A DIGEST

OF THE

NOVA SCOTIA REPORTS

(VOLS. 21 TO 34 INCLUSIVE)

AND OF ALL NOVA SCOTIA CASES DECIDED IN THE

SUPREME COURT OF CANADA

AND THE

IMPERIAL PRIVY COUNCIL

BETWEEN THE YEARS

1888 AND 1903,

AND

AN INDEX OF ALL ENGLISH, CANADIAN AND NOVA SCOTIA STATUTES REFERRED TO THEREIN.

BY

BENNETT H. ARMSTRONG,

OF THE NOVA SCOTIA BAR.

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PREFACE.

The following pages contain a digest of all cases reported in Volumes XXI. to XXXIV. of the N. S. Reports, and of all other Nova Scotia cases, wherever reported, decided during the time covered by those volumes, the years 1888 to 1902 inclusive. To avoid possible confusion I have not touched upon Volume XXXV., a portion only of which was available at the time of going to press.

Case references are to the volumes of the uniform series (the first volume of which is Thomson's Reports, 1834-1851), now the ordinary mode of reference. The alternative title of each volume may be found by reference to the table inserted at page vi., as may also its date of issue, frequently a matter of importance in estimating the present standing of some decisions as authorities. As the mode of abbreviated reference to the Supreme Court of Canada Reports seems to be as yet a matter of personal preference, I have selected the letters S.C.C. from among some five or six different styles indifferently employed.

It was not possible, as the work proceeded, to note the position of Nova Scotia Statutes referred to, in the Revised Statutes 1900. This defect I have endeavoured to remedy by means of the cross reference index which stands under the title, STATUTES. This index is necessarily a selection from the large number of statutes mentioned in the pages of the Reports, but I believe it will be found to afford a key to every instance in which a statute has come up for anything like construction or special application. I would extend the same observation to the similar cross reference index standing under the title, JUDICATURE ACT AND RULES.

As mine is in effect a continuation of the admirable work of Mr. Congdon, which has long marked an epoch in the history of law reporting in this Province, I have followed, in a general way, its plan and arrangement. But as, perhaps luckily for amateurs, the making of Digests is still a very inexact science, I have frequently departed from my model, and have occasionally even ventured to introduce features which I have not observed elsewhere.

It remains for me to express my great sense of obligation to Mr. A. A. MacKay, B.A., LL.B., the well known Law Clerk of the Nova Scotia Assembly, for some valuable suggestions, and for reading these pages as they were going through press and making many corrections; and I acknowledge my debt to several other members of the Bar for occasional assistance, and for frequent expressions of interest and good will.

B. H. A.

HALIFAX, June 1st, 1903.

THE SUPREME COURT OF NOVA SCOTIA

DURING THE PERIOD OF THE REPORTS DIGESTED.

CHIEF JUSTICE:

THE HONORABLE JAMES McDONALD,
(Appointed May 20th, 1881.)

JUDGE IN EQUITY:

THE HONORABLE WALLACE GRAHAM,
(Appointed September 29th, 1889.)

JUSTICES:

THE HONORABLE HUGH McDONALD,
(Appointed November 5th, 1873; Resigned February 20th, 1893.)

THE HONORABLE HENRY W. SMITH,
(Appointed January 15th, 1875; Died February 1st, 1890.)

THE HONORABLE ROBERT L. WEATHERBE,
(Appointed October 7th, 1878.)

THE HONORABLE J. NORMAN RITCHIE,
(Appointed September 29th, 1885.)

THE HONORABLE CHARLES J. TOWNSHEND,
(Appointed May 4th, 1887.)

THE HONORABLE NICHOLAS H. MEAGHER,
(Appointed April 23rd, 1890.)

THE HONORABLE HUGH McD. HENRY,
(Appointed February 20th, 1893.)

ATTORNEY-GENERAL:

THE HONORABLE J. WILBERFORCE LONGLEY,
(Appointed May 25th, 1886.)

REPORTERS:

BENJAMIN RUSSELL, M.A., D.C.L., Q.C.
JOHN M. GELDERT, LL.B.
FRANK W. RUSSELL, LL.M.

ABBREVIATIONS.

C.C.C., ... Canadian Criminal Cases.
C.C.J., ... County Court Judge.
C.L.J., ... Canada Law Journal.
C.L.R., ... Commercial Law Reports (Canadian).
Cass. Dig., ... Cassell's Digest, Supreme Court of Canada Reports, 1875-1893.
Cout. Dig., ... Coutlee's Digest, Supreme Court of Canada Reports, 1893-1898.
E.J., ... Judge in Equity.
J.C.C., ... Judge of County Court.
James, ... James Nova Scotia Reports, 1853-1855.
N.S.D., or N.S. Dec., Nova Scotia Decisions (Geldert & Oxley), 1866-1875.
Old., ... Oldright's Nova Scotia Reports, 1860-1867.
R. & C., ... Russell & Chesley's Nova Scotia Reports, 1875-1879.
R. & G., ... Russell & Geldert's Nova Scotia Reports, 1879-1895.
R.S., ... Revised Statutes of Nova Scotia. (Unless otherwise specified the Fifth Series, revision of 1884, is meant.)
R.S.C., or R.S. Can., Revised Statutes of Canada 1886.
Rit. Eq. Dec., ... Ritchie's Equity Decisions. Nova Scotia, 1873-1882.
S.C.C. or S.C.R., ... Supreme Court of Canada Reports.
Thom. or Thomson, .. Thomson's Nova Scotia Reports, 1834-1851, 1856-1859.

A CHRONOLOGICAL LIST

OF THE

NOVA SCOTIA REPORTS.

Stewart, (Vice-Admiralty)..... 1803-1813
Young's Admiralty Decisions (Oxley)..... 1865-1881
Ritchie's Equity Decisions (Russell)..... 1873-1882
Russell's Election Reports..... 1874
Thomson..... 1834-1841

NOVA SCOTIA REPORTS.

(Uniform Series.)

1, Thomson, 2nd Edition..... 1834-1851
2, James..... 1853-1855
3, 2 Thomson..... 1856-1859
4, Cochran..... 1859
5, 1 Oldright..... 1860-1865
6, 2 " 1865-1867
7, 1 Nova Scotia Decisions (Geldert & Oxley)..... 1866-1869
8, 2 " " " " 1869-1872
9, 3 " " " " 1872-1875
10, 1 Russell & Chesley 1875-1876
11, 2 " " 1876-1877
12, 3 " " 1877-1879
13, 1 Russell & Geldert..... 1879-1880
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28, 1 Geldert & Russell..... 1895-1896
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31, 4 " " 1898-1899
32, 5 " " 1899-1900
33, 6 " " 1900-1901
34, 7 " " 1901-1902

A DIGEST

OF

THE NOVA SCOTIA REPORTS,

1889-1903.

INCLUDING VOLS. XXI. TO XXXIV.

ABANDONMENT.

Of appeal.]—See APPEAL, 36.

To underwriters.]—See INSURANCE, 14.

ABATEMENT.

Of action.]—See TRESPASS, 1.

Of legacies.]—See WILL, 25.

ABSENT OR ABSCONDING DEBTOR.

1. **A summons for agent** may not issue after judgment entered.

Cawsey v. Elliot, 22/163.

2. **The proper course** is to proceed under O. 43, by garnishee process.

Dempster v. Elliot, 22/443.

3. **Summons for agent—Appeal.**]—As to whether an appeal may be taken from the order of a Judge, discharging a person summoned as agent, after having made answer to the satisfaction of the Judge. Preliminary objection taken, but not decided, the appeal being dismissed on other grounds. See O. 46, R. 18.

Banks v. Mackintosh, 27/480.

4. **Summons for agent—Discharge of agent.**]—Where a summons for agent issues and the agent admits having assets in his hands, he cannot be discharged until after the plaintiff has obtained judgment. An order discharging him, "except as to the goods and chattels mentioned in the declaration filed," is bad, as that is the only behalf in which he was before the Court, likewise an allowance of costs in the same order.

Daniel v. D'Homme, 21/341.

5. **Summons to agent—Attacher's rights depend on those of debtor.**]—An attacher's right to recover money out of the hands of an agent is, as against the agent, the same as that of the principal.

R. B. M. had assigned his expectation of a legacy to J.C.M., for the sum of $600. Later, he suffered judgment to pass against him, at the suit of J. C. M., for the debt. The legacy having fallen in, and being in the hands of J. C. M., as executor of the devisor, R. B. M. gave him a receipt for the amount, and J.C.M. credited it on the judgment.

The plaintiff having summoned him as agent having monies payable to R.B.M. in his hands, contending that J.C.M. had released his security in respect to the assignment of the legacy, by becoming a party to the composition and release con-

tained in an assignment by R.B.M., for the benefit of his creditors:—

Held (obiter—See ASSIGNMENT, 8), that R.B.M. having suffered a judgment to pass against him at the suit of J.C.M., which was unaffected by the subsequent assignment, there was nothing to prevent his making a payment thereon. And having in effect done so completely and irrevocably, with the legacy due him, there were no longer monies of his in the hands of J.C.M. And his right of recovery against J.C.M. having thus terminated, the right of the plaintiff, dependent thereon, no longer existed.

Banks v. Mackintosh, 27/480.

6. **Attachment—Distress for rent.**]—Plaintiff caused an attachment to issue against the defendant as an absent or absconding debtor, to recover a balance due for goods, and also for rent. Subsequently he distrained for the same rent on part of the property levied under the attachment. At the instance of a subsequent attacher: Held, that by distraining he lost his right of action for the rent, and could not hold his attachment for so much of his claim.

Gray v. Curry, 22/262.

7. **Attachment—Right of creditor in possession of property as against attachment.**]—On the 8th September, 1892, the property of M., who had been a livery stable keeper at Truro, and was absconding from the Province, was levied under attachment, by the defendant sheriff. At the time of the levy a horse and carriage were out on hire. On the 13th these were returned to Truro by train, and were taken possession of by the plaintiff, who removed them from the county. The following day the plaintiff, who was a creditor of M., telegraphed him an offer for the horse and carriage, which a few days later was accepted by letter. Until this time plaintiff kept the property out of the county. On October 17th, it was levied on under attachment and subsequently sold in part. Plaintiff brought trover against the Sheriff, who contended that the property was bound by the original writ of attachment of September 8th. There was no evidence that the plaintiff, at the time he took possession of the property, and made his offer, had notice of the attachment and levy, but he knew in a general way that the property of M. was likely to be attached, and his action was a bona fide and non-collusive effort to obtain payment of the debt due him by M.

Held, that under Order 40, Rules 32, 41, the attachment did not bind until actual levy had been made, and, meanwhile, plaintiff having perfected a bona fide purchase of the property for a good consideration, and, being in possession, which took the place of delivery, was entitled to recover against the Sheriff levying; but without costs.

Mahon v. Crowe, 28/250.

8. **Attachment of goods in possession of third person—Sheriff must justify.**]—Action against the Sheriff for wrongful taking of goods out of the possession of plaintiff, under an attachment against J.J., an absent or absconding debtor, which plaintiff claimed as his own property by purchase from J.J.

Held, that the goods having been found in the possession of plaintiff, the onus was on the Sheriff to prove the lawfulness of his action. The possession of plaintiff being sufficient to maintain trespass against a wrongdoer, he need not prove title.

And the Sheriff was a wrongdoer, because the affidavit on which the attachment was granted did not prove that any debt was due by J.J., the absent or absconding debtor.

Quære, in relation to the purchase alleged by the plaintiff, is the Statute of Frauds as a defence, open to the Sheriff? (Note.—Cf. FRAUDS, STATUTE OF, 12.)

Johnson v. Buchanan, 29/27.

9. **Perishable property.**]—Lumber and deals exposed to the weather under such circumstances that they cannot be stored, and are hence liable to deterioration, come within the terms of O. 46, R. 5, and may be ordered to be sold. The matter seems to be entirely within the discretion of the Judge applied to.

Bank of Nova Scotia v. Ward, 21/230.

10. **Library stamp.**]—The Acts of 1879, c. 86, s. 2, requiring a twenty-five cent adhesive stamp to be affixed to each "Writ of Summons," for the benefit of the Law Library of the Barristers' Society, at Halifax, does not apply to a summons for agent issued under absconding debtor process.

Henry v. Curry, 22/152.

ACCIDENT INSURANCE.

See INSURANCE, 1.

ACCORD AND SATISFACTION.

See also JUDGMENT, PAYMENT.

1. **Compromise of action — Payment into Court.**]—In an action and counterclaim pending, the parties agreed in writing that plaintiff should accept and defendant pay the sum of $240 in settlement of all matters of difference between them. Next day the defendant tendered the amount, but plaintiff repudiated the arrangement, considering that it was merely an offer on his part, which he had a right to withdraw. Held, on trial of the action, that defendant should succeed, there being a valid contract of settlement for good consideration, and with costs. Also, Ritchie, J., dissenting, on proof of tender having been made of the amount, without payment into Court having been made.

Forsyth v. Moulton, 25/309.

2. **Compromise of litigation.**]—Cannot include fine under Canada Temperance Act.

See CANADA TEMPERANCE ACT, 32.

3. **Discharge of debt.**]—By less valuable payment in goods. Written agreement in relation thereto. Not to be varied by parol.

See CONTRACT, 6.

ACCOUNT.

1. **Account stated.**]—The fact that an account has been stated is only prima facie evidence of its correctness. It may be impeached on account of unfairness or mistake of law or facts.

Hart v. Condon, 22/334.

2. **Adopting credits does not admit debits.**]—In an accounting before a Master, a party by adopting the credits shown by the account of his opponent, does not admit the debits shown, nor admit the account as a whole.

King v. Drysdale, 24/308.

3. **Mesne profits.**]—A Judge may order an account to be taken as to mesne profits at any stage of the proceedings, and after final judgment. Cf. O. 32, R. 2, and O. 13, R. 9, 10.

See LAND, 18.

ACCRETION.

Trespass—Ownership of land formed.] The parties to an action of trespass involving the ownership of a piece of land formed by a stream, were owners on opposite banks of B. River. The plaintiff's contention was that during a freshet the course of the river had shifted and cut off a piece of his land, and that the defendant had prevented the river from resuming its old channel. The plaintiff's deed described his land as bounded by the river.

In answer to questions the jury found that in 1849 the river had flowed closer in on defendant's bank, and that the change had been gradual, but "due to freshets and jams of ice."

Held, that as the formation of the strip in dispute, between the new and old channels, though gradual, had not been imperceptible—a necessary element of accretion—it was the property of the plaintiff, who was entitled to recover for the defendant's trespass thereto.

Townshend, J., dubitante, on the evidence.

McKay v. Huggan, 24/514.

ACKNOWLEDGMENT OF DEBT.

See LIMITATION OF ACTIONS.

ACTION.

Abatement.]—Death of plaintiff.

See TRESPASS, 1.

Action pending.]—

See LIS PENDENS.

Chose in action.]—Assignment of.

See CHOSE IN ACTION.

Compromise of action.]—

See ACCORD AND SATISFACTION.

Dismissing action.]—Want of prosecution. Notice to proceed.

See PRACTICE, 10.

Form of Action.]—Amendment.

See PLEADING, 3.

Interlocutory decree.]—Action will not lie on.

See PRACTICE, 31.

1. **Definition of "Action."**]—The proper definition of the word action as used in the County Court Consolidation Act, 1889, is that assigned to it by the interpretation clause of the Judicature Act. And a proceeding under section 62 of the former Act, against a tenant for overholding, does not fall within that definition. (Note.—Now, however, see interpretation clause, County Court Act, R.S. 1900.)

Hill v. Hearn, 29/25.

2. **Notice of action—Railway Act.**]—Though an employee of the Intercolonial (Government) Railway may avail himself of the want of notice of action required by the Railway Act, as a ground of defence, it does not appear that the defence continues in favor of a party who has been substituted for him by interpleader proceedings.

McLachlan v. Kennedy, 21/271.

3. **Auctioneer — Inland revenue.**]—An auctioneer conducting a sale of property seized under the Inland Revenue Act, is entitled to the notice of action provided for by that Act.

McDonald v. Clarke, 22/110.

4. **Inland revenue—Action by informer.**]—In an action by an informer against a preventive officer on an agreement to share proceeds of a seizure: Held, that the officer was not entitled to the notice of action mentioned in the Inland Revenue Act.

Wright v. Curless, 21/232.

Carroll v. Curless, 23/32.

5. **Constable.**]—A county constable wrongfully levying county rates, is not entitled to the notice of action contemplated by s. 91, c. 56, R.S. 5th Series, as he does not hold office under that chapter.

Wallace v. Stewart, 22/340.

6. **Wrongful levy.**]—To an action for wrongful levy, the defendant, a constable, pleaded that no notice of demand to peruse the warrant, or for a copy, had been served as required by R.S. 5th Series, c. 19, s. 1. Held, that this was not necessary, unless it was desired to make the justice who issued the warrant a defendant.

Whitford v. Mills, 27/227.

7. **Replevin.**]—It is well settled that the notice of action to an inspector of license, required by the Liquor License Act, 1886, and other enactments similar to the English Act, 24 Geo. II. c. 44, s. 6, designed for the protection of inspectors, constables, etc., in the performance of their duties, does not apply to the action of replevin.

Wilson v. Reid, 21/318.

8. **Replevin.**]—Action in replevin and for damages against a constable for wrongful levy. The defendant pleaded the want of notice required by R.S. 5th Series, c. 19, ss. 1, 2. Damages being awarded plaintiff the defendant appealed. Held, that notice was not required by the statute as to the replevin, but was required as to the claim for damages. And that plaintiff having wrongly recovered damages, might during the term enter a remittatur, though afterwards he must obtain leave of the Court. Defendant's

appeal allowed, without costs, and plaintiff granted leave to remit the damages.

Johnston v. Smith, 22/93.

9. **Action against magistrate—Notice.**]—An action against a magistrate for false arrest was dismissed for want of action given, under R.S. 5th Series, c. 101, s. 19. On appeal the Court was equally divided.

Held, per Henry, J., Graham, E.J., concurring, dismissing appeal, that a magistrate is entitled to notice of action under the section, wherever he has acted in good faith, and not merely colorably in the execution of his office, no matter how great the error of law into which he may have fallen.

Per Ritchie, J., McDonald, C.J., concurring, that though such was the sense of the older cases, now, if a magistrate acts entirely without jurisdiction, he is not entitled to notice.

Semble, also, the fact that he was misled by a barrister is not a mitigation of his error.

Mott v. Milne, 31/372.

ACTIONS, LIMITATION OF.

See LIMITATION OF ACTIONS.

ACQUIESCENCE.

See ESTOPPEL, LACHES, WAIVER.

ADJOURNMENT.

1. **Sine die.**]—A magistrate who adjourns a trial without naming a day, loses jurisdiction, and a conviction made thereafter is void.

Queen v. Morse, 22/298.

Queen v. Gough, 22/516.

2. **Postponement.**]—A summons for a violation of the Canada Temperance Act was returnable at 10 o'clock on a certain day. At that hour, no one appearing, the justices adjourned until 2 o'clock on the same day. Held, they had not lost jurisdiction.

The King v. Wipper, 34/202.

3. **Criminal term.**]—After adjournment of a criminal sittings, the presiding Judge may not make an order, as of date the last day of the sittings.

See CRIMINAL LAW, 24.

4. **Restitution of goods levied.**]—An applicant entitled at the date of application, but who loses his right owing to a new trial taking place during adjournment thereof, does not lose his right to costs of his application.

See EXECUTION, 11.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

ADVANCES.

See INSURANCE, 19.

ADVERSE POSSESSION.

See POSSESSION.

AFFIDAVIT.

See also BILL OF SALE.

1. **Defective jurat.**]—Per Graham, E.J., "the county need not be inserted in the jurat, if by reference to any other portion of the affidavit it appears that the place mentioned in the jurat was comprised in the county in respect to which the Commissioner has jurisdiction," but this does not apply to affidavits under the Bills of Sale Act.

Phinney v. Morse, 25/509.

2. **Irregular heading.**]—On a motion to set aside an execution, the plaintiff objected to the reading of the defendant's affidavits on the ground that they were entitled "In the County Court" only, and

not "In the County Court for District No. 1."

Held, per Johnstone, C.C.J., not appealed from, admitting the contention that the County Courts were separate and distinct tribunals in the several districts, yet the defect might be cured under O. 36, R. 14, and a memorandum subscribed on the document.

Armstrong v. Dunlap, 24/334.

3. **Cross-examining.**]—Held, the Chambers Judge is within his discretion in refusing an application for leave to cross-examine on an affidavit read in support of a motion to set aside pleas as false, frivolous, etc.

