt* v. *Marsh*, 4 U. C. R. 485.

**Materials** — *Instalments — Progress of Work.*]—A. agreed to do certain work for B., for which A. was to be paid £3,600, partly in materials, &c., and the balance "in three yearly instalments, and according as the work progresses:"—Held, that each yearly instalment was limited by the work done and materials provided during the year. *Grant* v. *McDonald*, 9 C. P. 195.

**Promissory Note**—*Delivery—Tender.*]—Where a plaintiff contracts to receive for work at its completion a certain sum, and then agrees to accept from defendant at the day named the note of B. for the sum, if the note be not delivered at the day named, he may sue for the money. A tender of the note after the time specified, and refusal, will be no defence. *Fisher* v. *Ferris*, 6 U. C. R. 534.

**Shares**—*Delivery—Payment in Money.*]—The plaintiff performed certain work, amounting to $405, for defendants, a joint stock company, incorporated under R. S. O. 1877 *c.* 150, under an agreement for payment in shares of the capital stock of the company:—Held, that the plaintiff could not sue on an implied assumpsit to recover the value of the work so performed in money, unless it was shewn that the defendants were unable or had refused to deliver the shares. *Inglis* v. *Wellington Hotel Co.*, 29 C. P. 387.

**To Third Person**—*Order of Contractor.*]—Plaintiffs, N. & T., jointly contracted to perform certain work for defendants, to be paid monthly, as the work progressed. Defendants through their treasurer opened accounts and paid moneys on orders, making the cheques payable to N. & T., which cheques were indorsed sometimes by N. and sometimes by T., in the name of N. & T. Upon an action brought for a balance of $496.81, defendants pleaded a tender before action and payment into court of $256.81, and an order and payment thereunder in the following words:—"Brantford, 31st July, 1858. Allan Cleghorn, Esq. Reserve $300 from the Central School, payable to Ritchie & Russell, North & Turnbull." This was signed by Turnbull. Ritchie & Russell were grocers, from whom plaintiffs got goods on the credit of this order:—Held, that the payment thereunder was a payment on account of the plaintiffs, and could not be recovered again. *North* v. *Brantford School Trustees*, 10 C. P. 401.

*See Leonard* v. *Northey*, 22 C. P. 11, *ante* IV. 2 (b).

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*4. Subject to Certificate or Decision of Third Person.*

**Appointment of Substitute**—*Dispensing with.*] — Plaintiff agreed to do certain work for defendant, to be approved of by one D. B. It was provided that in case of D. B.'s absence, any other person might be appointed by plaintiff and defendant:—Held, that defendant might dispense with such appointment and accept the work himself. *Ladd* v. *Bullen*, 10 U. C. R. 295.

**Architect** — *Award—Extras—Pleading.*]—Declaration for work and materials, &c. Second plea, that the work was done under a sealed contract between plaintiff and defendants, by which plaintiff covenanted for a fixed sum to erect a town hall for defendants, and it was provided that no deviation should be made from the specifications without the authority of the architect, who should be at liberty to alter or vary the work, and add or deduct the value of such difference from the contract price; that a weekly statement should be rendered to the architect of all work which the contractor might deem extra, and no other extra work should be allowed for; that the plaintiffs rendered no statement of extra work; that the architect directed certain small variations, which lessened the contract price, and far exceeded any extra work done by the plaintiff; and so defendants alleged that all the plaintiff could claim for the work, &c., mentioned in the declaration, was less than the contract price, and that during the progress of the work they paid more than that, and more than he was entitled to. Third plea, on equitable grounds, that the plaintiff covenanted to complete the work on the 15th August, 1860, under a penalty of £10 a week beyond that time; that no statement of extra work was furnished; that the work was not finished for nineteen weeks after the day contracted for, for each of which weeks defendants claimed £10, and after deducting this sum defendants paid more than plaintiff was entitled to under the contract. Fourth plea, that it was agreed by the contract under which the work claimed for was done, that all disputes should be referred to the architect; that the defendants paid more than the contract price; that differences arose as to the work done, and the omissions, variations, and extra work claimed for, which said matters in difference formed the sole subject of the plaintiff's claim in this suit, and that these were referred to the architect, who awarded that the plaintiff was indebted to defendants in $579.32, for work omitted, less $253.70, due to him for extra work. Sixth plea, that several attaching orders had been obtained by judgment creditors of plaintiff; that as to one it was directed that the creditor should be at liberty to proceed against defendants; and that the others were duly served upon defendants and plaintiff:—Held, second, third, and fourth pleas good, sixth plea bad. At the trial it appeared that the plaintiff on the 8th January, 1861, had furnished defendants with a statement of his claim for extras. The architect informed him

that he was going to ascertain what was due, having been requested by defendants to do so, and the plaintiff made no objections, but gave him his statement indorsed "for the architect," who afterwards made his award, and gave it to defendants, but not to the plaintiff:—Held, with the contract, sufficient to prove the fourth plea. *McGinnis* v. *Village of Yorkville*, 21 U. C. R. 163.

——— *Certificate — Necessity for — Subcontractor.*]—Held, that the non-production of an architect's certificate approving of the work done, though required by the contract with the dismissed contractor, as a condition precedent to payment, did not preclude the sub-contractor from recovering under the oral agreement, provided the work was so done as to morally entitle him to such certificate. Lewis v. Hoare, 44 L. T. N. S. 66, followed. *Petrie* v. *Hunter, Guest* v. *Hunter*, 2 O. R. 233.

——— *Certificate — Wrongful Deprivation — Extras.*]—The plaintiff, having sued upon the common counts, produced no certificate from the architect; without a certificate, under the contract, no payment was to be made. The court in term allowed a count to be added claiming for a wrongful dismissal, by reason whereof he was prevented from obtaining such certificate, and entered a verdict upon it for the amount remaining unpaid upon the contract price, exclusive of extras, which, although ordered by the architect, had not been included in the weekly statement, under a provision of the contract with which the architect had no power to dispense. *Smith* v. *Gordon*, 30 C. P. 553.

——— *Certificate as to Defects—Necessity for Writing—Proof of Dissatisfaction—Extras—Acceptance.*]—The plaintiffs agreed in writing to build a house for defendant, for $10,405, $2,000 in advance, and the balance at the rate of 85 per cent. for the work fixed in its place, but no payment to be made without a written certificate from the architect; the remaining 15 per cent. to remain in defendant's hands for a month after the completion of the work, and also until all the defects which the architect should within that period certify to exist should be remedied. It was also agreed that no extras should be permitted or allowed unless agreed upon in writing, and that the writing should be produced before payment therefor. In an action to recover the 15 per cent., and for extras:—Held, that the certificate as to defects need not be in writing, that not being expressly required; and, there being evidence that the architect within the month orally signified his dissatisfaction with certain specified defects, that the plaintiff could not recover. Held, also, that there could be no recovery for extras claimed, no writing therefor having been produced. The defendant having taken possession of the building, which was upon his own land:—Held, that this could not entitle the plaintiffs to recover under the common counts. Munro v. Butt, 8 E. & B. 738, approved of and followed. *Oldershaw* v. *Garner*, 38 U. C. R. 37.

——— *Satisfaction of — Proof of without Certificate — Acceptance and User.*] — The plaintiffs agreed to put in three hoists, to raise and lower goods, in four wholesale warehouses which the defendant was building. The specifications required them to be "capable of raising a weight of 2,000 lbs. without risk." and the plaintiffs' offer, which defendant accepted, was to make them according to the plans and specifications, and to the satisfaction of defendant's architects, the same as in certain other warehouses named. They were put in in June, and the defendant's tenants were in in the same month. On the 31st August defendant's architects wrote to the plaintiffs requiring them to remove the hoists and put in others, and the plaintiffs then made some improvements, which were completed in December. After the alterations were completed there was no evidence either of a refusal to accept or of any direct acceptance, but the hoists remained in the warehouses and were used by the tenants until the 13th February following, when the whole premises with everything in them were destroyed by fire. The defendant had left the country in January, and did not return until after the fire. The architect, who was called as a witness, said that he never had been satisfied with the hoists:—Held, reversing the decision in 23 C. P. 263, that the user of the hoists by defendant's tenants up to the time of the fire, was evidence of acceptance, so as to entitle the plaintiffs to recover their value under the common counts. Held, also, that "capable of raising a weight of 2,000 lbs. without risk." meant strength enough to lift and sustain such a weight during the lifting, and that defendant could not insist upon this being done with the application of any specified power. The satisfaction of the architects was to be with the performance of the contract as properly construed, and such satisfaction was a question of fact, not necessarily to be shewn by an express declaration or certificate of the architects. *Hamilton* v. *Myles*, 24 C. P. 309.

**Averment of Performance of Conditions Precedent.**]—See *Shanly* v. *Midland R. W. Co.*, 33 U. C. R. 604.

**Engineer** — *Certificate—Collusive Withholding—Pleading—Extras.*] — The declaration in an action on a contract to make gravel roads for defendants, alleged generally the performance by plaintiffs of all conditions precedent to the plaintiffs' right of recovery. The defendants pleaded, after setting out the contract, that the work had not been certified to, or the amount ascertained by the engineer; to which the plaintiffs replied, equitably, that the certificate was withheld by the wrongful acts of defendant in collusion with the engineer:—Held, that the averment in the declaration must be construed as setting out every condition precedent to the plaintiffs' right of action, including the engineer's certificate; that the plea therefore only traversed a material averment in the declaration, thus raising a complete issue; and the replication was bad as being a departure from the declaration. Held, also, that a clause in the agreement which stipulated that all extra work ordered to be done by the engineer or his assistant in excess of the work (previously referred to in the contract), should be paid by the parties of the first part, notwithstanding anything to the contrary contained in this agreement, did not override the previously existing stipulation in the agreement that all work should be certified by the engineer. *Wright* v. *County of Grey*, 12 C. P. 479.

——— *Certificate—Conclusiveness.*] — Defendants agreed with plaintiff to pay him for work to be done by him according to the certificate of the engineer of a certain railway

that the work had been fully completed, and not otherwise:—Held, that the plaintiff was bound, in the absence of fraud or undue influence, by the certificate of the engineer, and could not dispute the same. *Canty* v. *Clark*, 44 U. C. R. 505.

——— *Certificate — Condition Precedent.*] —The plaintiff entered into a contract with defendants for the construction of certain main sewers. The contract provided that the work and material should in all things be performed and provided according to the plans and specifications, by a named date, and to the entire satisfaction of the engineer in charge of the work. The specifications provided that the contractor should, on the first day of each month, hand in to the engineer his account for work during the preceding month, and be paid on the certificate of the engineer at the rate of eighty-five per cent. of the work done during the previous month; an additional ten per cent. when the work was finished, and the balance of five per cent. at the expiration of three months from the date of the completion of the contract, &c. No final certificate was obtained from the engineer of the completion of the work; nor was the work completed to his satisfaction. In an action to recover the balance alleged to be due under the contract:—Held, that the certificate of the engineer as to the completion of the work was a condition precedent to the right to recover, and therefore the plaintiff must fail. *Robinson* v. *Town of Owen Sound*, 16 O. R. 121.