Bank of Montreal v. Bent, 34/489.

4. **Setting aside defence—Cross-examining on affidavit—Notice required.**]—Plaintiff moved to set aside as false, frivolous and vexatious a defence and counterclaim to an action on a promissory note. To this defendant opposed his affidavit to the effect that there was no consideration, that there was fraud and misrepresentation, that at the time of signing he was of unsound mind, etc. Plaintiff thereupon applied to cross-examine the defendant on his affidavit, which was granted and a time set for his appearance, but no order therefor was made and no notice was given by plaintiff. Defendant not having appeared at the time set, his affidavit was rejected, and his defence and counterclaim set aside. Defendant appealed.

Held, that O. 36, R. 28, is by virtue of O. 35, R. 21, applicable to such an enquiry as the present, and notice of cross-examination not having been given in accordance with O. 36, R. 28, the affidavit was improperly rejected. And the affidavit being sufficient to prevent the defence from being set aside as false, etc., the action should have been permitted to go to trial.

Whitford v. Zinc, 28/531.

5. **Sworn in New Brunswick.**]—Held, that an affidavit sworn at Moncton, N.B., before "A.B., a Commissioner for taking affidavits to be read in the Supreme Court of New Brunswick, and I do hereby certify that there is no Commissioner for Nova Scotia here," is receivable under O. 36, R. 6.

Humphrey v. LeVatte, 24/187.

6. **Filing affidavits—Motion to dismiss appeal.**]—There is no practice requiring affidavits in support of a motion, (here to dismiss an appeal for non-compliance with an order requiring security for costs), to be filed before the hearing of the motion, except in the special cases of setting aside, etc., awards and attachments, where they must be served. The only effect is, that if there has not been time to answer, a postponement is necessary.

Knauth Nachod v. Stern, 30/295.

7. **Affidavit for appeal** under Act. Requisites.

See LIQUOR LICENSE ACT, 8.

AFFILIATION.

See BASTARD.

AGENCY.

See PRINCIPAL AND AGENT.

AMENDMENT.

Cf. PRACTICE, 32 (Non-compliance).

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Actions.]—Consolidating.

See PLEADING, 24.

Actions.]—Chose. Notice of assignment.

See PLEADING, 55.

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See CAPIAS, 2.

Affidavit.]—Headed "In the County Court."

See AFFIDAVIT, 2.

Appeal.]—Amendment on.
See PLEADING, 3.

Capias.]—Amending affidavit.
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Chose in action.]—Alleging assignment.
See PLEADING, 55.

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See CONVICTION, 3, LIQUOR LICENSE ACT, 14.

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Crown rules.]—Non-compliance.
See CROWN RULES, 2, 5, 6.

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See PRINTING, 1.

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APPEAL.

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RIGHT TO APPEAL.

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MISCELLANEOUS, 46.

Criminal appeal.]—
See CRIMINAL LAW, 16.

Tax appeal.]—
See TAXATION.

1. **Award varied by Judge at Chambers—No further appeal.**]—Motion to quash an appeal from the order of the Judge at Chambers varying the award of appraisers for damage caused by loss of water incident to the introduction of a water supply into the Town of D., under Acts of 1892, c. 66.

Held, there was no appeal, the matter not having "orginated in the Supreme Court," within the meaning of O. 57, R. 17. O. 57, R. 4 gives an appeal from the decision of a Judge at Chambers, but R. 17 of the same order restricts it to "matters originating in the Supreme Court."

In re Ross, 27/297.

2. **From County Court — Reviewing award.**]—By an Act incorporating a railway company, an appeal to the County Court was given, from the award of arbitrators in respect to lands appropriated. The Act provided for no further appeal. Held, that the decision of the County Court was final. There was no provision in the County Court Act for an appeal in such a matter, it not being embraced in the word "action" as used in that Act. 1889, c. 9, s. 4.

In re McMillan, 24/360.

3. **Matter originating in magistrate's Court.**]—The County Court Act (1889, c. 9, s. 64) does not authorize an appeal from the County Court to the Supreme Court "in any matter or proceeding not coming under the technical term of "an action," no matter whether it was begun in the County Court or in some inferior Court. This excludes appeals by a garnishee, appeals from orders relating to the removal of paupers, bastardy proceedings, and, perhaps, overholding proceedings, etc. Some of these often involve matters of considerable moment, and it would be strange indeed if the Legislature, as it has, denied an appeal in matters not originated by an action, and yet gave it to a party to a suit begun in a justice's Court for the sum of $1 or even less."

Halifax Pilot Commissioners v. Farquhar, 26/333.

4. **Decision of like tenor in.**]—

Cape Breton Fish & Trading Co. v. Morrison, 26/487.

5. **And followed in.**]—

Fluke v. Wallace, 27/164.

6. **Bond "to abide, etc."**] — Semble, where an appeal to a higher Court has been had by giving a bond to abide by the decision of that Court, no further appeal may be had.

Halifax Pilot Commissioners v. Farquhar, 26/333.

7. **From County Court—Liberty of Subject Act.**]—There is no appeal provided for a prisoner who has applied for his discharge under the Liberty of the Subject Act, to the County Court. That Act provides none, and the proceeding does not come within the meaning of the word "action," as used in the County Court Act.

Re Edwin G. Harris, 26/508.

(Note.—Now, however, see Interpretation clause, County Court Act, R.S. 1900.)

8. **Overholding.**]—There is no appeal from the decision of the County Court in a proceeding against a tenant for overholding, under section 64 of the County Court Consolidation Act, 1889, c. 9, that proceeding not falling within the definition of the word "action," as laid down in the Interpretation clause of the Judicature Act, which determines its meaning in the County Court Act.

Hill v. Hearn, 25/29.

(Note.—But see interpretation County Court Act, R.S. 1900.)

9. **Summary Convictions Act.**]—Where an appeal has been taken to the County Court under R.S. 5th Series, c. 103, s. 66, the decision of that Court is final.

Queen v. Leslie, 25/163.

10. **Discretion of Judge.**] — Whether there is an appeal from the decision of a County Court Judge refusing to set aside the finding of a jury with which he is not dissatisfied, the matter being one within his discretion? Per Ritchie, J.

Culbert v. McKeen, 22/45.

11. **Discretion of Judge.**]—Where a Judge has decided a matter left to his discretion, such exercise of his discretion will not be reviewed on appeal, unless it can be shown that he acted on some erroneous principle.

In re Bank of Liverpool, 22/97.

Forsyth v. Bank of Nova Scotia, 18 S.C.C. 707.

Ashton v. Nova Scotia Cotton Co., 22/309.

Snyder v. Arenburg, 27/247.

McLeod v. Insurance Cos., 32/481.

12. **Order for possession—Judge refusing to set aside.**]—One Judge at Chambers granted an order directing a writ of possession to issue, which was irregular in that it did not specify the number of days after which the writ was to issue. Another Judge at Chambers refused to set the order aside. Appeal was taken as to both orders:—Held, that the appeal from the first order should be allowed, and from the second dismissed.

Re Broad Cove Coal Co., 29/1.

13. **Erroneous deduction by Judge—Reversed on appeal.**]—In an action for wrongful dismissal, the plaintiff having been dismissed by defendant with one week's wages in lieu of notice, plaintiff contended that the contract had been one of yearly hiring. The County Court Judge found that there was a weekly hiring, but that plaintiff was entitled to more than one week's notice. Both parties appealed.

Held, that the finding of the Judge as to notice required was wrong and should be set aside, but that substantial grounds must appear for setting aside his finding as to the nature of the hiring. There being no other witnesses but plaintiff and defendant, who contradicted each other directly, the burden of proof was on plaintiff.

Holloway v. Lindberg, 29/462.

13a. **Similarly,** where the trial Judge found erroneously that the plaintiff had not title by possession on which he might base his action for trespass, the Court on appeal ordered a new trial.

Thomson v. Thomas, 23/325.

14. **Question of fact.**]—The Court will not usually interfere with the findings of the Judge who has tried the case and heard the witnesses, and ought to be in the best position to come to a correct conclusion as to the facts. When, however, the evidence manifestly preponderates in favor of the party against whom the Judge has decided, and no satisfactory reasons are given for the decision, it is incumbent on the Court to exercise an independent judgment in the matter.

McLeod v. Chetwynd, 21/520.

15. **Question of fact.**]—The Court will not interfere with the decision of the trial Judge who has heard the witnesses.

Ralston v. Logan, 21/384.

McAskill v. Smith, 24/247.

McDonald v. McDonald, 26/255.

Holloway v. Lindberg, 30/421.

16. **Particularly** where he has inspected the locus out of which the dispute has arisen.

Guild v. Dodd, 31/193.

17. **But where all the evidence,** upon which the trial Judge has based his finding, has been taken by a Commissioner, the same reason for not interfering does not appear, though even then substantial grounds must be shown to the Court.

Malzard v. Hart, 29/431, 27 S.C.C. 510.

18. **Reviewing Judge's finding.**]—The Court reversed the finding of the trial Judge on a question of fact, as not warwanted by the evidence.

Thomson v. Thomas, 23/325.

Woodworth v. Thomas, 25/42.

Craig v. Matheson, 32/456.

McInnes v. Ferguson, 32/516.

McCurdy v. Grant, 32/520.

Starr v. Royal Electric Co., 33/156.

Zwicker v. Zwicker, 33/284.

18a. **Finding as to negligence.**]—The Court was equally divided on appeal from the decision for defendant of a Judge without a jury, in an action for negligence, the point being whether, admitting plaintiff's contributory negligence, defendant might not have averted the accident by the exercise of ordinary care and diligence.

Robertson v. Halifax Coal Co., 22/84.

19. **Finding as to value.**]—The trial Judge, from materials before him, having arrived at a conclusion as to the value of goods in question, this is a matter which above all matters the Court of Appeal will not disturb.

Burke v. Roberts, 27/445.

20. **Judge may correct order—Recourse is by appeal.**]—At the conclusion of a trial an order by consent was taken, awarding plaintiff one dollar damages. The Judge, afterwards learning that it also included costs, on motion of the defendant, amended the order to read, "without costs to either party." This plaintiff declined to accept, contending that his consent was based on the supposition that the intention was to award costs.

Held, that the Judge had undoubted power to amend the order. That plaintiff's only recourse was by appeal from the amendment. That the prothonotary must receive and file such an order. Being merely a ministerial officer, he could not decide as to whether the order "had been rendered abortive by the learned Judge."

McDougald v. Mullins, 30/313.

21. **Habeas corpus.**]—There is no appeal from the order of a competent tribunal discharging an applicant from custody.

Re E. G. Blair, 23/225.

22. **Supreme Court of Canada.**]—The original jurisdiction of the Judges of the Supreme Court of Canada in habeas corpus will not be exercised to review an application dismissed by the Supreme Court of Nova Scotia.

Re Patrick White, 31 S.C.C. 383.

23. **Improvident appeal by executor.**]—Costs on failure ordered to be paid by him, personally, not out of estate.

See PROBATE COURT, 11.

24. **Receiver.**]—A receiver appointed to wind up an insolvent partnership, successfully, appealed from an order directing him to pay over monies collected, to a single creditor. To an objection that he had appealed without leave:—Held, by taking that course he merely ran the risk of not being entitled to reimbursement for his costs if he failed.

O'Brien v. Christie, 30/145.

25. **Rescinding order dismissing action.**]—Semble, where the plaintiff has been heard on a motion to dismiss his action for want of prosecution under O. 34, R. 23, he loses his right to apply to rescind the order granted, though the order be irregular, and must proceed by way of appeal therefrom.

Nelson v. Studivan, 23/189.

26. **Order dismissing action—O. 34, R. 24.**]—Where an appeal lies, and where the recourse is confined to an application to restore within six days under the rule.

See PRACTICE, 16.

27. **Re-taxation of costs—C. 36, Acts of 1885,** creating the office of Taxing Master, does not affect the right to re-taxation before a Judge (O. 63, R. 23).

On appeal from such a re-taxation, the Court will only interfere in an extreme case, the discretion of the Judge being ample.

Palgrave Gold Mining Co. v. McMillan, 31/198.

28. **Appeal after discontinuance.**]—January 15th an order was made at Chambers dismissing, with costs, an application to set aside a writ served out of the jurisdiction, on defendants who were not British subjects. January 27th the plaintiff discontinued the action. February 3rd defendants appealed from the order of January 15th:—Held, they could not at that date assert their appeal.

Weatherbe v. Whitney, 29/97.

29. **Null proceeding—Certiorari where no appeal.**]—On an application for certiorari to remove the matter of a decree of the Probate Court, it was objected that certiorari could not be had because the decree read in favor of the applicant:—Held, that as the decree was a nullity for want of jurisdiction, there was no

appeal, consequently certiorari was the proper means of relief.

Queen v. Foster—Estate of Esson, 30/1.

30. **Amendment on appeal.**] — The Court has power to make, and under the Judicature Act should make, all amendments necessary to determine the real question at issue between the parties.

See PLEADING, 3.

31. **Order which ought to have been made — Amendment by Court.**] — The Court, on appeal, reformed an order or rule for judgment of a County Court Judge to make it agree with his decision, under O. 57, R. 5, instead of remanding it back.

McLellan v. Morrison, 23/235.

32. **Bond on appeal—Construction of condition.**]—Action against the surety in a bond on appeal, the condition of which was as follows:—". . . if the said H. shall effectually prosecute his said appeal, and in the event of said judgment being sutained, shall pay the amount of the said judgment in the County Court, together with such further sum as may be awarded by said Supreme Court for costs to the plaintiff on said appeal, and comply with the order of the said Supreme Court on said appeal, then this bond . . . shall be void . . . "

Held, that the security of the bond did not attach except in the event of the judgment of the County Court being sustained, which not having happened, the surety was not in any case liable.

Smith v. Ashwood, 28/331.

33. **Bond — "Effectually prosecute."**]—Action against the surety on a bond given to obtain a stay of proceedings pending an appeal to the Supreme Court. The condition of the bond was " . . . if the said S. shall effectually prosecute his said appeal and respond the judgment to be finally given thereon, then this bond . . . ." The appeal was dismissed with costs, which S. paid.

Held, this did not satisfy the condition of the bond. "Effectually prosecute" is synonymous with "prosecute with effect," and means that the appellant must succeed in his appeal.

McSweeny v. Reeves, 28/422.

34. **Time for appealing.**]—The time for appealing runs from the date of the pronouncement of the judgment, not from the date of the order made in accordance therewith.

An appeal from an order is restricted to the form of the order or the question whether it correctly embodies the terms of the judgment upon which it is based. Such an order may be corrected on an application to the Court for that purpose. Weatherbe, J., dissented.

King v. Drysdale, 25/115.

(Note.—But cf. Rules S.C. (1900), O. 57, R. 3.)

35. **Enlarging time — Legislation.**] — Judgment was given for the defendant in the County Court, the order for which was passed December 9th, 1886, and notice of appeal was given December 26th, which appeal was dismissed on the ground that the Acts of 1886, c. 34, s. 9, had taken away appeals in such cases. Plaintiff then applied for and obtained an order for enlarged time in which to apply to set aside the findings, and from this order defendant did not appeal. On 19th July the Judge set aside the findings, the answers of the jury being directly against the evidence.

Held, it was competent for the plaintiff to question the legality of the enlargement, although he had not appealed from the order therefor, but that the judgment was regular and the judgment setting aside the findings correct.

Belden v. Freeman, 21/106.

36. **When appeal is abandoned.**] — "Under the provisions of O. 58, R. 6, an appeal is to be considered as abandoned unless it is entered on the first entry day after the notice, and the motion made when the cause is called on the docket, or some effectual proceeding has been taken by the appellant to preserve his appeal, and in such a case it shall not be necessary for the respondent to make any motion or take any order dismissing the

appeal unless the proceedings have been stayed.

If the respondent has incurred any costs in preparing to oppose the appeal, he will be entitled to an order for their payment, but no costs of the application for the costs of the abandoned motion can be allowed unless the applicant has made a previous demand for payment, which has not been complied with."

O'Neil v. Madore, 26/129.

37. **But the Court has power** to make an order on an application to dismiss an appeal which has failed for want of prosecution, and will use it where it seems advisable, as in the case of an appeal from an interlocutory order below, to expedite proceedings, to remit back papers, etc., etc.

Fluke v. Wallace, 27/164.

38. **Restoring appeal.**]—The appellant having obtained a stay of proceedings pending appeal, the respondent later on applied to the Court after notice, and the appeal was struck off the docket for want of prosecution.

Held, the Court would not entertain a motion to restore it, on the same grounds that the appellant used in opposing the motion to strike it off, the only difference being an additional affidavit by himself.

Wiswell v. Wallace, 26/505.

39. **Stay of proceedings** pending appeal ordered, though the Judge at the same time refused to set aside an order dismissing an action under O. 17, R. 8, the plaintiff having died and no application having been made to substitute his executor.

See PARTIES, 10.

40. **Stay of proceedings.**]—A stay of proceedings, pending appeal, must be applied for on notice of motion, not ex parte.

Perkins v. Irvine, 23/291.

Stay of proceedings generally:—

See PRACTICE, 51.

41. **Further evidence on appeal.**]—O. 57, R. 5, which permits the Court to hear further evidence on appeal, is limited to actions which have originated in the Supreme Court.

Hickman v. Baker, 31/208.

42. **Newly discovered evidence.**]—In an action for an accounting, the report of a Master showed a balance due defendant. Plaintiff appealed against the allowance of two of the items making up the balance, and, after appealing, obtained an order allowing him to offer newly discovered evidence, consisting of a document which cancelled a large part of his indebtedness. The Judge in Equity who tried the case refused to admit the document on the ground that it was not genuine, and from this ruling plaintiff did not appeal:—Held, the document could not be received on argument.

Watson v. Harrington, 21/218.

43. **Introducing fresh evidence.**]—Appellant had made an application to the Judge at Chambers which was dismissed because of conflicting affidavits. On his appeal he sought to read affidavits made since the decision at Chambers, which the Court refused to receive, adopting the ruling of Jessel, M.R., in Saunders v. Saunders (19 C.D. 380): "As has often been said, nothing is more dangerous than to allow fresh oral evidence to be introduced, after a case has been discussed in Court. The exact point on which evidence is wanted, having been thus discovered, to allow fresh evidence to be introduced at that stage, would offer a strong temptation to perjury."

Leary v. Mitchell, 21/367.

44. **Introducing fresh evidence.**] —A summons to set aside a judgment by default was served on the plaintiff, returnable "Thursday, the 27th." Plaintiff, thinking "27th" was "21st" (the figure 7 being as much like 1 as 7), which would be short service, instructed his agent to oppose the motion on that ground. The 21st did not fall on Thursday. The 27th did. The judgment being set aside, the plaintiff appealed, and sought to introduce evidence which might

have been offered on hearing of the motion:—Held, under the circumstances stated above, he should have made inquiries as to the return day intended, and having chosen to rely on technical grounds, he could not now appeal to the discretion of the Court to enable him to do that which he might have done below.

Gillies v. McDonald, 23/411.

45. **Further evidence.**]—Per Meagher, J., the authorities establish the following principles governing the production of further evidence after trial, under O. 57, R. 5:—

"1. That parties must be diligent in bringing forward on trial all known available evidence, and if want of diligence is apparent leave will not be given.

2. That they must not take the chances of the result of trial in the Court of first instance, and then tender fresh evidence in the Court of Appeal.

3. That the Court will not receive such further evidence unless there is some sufficient reason to justify its doing so; such an application is always regarded as one for indulgence.

4. That it is impossible to lay down a priori, what will be a sufficient ground. Each case must depend on its own special circumstances. But as a general rule, I might say an almost invariable rule, parties are not allowed to bolster up their cases by adducing fresh evidence before the Court of Appeal unless there are reasonably strong special circumstances to justify it, and the more so, as it is the duty of parties to litigation to give the evidence in the first instance, if it could have been produced by the exercise of due diligence. And if it was not so given through any remissness or want of diligence, the leave should be refused. This is particularly so where the parties or witnesses were examined below and the evidence might have been elicited then.

5. That the Court should always be very cautious about admitting further evidence . . . and should always exercise such jurisdiction with great care.

6. That it is regarded as a general, if not universal rule, that it is most dangerous to allow fresh evidence to be introduced after a case has been discussed in Court. But this is not insisted on where the evidence was not discovered until after the trial, and the party desiring to adduce it is not open to the charge of remissness or want of diligence.

7. Surprise is often an important element. But where there is no surprise, and the evidence was not discovered after the hearing, leave will be refused.