——— *Certificate—Condition Precedent—Extras—New Contract—Crown.*] — S. et al. made a contract with Her Majesty the Queen, represented by the minister of public works, for the construction of a bridge for a lump sum. After the completion of the bridge a final estimate was given by the chief engineer, and payment thereof made, but S. et al. preferred a claim for the value of work, not included in such final estimate, alleged to have been done in the construction of the bridge, and caused by changes and alterations ordered by the chief engineer of so radical a nature as to create, according to the contention of the claimants, a new contract between the parties:—Held, that the engineer could not make a new contract binding on the Crown; that the claim came within the original contract and the provisions thereof which made the certificate of the engineer a condition precedent to recovery; and such certificate not having been obtained, the claim must be dismissed. The Crown having referred the claim to arbitration instead of insisting throughout on its strict legal rights, no costs were allowed. *The Queen* v. *Starrs*, 17 S. C. R. 118.

——— *Certificate — Necessity for — Construction of—Amount Due.*] — The plaintiffs entered into a contract with the defendant to construct a cedar block roadway, &c., according to plans and specifications, and to the direction and satisfaction of the city engineer, &c. Payment was to be made monthly at the rates mentioned in the tender, during the progress of the work, upon the engineer's certificate and that of the chairman of the committee, and until the granting thereof no money was to become due or payable. A drawback of fifteen per cent. was to be retained by the corporation until after six months from the time of the final certificate, shewing the satisfactory completion of the work. By the by-law no contractor could demand payment until he should present to the treasurer a certificate from the engineer, &c., stating that he had examined, measured, and computed the work, and that the same was completed, or that the payment was due on such work, and also stating what the work was on which such money was due; also that every account before being paid should be certified by the engineer, and by the committee under whose authority the work was done; and the treasurer should not pay such accounts unless furnished with the two certificates:—Held, that the required certificate must be in writing. By the conditions found with the specifications the engineer was the sole judge of the quantity and quality of the work done, and his decision was to be final and conclusive as against the contractor; that monthly payments up to eighty-five per cent. of the work done should be made, &c., on the measurement of the engineer, such certificates to be binding only as progress certificates, and in no way to affect the final certificate, which should only be given on the whole work being completed and measured up, and at the expiration of six months when a certificate for the balance should be issued by the engineer. Part of the work required to be done by the plaintiffs was the raising and removing of the street railway ties, &c., and replacing same after the grading and ballasting had been completed. The plaintiffs did not replace the ties, &c., as the street railway company elected to do the work themselves, but the plaintiffs sent in their accounts charging therefor as if they had done the work. As to a portion of the work there was no certificate by the engineer that the work was done or that the price was payable therefor; and as to the other portion the acting engineer wrote under the account sent in "allowed one-third of above $521.66;" and then under this was written "certified for the sum of $521.66." On the back of the account the engineer subsequently certified that he had examined the account, and that plaintiffs were entitled to recover the sum of $521.66, which was paid to the plaintiffs. Under this certificate the plaintiffs claimed that they were entitled to recover for the whole work done, as this was the effect of the certificate:—Held, that as to the first named portion there could be no recovery by reason of the absence of a certificate; and as to the other portion the certificate did not shew that the work was done to the engineer's satisfaction or was completed, or that the payment demanded was due; but at most that one-third of the work was done, which had been paid for; and therefore nothing was shewn to be due to the plaintiffs. *Ardagh* v. *City of Toronto*, 12 O. R. 236.

——— *Certificate—Notice of — Agent.*]—Plaintiffs contracted with defendants to perform certain works, to be paid for monthly in debentures made by defendants, on the estimate of their engineer, payments to be made by orders on the debentures or proceeds thereof to be deposited in the hands of B. F. & Co., London, England. The third breach of the declaration being that, though plaintiffs completed their work, and the defendants delivered to the plaintiffs orders to the amount of the certificates of the engineer, &c., upon B. F. & Co., in whose hands defendants alleged the debentures had been deposited, yet the defendants did not deliver, &c., but B. & Co., being their agents, wrongfully refused for an unreasonable time to deliver the debentures or proceeds, &c.:—Held, (1) that the plaintiffs were not obliged to notify the defendants of

the completion of the work and acceptance thereof by the engineer of defendants, he being their own servant whom they had authorized to accept the work, and by whose act they were therefore bound. (2) That B. F. & Co. were the agents of both plaintiffs and defendants, and that neither party was liable to the other for their (B. F. & Co.'s) acts as being tortious. *Willson* v. *Counties of Huron and Bruce*, 10 C. P. 498.

——— *Certificate—Production of.*]—Plaintiff contracted with defendants to construct a gravel road, according to plans and specifications annexed, payments to be made monthly on the estimate of the engineer in charge, who was to determine the amount of work to be paid for, and all disputes:—Held, that the plaintiff could not recover for work done under such contract, without a certificate of the engineer. *Elkins* v. *County of Bruce*, 30 U. C. R. 48.

——— *Certificate—Waiver — Pleading.*]—Declaration on the common counts. The fifth plea referred to a sealed contract set out in the fourth plea, made between plaintiff and defendants, whereby the plaintiff for a lump sum, 822,123, agreed to build a railway from Galt to Doon, which was to cover all extras of every kind, except as specified; and then averred that it was further agreed by said contract, that approximate estimates should be made every month, until the work was completed, of the work done the preceding month, and certified in writing by defendants' engineer; that 75 per cent. of such estimate should be paid to the plaintiff on or before the 15th of each month, until the completion of the whole work to the satisfaction of said engineer; that all percentages retained by defendants during the progress of the work should be paid to the plaintiff upon the certificate in writing of the completion of the work being granted by the engineer; that the plaintiff's alleged cause of action was for the work alleged to have been done by him in performance of his said contract in respect of the work embraced therein; that one D. C. O. was defendants' engineer in charge; that defendants had paid the plaintiff 75 per cent. of the approximate estimates; and that no certificate of the completion of the work had been procured or applied for by the plaintiff, or granted by the engineer, &c.; and so said percentages are not payable to the plaintiff. Sixth plea, except as to the same sum, that by the contract it was provided that all disputes, either as to quantities of work to be done over and above that of the contract, and defined in specifications, or as to the quantity of work done by the plaintiff, and the amount of the same demanded by the contract, should be determined solely by the engineer, whose decision on all questions pertaining to the contract should be final; and the defendants say that the plaintiff's alleged cause of action was for work alleged to have been done by him under said contract; that D. C. O. was the engineer in charge, and that he has not determined or decided that the plaintiff has performed any work over and above that of the contract, or that the plaintiff is entitled to recover from the defendants any sum whatever. Replication to the fifth plea, that before action defendants accepted and received from the plaintiff all the work mentioned and referred to in the fifth plea, and waived any rights they had to the production or procurement by plaintiff from the engineer of the certificates of completion, and defendants so relieved the plaintiff from any obligation to procure such certificate:—Held, (1) pleas good, for, it being admitted by the demurrer that the cause of action was for work done under the sealed contract, the plaintiff could not recover without the stipulated certificate or the decision of the engineer. (2) Replication bad. *Ferguson* v. *Town of Galt*, 23 C. P. 66.

——— *Reference to—Agreement—Liability dehors—Pleading.*]—Action on the common counts for work and labour, &c., done by J. B. and W. B., alleging an assignment to plaintiff. Eighth plea, that by the said indenture in the last plea mentioned, and by the said contract and agreement therein mentioned and referred to, it was further covenanted and agreed by and between the said J. B. and W. B., and defendants, that all points in dispute, whether as to quantities or qualities of work or material, should be left to the decision of an engineer named, from whose decision there should be no appeal; that the alleged causes of action in said declaration mentioned are matters in dispute as to the qualities and quantity of work alleged to have been done by the said J. B. and W. B., in performance and execution of the said contract; and that the said engineer has not decided that the said J. B. and W. B. or the plaintiff, are or is entitled to recover from the defendants any sum of money whatsoever:—Held, plea bad, for, so far as appeared therefrom, the defendants' liability arose independently of the agreement to refer, so as not to preclude plaintiff suing at law, though he might be liable for breach of the covenant to refer. The case was reheard before the full court, when by consent the previous plea, the seventh, referred to in the eighth plea, was put in, which in substance raised the same point as to the necessity of the engineer's decision, upon which issue in fact was joined. The court affirmed the judgment as to the eighth plea, but, deeming it under the circumstances superfluous in addition to the seventh, ordered it to be struck out. The preceding case distinguished. Held, also, that merely referring to the indenture in the seventh plea, as was done in the eighth plea here, did not incorporate therein the averments in the seventh plea as to the contents of such indenture, but that such averments should either have been repeated, or there should have been a statement to the effect, that by the indenture in the seventh plea mentioned it was covenanted and agreed to the purport, tenor, and effect in that plea mentioned, and further, &c. *Pegg* v. *Nasmith*, 28 C. P. 330.

——— *Delay in Appointing—Reference to Master — Inspection.*] — Two incorporated trading companies agreed, under their seals, that certain works, which were to be constructed by one for the other, should, on completion, be inspected by engineers to be chosen by the companies respectively, and if reported as completed the works were to be accepted by the party for whom they were done, who thenceforth should be debarred from denying or contesting the due and proper execution and acceptance of the works. After the works were alleged to have been completed, the parties who performed the same notified the others thereof, calling upon them to appoint an engineer, which was not done, and subsequently a portion of the works having been destroyed, a bill was filed to compel the parties so neglecting to accept the works. The court

below, considering that the delay which had occurred in naming an engineer, according to the terms of the agreement, ought not to preclude the parties from obtaining an inspection of the works, made a decree in favour of the plaintiffs, but under the circumstances directed a reference for the purpose of inquiring and reporting as to the due performance of the works. On appeal, this decree was reversed, and the bill in the court below ordered to be dismissed with costs. *Desjardins Canal Co. v. Great Western R. W. Co.*, 9 Gr. 503, 2 E. & A. 350.

——— *Measurement—Condition Precedent—Satisfaction — Revocation of Authority — Deduction.*] — Declaration on the common counts for work done. Fourth plea, except as to part, that plaintiff's claim was for work done by plaintiff for defendant, under a covenant by plaintiff to construct and complete the grading, &c., of part of a certain railway to, &c., according to a profile thereof by the chief engineer, at certain specified prices, &c.; and that the said grading, &c., should be measured, calculated, and determined by the said engineer, whose decision should be conclusive; and that the said engineer, before this action, measured and determined said work and the amount payable therefor, which defendant paid to plaintiff:—Held, plea good, as shewing not a covenant to refer to arbitration, but to pay certain prices to be ascertained by the engineer, whose ascertainment was a condition precedent to plaintiff's right to recover. Fifth plea, as to the claim for work done, that before any of the work was done, or the materials provided, plaintiff covenanted to perform the same to the satisfaction of said engineer, and that defendant should retain ten per cent. of the value of said work, which is the plaintiff's claim herein pleaded to, and that the same should not be payable until said engineer was satisfied with said work; and said engineer was not, before action, satisfied therewith:—Held, plea good; for that it was not a collateral covenant that was set up, but that the engineer was to be satisfied was a condition precedent to plaintiff's right to recover. To the fourth plea plaintiff replied, (1) that the deed was not executed by defendant, nor was there any such mutual agreement between him and defendant as bound defendant to abide by the decision of the engineer; (2) that before the decision of the engineer plaintiff withdrew all authority to determine as against him, or in any way affecting him, in the matter of the said measurement:—Held, bad; for, as to the first, it was not essential that defendant should execute the deed containing the contract; and as to the second, the covenant was treated by it as a mere reference to arbitration, which it was not, but a term of the contract requiring observance before a cause of action arose; and the authority to the engineer was not revocable; but semble, that, even treating the covenant as a reference to arbitration, there being no provision in the submission itself for making the submission a rule of court, it was irrevocable. To the fifth plea plaintiff replied that the engineer was satisfied with the work, save that the road or ground set apart for the railway had not been in some places cleared to its full width, and for and in respect of which a deduction of a small sum, much less than the said ten per cent., was made in the final estimate of the engineer, assented to by plaintiff, and formed no part of the moneys sued for. Held, bad, as not shewing any authority or power in the engineer to make any deduction from plaintiff's claim in respect of work not to his satisfaction, and admitting that a portion was not to his satisfaction; and as not averring a substantial performance of the work to the satisfaction of the engineer. *Canty v. Clark*, 44 U. C. R. 222.

——— *Measurement—Conclusiveness upon Sub-contractor.*]—Plaintiffs agreed with defendant, a contractor on the Great Western R. W. Co., to perform certain work at the rate of six pence per cubic yard, according to the estimate of the engineer in charge. The engineer proved that he had measured the work, and that the plaintiffs had received the full amount thus due to them. The plaintiffs called another engineer, who had also measured the work done by them, and found it to be more than it was estimated at:—Held, that the measurement of the company's engineer was conclusive upon the plaintiffs, as it ought to be, for the defendant would himself be obliged to adhere to it in his claims against the company for the same work. *Jarvis v. Dalrymple*, 11 U. C. R. 393.

**Manager of Company** — *Certificate — Sub-contractor—Privity.*]—One T. contracted with defendants, a corporation, to construct certain works for them, and on the same day the plaintiff agreed with T. to do a portion for $900, subject to the same conditions which bound T. in his contract with defendants, one of which was that 20 per cent. of the price should be retained until 3 months after completion of the work, and then paid upon the certificate of the manager that it had been performed to his satisfaction. Defendants paid the plaintiff all but 2 per cent. as the works progressed, but the manager refused to certify as the contract required, complaining that it was improperly performed. He, however, had orally agreed to pay the plaintiff's men $100 if they would discharge the company:—Held, that the plaintiff had no right of action against defendants, for there was no contract between them, and at all events they would not be liable without the manager's certificate. *Standing v. London Gas Co.*, 21 U. C. R. 209.

**Overseer of Works**—*Certificate—Obligation to Give—Covenant.*]—The contract was for the performance of certain specified work at a price named, in conformity with the instructions of one H., the overseer of the works. By it H. was made the sole judge as to the state and completion of the work, and generally as to any question arising under the contract; he was empowered to reject any materials which he might think unfit, and to employ others in the event of the plaintiffs not using sufficient despatch, and no payments were to be made without his written certificate:—Held, that there was clearly no covenant by defendants that the overseer should give certificates when plaintiffs were entitled thereto, as alleged in the declaration. *Kempster v. Bank of Montreal*, 32 U. C. R. 87.

**Payment without Certificate**—*Monthly Payments—Estimate—Suspension of Work.*] —Plaintiff sued on an agreement, by which he undertook to do certain work for defendants on a railway, in accordance with the instructions of the engineers of the road, and within such time as they might direct, and to receive such estimates as they might allow, certain prices being specified; and the defend-

ants agreed to make monthly payments. The first count complained that defendants would not make monthly payments to him in accordance with the agreement. The second count, that defendants would not allow the plaintiff to finish the work, but wrongfully prevented him from doing so. Defendants pleaded to both counts, that they paid the plaintiff the amount of the estimates of all work done by him in pursuance of the agreement, under the directions of the engineers, and for which estimates were allowed by them:—Held, no defence, for, as to the first count, the agreement required the payments to be made monthly, whether the estimates were furnished by the engineers or not; and, as to the second, the stipulation that the work should be done within such time as the engineers might appoint gave only a reasonable control as to time, and did not authorize defendants in effect to suspend the work indefinitely. *Lake v. Cameron*, 18 U. C. R. 622.

**Receipt of Money on Certificate**—*Action on Original Contract.*]—Held, that a person contracting to complete a building according to plans and specifications at a specified price, and to the approval of a particular person, cannot, after he has upon the certificate of such person received the amount contracted for, sue on the original contract, contending that it did not contain the quantities actually required to complete the building; nor can he set aside the contract and sue for work and labour. *Patterson v. Great Western R. W. Co.*, 9 C. P. 229.

**Surveyor**—*Certificate—Production of.*]—Where work is to be done under a special agreement, to the satisfaction of a surveyor, and paid for on his certificate, such certificate must be produced to entitle the plaintiff to recover. *Coatsworth v. City of Toronto*, 7 C. P. 490, 8 C. P. 364.

**Valuator**—*Final Award—Submission.*]—By an agreement made between L., a builder, and the building committee of a religious body, all previous contracts and agreements were terminated and surrendered, and L. was to forego all right to compensation except under the agreement. One E. was to inspect and value the work already done on the building, and if not according to plans and specifications, L. was to rectify the same at his own expense. E. was to value the building in its present condition, and his award was to be final, and to be the sole amount due to L. to date; he was also to inspect and value the building material on the ground, which was to be paid for at the original cost:—Held, that the effect of the agreement was, that a price to be fixed by E. was to be paid for L.'s works; that E. was not an arbitrator; and that the agreement could not be made a rule of court as a submission to arbitration. *In re Langman and Martin*, 46 U. C. R. 569.

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*5. Other Cases.*

**Ascertainment of Price** — *Proposed Company—Letter to Corporator—Representation.*]—The formation of a street railway company being in contemplation, the plaintiffs, in January, 1867, wrote to one K., saying that the tamarac wood required for it could be got then, but not later, delivered at their mill at a price specified, and they, the plaintiffs, would saw it for not over $3 per M., perhaps less; and they added that, if K. would start the stock list with $5,000, they would venture to order the wood, and would agree to get the balance of stock taken. K. said that upon this, after communicating with the plaintiffs, he took the $5,000 stock, and plaintiffs ordered the wood, and the company was formed, of which K. was made president. The sawing was not done until 1868, and the plaintiffs sued the company for it, claiming $4.25 per M.:—Held, that the letter was properly treated as fixing the price to be paid at not more than $3 per M. Quære, whether, if there had been no communication with the plaintiffs after the letter, the defendants could have claimed the benefit of it as a representation intended to have been communicated to them, and on which they acted. *Currier v. Ottawa City Passenger R. W. Co.*, 30 U. C. R. 61.

**Incomplete Work** — *Impediment—Payment for Work Done.*]—The defendant agreed with the plaintiffs to sink an artesian well at seventy-five cents a foot. After sinking a distance of 160 feet, he met with an impediment, and refused to proceed further:—Held, that he was entitled to be paid for the work done, as the evidence did not shew an agreement that he should receive nothing unless he succeeded in finding water. Quære, whether evidence as to how contracts for artesian wells were usually made in Barrie should have been received. *Barrie Gas Co. v. Sullivan*, 5 A. R. 110.

**Recovery of Moneys Overpaid**—*Defence in Former Action.*]—Where two masons brought an action for work and labour against their employer and recovered a verdict for £60, it was held that the employer could not afterwards bring an action against them for money he had paid them on account, and which he had attempted to prove in the former action. *Hunt v. McCarthy*, 6 O. S. 434.

**Sub-contractor**—*Amounts Received by Contractor—Amounts not Received by Fault of Contractor—Work Done.*]—The defendant had a contract with the Midland Railway Company for the construction of about fifty miles of their railway, and plaintiff was the assignee of a sub-contractor under the defendant for about four miles. By the plaintiff's contract all payments based on the certificates of the company's engineer were to be made monthly, and within ten days after defendant received the amount coming to him from the company; but defendant was to retain ten per cent. of such monthly estimates as a security for the plaintiff's due completion of the work to the satisfaction of the defendant and of the company's engineer, which, with any balance coming to the plaintiff on a final estimate, was to be paid to him within thirty days after the work was accepted by the company and defendant paid therefor; and the suspension of the works by the company should not give the plaintiff a claim for damages, but only for defendant's default in furnishing the estimates or paying them when paid by the company, or for any delay caused by the suspension, but he should be paid for the work actually done by him. The plaintiff's work was all completed and accepted by the company, and he claimed $1,510.36, $719.61 for percentages retained by defendant up to the 31st December, 1872, which the jury found that defendant had received from the company, and $790.75, for work done after that date, for which defend-

ant had not been paid, but the jury found that the company had put an end to defendant's contract with them owing to his default:—Held, that the plaintiff was entitled to recover the whole amount claimed by him; for (1), as to the sum of $79.61, the defendant had received this from the company, and the fact that they had not paid defendant for the work on other sections could form no defence; (2) as to the sum of $150.75, the non-payment by the company being caused by defendant's own default, he could not take advantage of it under the letter of the contract, as a defence to the action. In addition to the defendant being thus precluded, the plaintiff, by the express terms of the contract, was to be paid, in case of suspension by the company, for the work actually done by him. *McBrien* v. *Shanly*, 24 C. P. 28.

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VII. Right of Property while Work in Progress.

**Agreement** — *Materials.*] — Where the plaintiff agreed to build a house for defendant, who paid a certain sum in advance, and gave the plaintiff permission to make the bricks of which the house was to be built, on his land, and to sell any surplus, and, the plaintiff not proceeding with the building, defendant seized some bricks which the plaintiff had made, and a number of articles belonging to the plaintiff:—Held, in trover by the plaintiff, that under the agreement the bricks were the property of defendant. *Wilcox* v. *Burnside*, 4 O. S. 288.

Defendant agreed to put up a building for the plaintiff for £350, and to take in payment from him £250 in materials, at the cost prices, or such quantity as should be required, and the balance, if any, in cash. The timber had been all furnished, and the building partly completed, when it was blown down and abandoned:—Held, that the timber so delivered belonged to defendant. *Graham* v. *Wiley*, 16 U. C. R. 265.

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VIII. Miscellaneous Cases.