8. Mere blunder or inadvertence, or even accident, on the part of the parties, or their agents, by which some point or feature has been overlooked, does not necessarily constitute sufficient ground for the exercise of this jurisdiction.

9. The Court never passes in advance upon the admissibility or sufficiency of the evidence. At any rate it should never do so. Such a course is considered "as obviously extremely undesirable," and therefore where leave is given, the evidence is regarded as taken de bene esse, and this would be true, especially where having regard to the pleadings, it was not admissible." (Authorities cited.)

Leckie v. Stuart, 34/140.

46. **Issue not appealed — Is before Court.**]—Semble, where two distinct issues have been passed on on trial, and there is an appeal in respect to one of them only, the Court of Appeal may, notwithstanding, vary the decision of the lower Court as to the matter not appealed from. If the doctrine of res adjucata applies because of the non-appeal, it is to be met with that of lis pendens.

Fisher v. McPhee, 31/323.

(Cf. JURY, 36. And as to an issue not tried, cf. FRAUD, 7.)

47. **Point not insisted on at trial.**]—Notice of an application for a new trial was given one day short of two clear days. The solicitors agreed to continue the hearing for one week. On the hearing the respondent's solicitor took objection to the short notice, but on being reminded that he had actually had ample time in which to prepare his answer, did not insist on the point:—Held, that because of this non-insistence, he could not

renew his objections at the argument on appeal, as had he insisted before, the application might have been dismissed, thus avoiding expense.

McBeath v. Sinclair, 23/342.

See also JURY, 39.

48. **Equal division of Court—Whether there is a decision.**]—The issues in this action and another being the same, it was agreed in writing by solicitors, that the decision in the other on trial and on appeal, if any, should be the decision in this. On trial of the other, judgment was for the plaintiff. On appeal the Court was equally divided, and the defendant insisted on his right to be heard on appeal in this action, contending that there had been no decision of the appeal in the other.

The Court was again equally divided:—Per Weatherbe and Meagher, JJ., that the word "decision" in the agreement meant "judicial determination," and that the order dismissing the appeal in the other case applied to this.

Per Townshend and Graham, JJ., that where the Court is equally divided, no decision has been reached, and that the appeal in this action should therefore be heard.

Naas v. Backman, 28/504.

49. **Futile appeal.**]—Defendant having been discharged by a Judge, an appeal from his decision is futile because the bond furnished having been delivered up and cancelled, the liability of the sureties cannot be restored; also because the utmost limit of time for which the defendant might have been held (Acts of 1901, c. 16) expired before the appeal was heard.

McLaughlin Carriage Co. v. Fader, 34/534.

50. **Sale appealed against taking place.**]—An appeal was taken from an order for foreclosure and sale, first to the Supreme Court of Nova Scotia, then to the Supreme Court of Canada:—Held, in the Supreme Court of Canada, that the fact that the sale had actually taken place before the hearing of the first appeal, was ground for dismissing it.

Collins v. Cunningham, 23/350, 21 S.C.C. 139.

APPEARANCE.

See PRACTICE, 1.

APPENDIX.

See SCHEDULE.

APPROPRIATION OF PAYMENTS.

See PAYMENT, 1.

ARBITRATION AND AWARD.

1. **Setting aside award.**]—Per Graham, E.J., the Judge in Chambers has no power to set aside the award of arbitrators where the reference has been voluntary, and not compulsory under R.S. 5th Series, c. 115.

Austen v. Bertram, 23/379.

2. **Setting aside award.**]—In 1889 plaintiff and defendant agreed to submit a matter of disputed boundary to arbitration. An award was made August 28th of that year. In May, 1894, plaintiff brought action for possession of the land awarded him, for trespass, etc. Defendant counterclaimed to set aside the award on the grounds that the arbitrators exceeded their jurisdiction, that defendant was not heard, that the award was made ex parte, etc.:—

Held, that though he might otherwise have succeeded, the defendant had, by his delay in moving, lost his right to question the award.

Clish v. Fraser, 28/163.

3. **Setting aside award—Mistake of law—And of fact.**]—Though an award may be set aside for a clear mistake of law appearing on its face, yet it should not be set aside for a mistaken conclusion as to fact, based upon evidence which cannot be said to be inadmissible. And a letter written by the party against whom the award has been made, making

an unqualified offer of settlement at a certain figure, which letter was not stated to be "without prejudice," is to be regarded as an admission of liability.

McRae v. Rhodes, Curry & Co., Ltd., 28/343.

4. **Appeal from award.**]—There is no appeal from the order of a Judge in Chambers varying the award of appraisers in respect to damage caused by loss of water connected with the introduction of a water system in the Town of Dartmouth, under Acts of 1892, c. 66, s. 38, the same not being a matter originating in the Supreme Court. Cf. O. 57, R. 4 and 17.

In re Ross, 27/296.

5. **Nor from the County Court,** where an appeal has been taken thereto, under a special Act not mentioning any further appeal, of a matter of arbitration not coming within the meaning of the word "action" as used in the County Court Act.

In re McMillan, 24/360.

6. **Award by arbitrator—Action to collect.**]—On an action to collect an amount awarded by an arbitrator on a voluntary reference by agreement, an application was made to strike out the defence as "false, frivolous, etc." The Court struck out several pleas, but allowed the following to stand, as fairly raising matters at issue:—(Townshend, J., dissenting),—that the arbitrator had not considered all matters of difference—that he had not heard the parties and published his award—that the award was not published in time.

Holmes v. Taylor, 32/191.

7. **Agreement of reference—Enlarging time—Non-compliance by arbitrator—Waiver.**]—An agreement of reference provided that the arbitrator might enlarge the time for award, by endorsing a memorandum on the agreement. Instead, he wrote a memorandum on a separate sheet of paper.

On an application to set aside his award:—Held, that it was null and void, a particular mode of enlargement having been set out, it should have been followed.

Also, that the applicant had not waived his right to object by corresponding with the arbitrator in reference to his award, because it was not shown that he had notice of the error at the time, because the award was a nullity, and because the other party could not claim as a waiver what passed between the applicant and the arbitrator.

McKay v. Nicol, 28/43.

8. **Extension of time—Umpire—Acts of 1895, c. 7, s. 2 (e).**]—Matters in dispute between the parties were referred to the determination of two arbitrators, and in case they disagreed, or failed to make award before August 1st, then to the decision of an umpire to be appointed by them, "so as said arbitrators or umpire do make and publish his and their award in writing under his or their hands . . ready to be delivered . . . on or before the 10th day of August."

On the 29th day of July the arbitrators appointed J., umpire, and on the same day, by endorsement on the submission, extended the time for action by themselves from the 1st to the 25th of August, and for the umpire from the 10th to the 30th day of August. On the 25th August they further extended their own time to the 10th of September and the umpire's to the 20th. On the 20th September the umpire extended his time to the 30th, and on that date to the 10th October. On October 7th he made and published his award, to enforce which this action was brought.

Held, per Ritchie, J., and Graham, E.J., that power on the part of the arbitrators expired under the terms of the agreement absolutely on the 1st day of August, after which the umpire became seized. But, as he had not taken action, nor attempted to extend his time, before August 10th, his subsequent award was null and unenforceable. Also, the provisions of 1895, c. 7, s. 2 (e), (Arbitration Act), did not apply, the contrary intention appearing on the face of the submission.

Per Meagher, J., McDonald, C.J., concurring, that the powers of the arbitrators to act, and consequently to extend

time, did not expire until they had disagreed as to terms.

Holmes v. Taylor, 33/415.

9. **Appointment of third arbitrator.**]—Unless by statute, there is nothing to require the appointment of a third arbitrator by the other two (or an umpire on a submission), to be in writing.

And an appointment having been made, it is irrevocable.

Kedy v. Davison, 34/233

10. **Court acting as quasi arbitrator.**]—In the settlement of the estate of a deceased person, the Judge of Probate, without objection being made, decided a matter of dispute between the administrator and M. S., one of the heirs, as to which he had no jurisdiction:—

Held, that as he had no jurisdiction, he must be taken to have acted as a sort of quasi arbitrator, and while his action was not strictly correct in a legal aspect, yet a fair measure of justice to both having been attained, the Court would not vary the result.

Re Estate E. Scott, 29/92.

11. **General assignment — Arbitration clause.**]—An arbitration clause to the effect that matters of dispute arising between creditors and the insolvent estate should be referred to arbitration, is not only not to be regarded as tending to hinder or delay creditors, but is of a beneficial character. If a question of law proper should arise, action by the Court would not be stayed to enable arbitrators to act, and similarly, if a proper question for a jury. And the Court would not lend its aid, if delay were aimed at by means of an arbitration.

Hart v. Maguire, 29/181.

12. **Fire policy—Arbitration clause.**]—A policy of fire insurance required as a condition that any difference arising as to the amount of loss, should at the request of either party be referred to arbitration, and that no action should be brought until after award. No request having been made in this case:—Held, that there was no obstacle to plaintiff's bringing this action.

Bishop v. Norwich Union Fire Ins. Society, 25/492.

13. **Surface rights.**]—Award in respect of, under the Mines Act. Validity of appointment of arbitrator by warden. Notice.

See MINES AND MINERALS, 15, 16.

ARCHITECT.

Architect—Agreement as to remuneration — Commission.] — Defendant employed plaintiff, an architect, to prepare plans and specifications for a hotel building, to cost not more than $4,000 or $5,000, for which he was to receive a commission of two per cent. on the cost, and one per cent. more for superintendence. Instructions as to size, number of rooms, etc., were given by defendant. Before completion, changes were made in the plans, involving additional expenditure to the extent of $1,500.

Plans were approved by defendants and the work was begun. It was then found that, owing to advances in the price of material, the work would cost more than anticipated, and it was stopped:—

Held, plaintiff was entitled to recover two per cent. on the estimated cost of the building, with the additions and alterations approved by defendant.

Hutchinson v. Conway, 34/554.

ARREST.

See CAPIAS, COLLECTION ACT, CRIMINAL LAW, EXECUTION, 12, FALSE ARREST AND IMPRISONMENT, INDIGENT DEBTOR, MALICIOUS PROSECUTION.

ASSAULT.

1. **Forcibly recovering property from wrongdoer.**]—Plaintiff loaned money to the father of the defendant, taking as security therefor a conveyance of a piece of land. At the same time plaintiff executed and delivered a bond conditioned for the reconveyance of the land on re-

payment. Some time after the debt was due the defendant offered to return the money. Plaintiff asked to see the bond, which was handed to him. Defendant asked him what he intended to do, and plaintiff replied that he did not think he would make the reconveyance just then, and refused to return the bond. Thereupon the defendant forcibly recovered possession of it, and in doing so assaulted the plaintiff.

In an action for assault, the defendant paid into Court the sum of $5, which the trial Judge held to be sufficient to satisfy the plaintiff's claim for damages.

On appeal:—Held, that the assault for the purpose of recovering possession of the bond was justifiable.

Weatherbe, J., and Graham, E.J., dissented on the ground that the evidence showed that an unnecessary degree of violence was used.

Holmes v. McLeod, 25/67.

2. **On a barrister in Court room—Forcible removal by police.**]—Plaintiff, who had been guilty of misconduct before the Stipendiary Magistrate of Halifax, was by his order removed from the Court room. He returned in about five minutes and was requested by the police to retire. Upon refusal he was by them forcibly removed and for a short time locked in a cell. In an action against the police concerned, for assault and false imprisonment, the jury, under direction of the trial Judge, found that the second removal was unwarranted and illegal, and awarded $700 damages. Defendants appealed:—

Held, that the second expulsion, without an order from the Magistrate, was illegal, and not justified by his order to effect the first. Also, that under the circumstances, the damages were not excessive.

Bulmer v. O'Sullivan, 28/406.

3. **Plea of previous conviction.**]—To a civil action for damages for assault, the defendant pleaded that he had been previously convicted and fined before a Magistrate for the same assault, and consequently that the action was barred by R.S. Canada, c. 178, s. 75 (Criminal Code 866):—

Held, that the plea was bad unless it set out that the conviction was at the instance of the plaintiff.

Ross v. McQuarrie, 26/504.

ASSEMBLY, HOUSE OF.

Privileges—Sitting as a Court—Punishing for contempt—R.S. 5th Series, c. 3.]—The plaintiff had been adjudged guilty of contempt of the House of Assembly in presenting an offensive petition, and on refusal to apologize when brought to the bar, was by resolution committed to the common gaol for 48 hours. This action was against the Sergeant at Arms and a number of members, forming the majority which supported the action of the House, for false arrest and imprisonment, and resulted in a verdict for the plaintiff for the sum of $200 damages, against all but a few members, in whose interests an act of indemnity had been passed.

On appeal:—Held, per Ritchie and Weatherbe, JJ., that the passing of the act of indemnity was within the power of the Legislature; and that the Legislature also had power to pass the provisions of R.S. 5th Series, c. 3, which were designed for the protection of members of the House of Assembly against the consequences of acts done within the House.

Per Graham, E.J., McDonald, C.J., concurring, that these provisions attempted to define crimes and affix punishments, a matter exclusively for Dominion control.

On further appeal to the Privy Council:—

Held, that the House of Assembly has statutory power to adjudicate that wilful disobedience to its order to attend in reference to a libel reflecting on members, is a breach of privilege and contempt, and to punish that breach by imprisonment.

As to the action for assault and imprisonment against members of the House of Assembly who had voted for the plaintiff's imprisonment:—Held, that

the sections of c. 3, R.S. 5th Series, which create the jurisdiction of the House and indemnify members against legal proceedings in respect of their votes therein, are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the House. Those sections, except in so far as they may be deemed to confer any criminal jurisdiction, otherwise than as an incident to the protection of members, are intra vires of the local Legislature, as relating to the constitution of the Province, within the meaning of section 92 of the B.N.A. Act, and under the authority of section 5 of the Colonial Laws Validity Act (28 & 29 Vict. c. 63) recognized by the B.N.A. Act, s. 88.

Thomas v. Haliburton, 25/55.

Fielding v. Thomas, 1896, A.C. 600.

ASSESSMENT.

See TAXATION.

ASSIGNMENT.

See also BILL OF SALE, CHOSE IN ACTION, FRAUDULENT CONVEYANCE.

1. **Sewing machine.**]—A sewing machine does not pass as "household furniture" under the general words of an assignment for the benefit of creditors.

Allen v. Wallace, 21/49.

2. **Registered trade mark—Passes to assignee** under general words of an assignment for the benefit of creditors.

See TRADE MARK.

3. **Filing under Bills of Sale Act.**]—An assignment of personal property directing a distribution among a specified class of creditors is not a general assignment for the benefit of creditors, and so is not exempted from the requirements of the Bills of Sale Act, as to filing, etc.

Archibald v. Hubley, 22/27, 18 S.C.C. 116.

4. **In contradistinction** to an assignment which in one way or another provides for the payment of every creditor, which is so exempted, and need not be filed.

Kirk v. Chisholm, McPhie v. Chisholm, 28/111, 26 S.C.C. 111.

5. **Filing under Bills of Sale Act.**]—Cases in which the necessity for filing is obviated by delivery of possession.

See BILL OF SALE, 13.

6. **Release under seal—Composition deed—Authority to sign.**]—Plaintiff sued on an account stated, to which the defendant set up a release under seal contained in a general assignment for the benefit of creditors, made by defendant several years previously. The defendant had signed this document on behalf of plaintiff by authority of a letter as follows:—" . . . I have done as you desired by telegraphing you to sign deed for me, and I feel confident that you will see that I am protected, and will not lose one cent by you . . . ." About a year before action was brought, defendant had written to plaintiff " . . . in one year more I will try again for myself, and I hope to pay you in full."

Held, per Weatherbe, J., though the execution of the release was not strictly legal, yet plaintiff's conduct in not repudiating it amounted to acquiescence, and it should not be assumed that plaintiff by his telegram intended to commit a fraud on other creditors. Per Ritchie, J., from an early date Courts of Equity have relaxed the strict common law rule with regard to the execution of deeds for the benefit of creditors, and a party having placed himself in a position to avail himself of its benefits, is liable to all the burdens and restrictions which it imposes. Per McDonald, J., that though plaintiff had not given a release, he had given what amounted to an agreement for a release.

Per McDonald, C.J., and Townshend, J., dissenting, a document purporting to be authority for a release under seal must itself be under seal.

But in the Supreme Court of Canada:—Held, that the execution of the deed on his behalf being made without sufficient authority from plaintiff, he was not bound by the release contained therein.

And never having subsequently assented to the deed, or recognized or acted under it, he was not estopped from denying that he had executed it.

Per Taschereau and Patterson, JJ., dissenting, that though defendant had no sufficient authority to sign, yet there was an agreement to compound which was binding on plaintiff, and the understanding that he was to be paid in full would be a fraud on the other creditors, who could only receive the dividends realized by the estate.

Lawrence v. Anderson, 21/466, 17 S.C.C. 349.

7. **In trust for creditors—Release of lien—Preference.**]—Plaintiff conveyed all his estate to defendant in trust, (1) to satisfy all mortgages, judgments, liens, etc; (2) to pay Union Bank all bills of exchange and notes upon which plaintiff and others were liable. The bank became a party to the assignment, and released its lien on real estate, under a judgment by confession to enable the same to be sold, and received from the defendant the amount realized, being less than the amount of the judgment lien released. At the date of the assignment plaintiff was liable as the indorser on a note for $3,000 held by the Bank.

He claimed that a rateable proportion of the amount realized from the sale of the land should be applied to the reduction of this note, and brought suit against the assignee and bank. The defence was the assignment providing in the first place for the payment of all liens, etc.:—Held, that the bank alone was entitled to the proceeds of the sale, their lien being in excess of the amount realized, also that the bank by releasing its lien did not lose its position as a preferred creditor.

Harris v. Ritchie, 22/141.

8. **Release of claims in assignment—Effect of on debt not referred to—Construction of document—Summons to agent.**]—On December 7th, 1886, R.B.M. executed to J.C.M., for $600, an assignment of his expectation of a legacy from R. De cember 23rd he executed a general assignment for the benefit of creditors, preferring J.C.M. therein for $4,000, and containing a clause whereby "the said creditors respectively hereby release the said assignor from all debts owing from the said assignor to the said creditors, respectively, in respect whereof they would be entitled to receive dividends under these presents," and another "Provided always and it is hereby agreed and declared, that nothing herein contained shall prevent the said creditors or any of them from enforcing and otherwise obtaining the full benefit of any charge or lien which they respectively now have upon any estate or effects whatsoever, or from suing . . . ." J.C.M. became a party to this general assignment.

In 1887, R.B.M. suffered a judgment on the debt of $600 secured by the assignment of the legacy, to pass against him at the suit of J.C.M.

In 1893, R. died, and under her will a legacy of $500 became payable to R.B.M. This being in the hands of J.C.M. as executor, R.B.M. gave him a receipt for the money, and J.C.M. applied it to the satisfaction of the judgment.

Plaintiff, as a creditor of R.B.M., having summoned J.C.M. as an agent having in his hands credits of R.B.M., who was absent or absconding, J.C.M. made a return of the above particulars, and that the whole indebtedness of R.B.M. to him was $4,800, and was discharged. Plaintiff appealed, contending that J.C.M.'s security on the legacy was discharged by his execution of the release in the genral assignment.

Held, that under the wording of the clause, the release only applied to claims in respect to which he "would be entitled to receive dividends," and as J.C.M had only executed in respect to the amount of $4,000 for which he was preferred, it could not apply to a debt outside the preference.

Also, on the view that J.C.M. lost any security he might have had under the assignment of the legacy, by failing to give notice of it to the other creditors, on executing the general assignment, that the contention must fail, either because the assignment of the legacy was a "charge or lien," specially excluded by the clause above quoted, or if not a

"charge or lien," it was not a "security" of which notice must needs have been given.

Also, admitting for the sake of argument, that the debt secured by the assignment of the legacy, was released by the general assignment, yet afterwards R.B.M. had allowed a judgment for $600 to pass against him, and there was nothing to prevent his making payment in satisfaction thereof. And having made in effect a complete and irrevocable payment with the legacy due him, there were no longer credits of R.B.M. in the hands of J.C.M., or a right of recovery in respect of the legacy in R.B.M., on which plaintiff must needs depend for his right.

Banks v. Mackintosh, 27/480.

9. **Employing assignor to manage—Unauthorized payment—May be recovered by assignee.**]—W., who had been carrying on the business of brick-making, made a general assignment for the benefit of creditors, to the plaintiff, who thereupon employed W. as his agent, to carry on the business during the administration of his trust. Of the deed of assignment, the defendant, who was a creditor, had the usual notice, and responded in such a way as to affect him with knowledge of its terms. Without authorization from the plaintiff as assignee, W. paid the defendant at several times, sums of money out of the assets of the insolvent estate, on account of an indebtedness contracted before the date of the assignment. In an action by the plaintiff as assignee:—Held, that these sums might be recovered back.