**Conflicting Evidence**—*Failure of Proof —New Trial.*]—In assumpsit, where there was conflicting evidence as to certain work done, absence of evidence as to other portions of the plaintiff's claim, and failure of proof as to large quantities of the work claimed for, and a verdict for a large sum, nearly the whole amount claimed, a new trial was granted on payment of costs. *Hewitt* v. *Gzowski*, 6 C. P. 89.

**Particulars** — *Work dehors Contract — Declaration—Damages.*]—The particulars in an action on the common counts were headed, "Detailed statement of extra work performed by P. R. (plaintiff), on sections 3 and 4, Bruce gravel roads, under contract of 1866:"—Held, that this did not necessarily restrict the plaintiff to work done under the sealed contract of that year entered into between the parties, but that he might shew that any work mentioned in the particulars was done outside of such contract, and under a wholly separate and independent one. Held, also, that under the declaration the plaintiff clearly could not recover for damages of any kind. *Ross* v. *County of Bruce*, 21 C. P. 41.

**Rescission or Abandonment of Contract before Completion**—*Counterclaim.*] —The defendant had agreed with the plaintiffs for the erection by them of a house on his land; and while engaged in such work the plaintiffs alleged unnecessary delays in their operations caused, as they said, by the neglect of the defendant in supplying material for the building, and in the course of a discussion the defendant told the plaintiff "If you won't go on with your work, go away:"—Held, that this did not amount to a rescinding of the agreement, and that plaintiffs were not warranted in treating the agreement as abandoned by the defendant, who was entitled to counterclaim against the plaintiffs for the increased cost to him of finishing the building. Midland R. W. Co. v. Ontario Rolling Mills Co., 10 A. R. 677, followed. Decision in 14 O. R. 608 reversed. *Clayton* v. *McConnell*, 15 A. R. 560.

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*See* Contract—Lien—Municipal Corporations, IX.

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## WORK FOR GENERAL ADVANTAGE OF CANADA.

*See* Railway, XXVII.

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## WORKMEN'S COMPENSATION FOR INJURIES ACT.

*See* Constitutional Law, II. 23—Master and Servant, VI. 4.

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## WOUNDING.

*See* Criminal Law, IX. 32.

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## WRIT OF ERROR.

*See* Criminal Law, VIII. 2 (b)—Sessions, III. 7.

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## WRIT OF REPLEVIN.

*See* Replevin, II. 6.

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## WRIT OF SUMMONS.

*See* Practice—Practice at Law before the Judicature Act, XI. 2 — Practice since the Judicature Act, XXI.

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## YEAR.

*See* Time, IV.

END OF THE DIGEST.

# CASES

## AFFIRMED, REVERSED, FOLLOWED, OVERRULED, SPECIALLY CONSIDERED, &C., &C.


**Abe-Agr]** COLUMN.

*Abell v. Church*, 26 C. P. 338, reversed, 1 S. C. R. 442 ..... i., 2270

*Abell v. Morrison*, 19 O. R. 669, distinguished; McLeod v. Wadland, 25 O. R. 118 ..... ii., 4481; iii., 6769

*Abouloff v. Oppenheimer*, 10 Q. B. D. 295, followed; Hollender v. Ffoulkes, 26 O. R. 61 ..... ii., 3632

*Abouloff v. Oppenheimer*, 10 Q. B. D. 297, discussed; Woodruff v. McLennan, 14 A. R. 242 ..... ii., 3632

*Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, 11 App. Cas. 247, considered; Archibald v. McLaren, 21 S. C. R. 588 ..... ii., 4097

*Abrath v. North Eastern R. W. Co.*, 11 Q. B. D. 79, 440, commented on; Young v. Nichol, 9 O. R. 347 ii., 4087

*Abrey v. Newman*, 16 Beav. 431, applied; Wood v. Armour, 12 O. R. 146 ..... iv., 7611

*Acey v. Fernie*, 7 M. & W. 151, approved; London and Lancashire Life Assurance Co. v. Fleming, [1897] A. C. 499 ..... ii., 3439

*Ackroyd, Re*, 1 Ex. 479, referred to; Public School Trustees of Section 9, Nottawasaga v. Township of Nottawasaga, 15 A. R. 310 ... i., 2053

*Acre v. Livingstone*, 26 U. C. R. 282, not followed; Pearson v. Mulholland, 17 O. R. 502 ..... i., 1834

*Adams and Kensington Vestry, In re*, 27 Ch. D. 394, specially referred to and followed; Bank of Montreal v. Bower, 18 O. R. 226 .. iv., 7690

*Adams v. City of Toronto*, 12 O. R. 243, discussed; Pratt v. City of Stratford, 14 O. R. 260, 16 A. R. 5 iv., 7441

*Adams v. Loomis*, 22 Gr. 99, affirmed, 24 Gr. 242 ..... ii., 3072

*Adams v. Loomis*, 24 Gr. 242, considered; Wylie v. Frampton, 17 O. R. 515 ..... ii., 3073

*Adamson v. Rogers*, 22 A. R. 415, affirmed, 26 S. C. R. 159 ... i., 877; ii., 3781

*Adjala, Township of, v. McElroy*, 9 O. R. 580, specially considered; Town of Meaford v. Lang, 20 O. R. 42, 541 ..... i., 274; iii., 5726

*Ætna Insurance Co. v. Brodie*, 5 S. C. R. 1, followed; Schwersenski v. Vineberg, 19 S. C. R. 243 ... ii., 2513

*Agar-Ellis, In re*, 10 Ch. D. 49, 71, specially referred to; Re Mathieu, 29 O. R. 546 ..... ii., 3146

*Agency Co. v. Short*, 13 App. Cas. 793, distinguished; Hartley v. Maycock, 28 O. R. 508 ..... ii., 3957-8

*Agra and Masterman's Bank, In re*, L. R. 2 Ch. 397, specially referred to; Quebec Bank v. Taggart, 27 O. R. 162 ..... i., 934

**Agr-All]** COLUMN.

*Agricultural Savings and Loan Association v. Federal Bank*, 45 U. C. R. 214, affirmed, 6 A. R. 192 ... i., 617

*Ahrens v. McGilligat*, 23 C. P. 171, followed; Westover v. Turner, 26 C. P. 510 ..... i., 2054; iii., 6015

*Aitkin, Re*, 4 B. & Ald. 47, followed; Re McBrady and O'Connor, 19 P. R. 37 ..... iii., 6554

*Albemarle and Eastnor, Re*, 45 U. C. R. 133, distinguished; Village of East Toronto v. Township of York, 16 O. R. 566 ..... ii., 4619

*Aldous v. Hicks*, 21 O. R. 95, approved; Forster v. Ivey, 32 O. R. 175 .ii., 4440

*Aldrich v. Aldrich*, 23 O. R. 374, affirmed, 24 O. R. 124 ... i., 2050; ii., 3624

*Aldrich v. Canada Permanent L. and S. Co.*, 27 O. R. 548, affirmed, 24 A. R. 193 ..... ii., 4472

*Alexander v. Township of Howard*, 14 O. R. 22, followed; Confederation Life Association v. Township of Howard, 25 O. R. 197 .ii., 4247-8, 4603

*Allan v. McTavish*, 2 A. R. 278, commented on and followed; McCullough v. Sykes, 11 P. R. 537 .... ii., 4042; iii., 6310

*Allan v. McTavish*, 2 A. R. 278, followed; Macdonald v. McDonald, 11 O. R. 187 ..... ii., 4445

*Allan v. McTavish*, 2 A. R. 278, followed; McDonald v. Elliott, 12 O. R. 98 ..... ii., 4041

*Allan v. McTavish*, 2 A. R. 278, commented on; McMahon v. Spencer, 13 A. R. 430 ..... ii., 4042; iii., 6309

*Allan v. Platt*, 13 App. Cas. 780, referred to as overruling Joyce v. Hart, 1 S. C. R. 321; Monette v. Lefebvre, 16 S. C. R. 387 .. iii., 6789

*Allen v. Furness*, 20 A. R. 34, distinguished; Cameron v. Adams, 25 O. R. 220 ..... ii., 2590; iv., 7668

*Allen v. Merchants Marine Ins. Co.*, 15 S. C. R. 488, followed; Supreme Tent Knights of the Maccabees of the World v. Hilliker, 29 S. C. R. 397 ..... ii., 3428-9; iii., 5397

*Allgood v. Merrybent and Darlington R. W. Co.*, 33 Ch. D. 571, distinguished; Lincoln Paper Mills Co. v. St. Catharines and Niagara Central R. W. Co., 19 O. R. 106, iii., 5949

*Allison, Re*, 12 P. R. 6, approved and followed; Re Cameron, 13 P. R. 173 ..... iii., 6546

*Allison v. McDonald*, 23 O. R. 288, reversed, 20 A. R. 635, 23 S. C. R. 635 ..... i., 740, 973; iii., 5711

*Allman v. Kensel*, 3 P. R. 110, followed; Hart v. Ruttan, 23 C. P. 613 .. i., 197

*Ambrose v. Fraser*, 12 O. R. 459, affirmed, 14 O. R. 551 ..... ii., 3085, 3795; iii., 6367

*Amer v. Rogers*, 31 C. P. 195, considered: Lee v. Hopkins, 20 O. R. 666, ii., 3055; iii., 5095

*Ames v. Birkenhead Dock Co.*, 20 Beav. 332, acted on: Stuart v. Grough, 15 A. R. 200.....i., 365; ii., 2595

*Amsden v. Kyle*, 9 O. R. 441, corrected: Leys v. Toronto General Trusts Co., 22 O. R. 603 .....i., 2119

*Amsden v. Kyle*, 9 O. R. 439, distinguished: Re Shunk, 31 O. R. 175 ..... i., 2120

*Ancaster, Township of, v. Durrand*, 32 C. P. 563, distinguished: Smith v. Township of Ancaster, 27 O. R. 276, 23 A. R. 596...iv., 7473, 7478

*Anchor Marine Ins. Co. v. Phœnix Ins. Co.*, 30 C. P. 570, affirmed, 6 A. R. 567 .....ii., 3450

*Ancona v. Marks*, 7 H. & N. 686, distinguished: *Coates* v. *Kelly*, 27 U. C. R. 284 .....i., 664

*Anderson v. Canadian Pacific R. W. Co.*, 17 O. R. 747, followed: Carty v. City of London, 18 O. R. 122 .....iii., 6754

*Anderson v. Grand Trunk R. W. Co.*, 27 O. R. 411, 24 A. R. 672, reversed: Grand Trunk R. W. Co. v. Anderson, 28 S. C. R. 541. ... iii., 5928

*Anderson v. Jellett*, 27 Gr. 411, 7 A. R. 341, reversed, 9 S. C. R. 1....ii. 2789

*Anderson v. Northern R. W. Co.*, 25 C. P. 301, distinguished and questioned: Connell v. Town of Prescott, 20 A. R. 49, 22 S. C. R. 147 .....iii., 4783