Dickie v. Northup, 24/121.

10. **Employing assignor—With power of attorney—Binding assignee.**]—A., doing business as "J. A. & Son," made a general assignment to defendant H., who was his brother-in-law, for the benefit of his creditors. The assignment contained a clause authorizing H. to employ A., or some other person, to execute the trusts of the assignment, and in carrying on the business if thought expedient. On the day following, H., as trustee, executed a power of attorney to A., authorizing him "to collect money, prosecute suits, draw, make and indorse bills, cheques, notes, etc.," in the name of the trustee, and generally to do all acts in relation to the estate, as fully as the trustee might do himself.

Under this power of attorney, A. went into possession, continued the business, bought and sold goods, made notes, etc., for upwards of five years. For goods purchased from plaintiff he gave a note signed "J. A. & Son," and "H., per J.A., Atty."

Plaintiff now sought to recover against both A. and H.

Held, Graham, E.J., dissenting, that both were liable. Per Meagher, J., the question is not so much the construction of the deed, as the relationship between the parties, intended, under all the circumstances, and H. having full control over A., and having permitted him to continue the business, etc., was bound to have knowledge of his acts, and could not now repudiate them.

But in the Supreme Court of Canada:—Held, reversing the decision above, Gwynne, J., dissenting, that the evidence clearly showed that the credit as to the goods sold was given to A., not to H., that A. had not carried on the business after the assignment at the instance, or as the agent of H., nor for his benefit; that A. was not authorized to sign H.'s name as he did; and that H. was not liable either as a person to whom the credit was given nor as an undisclosed principal. Also, though H. were guilty of a breach of trust in allowing A. full control as he did, that would not render him liable in this action.

Anderson v. Allen, 25/22.
Hechler v. Forsyth, 22 S.C.C. 489.

11. **Payment to preferred creditor—Void assignment—Execution.**]—Where an assignment has been held void under the Statute of Elizabeth, and the result of such a decision is that a creditor who had subsequently obtained judgment against the assignor, and, notwithstanding the assignment, sold all the debtor's personal property so transferred, becomes entitled to all the personal property of the assignor levied upon by

him under his execution, such creditor has no legal right and no equity to an account, or to follow moneys received by the assignee or paid by him under such assignment, in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible.

(In the Supreme Court of Canada.)

Cummings & Sons v. Taylor, 28 S.C.C. 337.

12. **Payments to preferred creditors—May not be recovered—Though under fraudulent conveyance.**]—Held (in the Supreme Court of Canada), in an action to have a deed of assignment set aside, by creditors of the grantor, on the ground that it was void under the Statute of Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him, can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. Cox v. Worrall, 26/366, overruled, pro tanto.

Taylor v. McKinnon, 29/162.

Taylor v. Cummings, 27 S.C.C. 589.

See also FRAUDULENT CONVEYANCE, 10.

13. **Fraudulent conveyance.**] — Preference in assignment larger than amount due. Though the full amount afterwards become due.

See FRAUDULENT CONVEYANCE, 8.

14. **Accommodation indorsers—Preference** where bills have not matured. May be preferred.

See FRAUDULENT CONVEYANCE, 9.

15. **First preference to assignee's firm.**] Held, by the Supreme Court of Canada, that an assignment is void under the Statute of Elizabeth as tending to hinder and delay creditors, if it gives a first preference to a firm of which the assignee is a member, and provides for an allowance of interest on the debt of such firm until paid, and the assignor is to continue in the same control of the business as he previously had, though no one of these provisions taken singly would have that effect.

A provision that the assignee "shall only be liable for such monies as shall come into his hands as such assignee, unless there be gross negligence or fraud on his part," will also avoid the instrument under the Statute of Elizabeth.

Authority to the assignee not only to prefer parties to accommodation paper, but also to pay "all costs, charges and expenses in consequence" of such accommodation paper, is a badge of fraud.

Kirk v. Chisholm, McPhie v. Chisholm, 28/111, 26 S.C.C. 111.

16. **Preference to assignee—Indefinite accounts — Combination of facts.**] — In 1887, G. having taken administration of her deceased husband's estate and paid his debts, continued to carry on his business and to employ, as he had done, her son, defendant H., as clerk and manager, relying solely on him, being herself almost illiterate and knowing nothing of the details of affairs.

The arrangement between G. and H. appears to have been rather indefinite, but it appeared in a general way that G. was to receive her living only, H. $40 per month and board. H. had not been in the habit of drawing all that was due him.

Judgment for a large amount having been recovered by plaintiffs, G. made a general assignment to H., preferring him for a large sum. In an action to set this assignment aside as fraudulent, it appeared that charges and entries going to show the details of G.'s obligation to H., for which he had been preferred, were not made until the eve of assignment, and that some entries had been made by estimating and averaging.

Held, setting the assignment aside, that each case of this sort must be judged by itself, and though an isolated fact is not sufficient in itself to void a conveyance, yet a combination of such facts may irresistably lead to that conclusion.

Delong v. Gillis, 31/61.

17. **Trust for payment of debts—Cannot be invoked by third persons.**]—Cer-

tain heirs at law of a deceased person made a conveyance to W. R. "in consideration of W. R. paying all debts due and owing by the late G. R. and discharging all debts against the estate of the late A. R." At the suit of a creditor against W. R.:—Held, that the provision was one entirely "res inter alios" as regarded him; that it created no trust for the creditors of G. R. and A. R., but was a mere contract between the parties to the deed, enuring exclusively to the benefit of the party from whom the consideration moved.

Burris v. Rhind, 29 S.C.C. 498.

18. **Oral transfer of business—To evade execution—Not fraudulent if consideration real.**]—W., operating on his own account two trading vessels registered in the name of plaintiff, his sister, bought a large quantity of fish from B. which he did not pay for. Being pressed for payment, and served with a writ at the suit of B., he verbally agreed with plaintiff to transfer his business to her in consideration of an indebtedness, and that he should thereafter only be master of one vessel, and manager of both, for her benefit.

B. having matured his judgment against W. and levied on part of the property transferred, this was replevin against the sheriff.

Held, that the transfer, though made in consideration of a debt due, having been made orally, and being, therefore, practically revocable between the brother and sister, and having been made pending the writ, was not bona fide, and was void as designed to defeat creditors. (The fact of a benefit retained in the assignor (cf. Kirk v. Chisholm, ante) in his continuing to be employed as master, noticed p. 132).

But in the Supreme Court of Canada:—Held, that a transfer to a creditor for good consideration, with intent to avoid execution by another creditor, or to delay or to defeat him in his remedies, is not void if made to secure an existing debt, and the transferee does not make himself an instrument for subsequently benefiting the assignor.

Mulcahy v. Archibald, 30/121, 28 S.C.C. 523.

19. **Assignment obtained by threat of prosecution—Valid unless agreement to stifle.**]—Plaintiff had executed, and now sought to have set aside, an assignment, in which defendants were preferred creditors, under threats of criminal prosecution by them for embezzlement. The jury found that there was no agreement, express or implied, on the part of defendants to abstain from prosecuting:—

Held, this being the case, there was nothing unlawful in the application of threats. "It seems clear generally, that where the threats made are only to do that which may lawfully be done, there is no duress, so that although the threat of unlawful imprisonment may be duress, it is not so if the threat be of lawful imprisonment."

Semble, there is a distinction if the compulsion be on a third person who is under no obligation to the person applying threats.

Fulton v. Kingston Vehicle Co., 30/463.

20. **Bill of sale by insolvent—Antecedent agreement for security—Preference.**]—A. made a bill of sale to his brother W., the alleged agreement being a prior agreement that W. should "go good" for amounts owing to two of the creditors of A., and a present cash advance of $20. The evidence showed that at the time the alleged agreement was made and at the time of the execution of the bill of sale, the grantor was insolvent, to the grantee's knowledge, and that the latter had not discharged the obligation undertaken:—

Held, the bill of sale was void under Acts of 1895, c. 11, s. 2. Though, if the grantee has dealt absolutely in good faith, and the obligation undertaken by the antecedent agreement has not been discharged at the time of the giving of the bill of sale, the grantee is not in the ordinary sense a creditor, and the bill of sale relates back to the date of the agreement, and is not a preference within the meaning of the Act, provided there be no evidence that the execution of the bill of sale has been purposely postponed

until the grantor finds himself in insolvent circumstances.

Also, the fact of insolvency having been established, the presumption is against the bona fides of such a bill of sale, and must be rebutted by the party claiming thereunder.

McCurdy v. Grant, 32/520.

21. **Criminal Code, s. 368—Fraudulent assignment—Connivance of assignee.**]—Defendant, who had been legal adviser to C. & Co., and was their assignee under an assignment for the benefit of creditors containing preferences, was convicted under Code s. 368 for receiving among the assets of C. & Co. a certain boiler and engine, with the knowledge that C. & Co. had, before making the assignment, promised to give the makers thereof a lien for a balance of the purchase price.

On a case reserved:—Held, per Townshend, J. (McDonald, C.J., concurring, Ritchie, J., dubitante), "There is nothing in our law to prevent a debtor from assigning all his property to a trustee for the benefit of his creditors, even though he make such preferences as will practically cut out all but those preferred from getting any benefit. It may be fraudulent and void under the Statute of Elizabeth, and yet not amount to the offence created by this section. I do not think on such evidence even C. & Co. could be rightly convicted. It evidently contemplates such an abstraction, or doing away with property, as, if carried out, would completely rob the creditors, or any of them, of any benefit whatever. At least, I think we should so construe a statute, making that an offence which borders so closely upon civil rights and remedies. It is pehaps somewhat difficult to draw the line precisely—to say exactly where, and under what circumstances, fraudulent dealing with property becomes an offence under this statute, but I feel justified in arriving at this conclusion, that an assignment to a trustee, even with preferences, where the property has been handed over to the trustee in accordance therewith, is not a violation of it, even if made by the debtor in breach of prior agreements to prefer other creditors."

(Note.—Decided April 14th, 1895).

Per Henry, J., Graham, E.J., concurring, that the conviction was bad as based on the promise to give security, and no mere non-performance or breach of a promise constitutes a fraud.

Also, becoming a party to a breach of the Statute of Elizabeth, creates liability under Code 368.

Quaere, might not the complaining creditor have followed his right to a lien against the assignee; or might he have succeeded in an action to have the assignment set aside as fraudulent under the Statute of Elizabeth?

Queen v. Shaw, 31/534.

22. **Construction of assignment—Fraud of bank agent and assignee—Preference.**]—K. was agent of plaintiff bank and procured from defendant accommodation paper, representing that it was to be indorsed by him and discounted with plaintiff bank for his own use. It was so discounted, in violation of his instructions, but was not indorsed by him.

Before the paper became due he became insolvent and assigned to defendant. It was expressly agreed between defendant and plaintiff bank, that if plaintiff bank consented to look to the insolvent estate for settlement of the accommodation paper, it should take first preference "for all debts due and owing or accruing due or owing by the assignor," the defendant second. The assignment was drawn accordingly. The insolvent estate proving insufficient to discharge the bank's whole claim, it sought to hold the solvent defendant as maker of the paper, claiming a right to disavow the fraudulent act of its agent in discounting the paper, as not creating a debt from him to it. The defendant contended that the debt was in fact a debt of assignor which could only be recovered under the first preference clause of the assignment:—Held (Townshend, J., dissenting), that the debt was one due by the assignor, provided for by the first preference, and that the defendant was not liable.

Merchants Bank of Halifax v. Whidden, 22/200, 19 S.C.C. 53.

23. **Contract made in Ontario—Retaining property in vendor—Bills of Sale Act, s. 3 does not apply.**]—M. agreed in writing with plaintiff to purchase certain machinery, to be paid for part cash, part notes at three, six and nine months. Also, until payment, that the property should remain in plaintiff, and that "for the execution of this, the parties do elect domicile in the town of Galt, Ontario (which was the residence of the vendor), for demands of payment, suits, etc." The machinery having been removed to M.'s factory at Hopewell, N.S., some time afterward, but before final payment therefor, M. made a general assignment for the benefit of creditors to the defendant. On the same day, and before execution of the assignment, plaintiff served demand for possession of the machinery, and this action was against the assignee for conversion. The defence was that the lease or agreement in writing was not in compliance with the provisions of s. 3 of the Bills of Sale Act:—

Held, that though the Legislature had power to control contracts made without the Province to be executed within, it had not by s. 3 of the Bills of Sale Act, done so, and that that section as to affidavit, filing, etc., did not apply unless similar provisions should be found in Ontario, the place of contract. Singer Sewing Machine Co. v. McLeod, 20/341, reviewed.

Per Meagher, J., concurring, that as a binding contract as to the property in the machinery was outstanding between plaintiff and M., the defendant, assignee of, and privy with M., was not within the class of persons protected by s. 3. Weatherbe, J., dissented.

McGregor v. Kerr, 29/45.

ATTACHMENT.

See also ABSENT OR ABSCONDING DEBTOR.

1. **Attachment stands though claim be reduced.**]—Writ and attachment against an absent or absconding debtor for $630. On an application to set aside all proceedings on the ground that the amount sued for was beyond the jurisdiction of the County Court (q.v.), the plaintiff applied, and an amendment was granted, reducing the amount claimed to $393, but, held that the attachment outstanding against land for the larger amount, should not for that reason be interfered with. It not being final, no more could be had thereunder than might be awarded by final judgment, and if defendant desired to relieve the land, no more bail need be required than a cause of action was outstanding for. McDonald v. Fraser (3 R. & G. 293), approved and followed.

Harris v. Morse, 29/105.

2. **Absconding debtor process—Attachment does not bind** until an actual levy is made of the goods.

See ABSENT OR ABSCONDING DEBTOR, 7.

3. **Funds in Bank—Assignee of chose in action.**]—Where the assignee of a chose in action has not given the debtor express notice in writing as required by O. 61, he is not in a position to avail himself of O. 43.

O'Donnell v. Smith, 23/208.

4. **Foreign company in liquidation—Property must not be attached after liquidator appointed.**]—Plaintiff attached a cargo of laths belonging to the defendant company—an English company doing business in New Brunswick, which happened to be at Port Hawksbury, in transit to Boston. The company at the time was being wound up in the Supreme Court of New Brunswick and a liquidator had been appointed, who now sought to set aside the plaintiff's process:—

Held, that after the company had been put into liquidation in Court in the interests of creditors, no attachment by an individual creditor should be allowed to issue.

Also, that the liquidator had sufficient status as a party either under the Winding-up Act (R.S.C. ch. 129, s. 30), or under s. 12 (5) of the Judicature Act, to enable him to appear to set aside such an attachment. And that the fact of the liquidation and of the appointment of a liquidator was sufficiently proved by his affidavit to that effect.

Also, per Meagher, J., that as the action was in respect of a bill of exchange accepted and payable in New Brunswick, where default had been made, the cause of action had not arisen either wholly or in part in Nova Scotia, an element necessary in maintaining proceedings of this character.

Salter v. St. Lawrence Lumber Co., 28/335.

5. **Garnishment of legacy—Subsequent attachers.**]—In October, 1887, plaintiff obtained a garnishee order to attach all debts due or to accrue due by F. E. and E. E. to defendant, a residuary legatee under a will of which they were executors. At the time of the service of the order the will had been admitted to probate, but the real estate had not been sold, and the amount of the residue could not be ascertained until this occurred. The estate was not finally wound up until May, 1889. The order was attacked by subsequent attachers:—

Held, per McDonald, C.J., that the residue was a debt due the defendant at the time of the issue of the order, for which the executors were liable to be sued. Per Weatherbe, J., that under O. 43, R. 4, the only person who may dispute the liability of the garnishee, is the garnishee himself. That by R. 5 he may admit his liability, but suggest the interest of a third party, who may then be called in, but merely to state his claim. He may not dispute the liability of the garnishee. Appeal of the subsequent attachers dismissed with costs.

Dempster v. Elliot, 22/442.

6. **Attacher takes no more rights than the debtor.**]—An attaching creditor takes no more rights by virtue of his attachment (garnishee), than the debtor had. Therefore, if he attaches a fund to which another person had a prior right, he does not oust that person. Solicitor's lien for costs. Equitable assistance of Court.

See BARRISTER AND SOLICITOR, 11.

See also ASSIGNMENT, 8.

7. **Setting aside writ and attachment —Waiver by appearance and furnishing security.**]—Defendant company appeared to the writ of summons "without prejudice to the right to object to the jurisdiction," and now sought to set aside the writ and service, and an attachment (absconding debtor). It had procured an undertaking to be given plaintiff company by the Bank of Montreal, on which the attached property—a vessel—had been allowed to proceed on her voyage:—

Held, the writ having been regularly issued, and in proper form, could not be set aside. Service thereof, though in itself probably defective, had been cured by appearance. Where a defendant appears, no service is necessary.

Also, appearance under protest is unknown to our practice, even had defendant company so sought to protect its right to object to the service. (Cf. O. 12, R. 18.)

Also, the attachment was vacated when security was furnished, leaving nothing to be acted on now.

Semble, had the defendant under the statute, put in special bail under protest, he might have succeeded on motion to set aside the attachment.

Dominion Coal Co. v. Kingswell S.S. Co., 30/397.

8. **Caretaker** for attached mining property—Sheriff may employ—Slight evidence will render attacher liable for wages.

See SHERIFF, 3.

9. **Wages of seaman or fisherman.**]—The wages or share "on the half lay" of a fisherman, who is employed both as sailor and fisherman are to be regarded as the wages of a seaman, not attachable, under R.S. Canada, c. 74, and the "Merchants' Shipping Act, 1854."

See SHIPPING, 2.

ATTORNEY.

See BARRISTER AND SOLICITOR.

ATTORNEY-GENERAL.

1. **Proceedings to forfeit charter—Quo warranto — Interests of public.**] — The Attorney-General, acting in the interests of the public, may maintain action in the Supreme Court (or by quo warranto on the Crown side), to inquire into the compliance by defendants claiming to be organized as a railway company, under an Act of the Legislature, with the terms of the charter; and without showing any special public injury.

And tests of the existence of an interest in the public are furnished by the facts that the object of incorporation is to attain a matter of public convenience, and that the sovereign power of eminent domain has been delegated, and is liable to be illegally exercised.

And the Attorney-General may proceed independently of any relator.

Attorney-General v. Bergen, 29/135.

2. **Delegation of functions by**—1887, c. 66, s. 2.]—Power of prosecuting Attorney to prefer an indictment.

See CRIMINAL LAW, 22

ATTORNEY, POWER OF.

Excess of authority — Principal not bound.

See ASSIGNMENT, 10.

PRINCIPAL AND AGENT, 14.

AUCTION.

1. **Inland Revenue Act.**]—An auctioneer selling under its provisions is entitled to the notice of action therein provided.

See INLAND REVENUE, 2.

2. **Sale of land.**]—Encumbrances must be disclosed, otherwise the sale is voidable by purchaser.

See LAND, 2.

3. **Misrepresentation** by administrator acting as auctioneer on a sale of land. The deed set aside.

See DEED, 10.

AWARD.

See ARBITRATION AND AWARD.

BAIL.

1. **Effect as a waiver—Attachment.**]—One who furnishes security in the nature of an undertaking by a bank, to secure the release of a vessel attached under absconding debtor process loses his right afterwards to move to set aside the attachment. He should furnish special bail

See ATTACHMENT, 7.

2. **Capias.**]—But one who furnishes bail to secure his release from custody under a capias, does not lose or waive his right to move to set aside the capias.

Craven v. Williamson, 31/256.

Orwitz v. McKay, 31/243.

3. **Bond cancelled.**]—The liabilities of the sureties cannot be restored. Ground for dismissing appeal.

See CAPIAS, 14.

4. **Estreating recognizances.**]—The proceeding must be had under the Crown Rules, and if notice is not given to the sureties as therein provided, the order is bad.

Queen v. Creelman, 25/404.

BAILMENT.

Goods shipped by railway.]—Liability of company as warehouseman after arrival at destination.

See RAILWAY, 9.

BANKRUPTCY.

See ASSIGNMENT, COMPANY, 33, INDIGENT DEBTOR, PROBATE COURT, 7.

BANKS AND BANKING.

1. **Security on real estate.**]—Defendant bank advanced a large sum of money for

the purposes of the plaintiff company on security of the personal notes of E. and W. As collateral or additional security defendant bank also took a number of the first mortgage bonds of plaintiff company secured on all its real and personal property, with power to sell them on default. Default having been made, the defendant bank attempted to sell, and plaintiff company to prevent the sale. Among other grounds the point was taken that the bank had advanced money on real estate, in contravention of the Banking Act, s. 45. On trial:—Held, per Ritchie, J. (affirmed by the Supreme Court of Canada), that the transaction was within s. 48 of the Banking Act, the security on land having been taken as additional security for a debt contracted in the ordinary course of business, and within s. 60, which permits banks to hold as collateral security the bonds and debentures of other corporations.

N.S. Central Railway v. Halifax Banking Co., 23/172, 21 S.C.C. 536.

2. **Payment to cashier — Inference of payment to bank.**]—W., who was cashier of the H. Bank, in his personal capacity sued S., in respect of a negotiable instrument held by the bank as indorsee. S. paid the amount thereof to W., and then brought action against C., who had contracted to retire the negotiable instrument in the hands of the bank, for the amount paid.

C. applied to amend his defence to plead that the payment was voluntary, and to a stranger, consequently that it created no liability with respect to the negotiable instrument:—Held, refusing amendment (affirmed by Supreme Court of Canada), that there was a fair inference to be drawn of payment to the bank.

Seeley v. Cox, 28/210.

3. **Insolvent bank.**]—Winding up proceedings. Appointment of liquidator.

See COMPANY, 35.

BARRATRY.

See INSURANCE, 17.

BARRISTER AND SOLICITOR.

1. **Agreement between solicitors—Decision** in one case to govern result in another. There does not appear to be any "decision" where the Court is equally divided.

See APPEAL, 48.

2. **As to withdrawing defence** and pleading another. Effect of agreement on plaintiff's right to discontinue.

See PRACTICE, 8.

3. **As to postponement** of trial.

See PRACTICE, 13.

4. **As to refraining from entering judgment.**

See JUDGMENT, 19.

5. **Admission to the bar.**]—The Statute, 1891, c. 22, s. 4, does not so amend c. 108 R.S. as to dispense with the necessity for a certificate of having served under articles of clerkship.

In re Congdon et al., 24/92.

On appeal to the Supreme Court of Canada, for several extraneous reasons the Court declined to pass on the question.

In re Cahan, 21 S.C.C. 100.

6. **Prosecuting attorney—Power to prefer an indictment.**]—The Act of 1887, c. 66, s. 2, provides that the Attorney-General shall appoint a competent barrister at each sittings in each county by instructions under his hand, which, on presentation to the presiding Judge, "shall, in the absence of the Attorney-General, be a sufficient authority for any barrister to take charge, on behalf of the Crown, of criminal business, and to conduct the trial of criminals in any sittings or terms."

At the opening of the term W., a barrister, produced a written authority under this section, general in its terms and not entitled in any particular case.

In charging the grand jury in the case of the defendant Whiting, the presiding Judge, of his own motion, directed them that it was their duty to find a bill

against the defendant Townshend, whereupon W. preferred a bill upon which the defendant Townshend was tried and convicted.

On a case reserved, which did not state that this was ordered by the Court:—Held, that the conviction of the defendant Townshend must be quashed. The delegation by the Attorney-General of power to prefer an indictment must be special and relate to a particular case. The conviction of the defendant Whiting to stand, he not having been prejudiced by being tried with the defendant Townshend.

Queen v. Townshend and Whiting, 28/468.

7. **Solicitor and client—Lien for charges.**]—The plaintiff had acted as solicitor for the defendant in a suit in the Exchequer Court, and had a charge against him of $100 for services over and above his taxed costs. Plaintiff received a cheque from the Government with instructions to endorse it over to defendant upon his signing a release sent therewith. Plaintiff refused to endorse it over unless his charge of $100 was paid. This defendant refused to do, and after some delay plaintiff gave him the cheque and brought action for his claim. Defendant counterclaimed for the retention of his cheque. The County Court Judge cut down plaintiff's charges, and awarded $8 damages on the counterclaim.

On appeal by plaintiff:—Held, that the award on the counterclaim was erroneous. That plaintiff was the agent of the Government not of defendant in the matter of the cheque, and not in such a contractual relation to the defendant as to warrant the claim for damages for withholding.

Ritchie v. Malcom, 25/119.

8. **Costs.**]—Quaere, may a solicitor maintain action for costs as between solicitor and client before taxation?

Smith v. Horton, 23/117.

9. **Client's costs.**]—The fact that a litigant has employed a solicitor who has not taken out a certificate as required by 1899, c. 27, s. 27, should not affect his right to costs.

Wallace v. Harrington, 34/1.

10. **Costs on settlement—When limitation begins to run.**]—Plaintiff, a barrister, was retained to defend an action brought against the defendant. Subsequently defendant settled the action without consulting plaintiff, who now sought to recover his costs as between solicitor and client:—

Held, that the Statute of Limitations was to be considered as beginning to run from the date of settlement, not from the date of retainer.

Gourley v. McAloney, 29/319.

11. **Solicitor's lien for costs—As against attachment—Garnishee.**]—W. had been solicitor for P. in litigation with M., and had failed in the Supreme Court, but had succeeded on appeal to the Privy Council. The result was a judgment against M. for $1,400, representing costs only. Before W. could obtain a charging order under the statute, O. obtained a judgment against P., and garnisheed all debts due him by M., in M.'s hands.

W. had served no notice as to his lien, when on an application by O. that the garnishee be ordered to pay over the amount of the judgment, W. appeared under O. 53, R. 6, and asserted his lien on the fund, which the Chambers Judge disallowed:—

Held, per Meagher, J., Townshend, J., concurring, that "an attorney or solicitor cannot perhaps be said to have a lien upon a judgment recovered by him for his costs, in the strict technical sense in which the word lien is generally understood by lawyers. But he has what the Courts have regarded as the same thing, in effect, namely, to the interference of the Court, to protect his rights and secure the payment of his costs, through the medium of the fund recovered by his exertions." Also, because the attacher must be presumed to have been aware that the fund was subject to deduction for the costs of the solicitor who has conducted the litigation which has been successful, unless he has been guilty of some mala fides, or has stood by while

the fund was being dealt with to the prejudice of others. And an attacher's rights are no greater than those of the judgment debtor. O. 63, R. 11, also recognizes the existence of the lien for solicitors' costs.

Per Ritchie, J., dissenting, the lien extends only to the costs of recovering the judgment, and is not general.

Palgrave v. McMillan, 31/488.

12. **Rendering signed bill**—1899, c. 27, s. 69—**Retroactive legislation.**]—By the Acts of 1899, c. 27, s. 69 (consolidating Acts relating to barristers and solicitors), passed March 30th of that year, it was provided that "No action shall be brought for the recovery of costs, fees, charges, etc., by a barrister or solicitor, as such, until one month after the bill therefor, signed by such barrister or solicitor, has been delivered to the party to be charged. . . ."

By another section of the same Act this provision was not to come into force until July 1st. Plaintiff, a barrister, issued a writ for the collection of an unsigned bill for costs, etc., May 4th. Trial of the action was not completed until after July 1st:—

Held, the enactment relating solely to a matter of procedure, should be given a retroactive construction, so that plaintiff could not recover. It was his duty to have anticipated the possibility of trial not being completed before the coming into operation of the Act, as no one can be said to have a vested right in any existing form of procedure.

Harrington v. Peters, 32/464.

13. **Barristers and Solicitors Act—Not retroactive—"Practising" must be proved.**]—The Acts of 1893, c. 27, require every practising barrister to obtain from the treasurer of the Barristers' Society before the first day of July, a certificate under the seal of the Society, to the effect that he has paid the prescribed fees. Section 3 of that Act provided that no barrister, not having done so, should be entitled to recover any charge in a Court of law, or tax any costs, etc.:—

Held, that a defendant raising such a defence must aver and prove that plaintiff seeking to recover costs, etc., was then actually practising. Also, that the Act was not retroactive, and did not apply to bills which accrued before its passage.

Gourley v. McAloney, 29/319.

14. **Retainer—By municipal corporation—Not under seal.**]—A solicitor retained by a municipal corporation to conduct suits cannot recover remuneration therefor unless his engagement is under the corporate seal.

Though the rule requiring every act of a corporate body to be under its seal has been greatly relaxed, yet the seal is still necessary to every act not specially within the purposes for which it was incorporated.

Laurence v. Town of Truro, 26/231.

15. **Employing counsel.**]—In the absence of express authority from his client, a barrister may not employ counsel.

Hearn v. McNeil, 32/210.

16. **Service on solicitor.**]—The relationship of solicitor and client is not presumed to continue after final judgment.

Service of a summons for an order under O. 40, R. 44, for the examination of an officer of a company in aid of execution, cannot be made on one who has been the solicitor of the company in the cause.

Hamilton v. Stewiacke Valley, etc., Co., and Dickie, 30/92.

17. **Service on solicitor.**]—W., a solicitor, was not regularly retained by the prosecutor to oppose a motion for certiorari, but was present and was permitted to act. Notice of appeal was served on W.:—Held, the prosecutor having availed himself of, and got the benefit of W.'s services, and there being no solicitor on the record, could not complain of undue service.

Semble, it would be otherwise were the appeal by the accused.

Queen v. Ferguson, 26/154.

18. **Negligence of solicitor—Liable to client.**]—A solicitor failed either to col-

lect or to return to his client a promissory note placed in his hands for collection:—Held, that he was liable to him in damages, the measure of which was prima facie the face of the note and interest, the burden of establishing a different measure on the facts to be on the defendant.

He is also liable to his client for loss occasioned by his returning another note without mentioning that he had collected the same, whereby the client incurred costs in an unsuccessful action to collect from the maker, the measure of damages being the amount of the costs thrown away (Henry, J., dissenting, as to the construction of facts).

Gould v. Blanchard, 29/361.

19. **Negligence of solicitor.**]—Overlooking defect in deed. See per Weatherbe, J.

See DEED, 3.

20. **Advising prosecution—Consequent action against solicitor for malicious prosecution.**]—Though consulting a solicitor has not the same effect as taking the opinion of counsel in England, yet having done so should make for the absence of malice and belief in the charge laid, on the part of the defendant, in an action for malicious prosecution.

See MALICIOUS PROSECUTION, 8.

21. **Magistrate who is a barrister.**]—Also laying a charge impeached as malicious, before a Stipendiary Magistrate who happens to be a barrister, ought to have something of the same effect.

See MALICIOUS PROSECUTION, 5.

22. **False arrest—Action against magistrate.**]—Semble, the magistrate's error is not mitigated by the fact that he was misled by a barrister.

See MAGISTRATE, 20.

23. **Recorder of incorporated town.**]—Right to recover salary and costs. Towns Incorporation Act. Special legislation. Legality of dismissal by town council.

See INCORPORATED TOWN, 4, 5.

24. **Power of solicitor to bind client.**]—A solicitor has power presumably to bind his client in granting a debtor time for settlement of a claim, in consideration of forbearance to sue.

Lyons v. Donkin, 23/258.

25. **Assault on barrister — False imprisonment — Forceable removal** from Court room by police. Damages therefor.

See ASSAULT, 2.

26. **Slander.**]—Imputing professional dishonesty in appropriating client's money. Proof and justification. Privilege.

See SLANDER AND LIBEL, 13.

BASTARD.

1. **Bond in excess of Act.**]—Defendant having been arrested as the putative father of a child likely to be born a bastard, under c. 37 R.S. 5th Series, gave the bail referred to in s. 2, which requires a bond conditioned to relieve the poor district from expense in connection with the birth of the child. The bond, however, followed one of the forms given at the end of the Act, and was conditioned, "to perform any order of filiation that may be made, etc." Section 13 directed that such forms should be followed "as nearly as may be."

After the birth of the child the defendant attended the hearing before the justice, and an order was made adjudging him to pay $10 in respect to the birth, and thereafter $1 per week for the maintenance of the child. No new bond was taken or commitment made under s. 6.

In an action by the overseers to recover on the bond the above $10, and $2 for two weeks maintenance, the defendant paid into Court $10:—

Held, that the terms of the bond, though following the schedule of the Act, were in excess of s. 2, and could not be enforced except as to charges up to and including the birth of the child, which had been paid into Court. That the

schedule, being repugnant to the body of the Act, must give way.

Overseers of the Poor v. Chase, 28/314.

2. **Liability of poor district—Depends on statute.**]—In an action for compensation for the expense of maintaining a bastard child, plaintiff rested his right to recover on an alleged express contract to indemnify him, on the part of the defendant overseers. The jury found against the existence of any such contract, and judgment was accordingly for defendants:—

Held, that on proof that the mother had a settlement within the district, the liability of the overseers for the support of a bastard child was absolute under the statute (R.S. 5th Series, c. 37), without reference to any contract, express or implied. But the fact that the mother had such a settlement not having been pleaded, though abundantly established by the evidence, there should be a new trial, and plaintiff allowed to amend on payment of costs.

Per Meagher, J., dissenting, the statute does not apply where notice has not been given the overseers.

Carter v. Overseers of the Poor, Brookfield, 30/225.

BAWDY HOUSE.

See CRIMINAL LAW, 8.

BENEFIT SOCIETY.

Right of unincorporated society to sue, etc.

See ODDFELLOWS.

BETTER PARTICULARS.

See PLEADING, 17.

BETTING.

See GAMBLING.

BILL OF EXCHANGE.

See BILLS AND NOTES.

BILL OF LADING.

See SHIPPING.

BILL OF SALE.

1. **General assignment — Affidavit — Jurat.**]—An assignment of personal property upon trust, to sell and pay certain named creditors of the grantor, is a bill of sale within s. 4 of the Act, and not a general assignment for the benefit of creditors, and so excepted from the operation of the Act by s. 10.

The omission of the words "before me," in the jurat of the affidavit of such a bill of sale, renders the affidavit void, and the defect may not be repaired by parol evidence.

In the Supreme Court of Canada:—Held, affirming the above that such omission is not a mere matter of form, or of ambiguity, but is one of insufficiency and non-compliance with the Act, such an affidavit not being "as nearly as may be" in the form of the affidavits set out in the Act. And this though the omission does not change the legal effect of the document.

Hubley v. Archibald, 22/27, 18 S.C.C. 116.

2. **Affidavit—Identification of deponent with grantor.**]—In an action by the grantee of a bill of sale against a sheriff for wrongful levy at the instance of a creditor of the grantor, it appeared that in the affidavit attached the words, "I am the rightful owner and possessor" occurred in place of the words of the statutory form, "I am the grantor," and that the description of the grantor was omitted, also that the words, "said

Hiram B. Ward" appeared in the second clause instead of the word "grantor," and that in the line following a word was omitted:—

Held, that the affidavit was bad because the identity of the deponent with the grantor, and the bona fides of the bill of sale did not clearly appear.

Hubley v. Archibald, supra, followed. (Townshend, J., dubitante).

Kilcup v. Belcher, 23/462.

3. **Affidavit—Occupation not stated.**]—In an action against a sheriff for wrongful levy of goods, by the grantee of a bill of sale made by the execution debtor, it appeared that the occupation of the grantor was not inserted in the affidavit:—Held, that this was not compliance "as nearly as may be," with the terms of the Act.

It was contended that the burden of showing that the grantor had an occupation, ought to be on the person attacking the document:—Held, that the burden was rather on the person claiming to recover goods, to show that his title thereto was perfect under the Act. That he had not done so, and there was abundant evidence on the face of the bill of sale, to show that the grantor in fact had an occupation which ought to have been stated in the affidavit.

But, on appeal to the Supreme Court of Canada:—Held, that inasmuch as the affidavit in terms referred to the bill of sale to which it was attached, in which the occupation of the grantor was set out, the Act was complied with.

Per Taschereau, J., that the burden of showing that the grantor had an occupation was on the person attacking the bill of sale.

Smith v. McLean, 24/127, 21 S.C.C. 355.

4. **Affidavit — Not showing real consideration — Or contract made.**] — In an action for wrongful levy against a sheriff, the plaintiff's claim was under a bill of sale or chattel mortgage. In the body of this document the consideration was stated to be $1,500, in the affidavit as follows:—"That of the amount set forth therein as being the consideration thereof, the sum of $1,203.03 is justly and honestly due and owing by me to the said grantee therein named, and as regards the balance of the said consideration, namely, the sum of $296.97, the said party has agreed to supply goods for the full value thereof, and the said mortgage was executed by me in good faith, and not for the purpose of protecting the property therein mentioned against my creditors, or of preventing my said creditors from obtaining payment of any claim or claims against me":—

Held, that inasmuch as it had been held that the affidavit must be as nearly as possible in the form of the Act, this one was defective in that the amount sworn to as "justly and honestly due and owing," did not agree with the consideration as stated in the body of the bill of sale, and that the document considered as a chattel mortgage to secure future advances was also defective in that it did not set out the contract entered into between the parties as disclosed in the affidavit. In which case the affidavit should also state "that the mortgage truly sets forth the agreement entered into, etc."

Also, the plaintiff not having pleaded the chattel mortgage, the defendant was not bound to plead in detail the exact nature of his objections thereto.

Levy v. Logan, 24/412.

5. **Affidavit and jurat — Omission of word "due."**]—The affidavit attached to a bill of sale was attacked, (1) because the word "due" was omitted where the form of the schedule to the Act laid down the expression "due and owing," in reference to the consideration; (2) because the words "in the County of Annapolis" were omitted in the jurat.

The affidavit was headed "Canada, Province of Nova Scotia, County of Annapolis," and proceeded, "I, A. B., of Middleton, in the County of Annapolis, make oath, etc.," and the jurat read, "Sworn to at Middleton, this 6th day, etc.":—

Held, (1) that as the consideration was in part represented by two promissory notes of grantor not yet due, the word "due" was necessarily omitted,

and the result was "as nearly as may be" in the form of the Act, the facts not being within the purview of s. 5 of the Act. (2) That the fact that Middleton was in the County of Annapolis was sufficiently set out in the affidavit to validate it and to show jurisdiction in the officer administering the oath.

Per Ritchie, J., dissenting, that the case was governed by Archibald v. Hubley, supra.

On appeal to the Supreme Court of Canada:—Held, following Archibald v. Hubley, and distinguishing Smith v. McLean, supra, that the omission of the words "in the County of Annapolis" from the jurat was fatal.

Phinney v. Morse, 25/502, 22 S.C.C. 563.

6. **Affidavit — Varying and omitting words — Effect of possession.**]— N. executed a bill of sale to the plaintiffs R. and C., who were business partners, to secure them as to a debt due and as to certain accommodation indorsements they had made. Four days later he made a general assignment for the benefit of creditors to plaintiff C. of the same personal property, and after delivering possession, left the Province.

There were two affidavits attached to the bill of sale, neither of which literally followed the statutory form. One of them set forth that it "truly stated the amount of the liability intended to be created," but omitted the words "or covered" appearing in the form.

The property covered by this bill of sale having been levied on in the hands of plaintiffs, this action was against the sheriff:—

Held, that the affidavit was not "as nearly as may be in the form prescribed by the statute," as required by s. 2, and that the Court in construing the directions of the Act would not say that any words omitted were useless or had the same meaning as other words appearing, even though the legal effect would not be conceivably altered. (Affirmed in the Supreme Court of Canada.)

Also that the defects of plaintiffs' title were not cured by possession, because the delivery of such possession was referable to the subsequent general assignment to plaintiff C., not to the bill of sale.

Reid v. Creighton, 27/90, 24 S.C.C. 69.

7. **Combining affidavits.**]—P. executed to plaintiff a bill of sale (1) To secure the repayment of $50; (2) to secure him against liability on accommodation indorsements. The affidavit followed neither form "A" or "B" exactly, but was an attempt to combine both to suit the transaction. The property having been levied at the instance of another creditor of P., this action was against the sheriff. It was admitted that the affidavit did not sufficiently comply with form A, but it was contended that as by striking out the words "repayment of the sum of $50 lawful money with interest as well as of securing the mortgagee," referable to form A, the affidavit would be in compliance with form B, the bill of sale was pro tanto valid:—

Held, following the Supreme Court of Canada in Archibald v. Hubley, Phinney v. Morse, and Reed v. Creighton, supra, that the affidavit must not only fill the requirements of the sections of the Act applicable, but must also be as nearly as possible in the exact form of the schedule, and this is not the case where the elimination of words as surplusage is necessary, as the Court under the above decisions has no power to treat words as such, and this though the legal effect of the instrument be not changed. Such a course, also, would make the affidavit untrue.

Also (Weatherbe, J., dissenting), that the fact that the transaction does not fall within either s. 4 or 5 singly, but touches them both, does not dispense with the necessity for an affidavit, unless the affidavit may not be varied, which is not the case.