*Anderson v. Wilson*, 25 O. R. 91, considered: Grimes v. Miller, 23 A. R. 764 .....ii., 4086-7

*Andrews, Re*, 11 P. R. 199, distinguished: Re Parr, 11 P. R. 301..... ii., 3150; iii., 5243

*Andrews, Re*, 11 P. R. 199, not followed: Re Slosson, 15 P. R. 156..ii., 3150

*Andrews v. City of London*, 12 P. R. 44, applied and followed: Dale v. Weston Lodge, 17 P. R. 513...i., 1400

*Andrews v. Marris*, 7 Dowl. P. C. 712, followed: Delaney v. MacLellan, 13 P. R. 63 .....i., 1425, 2182

*Anglo-American Casings Co. v. Rowlin*, 10 P. R. 391, held no longer applicable: Payne v. Newberry, 13 P. R. 354 .....i., 1446

*Annot Lyle, The*, 11 P. D. 114, referred to: Ward v. The Ship "Yosemite," 4 Ex. C. R. 241..... ii., 2452; iii., 6468

*Anon.*, 11 W. R. 203, 32 L. J. N. S. Ex. 88, 7 L. T. N. S. 718, followed: Laird v. King, 19 P. R. 307 .....iii., 5612

*Appleton v. Chapel Town Paper Co.*, 45 L. J. Ch. 276, not followed: Re Butterfield, 14 P. R. 567....iii., 6572

*Arbuckle, Re*, 14 W. R. 585, followed: Re Campbell, 18 P. R. 400..... ii., 3161; iii., 5257

*Archbold v. Building and Loan Association*, 15 O. R. 237, varied, 16 A. R. 1 .....ii., 4404

*Archer v. Severn*, 8 A. R. 725, reversed, Cassels' Dig. 875 .....iv., 7703



*Archibald v. Bushey*, 7 P. R. 304, followed: Friendly v. Needler, 10 P. R. 267 .....i., 2077

*Archibald v. Hubley*, 18 S. C. R. 116, distinguished: Kirk v. Chisholm, 26 S. C. R. 111.....i., 489, 785

*Archibald v. Hubley*, 18 S. C. R. 116, followed: Morse v. Phinney, 22 S. C. R. 563 .....i., 801

*Archibald v. McNerhanie*, 6 B. C. Rep. 260, affirmed, 29 S. C. R. 564... iii., 5199-5200

*Armour v. Boswell*, 6 O. S. 153, 352, 450, followed: Young v. Saylor, 23 O. R. 513, 20 A. R. 645..... i., 1202; ii., 3716

*Armour v. Kilmer*, 28 O. R. 618, followed: O'Connor v. Gemmill, 29 O. R. 47 .....iii., 6541

*Armour v. Noble*, 3 Ch. Ch. 90, considered: Jardine v. Hope, 3 Ch. Ch. 197 .....i., 1339

*Armstrong v. Darling*, 6 C. L. T. 214, 22 C. L. J. 149, overruled: In re Town of Thornbury and County of Grey, 15 P. R. 192 .....i., 106

*Armstrong v. Hemstreet*, 22 O. R. 336, overruled: Davidson v. Fraser, 23 A. R. 439, 28 S. C. R. 272..... i., 467; iii., 5277

*Armstrong v. Lye*, 27 O. R. 511, reversed in part and affirmed in part, 24 A. R. 543 ..... i., 6502; iii., 5636, 5644, 6102

*Armstrong v. Nason, Armstrong v. Wright, Armstrong v. McClelland*, 22 O. R. 542, 21 A. R. 183, reversed, 25 S. C. R. 263 ...iv., 7178

*Arnison v. Smith*, 40 Ch. D. 567, distinguished: Chambers v. Kitchen, 16 P. R. 219.....ii., 2607; iii., 6307

*Arnold v. Robertson*, 8 C. P. 147, approved: Fraser v. Gladstone, 11 C. P. 125 .....i., 444, 798, 823

*Arnold v. Toronto R. W. Co.*, 16 P. R. 394, distinguished: Haist v. Grand Trunk R. W. Co., 16 P. R. 448 .....iii., 7001

*Arnold v. Van Tuyl*, 30 O. R. 663, distinguished: Tanner v. Weiland, 19 P. R. 149.....i., 1443; iii., 5566

*Arnould v. M'Lean*, 4 Gr. 337, reversed, 6 Gr. 242 .....iii., 6673

*Arpin v. The Queen*, 14 S. C. R. 736, distinguished: North British and Mercantile Insurance Co. v. Tourville, 25 S. C. R. 177 ..i., 38; iii., 6778

*Arscott v. Lilley*, 11 O. R. 285, reversed, 14 A. R. 283 .....ii., 3733

*Arscott v. Lilley*, 14 A. R. 283, distinguished: Re Pollock and City of Toronto, 15 P. R. 355 ....i., 106, 1344

*Arscott v. Lilley*, 14 A. R. 283, applied: Howard v. Herrington, 20 A. R. 175 .....i., 276, 1481; iii., 7018

*Arthur v. Grand Trunk R. W. Co.*, 25 O. R. 37, affirmed, 22 A. R. 89.. i., 1809; iii., 4817

*Arthur School Trustees v. Corporation of Arthur*, 9 C. P. 532, followed: Elzevir School Trustees v. Township of Elzevir, 12 C. P. 548...iii., 6273

*Ashbridge v. Ashbridge*, 22 O. R. 146, not followed: Nason v. Armstrong, 22 O. R. 542, 21 A. R. 183 .....iv., 7676

*Ashley v. Brown*, 17 A. R. 500, followed: Gurofski v. Harris, 27 O. R. 201, 23 A. R. 717 .....ii., 2882

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*Ashley's Case*, 6 Rep. 320, followed; McGuiness v. Dafoe, 27 O. R. 117, 23 A. R. 704 ..... ii., 4089

*Askew v. Manning*, 38 U. C. R. 345, 361, followed; Reg. ex rel. Moore v. Nagle, 24 O. R. 597, ii., 3912; iii., 5800

*Aslatt v. Corporation of Southampton*, 16 Ch. D. 143, referred to; Chaplin v. Woodstock Public School Board, 16 O. R. 728 ..... iii., 6293

*Assignments and Preferences Act, In re*, 20 A. R. 489, reversed; Attorney-General of Ontario v. Attorney-General of Canada, [1894] A. C. 189, 5 Cart. 266 ..... i., 1140

*Atkin v. City of Hamilton*, 28 O. R. 229, reversed, 24 A. R. 389 ..... iii., 5920; iv., 7448

*Atkinson v. Baker*, 14 A. R. 409, considered; Linton v. Imperial Hotel Co., 16 A. R. 337 ..... i., 449

*Atkinson v. City of Chatham*, 29 O. R. 518, affirmed, 26 A. R. 521.. iv., 7433

*Atlas Assurance Co. v. Brownell*, 28 S. C. R. 537, followed; Commercial Union Assurance Co. v. Margeson, 29 S. C. R. 601, ii. 3373; iii., 5654

*Attenborough v. St. Katharine's Dock Co.*, 3 C. P. D. 450, followed; Re Canadian Pacific R. W. Co. and Carruthers, 17 P. R. 277 ..... i., 905; ii., 3497

*Attorney-General v. Cameron*, 27 O. R. 380, 28 O. R. 571, appeal from not entertained 26 A. R. 103, iii., 6169

*Attorney-General v. Emerson*, 10 Q. B. D. 191, referred to; Moxley v. Canada Atlantic R. W. Co., 11 P. R. 39 ..... ii., 2476

*Attorney-General v. Hamilton Street R. W. Co.*, 27 O. R. 49, affirmed, 24 A. R. 170 ..... i., 1035; iii., 6773

*Attorney-General v. International Bridge Co.*, 28 Gr. 65, reversed, 6 A. R. 537 ..... i., 376, 1083

*Attorney-General v. International Bridge Co.*, 28 Gr. 65, reversed, 6 A. R. 537, 2 Cart. 559 ..... i., 1136

*Attorney-General v. Jeffrey*, 10 Gr. 273, followed; Re Wansley and Brown, 21 O. R. 34 ..... i., 961

*Attorney-General v. McNulty*, 11 Gr. 281, affirmed, 581 ..... iii., 4893

*Attorney-General v. Mercer*, 5 S. C. R. 538, referred to; Simpson v. Corbett, 5 O. R. 377, 10 A. R. 32 ..... ii., 2764-5

*Attorney-General v. Niagara Falls, Wesley Park, and Clifton Tramway Co.*, 19 O. R. 624, affirmed, 18 A. R. 453 ..... i., 1781; iii., 6773

*Attorney-General v. Queen Insurance Co.*, 3 App. Cas. 1090, distinguished; Fortier v. Lambe, 25 S. C. R. 422 ..... i., 1187

*Attorney-General v. Sheraton*, 28 N. S. Rep. 492, approved and followed; Temple v. Attorney-General for Nova Scotia, 27 S. C. R. 355 .. ii., 4225; iii., 6705

*Attorney-General v. Vaughan Road Co.*, 21 O. R. 507, reversed, 19 A. R. 224, but restored, 21 S. C. R. 631 ..... iv., 7484

*Attorney-General v. Walker*, 25 Gr. 233, affirmed, 3 A. R. 195..... iii., 6151

*Attorney-General v. Wilson*, 9 Sim. 526, distinguished; Hannum v. McRae, 17 P. R. 567, 18 P. R. 185 .... i., 1200-1; ii., 2416

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*Attorney-General of British Columbia v. Attorney-General of Canada*, 14 App. Cas. 295, commented on and distinguished; Farwell v. The Queen, 22 S. C. R. 553.... i., 2270

*Attorney-General of Canada v. Attorney-General of Ontario*, 19 A. R. 31, 20 O. R. 222, affirmed, 23 S. C. R. 458, 5 Cart. 517..... i., 1131

*Attorney-General of Canada v. Attorney-General of Ontario*, [1897] A. C. 199, 25 S. C. R. 434, followed; The Queen v. Yule, 30 S. C. R. 24 ..... i., 1130

*Attorney-General of Canada v. Attorney-General of Ontario*, [1897] A. C. 199, followed; Province of Quebec v. Dominion of Canada, In re Indian Claims, 30 S. C. R. 151 i., 1155; ii., 3134

*Attorney-General of Canada v. City of Toronto*, 20 O. R. 49, 18 A. R. 622, reversed, 23 S. C. R. 514.... i., 261; ii., 4740

*Attorney-General of Ontario v. Mercer*, 8 App. Cas. 767, followed; St. Catharine's Milling and Lumber Co. v. The Queen, 10 O. R. 196, 13 A. R. 148, 13 S. C. R. 577, 14 App. Cas. 46, 4 Cart. 107 .... i., 1156; ii., 3135

*Attorney-General of Ontario v. O'Reilly*, 26 Gr. 126, affirmed, 6 A. R. 576, i., 375