Semble, ". . . Section 4 does not refer solely to instruments which are given exclusively for a consideration due and owing by the grantor to the grantee, nor s. 5 to instruments which are given exclusively for securing the mortgagee against indorsements, or other liability by him incurred for the mortgagor, . . . an easy evasion of the Act might be

effected if it were held that instruments not given exclusively for one purpose, did not come within its provisions."

Quaere, is it possible to frame a valid affidavit by combining the two forms, or must two affidavits be attached?

Lantz v. Morse, 28/535.

8. **Filing—Grantor residing abroad.**]—The provision of the Act requiring a bill of sale to be filed in the county wherein the grantor resides, does not apply where the grantor resides outside of the Province.

Don v. Warner, 28/202.

9. **Filed by grantor—Without assent of grantee — Fraudulent conveyance — Preferred creditor.**]—Plaintiff sued defendants as administrators for money loaned their intestate, and after amendment, to set aside a voluntary conveyance made by the intestate, just before his death, to one of the defendants in favor of the other (his widow). The defendants set up, among other pleas, that plaintiff was a secured creditor, as holder of a bill of sale of personal property of the deceased, upon which he was at liberty to realize. This bill of sale had been made and filed by the deceased without delivery to the plaintiff, or his assent thereto, though he had notice of it:—Held, reversing the decision of the trial Judge, that he could not be considered a preferred creditor, and was entitled to have the conveyance in favor of the wife set aside, not having assented to the bill of sale.

Shortell v. Sullivan, 21/257.

10. **Absolute transfer — Defeasance—Grantor retaining possession.**]—The fact that the grantor of an absolute bill of sale remains in possession of the goods, only raises a prima facie presumption of fraud, as do some other circumstances, such as the amount of security granted being excessive. The question of bona fides is one of fact in each particular case.

No agreement between parties which is not in writing as to redemption, amounts in law to a defeasance, requiring to be filed under the Act.

Fraser v. Murray, 34/186.

11. **Bill of sale or general assignment.**]—W. made an assignment for the benefit of creditors to the defendant, in trust to pay (1) debts due preferred creditors; (2) claims upon which certain accommodation indorsers might become liable; (3) creditors who should execute the assignment within 60 days; (4) all other creditors; (5) the surplus, if any, to the assignor:—

Held, by the Supreme Court of Canada, overruling the decision of the Supreme Court of Nova Scotia, that inasmuch as it provided for all creditors (differing in this respect from Archibald v. Hubley, supra), it was a general assignment within the terms of section 10 of the Act, and that the provision (2), in favor of accommodation indorsers did not make it a bill of sale within section 5 of the Act, requiring an affidavit and filing, because the assignor or maker retained no redeemable interest, and the conveyance was complete and absolute.

Kirk v. Chisholm, McPhie v. Chisholm, 28/111, 26 S.C.C. 111.

12. **Document amounting to a bill of sale—Security—Filing.**]—Held, that the following document, signed by the vendee, was a bill of sale, void as against the creditors of the vendor, for want of an affidavit and filing under section 3 of the Bills of Sale Act (R.S. 5th Series, c. 92). Though intended to retain the property in the vendor it had in reality passed to the vendee, and the document was a giving of security within the terms of that Act.

"I have this day bought from G.H. the business lately bought by him from B. & Co. . . . Amount of goods in store, dry goods, groceries, etc. . . . to the amount of $1,500. I agree to pay the said G.H. the amount of $1,500, as follows; . . . the said G.H. to hold the goods, and whatever goods may come in after shall become the property of the said G.H. until his claim is paid in full; if I fail to pay any of the above notes, the said G.H. can take possession of the

business and all stock in the store, at the time of me failing to meet or pay any of the above-named notes."

J. E. H."

Manchester v. Hills, 34/512.

13. **Assignment for creditors—Delivery of possession — Filing.**]—The mischief sought to be remedied by the provisions of the Bills of Sale Act, requiring filing of bills of sale, etc., is confined to cases in which the title is to be in one person and the possession in another.

Therefore an assignment for the benefit of creditors where the delivery of possession to the trustee is immediate and apparent, need not be accompanied by an affidavit under the Act.

McMullin v. Buchanan, 26/146.

14. **Delivery of possession—Contract separable from bill of sale.**]—The plaintiff having a claim against M., called upon him at his farm to effect collection, and agreed to accept three head of cattle in full satisfaction. He received them one by one from M.'s hands, and placed his own mark upon them (a letter K. cut in the hair), and thereupon made an arrangement with M. to pasture the cattle and delivered them to him. While thus in M.'s possession they were levied in execution against him, and this action was against the constable for a wrongful taking and carrying away.

There was no evidence of fraud or of attempt to delay creditors, but there was evidence that on the day of the above transaction, M. had executed a bill of sale to plaintiff covering the same cattle, and defendant insisted that plaintiff's title, if any, was referable to this document, and that it should have been produced. Plaintiff asserted throughout that he did not rely on it for title:—

Held, that there was a complete sale, delivery and appropriation of the property, not depending in any way on the bill of sale and of which parol evidence might be given. And that the bill of sale was not to be regarded as the best evidence of title, unless it was the intention of the parties that it should be operative to pass the property and a necessary part of their contract.

Semble, the case is not affected by the question as to whether the parol contract or the bill of sale is first in time of making.

Kennedy v. Whittie, 27/460.

15. **Unrecorded bill of sale—Growing grass—Possession.**]—Plaintiff company, which held a mortgage on the farm of M., and a bill of sale on all his personal property, took a bill of sale on his crop of hay, then growing, which it did not record. It contained a right of entry to cut the hay. Plaintiff company later made an agreement with M. to cut and store the hay in the barns on the place, employing men on its behalf, and being remunerated himself by permission to remain on the place and use the teams, etc.

After the hay was cut and stored, the secretary of the plaintiff company visited the farm and took formal possession of it, but left it in charge of M., as agent, facts deposed to by the secretary and M. Afterwards, while still in charge of M., the hay was levied on by defendant sheriff, under execution against M., at the suit of K., and this action was for conversion:—

Held, it being conceded that it is not necessary to file a bill of sale of growing crops, that the taking of possession of the same after severance by the plaintiff was sufficient to obviate the necessity for so doing after the crops were cured and stored as personal property.

Also, "the question of apparent possession, or visible change of possession, or merely formal possession, cannot, it appears, arise under our statute, which in this particular differs substantially from the English and Ontario Acts."

Also, there was nothing to prevent the employment of the mortgagor, and his possession was that of plaintiffs.

Eastern Canada Savings and Loan Co. v. Curry, 28/323.

16. **Unrecorded bill of sale—Recovery of possession under—Subsequent levy.**]—Plaintiff sold F. a piano under an agreement in writing, void as a bill of sale because not filed, by which it was to remain the property of the vendor until

paid for. F. having absconded, his landlord distrained on and sold the piano, the plaintiff protecting his rights by purchasing at the sale. With the assent of the landlord he left the piano on the premises.

The constable in levying the distress had removed the key of F.'s apartments from a nail in the hall, where F. had placed it, and unlocked the door.

The piano afterwards being attached by the defendant sheriff under process against F., this action was in replevin:—

Held, that the distress having been accomplished by what amounted to a breaking in, was illegal, and the sale thereunder conferred no title on the purchaser. But the plaintiff holder of an agreement in writing as to the property in the piano, good as between himself and F., having recovered possession of his property by whatever means, that possession was good as against subsequent attaching creditors of F., and the levy by the sheriff was illegal.

Per Graham, E.J., the sheriff having made his seizure by the same illegal means as the landlord, or in consequence of the latter's illegal act, could not set up the nullity of the sale as against the plaintiff.

Miller v. Curry, 25/537.

17. **Hiring and sale of piano—Section 3 not applicable—Evasion of Act.**]—M. delivered possession of a certain piano to S., under a written agreement, whereby after payment of a rental therefor of $10 per month for a period of months, S. was to be entitled to receive from M. "one piano equal in value to the above piano, with a receipted bill of sale therefor." In no case, so far as the agreement showed, was S. to become owner of the piano delivered.

Plaintiff sheriff having levied the piano under attachment against S., M. resumed possession, and this action was for M.'s alleged wrongful act in so doing:—

Held, per Henry, J., Ritchie, J., and Graham, E.J., concurring, that section 3 of the Bills of Sale Act only applies to agreements whereby property in the goods bargained is to remain in the lessor, until some future time, or the performance of certain conditions, when lessees' ownership is to begin. Here the property in the specific piano in question was never to become that of S., and consequently had never passed out of M., so that the provisions of section 3 did not apply.

Per Townshend and Meagher, JJ., dissenting, that there was attempted evasion of the section, and evidence on which the trial Judge was justified in determining that the piano was the real subject matter of the sale, making compliance with the section necessary.

(Appeal to the Supreme Court of Canada dismissed with costs. Not reported.)

Guest v. Diack, 29/504.

18. **Unrecorded hiring agreement—Recovery by vendor—Trover—Statute of Frauds.**]—N. obtained certain goods from A. under an agreement for hiring and sale, by which property was to remain in the vendor until payment of a price agreed. After breach of this agreement, entitling the vendor, under its terms, to recover possession of the goods, N. died, and his administrator sold them to the plaintiff on his verbal agreement to pay $50 for them in nine months' time. Before plaintiff could gain possession, defendant, as agent for the original vendor, A., demanded and received the goods from a stranger in whose possession they were, and this action was in trover:—

Held, that the action was not maintainable, as the sale to him by N.'s administrator, on which his title depended, was within the Statute of Frauds.

Though the defendant succeeded on trial on the above ground, he had not pleaded the Statute of Frauds (except by replication, invalid for want of leave under O. 22, R. 2), yet no objection had been made, and the matter had been tried as if the pleadings were amply sufficient:—Held, that his omission should be considered as if amended. Per, Ritchie, J. (Meagher, J., contra), the action being trover, in which plaintiff had not set out the details of his title (which he was not bound to do), defendant could not tell what he had to meet, so that he should be allowed the benefit of any de-

fence developed by the trial, whether pleaded or not.

Kent v. Ellis, 32/549.

19. **Contract made in Ontario—Retaining property in vendor—Bills of Sale Act, s. 3, does not apply.**]—M. agreed in writing with plaintiff to purchase certain machinery, to be paid for, part cash, part notes at 3, 6 and 9 months. Also until payment, that the property should remain in plaintiff, and that "for the execution of this, the parties do elect domicile in the Town of Galt, Ontario (which was the residence of the vendor), for demands of payment, suits, etc." The machinery having been removed to M.'s factory at Hopewell, N.S., some time afterward, but before final payment therefor, M. made a general assignment for the benefit of creditors to the defendant. On the same day, and before execution of the assignment, plaintiff served demand for possession of the machinery, and this action was against the assignee for conversion. The defence was that the lease or agreement in writing was not in compliance with the provisions of section 3 of the Bills of Sale Act:—

Held, that though the Legislature had power to control contracts made without the Province to be executed within, it had not by section 3 of the Bills of Sale Act, done so, and that that section, as to affidavit, filing, etc., did not apply unless similar provisions should be found in Ontario, the place of contract. Singer Sewing Machine Co. v. McLeod, 20/341, reviewed.

Per Meagher, J., that as a binding contract as to the property in the machinery was outstanding between plaintiff and M., the defendant, assignee of, and privy with M., was not within the class of persons protected by section 3.

Weatherbe, J., dissented.

McGregor v. Kerr, 29/45.

20. **Condition of fire policy—Change of title—Giving chattel mortgage.**]—A chattel mortgage made during the currency of a policy of fire insurance, is not an assignment of an interest in the policy within the meaning of a condition of the policy. It is not "a sale or transfer" of the property insured unless it extend to the whole interest of the assured, but it is a "change of title" within the meaning of such condition. And it is "an incumbrance," even if the word "incumbrance" mean incumbrance on the policy.

Salterio v. Citizens' Insurance Co., 26/16, 23 S.C.C. 155.

A chattel mortgage is a "change of title" to property assured, within the meaning of a condition of the policy "by sale, legal process, judicial decree, voluntary transfer or conveyance of any kind," which condition rendered the policy void, unless notice was given to the company, etc.

Salterio v. City of London Fire Ins. Co., 26/20, 23 S.C.C. 32.

21. **Fixtures.**]—An instrument conveying an interest in lands and also fixtures thereon, does not require to be registered as a bill of sale, and there is no distinction in this respect between a licensee's or tenant's mortgage, and those covered by a mortgage made by the owner of the fee.

Don v. Warner, 26 S.C.C. 388.

22. **Indefinite description—Ten years old.**]—The description "1 horse or mare, 3 cows, 2 heifers, sheep, cart, and all my farming implements; 4 fishing nets, with all my fishing gear," appearing in a bill of sale ten years old, will not protect property found in the possession of the grantor from the sheriff levying, where there is evidence of substitution of parts of the property, exchanging without accounting for profit or loss, and where the grantor has treated the property as his own.

McAskill v. Power, 30/189.

23. **License to enter under bill of sale.**]—Trespass by the owner of an office building in which P. occupied two rooms, against the defendants, who were holders of a chattel mortgage of certain goods from P., and who entered plaintiff's building for the purpose of removing such goods on default by P., under a license contained in the chattel mort-

gage:—Held, the defendants had all the rights of entry which P. had.

Boston Marine Ins. Co. v. Longard, 26/387.

24. **Mistake in section 3 of Act.**]—There is a mistake in the use of the word "hirer" throughout section 3 of the Bills of Sale Act (R.S. 5th Series, c. 92). The context in each of the four cases where it is used, shows that the owner or bailor of the thing hired, and not the hirer or bailee, is meant.

Guest v. Diack, 29/504.

25. **Property in colt.**]—There is no satisfactory authority for saying that the holder of a bill of sale of a mare which foals a colt is owner of the colt, especially where the bill of sale is merely held as security for a loan of money, and the mare has never been in the possession of the person asserting property.

Hirschfeld v. City of Halifax, 22/52.

26. **Execution against equity of redemption—O. 40, R. 31.**]—Rights of grantor and grantee. Condition of property vesting in grantee if property attached or levied. Court equally divided. Conversion and replevin against sheriff levying.

See EXECUTION, 24.

27. **Since Assignments Act.**]—In what cases a bill of sale may be given as security by a person in insolvent circumstances. Preferences.

See ASSIGNMENT, 20.

BILLS AND NOTES.

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1. **Bona fide holder—Fraud of partner.**]—E., being a member of the firm of E. & Co., and also of S. C. & Co., made a note in the name of the latter and in favor of E. & Co., which he endorsed over to plaintiff bank, in settlement of an overdraft of E. & Co. E. & Co. shortly afterwards became insolvent. In an action against the makers, it was shown that the bank knew the handwriting and business circumstances of E., and the jury found that E. undertook the transaction in fraud of his partners, but made no finding as to the bank's knowledge of the fraud. The trial Judge entered judgment for defendant and the bank appealed:—Held, the case could not be decided on the findings and there must be a new trial, but on appeal to Supreme Court of Canada:—Held that there was evidence of sufficient knowledge to make it incumbent on the bank to institute inquiries, and not having done this, they were not entitled to be considered bona fide holders for value.

Halifax Banking Co. v. Creighton, 22/321, 18 S.C.C. 140.

2. **Gambling debt.**]—A bona fide holder for value may enforce payment of a note given for a gambling debt.

Laurence v. Hearn, 21/375.

3. **Acceptance by executor.**]—Held, that a defendant who was executor of J.P., and who accepted a draft as "A.M., executor of J.P.," was personally liable thereon, in an action by a bona fide holder for value.

Campbell v. McKay, 24/404.

4. **Conditional indorsement—Notice to agent—Principal, the holder affected.**]—For the accommodation of S., M. indorsed a promissory note for $1,000, made by S., payable to plaintiff bank. He did so on the express condition that the note should not be made use of unless the additional indorsement of H. was secured, a condition of which the bank's agent, or local manager, was aware. Without securing H.'s indorsement, S. turned the note over to plaintiff bank, which now sought to enforce payment:—

Held, M., the indorser, was not liable. Plaintiff bank's agent having notice of the condition attaching, they were affected with this notice, unless it could be shown that the agent was a party to

a scheme to defraud. And it is not sufficient to show that the agent had an interest in not disclosing the facts of the matter to his principal.

Commercial Bank of Windsor v. Smith, 34/426.

Commercial Bank of Windsor v. Morrison, 32 S.C.C. 98.

5. **Consideration — Accommodation.**]—The defendant and H. signed a promissory note to K., which came into the hands of the plaintiff by indorsement. The defendant did so "to accommodate H. for a month or two":—Held, this was good consideration for the note in the hands of any legal holder.

Creelman v. Stewart, 28/185.

6. **Accommodation acceptor—Liable to drawer—Accommodating third person.**]—Though a person who accepts a draft for the accommodation of the drawer is discharged if the draft be retired by the drawer (Bills of Exchange Act, s. 59, s.-s. 3), his liability continues if the acceptance was for the accommodation of a third person. The drawer's ordinary right against the acceptor should not be affected by the fact that the note was discounted, and that he was afterwards obliged to retire it.

Dill v. Wheatley, 34/526.

7. **Company—Secretary exceeding authority—Accommodation indorsements.**]—Secretary of defendant company indorsed sundry drafts "Eureka Woollen Mfg. Co., J.P., sec.," for the accommodation of X., who discounted them with plaintiff bank. It appeared that the secretary's powers in relation to negotiable paper were limited by by-law of the directors to the acceptance of drafts on the company. Plaintiff bank having been aware that the indorsements were for accommodation:—Held, that this put an end to the question of the company's liability, though,

Semble, defendant company having power to deal with commercial paper, it would be otherwise in the case of a bona fide holder for value.

Union Bank v. Eureka Woollen Mfg. Co., 33/302.

8. **Consideration—Forbearance to sue—Solicitor suing on negotiable instrument given for client's debt.**]—Plaintiff, a solicitor, having the claim of S. against defendant in his hands for collection, acceded to the written request of defendant to draw on him at thirty days, forbearing to sue in the meantime. The draft being dishonored at maturity, the plaintiff brought action in his own name:—Held, that the forbearance to sue until maturity of the draft was sufficient consideration therefor, and that the presumption as to the authority of the plaintiff to grant time and thus to bind his client, and suspend his remedy, should be in favor of a solicitor.

Lyons v. Donkin, 23/258.

9. **Consideration—Forbearance to sue—Father and infant son—Agency.**]—Plaintiff sued on a promissory note given by defendant as a settlement of a claim against him for damages for an assault upon the plaintiff's son, an infant nineteen years of age. The defence was that there was no consideration as between plaintiff and defendant:—Held, that the father, as the natural guardian of his son and as his specially authorized agent, had until revocation by the infant, a right to make the settlement, and following Lyons v. Donkin, supra, that his forbearance to sue was a sufficient consideration for the note sued on in his own name.

Also, that though the contract was voidable at the option of the infant, that doctrine exists for the protection of the infant only, and cannot be availed of by the other party as a defence in an action to enforce the contract.

Hubley v. Morash, 27/281.

10. **Consideration—Forbearance to sue.**]—Defendant was sued as maker of a promissory note which was a renewal of another given in payment of a debt due by his father to plaintiff, and made during the lifetime of the father, who was now deceased. Defendant at the time of the making of the first note was aware of the existence of the indebtedness of his father, and of the supplying of the goods in respect to which the indebt-

edness arose. He had succeeded to his father's business and had inherited his property:—

Held, McDonald, C.J., dissenting, that these facts, taken in connection with plaintiff's forbearance to sue the father during his lifetime, constituted a good consideration for the renewal note sued on. And that such consideration of forbearance need not depend on express agreement to forbear, but may be implied from the mere fact that plaintiff did not sue.

McGregor v. McKenzie, 30/214.

11. **Consideration — Shares in company.**]—Before incorporation of a joint stock company, the defendant had subscribed for certain shares of its proposed stock. After incorporation, but before organization, he gave his promissory note to W. and T., as trustees for the company, for the amount of his subscription. They indorsed the note to the company:—Held, that the note was without consideration, the defendant not being liable in respect to stock which had no existence.

Halifax Street Carette Co. v. Downie, 27/180.

12. **Note for insurance premium—Payable to agent—Descriptio personae.**]—S., having induced the defendant to insure his life, took his promissory note for the first premium, payable to "S., agent of the O. Life Ins. Co.," and indorsed it to plaintiff, who was another agent of the same company:—Held, that S., or his transferee, might maintain action, the note being in his favor, and not in favor of the insurance company; the words "Agent, etc." being merely descriptio personae. Also there was good consideration.

McDonald v. Smaill, 25/440.