*Attorney-General of Victoria v. Ettershank*, L. R. 6 P. C. 354, referred to; Peterson v. The Queen, 2 Ex. C. R. 67 ..... i., 1782; ii., 3740

*Attorneys and Solicitors Acts, In re*, 1 Ch. D. 573, followed; O'Connor v. Gemmill, 29 O. R. 47 .... iii., 6541

*Attwood v. Emery*, 1 C. B. N. S. 110, followed; The Queen v. The Beatrice, 5 Ex. C. R. 9 ..... ii., 2807; iii., 6479, 6717

*Attwood v. Taylor*, 1 M. & G. 307, referred to; Re McDonald v. Dowdall, 28 O. R. 212 ..... i., 2051

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*Atwood v. Atwood*, 15 P. R. 425, distinguished; Lafrance v. Lafrance, 18 P. R. 62..... ii., 3026

*Auger v. Ontario, Simcoe and Huron R. W. Co.*, 9 C. P. 165, considered; Hurd v. Grand Trunk R. W. Co., 15 A.R. 58 ..... iii., 5899

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*Hogaboom v. Receiver-General of Canada, In re Central Bank of Canada*, 24 A. R. 470, 28 S. C. R. 192, followed; In re Central Bank of Canada, 30 O. R. 320...i., 649

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*Holcomb v. Shaw*, 22 U. C. R. 92, referred to; Langford v. Kirkpatrick, 2 A. R. 513 .....i., 272

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*Holman v. Green*, 6 S. C. R. 707, followed; In re Jurisdiction over Provincial Fisheries, 26 S. C. R. 444 .....i., 1177-8; iv., 7319

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*Hooey v. Gilbert*, 12 P. R. 114, distinguished; Maclean v. Barber & Ellis Co., 13 P. R. 500 .... ii., 2474

*Hoofstetter v. Rooker*, 22 A. R. 175, affirmed; Rooker v. Hoofstetter, 26 S. C. R. 41 ..... ii., 4294; iii., 6009, 6101

*Hooper v. Hooper*, 3 Sw. & Tr. 256, followed; Wheeler v. Wheeler, 17 P. R. 45 ..... ii., 3039; iii., 5613

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*Hopton v. Robertson*, 23 Q. B. D. 126 n., distinguished; Cranston v. Blair, 15 P. R. 167 ..... i., 1451; ii., 2622

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*Hutchinson v. Collier*, 27 C. P. 249, followed: Lyttle v. Broddy, 10 O. R. 530 ..... i., 330

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*Indigo Co. v. Ogilvy*, [1891] 2 Ch. 31, specially referred to: Simpson v. Hall, 14 P. R. 310 ..... iii., 5617

*Inglis v. Beatty*, 2 A. R. 453, approved; In re Honsberger, Honsberger v. Kratz, 10 O. R. 521 ..... ii., 2729

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*Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265, followed: Coats v. Kelly, 15 A. R. 81 ..i., 461; iii., 6725

*Ings v. Bank of Prince Edward Island*, 11 S. C. R. 265, followed; In re Central Bank of Canada, Yorke's Case, 15 O. R. 625 ..... iii., 6364

*Ireland v. Oswego*, 13 Kernan 532, distinguished; Boswell v. Township of Yarmouth, 4 A. R. 353 ..... iv., 7437

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*Irwin v. Bank of Montreal*, 38 U. C. R. 375, followed; Book v. Book, 15 O. R. 139 ..... ii., 2713

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*Irwin v. Maughan*, 26 C. P. 455, distinguished; Plows v. Maughan, 42 U. C. R. 129 ..... ii., 3098

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*Ivay v. Hedges*, 9 Q. B. D. 80, followed; Graham v. Commissioners for Queen Victoria Niagara Falls Park, 28 O. R. 1 ..i., 1760; iii., 4767

*Ives v. Hitchcock*, Dra. 247, commented on; McSloy v. Smith, 26 O. R. 508 ..... i., 1980

*Ivey v. Knox*, 8 O. R. 635, 648, not followed; Burns v. Mackay, 10 O. R. 107 ..... i., 400

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*Jackson v. Barry R. W. Co.*, [1892] 1 Ch. 238, specially referred to; Sherwood v. Balch, 30 O. R. 1.. i., 74; iii., 5866

*Jackson v. Bowman*, 14 Gr. 156, distinguished, and approved; Davidson v. Maguire 7 A. R. 98 ..... ii., 2911

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*Jackson v. Hammond*, 8 P. R. 157, referred to; Cole v. Hall, 13 P. R. 100 ..... ii., 3926

*Jackson v. Hyde* 28 U. C. R. 294, distinguished; Henderson v. Barnes, 32 U. C. R. 176 .....i., 23; iii., 4781

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*Jacob v. Lawrence*, 4 L. R. (Ir.) 582, followed; Wells v. Lindop (2), 14 O. R. 275 ..... i., 1958

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*Jacques v. Worthington*, 7 Gr. 192, distinguished and approved of; McQuesten v. Thompson, 2 E. & A. 167 ..... i., 835; iii., 5670

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*Jamieson v. Harker*, 18 U. C. R. 590, followed; Dowsett v. Cox, 18 U. C. R. 594 ..... ii., 3972

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*Jarvis v. Jones*, 4 P. R. 341, referred to; Re Chatham Harvester Co. v. Campbell, 12 P. R. 666 ..... ii., 3674

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*Johnson and Toronto, Grey, and Bruce R. W. Co., In re*, 8 P. R. 535, followed; Hendrie v. Grand Trunk R. W. Co., Grand Trunk R. W. Co. v. Toronto, Grey, and Bruce R. W. Co., 2 O. R. 441 ..... iii., 5829

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*Johnson v. Boyle*, 8 U. C. R. 142, 11 U. C. R. 101, referred to; Walsh v. Johnson, 24 C. P. 367 ..... iv., 7503

*Johnson v. Cline*, 16 O. R. 129, dissented from; Gibbons v. Tomlinson, 21 O. R. 489 ..... ii., 2908

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*Johnston v. Johnston*, 9 P. R. 259, followed; Independent Order of Foresters v. Pegg, 19 P. R. 254 ..... ii., 4322

*Johnston v. Northern R. W. Co.*, 34 U. C. R. 432, considered and approved; Millar v. Grand Trunk R. W. Co., 25 C. P. 389 ..... iii., 5910

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*Jones v. Tepper*, 28 L. J. Q. B. 85 followed; Taylor v. McEwan, 2. U. C. R. 126 ..... iii., 6392

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*Jones, Re, Eure v. Cox*, 46 L. J. N. S. Ch. 316, followed; St. Louis v. O'Callaghan, 13 P. R. 322.... iii., 5610

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| Zumstein v. Snrumm | 22 A.R. 263 | iii. 4767, 4782. |
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| Zwick, Thompson v. | 1 U.C.R. 338 | ii. 2940; iii. 5464. |
| Zwicker, Ernst v. | 27 S.C.R. 594 | iii. 6747; iv. 7604. |
| Zwicker v. Feindel | 29 S.C.R. 516 | i. 2316; iv. 7170. |
| Zwicker v. Zwicker | 29 S.C.R. 527 | i. 1880; ii. 2463. |
| ———, Carruthers v. | Tay. 243 | iii. 6610. |
| ———, Corcoran v. | 3 Ch.Ch. 398 | iii. 5547. |
| ———, Doe ex dem. Burger v. | Tay. 363 | iii. 6172. |


END OF THE TABLES OF CASES.

# Chief Justices and Judges

OF THE

# SUPREME AND EXCHEQUER COURTS OF THE DOMINION OF CANADA,

AND OF

# THE SUPERIOR COURTS

OF THE

## PROVINCE OF ONTARIO, FORMERLY UPPER CANADA,

FROM THE CONSTITUTION OF THE PROVINCE UNDER 31 GEO. III., C. 31 (1790-1), TO THE END OF THE YEAR 1900.

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## Supreme Court and Exchequer Court.

### CHIEF JUSTICES.

| | | |
|---|---|---|
| HON. SIR WILLIAM BUELL RICHARDS, KNT. | Appointed | 8th of October, 1875. |
| " SIR WILLIAM JOHNSTONE RITCHIE | " | 11th of January, 1879. |
| " SIR SAMUEL HENRY STRONG. | " | 13th of December, 1892. |

### JUDGES.

| | | |
|---|---|---|
| HON. WILLIAM JOHNSTONE RITCHIE. | Appointed | 8th of October, 1875. |
| " SAMUEL HENRY STRONG.... | " | 8th of October, 1875. |
| " JEAN THOMAS TASCHEREAU. | " | 8th of October, 1875. |
| " TÉLÉSPHORE FOURNIER .... | " | 8th of October, 1875. |
| " WILLIAM ALEXANDER HENRY. | " | 8th of October, 1875. |
| " HENRI ELZÉAR TASCHEREAU. | " | 7th of October, 1878. |
| " JOHN WELLINGTON GWYNNE. | " | 14th of January, 1879. |
| " CHRISTOPHER SALMON PATTERSON, | " | 27th of October, 1888. |
| " ROBERT SEDGEWICK..... | " | 18th of February, 1893. |
| " GEORGE EDWIN KING..... | " | 21st of September, 1893. |
| " DÉSIRÉ GIROUARD ..... | " | 28th of September, 1895. |

## Exchequer Court of Canada.

### JUDGE.

| | | |
|---|---|---|
| HON. GEORGE WHEELOCK BURBIDGE. | Appointed | 1st of October, 1887. |

## Court of Error and Appeal, Court of Appeal, and Court of Appeal for Ontario.

### PRESIDING JUDGES AND CHIEF JUSTICES.

| | | |
|---|---|---|
| HON. SIR JOHN BEVERLEY ROBINSON, BART. C.B. | Appointed | 18th of March, 1862. |
| " ARCHIBALD MCLEAN..... | " | 22nd of July, 1863. |
| " WILLIAM HENRY DRAPER, C.B. | " | 20th of October, 1868. |
| " THOMAS MOSS..... | " | 30th of November, 1877. |
| " JOHN GODFREY SPRAGGE.... | " | 2nd of May, 1881. |

| | | |
|---|---|---|
| Hon. Sir John Hawkins Hagarty, | Appointed | 6th of May, 1884. |
| " Sir George William Burton | " | 24th of April, 1897. |
| " John Douglas Armour.... | " | 2nd of July, 1900. |

JUDGES.

| | | |
|---|---|---|
| Hon. Sir James Buchanan Macaulay, Knt..... ..... | Appointed | 23rd of July, 1857. |
| " William Hume Blake..... | " | 12th of March, 1864. |
| " Samuel Henry Strong.... | " | 27th of May, 1874. |
| " George William Burton.. | " | 30th of May, 1874. |
| " Christopher Salmon Patterson, | " | 6th of June, 1874. |
| " Thomas Moss ..... | " | 8th of October, 1875. |
| " Joseph Curran Morrison.. | " | 30th of November, 1877. |
| " Featherston Osler ..... | " | 17th of November, 1883. |
| " James Maclennan..... | " | 27th of October, 1888. |
| " Charles Moss ..... | " | 24th April, 1897. |
| " James Frederick Lister... | " | 21st June, 1898. |

Note.—By 34 Geo. III. c. 2, and 7 Will. IV. c. 2, appeals were allowed from the Court of King's Bench and Chancery, to the Governor and Council, who composed a Court of Appeal.

By 12 Vict. c. 63, a new appellate Court was established, called the "Court of Error and Appeal," composed of the Judges of the Courts of Queen's Bench, Common Pleas, and Chancery.

The present Court of Appeal was established by the 37 Vict. c. 7 (O.).

By 39 Vict. c. 7, s. 22, the style of the Court was changed to "The Court of Appeal," and by 44 Vict. c. 5 (O.) to "The Court of Appeal for Ontario."

The presiding Judge, by 32 Vict. c. 24, s. 1 (O.), was styled "Chief Justice of Appeal" until the death of Chief Justice Harrison, 1st of November, 1878, since which date he is styled "Chief Justice of Ontario."

## Court of King's (and Queen's) Bench and King's (and Queen's) Bench Division of the High Court of Justice.

CHIEF JUSTICES.*

| | | |
|---|---|---|
| Hon. William Osgoode..... | Appointed | 29th of July, 1792. |
| " John Elmsley..... | " | 21st of November, 1796. |
| " Henry Alcock..... | " | 7th of October, 1802. |
| " Thomas Scott..... | " | 6th of August, 1806. |
| " William Dummer Powell. | " | 1st of October, 1816. |
| " Sir William Campbell, Knt. | " | 8th of December, 1825. |
| " Sir John Beverley Robinson, Bart., C.B..... ..... | " | 13th of July, 1829. |
| " Archibald McLean..... | " | 18th of March, 1862. |
| " William Henry Draper, C.B. | " | 22nd of July, 1863. |
| " William Buell Richards.. | " | 12th of November, 1863. |
| " Robert Alexander Harrison, | " | 8th of October, 1875. |
| " John Hawkins Hagarty... | " | 13th of November, 1878. |
| " Sir Adam Wilson, Knt.... | " | 6th of May, 1884. |
| " John Douglas Armour.... | " | 15th of November, 1887. |
| " William Glenholme Falconbridge. | Appointed | 3rd July, 1900. |

* The Chief Justice of this Court, until 1878, was styled "Chief Justice of Upper Canada" or "of Ontario."

JUDGES.

| | | | |
|---|---|---|---|
| Hon. | William Dummer Powell.. | Appointed | 9th of July, 1794. |
| " | Henry Alcock..... | " | 30th of November, 1798.† |
| " | Thomas Cochrane..... | " | 25th of June, 1803. |
| " | Robert Thorpe..... | " | 24th of July, 1805. |
| " | William Campbell..... | " | 18th of November, 1811. |
| " | D'Arcy Boulton..... | " | 12th of February, 1818. |
| " | Levius Peters Sherwood.. | " | 17th of October, 1825. |
| " | John Walpole Willis..... | " | 26th of September, 1827. |
| " | James Buchanan Macaulay (*a*) | " | 13th of July, 1829. |
| " | Archibald McLean..... | " | 23rd of March, 1837. |
| " | Jonas Jones..... | " | 23rd of March, 1837. |
| " | Christopher Alex. Hagerman (*b*) | " | 15th of February, 1840. |
| " | William Henry Draper.... | " | 12th of June, 1847. |
| " | Robert Baldwin Sullivan.. | " | 15th of September, 1848. |
| " | Robert Easton Burns..... | " | 21st of January, 1850. |
| " | Archibald McLean..... | " | 5th of February, 1856. |
| " | John Hawkins Hagarty... | " | 19th of March, 1862. |
| " | Skeffington Connor..... | " | 31st of January, 1863. |
| " | Joseph Curran Morrison.. | " | 24th of August, 1863. |
| " | Adam Wilson..... | " | 12th of November, 1868. |
| " | John Douglas Armour..... | " | 30th of November, 1877. |
| " | Matthew Crooks Cameron. | " | 15th of November, 1878. |
| " | John O'Connor..... | " | 11th of September, 1884. |
| " | William Glenholme Falconbridge | " | 21st of November, 1887. |
| " | William Purvis Rochfort Street ..... | " | 30th of November, 1887. |

## Court of Common Pleas and Common Pleas Division of the High Court of Justice.

CHIEF JUSTICES.

| | | | |
|---|---|---|---|
| Hon. | James Buchanan Macaulay | Appointed | 15th of December, 1849. |
| " | William Henry Draper, C.B. | " | 5th of February, 1856. |
| " | William Buell Richards... | " | 22nd of July, 1863. |
| " | John Hawkins Hagarty... | " | 12th of November, 1868. |
| " | Sir Adam Wilson, Knt.... | " | 13th of November, 1878. |
| " | Sir Matthew Crooks Cameron, Knt..... | " | 13th of May, 1884. |
| " | Sir Thomas Galt, Knt..... | " | 7th of November, 1887. |
| " | Sir William Ralph Meredith, Knt ..... | " | 5th of October, 1894. |

† The Hon. Peter Russell, Administrator of the Government, received several commissions between the 15th of July, 1795, and the 17th of March, 1798, to act in the absence of other Judges.

(*a*) The Hon. J. B. Macaulay was on the 3rd of July, 1827, temporarily appointed a Judge of the Court of King's Bench, in the room of the Hon. D'Arcy Boulton.

(*b*) The Hon. C. A. Hagerman was on the 26th of June, 1828, temporarily appointed a Judge of the Court of King's Bench, in the room of the Hon. J. W. Willis.

### JUDGES.

| | | | |
|---|---|---|---|
| Hon. | Archibald McLean | Appointed | 19th of January, 1850. |
| " | Robert Baldwin Sullivan | " | 21st of January, 1850. |
| " | William Buell Richards | " | 22nd of June, 1853. |
| " | John Hawkins Hagarty | " | 5th of February, 1856. |
| " | Joseph Curran Morrison | " | 19th of March, 1862. |
| " | John Wilson | " | 22nd of July, 1863. |
| " | Adam Wilson | " | 24th of August, 1863. |
| " | John Wellington Gwynne | " | 12th of November, 1868. |
| " | Thomas Galt | " | 7th of June, 1869. |
| " | Featherston Osler | " | 5th of March, 1879. |
| " | John Edward Rose | " | 4th of December, 1883. |
| " | Hugh MacMahon | " | 30th of November, 1887. |

## Court of Chancery and Chancery Division of the High Court of Justice.

### CHANCELLORS.

| | | | |
|---|---|---|---|
| Hon. | William Hume Blake | Appointed | 29th of September, 1849. |
| " | Philip M. M. S. VanKoughnet | " | 19th of March, 1862. |
| " | John Godfrey Spragge | " | 27th of December, 1869. |
| " | Sir John Alexander Boyd, K.C.M.G. | " | 3rd of May, 1881. |

### VICE-CHANCELLORS AND JUDGES.

| | | | |
|---|---|---|---|
| Hon. | Robert Sympson Jameson | Appointed | 23rd of March, 1837. |
| " | James C. P. Esten | " | 29th of September, 1849. |
| " | John Godfrey Spragge | " | 27th of December, 1850. |
| " | Oliver Mowat | " | 14th of November, 1864. |
| " | Samuel Henry Strong | " | 27th of December, 1869. |
| " | Samuel Hume Blake | " | 2nd of December, 1872. |
| " | William Proudfoot | " | 30th of May, 1874. |
| " | Thomas Ferguson | " | 24th of May, 1881. |
| " | Thomas Robertson | " | 11th of February, 1887. |
| " | Richard Martin Meredith | " | 1st of October, 1890. |

Note.—By 7 Will. IV. c. 2, a Court of Chancery was established for the Province of Upper Canada, of which the Governor of the Province was Chancellor, and the Judicial powers whereof were exercised by a Judge, known as the Vice-Chancellor of Upper Canada. By 12 Vict. c. 64 (C. S. U. C. c. 12), the appointment of a Chancellor and two Vice-Chancellors was authorized.

## Judges of the Maritime Court and Local Judges in Admiralty.

### JUDGES.

| | | | |
|---|---|---|---|
| Kenneth Mackenzie, Esq., Q.C. | | Appointed | 12th of July, 1877. |
| John Boyd, Esq., Q.C. | | " | 28th of March, 1883. |
| Joseph Easton McDougall, Esq., Q.C. | | " | 17th of September, 1885. |

# ERRATA.

**Errors in the References to the Volumes and Pages of Reports of the Cases in the Digest have been corrected in the Table of Cases.**

Vol. I., col. 49. For Moore v. Connecticut Mutual Fire Ins. Co., read Moore v. Connecticut Mutual Life Ins. Co.

Vol. I., col. 58. For Bridgman v. Smith, read Brigham v. Smith.

Vol. I., col. 86. For In re McCluny and Mortley, read In re McCluny and Motley.

Vol. I., col. 115. For Cleat v Elliott, read Cleal v. Elliott.

Vol. I., col. 257, 6th line from top. For Great Western R. W. Co. v. Rogers, read Township of London v. Great Western R. W. Co.

Vol I., col. 329, 15th line from top. For 13 Gr. read 15 Gr.

Vol. I., col. 330, 4th line from bottom. For 204, read at p. 404.

Vol. I., col. 473. For Bresse v. Knox, read Breese v. Knox.

Vol. I., col. 524. For Bogwell v. Hamilton, read Bagwell v. Hamilton.

Vol. I., col. 789, 6th line from top. For Harnott, read Hanrott; for 702, read 704.

Vol. I., col. 848. For Ross v. Hope, read Rose v. Hope.

Vol. I., col. 859. For Carlisle v. Hostel, read Carlisle v. Hoshel.

Vol. I., col. 944, 10th line from top. For L. R. 3 Q. B., read 3 Q. B. D.

Vol. I., col. 977. For Cochrane v. Bucher, read Cochrane v. Boucher.

Vol. I., col. 1022. Line 5 from bottom, insert or before if.

Vol. I., col. 1136, 24th line from top. For 20 Gr. 34, read 28 Gr. 65.

Vol. I., col. 1221. For Marlatt v. Goderham, read Marlatt v. Gooderham.

Vol. I., col. 1294. For Wingate v. Enniskillen Oil Co., read Wingall v. Enniskillen Oil Co.

Vol. I., col. 1303. For Smiles v. Bedford, read Smiles v. Belford.

Vol. I., col. 1318. For Lawson v Canada Farmers' Ins Co., read Lowson v. Canada Farmers' Ins. Co.

Vol. I., col. 1322, 26th line from top. For 544, read 944.

Vol. I., col. 1362. Add to Isherwood v. Dixon, the reference 5 Gr. 314.

Vol. I., col. 1391, 16th line from bottom. For 502, read 503.