13.—**Material alteration — Inserting "jointly and severally"—Revival of former note.**]—The defendants made a note for $297 payable to N., who altered it by inserting the words "jointly and severally," thereby changing the liability of defendants, and indorsed it to plaintiff bank to retire a due note made by defendants:—

Held, that the alteration was material and vitiated the note as against defendants, but not as against N., an indorser, who had made the alteration.

Also, as against defendants, the renewal note being void, the right of action on the former note remained.

People's Bank v. Wharton, 27/67.

14. **Payment by note of third person —Whether extinguishing debt.**]—Action for work done and materials provided. The defence was that the debt was satisfied by the acceptance by plaintiff of the note of A.M. & Sons, in payment of the debt. The sole partner in the firm of A.M. & Sons was C.B.M., who was managing director of defendant company. The note had been dishonored:—

Held, Ritchie, J., dissenting, that the question as to whether the note was satisfaction of the original cause of action or not, was one of fact, depending on the intention of the parties. The presumption is that such a note is conditional payment only, so that the original cause of action revives on dishonor, and an agreement to accept it as satisfaction must be affirmatively shown by defendant. Taking a note in "payment" is not taking it in satisfaction, therefore proof that it was taken in "settlement" does not amount to proof of an agreement on the part of the creditor to abandon his original claim and accept a complete new right in substitution for it.

Patterson v. McDougall Distilling Co., 26/209.

15. **Payment by draft — Conditional payment—Laches.**]—In an action for $117, it appeared that the defendant had given the plaintiff a draft on R. for $100, which he had neglected to collect at maturity, of which the defendant had no notice until his recourse on R. had gone by reason of R.'s having left the Province:—Held, that the plaintiff, by his laches had made the draft his own, so that it amounted to absolute payment to the extent of its face. Though a negotiable instrument is in the first place conditional payment only, yet if the holder by his conduct adopt it as his own pro-

perty, it is then equivalent to absolute payment.

Hart v. McDougall, 25/38.

16. **Payment by note—Satisfies judgment.**]—Even though the satisfaction piece be not filed; and nothing short of the delivery up of the unfiled satisfaction piece will revive the judgment, except in favor of a bona fide holder without notice of the settlement.

See JUDGMENT, 22.

17. **Presentment for payment.**] — Where a place of payment is named in the body of the note, presentment may be made at any time before action brought, or:—Semble, within the term set by the Statute of Limitations.

Miller v. Dodge, 23/191.

18. **Presentation for payment—Bills of Exchange Act, s. 86.**]—Appeal from an order at Chambers permitting plaintiff to sign final judgment before defence pleaded, in an action (payee against maker) on a promissory note payable "to the order of E.W. at the Union Bank." The plaintiff had not alleged presentation at the Union Bank:—Held, that, under Bills of Exchange Act, s. 86, presentation should be made before action, and pleaded, but the case was a proper one for amendment, which was allowed upon payment of costs of appeal, costs below to abide the event.

Warner v. Symon-Kaye Syndicate, 27/340.

19. **Note payable "at Halifax"—Act s. 45, s.-s. 7.**]—Case similar to the above (and similarly decided), except that the note was "payable to the order of S.C. & Co. (plaintiffs) at Halifax":—Held, that the note was payable at a particular place, and that the words "at Halifax" amounted to more than descriptio personae. Presentation is provided for by the Act of 1890, s. 45, s.-s. 7

Quære, distinguishable from Spindler v. Grellet (1 Ex. 384).

Cunard v. Symon-Kaye Syndicate, 27/340.

20. **Presentment for payment—Must be pleaded** or the holder cannot recover on a note made payable at a particular place. But where objection has not been taken in defence. Costs.

See PLEADING, 64.

21. **And** where the holder has neglected to allege presentation at the place named, appearance to his specially indorsed writ will not be set aside under O. 14, R. 1.

See PRACTICE, 2.

22. **Presentment for payment — Cheque.**]—An allegation that the cheque "was duly presented for payment" is a sufficient allegation of the fact. It is in accordance with the form appended to the rules, R.S. Ch. 104 App. C. s. 3, No. 6, and with all the forms applicable to commercial paper which does not on its face require presentment at a particular place.

Knauth Nachod v. Stern, 30/251.

23. **Presentment for payment—Pleading.**]—Plaintiff issued a specially indorsed writ for the collection of a promissory note, payable at the P. Bank. In his indorsement he alleged that the note was "duly presented for payment," but did not mention at what place. The defendant appeared, but did not plead. On an application under O. 14, R. 1, to set aside the appearance and for judgment, the defendant produced no answering affidavits of merits, but relied on the alleged defect in pleading. Plaintiff produced an affidavit to show that presentation was in fact made at the P. Bank, which the Chambers Judge received, and set aside the appearance. Defendant appealed.

Held, that the Judge by admitting the affidavit had treated the pleading as if amended.

Quære, was not the allegation of presentation sufficient? "The pleader in this case had the authority of a form given in Chitty's Forms, 9th Ed., p. 88."

Crowell v. Longard, 28/257.

24. **Presentment and notice of dishonor—Waiver.**]—Action against defendant as indorser of certain promissory notes made by T. to defendant and by

him indorsed to plaintiff. The statement of claim alleged presentment at maturity, and notice of dishonor to indorser, or that defendant had by frequent promises to pay the notes after maturity waived these requirements.

The defence was fraud of the maker known to plaintiff, and the non-presentment, and want of notice of dishonor.

The County Court Judge found on trial that there was no presentment and no notice, but that the defendant's promises to pay operated as a waiver of notice, and that as a juror he inferred notice from such promises, also that plaintiff was an innocent holder for value.

On appeal by defendant the Court was equally divided.

Per Graham, E.J., and Ritchie, J., that the Judge's findings were irreconcilable and could not stand. Having found in fact that there was no presentment or notice, he could not infer from something else that which had no existence. Appeal allowed.

Per McDonald, C.J., and Meagher, J., that the findings of the Judge should not be disturbed. The defendant had full knowledge of the facts, and had very strong reasons for keeping himself informed, and his promise to pay was a full and unqualified one, on which he should be held liable.

McFatridge v. Williston, 25/11.

25. **Action indorsee versus maker—No contractual relationship**—3 & 4 **Anne, c.** 9.]—The relations of maker and indorsee are not contractual. Though the action of indorsee against maker is ex contractu, yet the indorsee's right of action is not derived from the contract between maker and payee, but from the Statute of 3 & 4 Anne, c. 9, and subsequent legislation, bringing negotiable instruments within the Law Merchant, and creating an exception to the Common Law rule, that no one can sue ex contractu except a party to the contract.

Also, section 12 of the Act of 1898, relating to procedure, might be given a retrospective effect, entitling plaintiff to sue in relation to a contract made before its passage.

Michaels v. Michaels, 33/1, 30 S.C.C. 547.

26. **Joint makers of note—Liabilities—Laches.**]—Defendants G. and N. were sued jointly as makers of a note for $25. The writ, which was issued in 1885, was served on defendant N., and defendant G. accepted service. N. appeared and pleaded, but by arrangement nothing was done in relation to the claim against G. In 1885 N. withdrew his defence, confessed the action, and final judgment was entered against him, on which some payments were afterwards made.

In 1899, plaintiff commenced proceedings against defendant G., who, under an agreement reserving his rights, appeared and pleaded:—

Held, that the judgment confessed by N. was an answer to the subsequent claim against G. And that the action being brought jointly against defendants, the liability of G. was not affected by the fact that the note was a joint and several one.

Per Meagher, J., plaintiff could not succeed without amendment, which could not be permitted after the lapse of 14 years.

McDonald v. Gillis, 33/244.

27. **Agreement of payee to renew.**]—Indorsee v. maker. Payee added as a third party. O. 16, R. 49. Non-fulfilment of condition by maker.

See PARTIES, 27.

BOARD OF HEALTH.

See MUNICIPALITY, 3.

BOND.

1. **Appeal bond.**]—Construction of. Liability of surety.

See APPEAL, 32, 33.

2. **Appeal from Commissioner of Mines.**]—The bond having been given to the Queen instead of to the respondent,

it is nevertheless good. Cf. Mines Act, R.S. c. 7, Sched. G.

See Mines and Minerals, 5

3. **Administrators bond.**]—Objections which might have been raised in Probate Court, not available in an action on bond.

See Executors and Administrators, 11.

4. **Bond cancelled — Cannot be restored.**]—A bail bond furnished by a defendant on his arrest by capias, having been ordered delivered up and cancelled, the liability of the sureties cannot be restored on appeal.

See Capias, 14.

5. **Bond set out in schedule,** in excess of the requirements of the Act itself, is bad.

See Bastard, 1.

6. **Estreating recognizances.**]—Criminal charge. The proceeding must be had under the Crown Rules, and if notice is not given the sureties as therein provided, the estreating order is bad.

Queen v. Creelman, 25/404.

7. **Mortgage bond.**]—See Mortgage.

8. **Replevin bond** must have two sureties, otherwise the sheriff or coroner, renders himself personally liable, on a failure of the security.

See Replevin, 6.

9. **Security for costs.**]—Bond for.

See Costs, 57.

10. **Towns Incorporation Act — Contractor.**]—The surety on a bond to the town conditioned for the faithful performance of his duties by the inspector of licenses, is a contractor with the town within the meaning of the Act, and is ineligible to be a town councillor.

See Incorporated Town, 1.

BOUNDARIES.

See Deed, 3, 4, 5, 6, 9.

BRIBERY.

Civil action.]—Though the result may involve the imprisonment of the defendant, an action to recover a penalty fixed by statute for bribery, is a civil action, and may be brought in the County Court, though that Court has (in 1889) no criminal jurisdiction.

Morrison v. Stewart, 22/1.

BRIDGE ACT.

See Municipality, 2.

BRITISH NORTH AMERICA ACT.

See Constitutional Law.

BUILDING SOCIETY.

Loan company — Mortgage — Special terms—Membership in society—By-laws.

See Mortgage, 22.

CANADA TEMPERANCE ACT.

Cf. Certiorari, Conviction, Liquor License Act.

1. **Information need not be sworn.**]—An information on which a summons issues, for an offence triable summarily (e.g., under Canada Temperance Act), need not be upon oath, unless a warrant is to issue for the arrest of the defendant.

Queen v. Wm. McDonald, 29/35.

2. **Information — Arrest in first instance.**]—Information to the effect "that deponent is informed, and believes, that defendant sold intoxicating liquors, etc.," is sufficient for the issue of a warrant for arrest in the first instance.

Queen v. E. McDonald, 24/44.

3. **Altering information.**]—An information purporting to be that of A. was signed and sworn to by B. In the presence of B. the Magistrate erased the name A. and inserted that of B., but did not re-swear B.:—Held, a conviction following was bad. And the defendant having raised the objection, and caused it to be noted, had not afterwards waived his rights by proceeding to his defence.

Queen v. McNutt, 28/377.

4. **Amending Act**—1884, c. 34—**Conviction.**]—Since the passing of this amendment a conviction which omits reference to the issuing of a warrant of distress and of the penalty of imprisonment in default of distress is bad. (Queen v. Porter, 20/352, distinguished.)

Queen v. McFarlane, 24/54.

Queen v. Ferguson, 26/154.

5. **Question as to previous conviction.**]—At an adjourned hearing the defendant was not present, but was represented by counsel. Prior to convicting the magistrate addressed the usual question as to previous conviction to defendant's counsel, and receiving no answer proceeded:—Held, if defendant was adequately represented by counsel on the general case, he was also as to this matter.

The King v. O'Hearon, 34/491.

6. **Defective service of summons—Waiver by appearance.**]—Defendant, intending to maintain that the constable who served the summons was not authorized to act for the district, caused his counsel to attend and cross-examine the constable, under protest. Counsel having done so, withdrew and took no further part in the proceedings:—Held, defendant by appearing had waived service.

Queen v. Doherty, 32/235.

7. **Service on solicitor—Notice of appeal.**]—W. was not regularly retained by the prosecutor to oppose a motion for certiorari, but was present and acted. Notice of appeal was served on W. There was no solicitor on the record:—Held, the prosecutor having availed himself of and got the benefit of W.'s services, could not set up that the service of the notice of appeal was bad.

Semble, otherwise if the case had been reversed and W. had acted for the defendant.

Queen v. Ferguson, 26/154.

8. **Description of magistrate.**]—It is not ground for quashing a conviction that the magistrate has therein described himself as "police magistrate," elsewhere as "stipendiary magistrate." In this Province there is no distinction.

Queen v. McDonald, 26/94.

Queen v. Hoare, 26/101.

9. **Jurisdiction of magistrate—Police district—Judicial notice.**]—An applicant by habeas corpus had been committed by the Stipendiary Magistrate for the municipality of Pictou, for an offence described as having been committed at "Hopewell in the County of Pictou."

By Acts of 1895, c. 89, s. 1, the municipality of the County of Pictou is made a police division. By Acts of 1895, c. 3, ss. 1, 2, the municipality is defined to be the County of Pictou, except such portions of it as are comprised within the limits of incorporated towns. The question being whether Hopewell might not be one of these, so that the warrant did not show jurisdiction on its face, as being within the limits presided over by the municipal stipendiary:—

Held, the Court will judicially recognize limits and bounds of towns, districts, etc., as far as they may be laid down in public statutes, and it appearing from the Act last referred to that Hopewell is described as a municipal polling section, and that a municipal polling section is part of the municipality, jurisdiction was sufficiently shown.

Queen v. W. McDonald, 29/160.

Ex parte James W. Macdonald, 27 S.C.C. 683.

10. **County stipendiary.**]—R.S. 1900, c. 33, regulating the appointment of Stipendiary Magistrates, makes the whole county the jurisdiction of a County Stipendiary. In the absence of legislation to the contrary, a County Stipendiary may convict for an offence committed

within the limits of an incorporated town.

The King v. Giovannetti, 34/505.

11. **Legality of imprisonment—Territorial limits.**]—Imprisonment in default of payment of a fine having been ordered as to a defendant, charged with a violation of the Canada Temperance Act, by a Stipendiary Magistrate of the incorporated town of Springhill, and there being no place for the confinement of prisoners describable as a common gaol within that town:—Held, the defendant was lawfully conveyed to and confined in the common gaol at Amherst, the county seat of the county in which Springhill is situated, though that place is outside the jurisdiction of the convicting magistrate.

In re Burke, 27/286.

12. **Adjournment of hearing.**]—At the hour fixed for the return of a summons for a violation of the Canada Temperance Act no one appeared for the defendant. The justices having mislaid the information, they adjourned until 12 o'clock the same day, after which they convicted the defendant:—Held, they had not lost jurisdiction by failing to prove service until the adjourned hearing.

The King v. Wipper, 34/202.

13. **Certiorari not applicable.**]—Circumstances such as that evidence was improperly admitted, that a full cross-examination of witnesses was not allowed and that an adjournment was improperly refused, not going to the jurisdiction of the magistrate, defendant's remedy is not by certiorari. Grounds not taken will not be considered.

Queen v. McDonald, 26/94.

Queen v. Hoare, 26/100.

14. **Certiorari taken away.**]—Certiorari having been taken away by the Act, it now only applies where the jurisdiction of the convicting Magistrate is questioned. Under s. 117 of the Act a conviction cannot be set aside which imposes a smaller penalty than the Act allows. Unless the penalty be greater, there is no question of jurisdiction.

Queen v. Rood, 28/159.

15. **Greater penalty imposed—Meaning of "penalty."**]—The word "penalty" as used in s. 117 is to be construed in its broadest sense. While it is generally applied to pecuniary punishment, its primary meaning includes punishment by imprisonment as well as by fine.

Therefore, in reviewing a conviction on which ninety days imprisonment was awarded, a greater penalty than the Act allows has been imposed, because ninety days may exceed three months.

Queen v. Gavin, 30/162.

16. **Erroneous ruling—Not reviewable.**]—On trial of an information for an offence against the Act, defendant's counsel proposed to ask defendant, a witness on his own behalf, "Did you ever sell liquor to C.?" C. having testified that he had. The Magistrate refused to allow the question to be put:—

Held, this was at most an erroneous ruling, but not a matter going to the jurisdiction, and hence not reviewable.

Queen v. Geo. McDonald, 29/33.

17. **Destruction of liquors—Certiorari pending.**]—Pending the determination of whether an order for certiorari to remove an order for the forfeiture of liquors can be sustained, and until it is shown that the matter is legally before the Court, no motion can be heard to quash the conviction on which the forfeiture was based, sent up as part of the return.

Queen v. Hurlburt, 26/123.

18. **Destruction of liquors.**]—Warrant for destruction of liquors, and the proceedings on which it was based, set aside for want of jurisdiction shown in the magistrate, the information in the case not showing that the premises to be searched were within the town of Yarmouth, for which the magistrate acted.

Queen v. Hurlburt, 27/62.

19. **Liability of constable.**]—Accordingly the owner of the liquor seized is entitled to recover in replevin against the constable who executed the warrant.

But in the Supreme Court of Canada:—Held, the warrant itself being good on its face, and in accordance with the form

given by the statute, it is sufficient to justify the officer who executed it, though it may have afterwards been set aside.

And the defendant not having been a party to the proceedings which resulted in the setting aside of the warrant, that matter was not res adjudicata as regards him, in seeking to justify under it.

Hurlburt v. Sleeth, 27/375, 25 S.C.C. 620.

20. **Followed in.**]
Queen v. Woodlock, 29/24.

21. **Costs.**]—Costs cannot be included in a conviction under the Canada Temperance Act.
Queen v. Oakes, 21/481.

22. **Costs on certiorari.**]—A defendant removing a conviction by certiorari is liable on failure for costs, and (Ritchie, J., dissenting) may be awarded costs against the prosecutor on succeeding.
Queen v. Freeman, 21/483.

23. **Costs against prosecutor.**] — Costs awarded accordingly against a prosecutor, not an inspector under the Act, on a conviction being quashed.
Queen v. Ida Adams, 24/559.

24. **On appeal by prosecutor.**] — A prosecutor having successfully appealed to the County Court, from the order of two justices dismissing a charge of violating the Act, the Judge convicted the respondent:—

Held, costs of appeal might be included in the penalty imposed.
Queen v. Hawbolt, 33/165.

25. **Omitting reference to costs.**] — A conviction will not be set aside because it omits the provisions as to costs of conveying to jail set out in the form of the appendix to the Act 51 Vic., c. 34. The defendant cannot complain that an additional burden and obstacle to his release was not imposed; and the imposition of costs is discretional.
Queen v. McDonald, 26/94.
Queen v. Learmont, 26/100.

26. **Under the Criminal Code.**]—Now, however, a conviction which proceeds under s. 872 of the Criminal Code, and which does not contain a reference to costs, is bad.
Queen v. Van Tassel, 34/79.

27. **Wording of Act.**] — A conviction which refers to "costs and charges," instead of "costs and expenses," the words of the Criminal Code 872 (b), is good, the words being synonymous.
Queen v. Van Tassel, 34/79.

28. **Minute omitting costs.**]—The minute of conviction need not mention costs.
Queen v. Van Tassel, 34/79.

29. **Warrant of commitment—Breaking in.**]—Following Queen v. Calhoun, 20/329, which decides that a prosecution such as one under the Canada Temperance Act constitutes a criminal case, a constable in the execution of a warrant of commitment may break in.

The defendant having thus effected an entrance, the plaintiff, whose apprehension he sought, ran out of the house, pursued by defendant, and concealed himself. Thereupon defendant returned and directed a carpenter who was replacing a broken panel in a door to remove it, thus effecting a second entry:—Held, that having once effected a lawful entry, this second entry was lawful.
Vantassel v. Trask, 27/329.

30. **Form of execution—Under Crown Rules.**]—The Crown Rules 1889, s. 138, directs that execution on the Crown side shall follow the form in use on the civil side as nearly as may be. When the rule was adopted imprisonment for debt had not been abolished, and the form of execution contained a clause directing the defendant's arrest. Subsequently, this clause was omitted.

On motion to set aside an execution for costs under the Canada Temperance Act, on the ground that it contained the arrest clause, and so did not follow the civil form:—Held, the form of execution of the Crown side had not changed with that of the civil side.
Queen v. Roberts, 27/381.

31. **Illegal payment to constable—Recoverable.**] — Plaintiff having been

arrested at S. Junction, charged with a violation of the Canada Temperance Act, paid defendant constable $30 to avoid being conveyed to S., and secured his release. Defendant testified that he received it "on and towards the fine":—Held, the money might be recovered.

Richards v. Taylor, 28/311.