Vol. I., col. 1394, 31st line from bottom. For 3 P. R., read 8 P. R.

Vol. I., col. 1440. For Glanson v. Fish, read Ganson v. Fish.

Vol. I., col. 1456. For Cochrane v. Ross, read Cochrane v. Cross.

Vol. I., col. 1465, 20th line from bottom. For 502, read 503.

Vol. I., col. 1488. For Anglin v. City of Kingston, read Anglin v. Township of Kingston.

Vol. I., col. 1503, bottom line. For 30 L. J. 517, read 30 L. J. N. S. Ch. 817.

Vol I., col. 1520. For Lawson v. Canada Farmers' Ins. Co., read Lowson v. Canada Farmers' Ins. Co.

Vol. I., col. 1627, 9th line from bottom. For Rex, read Regina.

Vol. I., col. 1650, 9th line from bottom. For Rex, read Regina.

Vol. I., col. 1735. For Cosgrove v. Corbell, read Cosgrove v. Corbett.

Vol. I., col. 1748, 6th line from top. For 22 S. C. R., read 25 S. C. R.

Vol. I., col. 1880. For Hutton v. Fish, read Hatton v. Fish.

Vol. I., col. 1915. For Edgar v. Sewell, read Edgar v. Newell.

Vol. I., col. 2164. For Mair v. Cully, read Mair v. Culy.

Vol. I., col. 2176. For Truffitt v. Lawder, read Duffill v. Lawder.

Vol. I., col. 2202. For Riddell v. Brian, read Riddell v. Briar.

Vol. I., col. 2214, line 16 from bottom. For 22, read 24.

Vol. I., col. 2272. For Mair v Cully, read Mair v. Culy.

Vol. II., col. 2383. For Beauchamp v. Case, read Beauchamp v. Cass.

Vol. II., col. 2464, 23rd line from bottom. For Osser read Orser.

Vol. II., col. 2471, line 37 from bottom. For 26, read 28.

Vol. II., col. 2549. For Da Costa v. Jordan Estate, read Da Costa v. Gordon Estate.

Vol. II., col. 2595, line 25 from top. For 14 Ch. D., read 18 Ch. D.

Vol. II., col. 2608. For Hutchin v. Baby, read Hutchinson v. Baby.

Vol. II., col. 2612. For Lawson v. Canada Farmers' Ins. Co., read Lowson v. Canada Farmers' Ins. Co.

Vol. II., col. 2669, line 23 from top. For 458, read 438.

Vol. II., col. 2686. For Clouster v. McLean, read Clousten v. McLean.

Vol. II., col. 2713. For Eades v. Marshall, read Eades v. Maxwell.

Vol. II., col. 2723. For Law v. Gemley, read Low v. Gemley.

Vol. II., col. 2958. For Morley v. Totten, read Morey v. Totten.

Vol. II., col. 3030, 27th line from top. For 579, read 570.

Vol. II., col. 3054. For Krasmer v. Gless, read Kraemer v. Gless.

Vol. II., col. 3080. For Malloch v. Derwan, read Malloch v. Derivan.

Vol. II., col. 3084, 33rd line from bottom. For 310, read 210.

Vol. II., col. 3194. For James v. Wooley, read Jones v. Wooley.

Vol. II., col. 3312. For Dean v. Western Assce. Co., read Dear v. Western Assce. Co.

Vol. II., col. 3314, 15th line from top. For 4 O. R., read 14 O. R.

Vol. II., col. 3400. For Lee v. Gorris, read Lee v. Gorrie.

Vol. II., col. 3453. For Melville Mutual Marine and Fire Ins. Co. v. Driscoll, read Millville Mutual Marine and Fire Ins. Co. v. Driscoll.

Vol. II., col. 3468. For Townsley v. Wythes, read Towsley v. Wythes.

# ERRATA.

Vol. II., col. 3497, 27th line from top. For Harnott, read Hanrott; for 702, read 704.

Vol. II., col. 3527. For Balkwell v. Beldome, 18 U. C. R. 231, read Balkwell v. Beddome, 18 U. C. R. 203.

Vol. II., col. 3606. For Rose v. Carscallen, read Ross v. Carscallen.

Vol. II., col. 3834. For O'Hara v. McCormick, read O'Hare v. McCormick.

Vol. II., col. 3838. For Murphy v. L'Abbé, read Murphy v. Labbé.

Vol. II., col. 3913. For Doe d. Roes v. Papst, read Doe d. Ross v. Papst.

Vol. II., col. 4047. For Coldwell v. Hull, read Coldwell v. Hall.

Vol. II., col. 4080. For McBride v. Heward, 12 L. J. 280, read McBride v. Howard, 12 C. L. J. 280.

Vol. II., col. 4163. For O'Neill v. Light, read O Neill v. Leight.

Vol. II., col. 4189. For Potts v. Bovine, read Potts v. Boivine.

Vol. II., col. 4297. For Watson v. Monro, read Munro v. Watson.

Vol. II., col. 4298. For Mundell v. Tinkins, read Mundell v. Tinkis.

Vol. II., col. 4328. For Novieux v. Labadie, read Nevieux v. Labadie.

Vol. II., col. 4343. For Sayes v. Brown, read Sayles v. Brown.

Vol. II., col. 4387. For Chisholm v. Sheddon, read Chisholm v. Sheldon.

Vol. II., col. 4430. For Wallace v. Goodere, read Wallace v. Goodeve.

Vol. II., col. 4437. For Re Crozier, Parker v. Glover, read Re Cozier, Parker v. Glover.

Vol. II., col. 4472. For O'Donohoe v. Whitey, read O'Donohoe v. Whitty.

Vol. II., col. 4604. For In re Stonehouse and Township of Plymouth, read In re Stonehouse and Township of Plympton.

Vol. III., col. 4847, line 10 from bottom. For 4 P. R. read 3 P. R.

Vol. III., col. 4848. For Frontenac Division, No. 2, Sons of Temperance v. Reedston, read Frontenac Division, No. 2, Sons of Temperance v. Rudston.

Vol. III., col. 4852. For Gass v. Colcleugh, read Glass v. Colcleugh.

Vol. III., col. 4868, 20th line from bottom. For 197, read 497.

Vol. III., col. 4872. For Wethen v. Caverley, read Whethen v. Caverley.

Vol. III., col. 4877. For Whethen v. Calverley, read Whethen v. Caverley.

Vol. III., col. 4878. For Stuart v. Buller, read Stuart q. t. v. Bullen.

Vol. III., col. 4884, 9th line from top. For 331, read 230.

Vol. III., col. 4892. For Gaskin v. Colvin, read Gaskin v. Calvin.

Vol. III., col. 4901. For Pall v. Kenney, read Palk v. Kenney.

Vol. III., col. 4905. For Sprung v. Ande, read Sprung v. Anderson.

Vol. III., col. 4908. For Sprung v. Ande, read Sprung v. Anderson.

Vol. III., col. 4921, line 23 from top. For 20 Gr. 425, read 21 Gr. 397.

Vol. III., col. 5017, 15th line from top. For 9 S. C. R., read 8 S. C. R.

Vol. III., col. 5064, 14th line from bottom. For A. C. 194, read A. C. 494.

Vol. III., col. 5073. For Dowling v. Eastwood, read Dowding v. Eastwood.

Vol. III., col. 5172, 31st line from bottom. For 639, read 698.

Vol. III., col. 5261, line 12 from bottom. For O. R., read A. R.

Vol. III., col. 5274. For Mellish v Wilkies, read Mellish v. Wilkes.

Vol. III., col. 5275. For Benedict v. Allen, read Benedict v. Van Allen.

Vol. III., col. 5289. For Koster v. Holder, read Koster v. Holden.

Vol. III., col. 5352. For Glass v. O'Gray, read Glass v. O'Grady.

Vol. III., col. 5357. For Bristowe v. Patterson, read Bristowe v. Pattenson.

Vol. III., col. 5361. For McKenzie v. McKittridge, read McKenzie v. Kittridge.

Vol. III., col. 5371. For Guggisberg v. Mutual Ins. Co., read Guggisberg v. Waterloo Mutual Fire Ins. Co.

Vol. III., col. 5372. For Right v. Way, read Wright v. Way.

Vol. III., col. 5377. For Frietsch v. Wrinkler, read Frietsch v. Winkler.

Vol. III., col. 5419. For Regina v. Desaller, read Regina v. Dessauer.

Vol. III., col. 5441. For Muller v. City of Hamilton, read Miller v. City of Hamilton.

Vol. III., col. 5482. For Nellie v. Wilkes, read Nellis v. Wilkes.

Vol. III., col. 5515, 11th line from bottom. For Daily read Day.

Vol. III., col. 5555. For Trade v. Phœnix Ins. Co., read Trude v. Phœnix Ins. Co.

Vol. III., col. 5596. For Prettie v. Lindner, read Prittie v. Lindner.

Vol. III., col. 5615, 6th line from bottom. For 579, read 570.

Vol. III., col. 6332. For Lawson v. McDermitt, read Lawson v. McDermott.

Vol. III., col. 6483. For Coorty v. The George L. Caldwell, read Coorty v. The George L. Colwell.

Vol. III., col. 6520, 19th line from bottom. For 100, read 150; and for 104, read 204.

Vol. III., col. 6807. For Lefeuntun v. Véronneau, read Lefeunteum v. Véronneau.

Vol. III., col. 6863. For McMillan v. Sherry, read McMillan v. McSherry.

Vol. III., col. 6897, 8th line from top. For 428, read 482.

Vol. III., col. 6976. For Doe d. Read v. Peterson, read Doe d. Read v. Paterson.

Vol. III., col. 7027, 34th line from bottom. For 20, read 80.

Vol. IV., col. 7190. For Moody v. Prevost, read Mooney v. Prevost.

Vol. IV., col. 7304. For McGillivray v. Mullin, read McGillivray v. Millin.

Vol. IV., col. 7400. For Stede v. County of York, read Steele v. County of York.

Vol. IV., col. 7404, 11th line from top. For 2 O. R., read 12 O. R.

Vol. IV., col. 7430. For Pewes v. Hall, read Plewes v. Hall.

Vol. IV., col. 7431, 20th line from top. For 20 Gr., read 29 Gr. 25th line from top, same correction.

Vol. IV. col. 7434. For Regina ex rel. Richmond v. Taggart, read Regina ex rel. Richmond v. Tegart.

Vol. IV., col. 7444. For Regina v. Woodstock and Durham Plank and Gravel Road Co, read Regina v. Woodstock and Dereham Plank and Gravel Road Co.

Vol. IV., col. 7487. For Nellie v. Wilkes, read Nellis v. Wilkes.

Vol. IV., col. 7711. For Carr v. Life Assurance Association, read Carr v. Fire Assurance Association.

Vol. IV., col. 7739. For Re Golrick v. Ryall, read Re McGolrick v. Ryall.

Vol. IV., col. 7759, line 25 from bottom. For 3 B. & S., read 1 B. & S.