32. **Compromise and settlement of litigation—Fine.**]—Defendant having been fined for a violation of the Canada Temperance Act, his goods were taken in distress. He replevied them in an action which resulted in an order against him for the return of the goods and costs. Thereupon he arranged a compromise of all matters with the solicitor who had charge of the case against him, and paid a sum of money, taking a receipt, "in full settlement of C.T.A. fine and costs":—

Held, the compromise must be referred solely to the matter of solicitor's costs, and could not touch the matter of the fine under the Canada Temperance Act.

McMillan v. Giovannetti, 29/91.

33. **Tampering with witness.**]—The Criminal Code, s. 154, which deals with the matter in a more general way, does not impliedly repeal s. 121 of the Canada Temperance Act, relating to the offence of tampering with a witness.

And s. 121 refers equally to a witness under subpoena to attend before the County Court on the hearing of an appeal.

Queen v. Gibson, 29/88.

34. **Amending Act—1884, c. 31—Bringing into force.**]—Owing to a defect in the Canada Temperance Act as originally passed, it could not be brought into force in a county where no system of license existed. To cure this Statutes of Canada, 1884, c. 31, was passed, under which the Act was brought into force in the County of Annapolis. The Act of 1884 was repealed by the Revised Statutes of Canada, 1886:—Held, that the Canada Temperance Act remained in force notwithstanding the repeal of the enabling Act.

Queen v. Freeman, 22/506.

CAPIAS.

1. **Affidavit—Issuing of writ.**]—O. 44, R. 1, not requiring the fact to be shown, an affidavit for capias need not set out that a writ of summons has been issued.

Murray v. Kaye, 32/206.

2. **Affidavit—"Fears," "believes."**]—Merely employing the word "fears" instead of "believes the debt will be lost . . ." does not comply with O. 44, R. 1, but the matter is one of non-compliance, curable under O. 68.

Sydney & Louisburg Ry. Co. v. Kimber, 23/338.

3. **Insufficient affidavit.**]—Writ of capias issued upon an affidavit of plaintiff, setting forth an indebtedness for goods sold, and for expenses incurred in recovering a judgment in New Brunswick. It was argued that no sufficient cause of action was set out, that it was not shown that costs were recoverable in New Brunswick, that the affidavit that plaintiff "feared" debt would be lost did not follow the statute, and that since the passing of the County Court Act, 1889, c. 9, arrest of a defendant could not be had in the County Court for an amount above $80. Appeal from County Court sustaining the capias was allowed on the ground of the insufficiency of the affidavit.

O'Mullin v. Wallace, 22/151.

4. **Affidavit—Good cause of action.**]—An affidavit merely stating that "the defendant is indebted to the plaintiff in the sum of $5,000" does not disclose a good cause of action under O.44, R. 1, and should be set aside, but it is a matter of non-compliance curable under O. 68.

Sydney & Louisburg Ry. Co. v. Kimber, 23/338.

5. **Setting out cause of action—Commissioner.**]—On November 10th, 1894, a statement appeared in a newspaper published in St. John, N.B., and sold through newsdealers to purchasers in the city of Halifax, to the effect that plaintiff had been guilty of obtaining money wrongfully from various persons mentioned, that he had collected, and not paid over,

rents, and premiums of insurance, that mortgage returns were not made, that letters were wrongfully opened and accounts overdrawn. On the 17th November, 1894, the further statement was published referring to the statement previously made, that the publisher was prepared to prove all that had been stated and a good deal more.

Plaintiff made an affidavit, in an action for libel, setting out the foregoing facts, and that defendant was the publisher of the paper, and was about to leave the Province, and on this affidavit a commissioner describing himself as "a commissioner of the Supreme Court in and for the County of Halifax," granted an order capias for his arrest.

On motion to set aside this order:—Held, that the commissioner was sufficiently described to show jurisdiction. That a good prima facie cause of action was shown in the affidavit and that the publication was sufficiently shown. Also that the recital of a further claim than that shown by the statement of claim did not vitiate the affidavit or order for arrest.

Spike v. Golding, 27/370.

6. **Omitting words "unless he be arrested."**]—O. 44, R. 1 requires an applicant for an order for arrest to make affidavit ". . . that the deponent has probable cause for believing and does believe, that the defendant is about to leave the Province unless he be arrested, and that he believes that the debt will be lost unless the defendant be forthwith arrested . . .":—

Held, that an affidavit which followed the rule except in omitting the words "unless he be arrested," where they first occur above is insufficient, and that the order based thereon should be set aside, as not showing that the defendant's leaving was to be immediate. Graham, E.J., dubitante.

Per Henry and Townshend, JJ., though as a matter of sound and careful practice an affidavit should show that the intended departure of the defendant is to be immediate, that requisite is not secured by the insertion of the words in question.

Spain v. Manning, 28/437.

7. **Not setting out proper cause of action.**]—Motion to set aside an order for arrest. The affidavit on which it had been granted alleged debt in respect of a perfected and completed sale of certain coal mining areas, but did not allege that the title had passed:—Held, that under O. 44, R. 1, it is not necessary in an action for goods bargained and sold to allege delivery; and similarly unnecessary to allege that the title here had passed.

But as the title had not passed, no right of action for the purchase price had accrued, but plaintiff's proper claim was, either in damages, or for specific performance, which, not appearing in the affidavit, the order was bad.

Weatherbe v. Whitney, 30/447.

8. **Sufficiency of affidavit—Particulars of claim.**]—In an action for breach of promise of marriage the defendant was arrested on the affidavit of the plaintiff's father under O. 44, R. 1, which did not set out the date of the promise of marriage, or the date at which it was due for fulfilment, or that the latter date was past:—Held, that the material placed before the commissioner who granted the order for arrest, was insufficient to enable him to determine the legal question as to whether a cause of action existed, a defect not supplied by the oath of the layman to that effect, for which reason the arrest should be set aside.

Craven v. Williamson, 31/256.

9. **In a Magistrate's Court.**]—The test of a defendant's liability to be arrested on a capias is whether he is likely to be forthcoming to satisfy execution in the action, when such may be had. The chances that he proposes to be absent from a particular county for ten days are greater than that he proposes to leave the Province for weeks or months, so that much less evidence will warrant a Magistrate in issuing a capias than would be necessary in the Supreme Court.

Orwitz v. McKay, 31/243.

10. **Order—Place of issue—Indorsement—Commissioner.**]—An order for arrest signed "Dated the 3rd day of January,

1889, J. M., a commissioner of the Supreme Court in and for the County of C." is bad as not showing on its face that the commissioner acted within his territorial jurisdiction. It is not mere non-compliance with the rules, but violates the substantive principle that orders of inferior Courts must show jurisdiction on their face. It cannot be amended under O. 68. Nor does the fact that an indorsement sets forth Sydney as the place of issue supply the defect because the indorsement is not prescribed in any part of the order, and because the Court will not judicially notice that Sydney is in the County of C.

Sydney & Louisburg Ry. Co. v. Kimber, 23/338.

11. **Arrest by wrong name.**]—Plaintiff H. O. was arrested on a capias issued by a magistrate at the instance of defendant, describing him as C. O. The proceeding being dismissed by the magistrate for this reason, he brought action for malicious arrest. The defendant had rendered him a bill for the goods sued for, as C. O., and plaintiff, while objecting to some items thereof, had not called plaintiff's attention to the matter of the name:—Held, the defendant was warranted in supposing plaintiff's name to be C. O., and the latter had only his own conduct to blame for the result.

Orwitz v. McKay, 31/243.

12. **False arrest — Liability of person directing.**] — A person having been arrested on a capias granted by a magistrate on what it was contended was an insufficient affidavit under R.S. 5th Series, c. 102, s. 5, brought an action for false arrest against the person who applied to the magistrate:—Held, the capias not being void, but voidable, the magistrate, in granting it exercised a judicial discretion within his jurisdiction, which fact is sufficient to protect all who act under it, even though the defendant in this case, after the issue of the capias, interfered to describe and point out the person who was to be arrested. It is different where the capias is void ab initio.

Orwitz v. McKay, 31/243.

13. **Application for discharge—Facts to be shown.**]—After the trial of an action but before judgment was given, defendant was arrested under O. 44, and made application for his discharge, which being refused, he appealed. In his affidavit in support of his application, he had set out amongst other things, that he had no intention of leaving the Province, that he would be therein in the course of business for several months, and when final judgment was rendered in ordinary course, and that his home was in Halifax, and that his wife resided there. These matters were partly corroborated by the affidavit of another person.

The only answering fact in plaintiff's affidavit was to the effect that defendant had stated in his evidence at the trial, that it was his intention to make Hamilton, Ontario, his future place of residence. The defendant was a commercial traveller:—Held, allowing appeal, following Larchin v. Willan (4 M. & W. 351), that if a party is going to leave the jurisdiction for a short time only he may not be arrested, but if for such a length of time that he is not likely to be forthcoming when final judgment is rendered, so that plaintiff may have execution against his body, plaintiff has a right to detain him. And following the rule laid down in Hunt v. Harlow (1 Old 709), Blake v. Stewart (1 N.S.D. 308), O'Donnell v. Honeyman (Ibid. 161), that if a party swears that it was not his intention to leave the Province, the affidavit in reply must set forth facts from which it can be clearly inferred that it was his intention to leave. This plaintiff had not done, nor anything equivalent to it. The only statement—to the effect that he intended to take up his residence in Hamilton—was defective in not showing at what time in the future this was to be.

Travers v. Dimock, 28/217.

14. **Discharge of defendant—Bond cancelled—Appeal futile—Lapse of time.**]—Inasmuch as the plaintiff in obtaining an order for arrest need not state facts or grounds, but is merely required to state his belief that the defendant is about to leave the Province, the defen-

dant, if he negatives that intention, is entitled to be discharged, unless the plaintiff can show facts from which it can be clearly inferred that it was his intention to leave. And such intention cannot be inferred from additional affidavits produced on appeal, to the effect that since his discharge, defendant had been keeping out of the way of service of an order under the Collection Act.

An appeal from a decision of the Chambers Judge, discharging such a defendant and directing that the bond for his appearance furnished be delivered up to be cancelled, is futile because the liability of the sureties cannot be restored.

And also, if, as here, the utmost time for which defendant might have been held (Acts of 1901, c. 16), has expired before the hearing of the appeal.

McLaughlin Carriage Co. v. Fader, 34/534.

15. **Effect of giving bail.**]—Notwithstanding DeWolf v. Vineo or Pineo (1 N.S. Dec. 26), the right of a defendant to move against an order for arrest is not waived by giving bail to secure his release from custody.

Craven v. Williamson, 31/256.

Orwitz v. McKay, 31/243.

CARRIERS.

1. **Negligence.**]—Injury of passengers.

See NEGLIGENCE, 1.

2. **Railway.**]—Liability as warehouseman.

See RAILWAY, 9.

3. **Goods.**]—After delivery to carrier, at purchaser's risk.

See SALES, 7.

CATTLE.

See IMPOUNDING OF CATTLE.

CERTIORARI.

1. **Null proceeding — Certiorari where no appeal.**]—On an application for certiorari to remove the matter of a decree of the Probate Court, it was objected that certiorari could not be had because the decree read in favor of the applicant:—Held, that as the decree was a nullity for want of jurisdiction, there was no appeal, consequently certiorari was the proper means of relief.

Queen v. Foster—Estate of Esson, 30/1.

2. **Applies only to judicial proceedings —Town council.**]—Certiorari only lies to inferior Courts and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, not legislative or ministerial.

The action of the council of an incorporated town in passing a resolution looking to the better enforcement of the Canada Temperance Act, and providing for a division of fines to be imposed, with volunteer informers, is a ministerial not a judicial act, and certiorari does not apply.

In re Town Council of New Glasgow, 30/107.

3. **Commissioner of mines.**]—Certiorari to the Commissioner of Mines will lie to remove proceedings relating to the forfeiture of areas. His functions under the Act in this behalf, and probably in others, are of a judicial and not merely ministerial character. One test of this is the discretion with which he is clothed to decree or not to decree forfeiture in certain cases, another that the appeal from his decision is to the Supreme Court. Weatherbe, J., and Graham, E.J., dubitantibus, as to whether he does not merely act as if a landlord.

Queen v. Church, 23/347.

4. **Reviewing evidence.**]—If the Court below had jurisdiction its conclusion as to matters of fact cannot be reviewed by certiorari. Queen v. E. McDonald, 19/336, overruled.

Under Liquor License Act.]—

Queen v. Walsh, 29/521.

Under Canada Temperance Act.]—
Queen v. Geo. McDonald, 29/33.

5. **Certiorari not applicable.**]—Circumstances such as that evidence was improperly admitted, that a full cross-examination of witnesses was not allowed and that an adjournment was improperly refused, not going to the jurisdiction of the magistrate, defendant's remedy is not by certiorari. Grounds not taken will not be considered.

Queen v. McDonald, 26/94.
Queen v. Hoare, 26/100.

6. **County Court.**]—The County Court has no general or original jurisdiction to grant certiorari, but only where it has been specially conferred by statute, as for instance, in connection with the liberty of the subject, under c. 117 R.S. 5th Series. Nor will an intention of the Legislature to confer such jurisdiction be inferred from sections of statutes indicating that the Legislature was erroneously acting on the belief that the Court possessed it already.

Writ of prohibition granted to restrain the County Court Judge from proceeding.
Ross v. Blake, 28/543.

7. **In matters of Dominion jurisdiction.**]—The authority conferred by the Provincial Legislature on the County Court, to grant certiorari must of necessity be limited to those matters over which it has jurisdiction, and clearly the Canada Temperance Act is not one of them.

Queen v. DeCoste, 21/216.

8. **Costs.**]—The awarding or withholding of costs on certiorari in England depends on statutory provisions. Whether or not those provisions have been sufficiently adopted here to make the English rule apply, has not been judicially determined. The practice of the Court has always been to award costs against the prosecutor to a defendant bringing up a conviction and succeeding, and he is unquestionably liable for costs if he fails.

Per Ritchie, J. The enactments of this Province are sufficiently similar to those of England to make the English decisions apply. Though a defendant failing to get a conviction quashed is liable for costs, yet if he succeeds he is not entitled to recover costs against the prosecutor.

Queen v. Freeman, 21/483.

9. **Motion for certiorari opposed—Costs against magistrate and prosecutor.**]—A motion for certiorari having been granted and a conviction quashed, costs were awarded against the convicting stipendiary magistrate and the prosecutor, who opposed the motion.

Queen v. Sarah Smith, 31/468.

10. **Second writ—After procedendo—Commissioner.**]—A writ of certiorari to remove a conviction by a stipendiary magistrate was quashed because of a defect in the bail bond and a writ of procedendo issued. Thereafter the commissioner allowed a second writ, to bring up the conviction a second time:—Held, that the commissioner had no authority to do anything which would destroy the effect of the procedendo. Order nisi setting aside the second writ of certiorari was made absolute with costs.

Queen v. Nichols, 21/288.

11. **Commissioner granting.**]—Since the adoption of the Crown Rules, 1889, a writ of certiorari can no longer be granted by a commissioner of the Supreme Court.

Queen v. Grant, 23/416.
Queen v. Conrad, 24/58.
Queen v. King, 24/62.

12. **Crown Rules—Commissioner.**]—On argument coming on after the coming into effect of the Crown Rules:—Held, that before the passing of those Rules a commissioner of the Supreme Court had express power to grant writs of certiorari, under Acts of 1874, c. 1, amending c. 89 R.S. 4th Series, and the practice was regulated by ss. 57 and 58 of the "Practice Act."

Queen v. Conrod, 24/58.
Queen v. King, 24/62.

13. **Non-compliance — Conviction not produced.**] — Appeal from an order at Chambers to remove a conviction. The affidavit on which this order was granted,

set out that "the defendant was served with the paper writing or minute of conviction . . . being the minute or memorandum of the conviction or judgment made. . . .":—

Held, allowing appeal, that Crown Rule 31 was not complied with, which requires production and proof of a copy of the conviction itself, in the absence of which there was no proof that a conviction had been made.

Queen v. Wells, 28/547.

14. **Non-compliance — Rule 29.**]—A Judge has no power to dispense with compliance with Rule 29 of the Crown Rules which requires that "No notice of motion for a writ of certiorari shall be effectual, nor shall any writ be granted therein, unless the recognizance and affidavit of justification shall have been filed . . ." nor may he grant leave to file additional affidavits where those presented on motion are defective.

McIsaac v. McNeil, 28/424.

15. **Quashing for want of diligent prosecution.**]—Defendant was convicted April 11th, 1890, of a breach of the Canada Temperance Act. On the 22nd May following he obtained a writ of certiorari to remove the conviction into the Supreme Court. The return to the writ was made June 16th, 1890, but no further step was taken by defendant until May 14th, 1891, nearly a year, when notice of motion was given to quash the return made by the magistrate. A motion was made before the Court at Yarmouth to quash the writ, which was done. On appeal:—Held, that the defendant had been guilty of laches and the writ was rightly quashed. Also if the magistrate did not make a true return that matter cannot be inquired into on a motion to quash it, but the remedy of the injured party was by action, or by information at the instance of the Attorney-General.

Queen v. Nichols, 24/151.

16. **Service on solicitor.**]—W., a solicitor, was not regularly retained by the prosecutor to oppose a motion for certiorari, but was present and was permitted to act. Notice of appeal was served on W.:—Held, the prosecutor having availed himself of, and got the benefit of, W.'s services, and there being no solicitor on the record, could not complain of undue service.

Semble, it would be otherwise were the appeal by the defendant after conviction.

Queen v. Ferguson, 26/154.

17. **Signature.**]—A writ of certiorari must be signed by the prothonotary.

Queen v. Ward, 21/19.

18. **Appeal—Change of former practice.**]—Since the adoption of the Crown Rules providing for an appeal, the Court will not entertain a motion except by way of appeal, to quash a writ of certiorari, unless for reasons arising after the making of the order therefor.

Re Cameron's Circus (2 R. & G. 248), and Re Rice (20 N.S.R. 440), are thus superseded.

Queen v. Simon Fraser, 22/502.

CHAMBERS (PRACTICE).

See PRACTICE, 26, 37.

CHARGE.

1. **On land by will—Parties.**]—Testator devised his farm in equal moieties to his son and son-in-law, charging the whole with the maintenance of his widow. The moiety of the son-in-law having come into the hands of the defendant, the widow brought action (continued by her executors), for a declaration that the lands so held by the defendant were chargeable with a proportion of her maintenance:—Held, on appeal from a decision for plaintiff, and ordering a new trial, that the son should be made a party to the action to ascertain his duty or liability to contribute.

Also that the question of the chargeability of certain lands cannot be decided by a master on a reference to take accounts, but is one for the Court.

Smith v. Beaton, 25/60.

2. **On land by will.**]—Mortgage by devisee of the fee, who is subject to the charge—Foreclosure—Ejectment—Rights of parties.

See MORTGAGE, 8.

3. **Maintenance charged on devise—Obligation not personal—Decree.**]—The will of a testatrix directed that plaintiff "be provided with a comfortable maintenance on my homestead during her life," and devised and bequeathed to defendant's intestate "my half of the homestead property . . . and the entire balance of all my real and personal estate . . . charged however with the maintenance of the said" plaintiff.

In an action for a declaration of rights:—Held, that the maintenance of plaintiff was a charge on the whole of testatrix's estate, but was not a personal liability of defendant's intestate as a condition to his acceptance of the devise, and so chargeable on his estate. (Townshend, J., contra.) And a decree having passed, setting apart a sum of money in bank to the payment of plaintiff's maintenance sufficient for thirteen years to come, the Court would not, under O. 25, R. 5, direct the setting apart of the profits of the real estate to respond possible future rights accruing on a deficiency.

Plaintiff, under the will, having a right of residence as to one-half of the homestead property, the Court suggested that the trial Judge should amend his decree to facilitate partition.

McKean v. McKean, 33/310.

4. **Annuity charged on land.**]—Only six years of an annuity charged on land may be sued for, and no interest ought to be allowed thereon.

Roche v. Roche, 22/211.

5. **Alienation of lands charged.**]—Where lands have been devised to A. charged with the maintenance of testator's widow, and A. has disposed of the same in two several parcels, per Graham, E.J., Ritchie, J., concurring, the charge must be first borne by the parcel last alienated, then if that be not sufficient, by the remainder.

Smith v. Beaton, 25/67.

6. **Annuity—Apportionment of burden.**]—A testator devised his real estate in trust to his executors, to pay a certain annuity to his widow, and to permit such real estate, in two parcels, to be occupied by his two children. He further directed his executors to apportion the contributions of these parcels in any way they saw fit. They did so, in unequal amounts, based on relative values:—Held, under the will they were warranted in doing so, the act being administrative, not judicial. Also, if the contribution of one of the parcels could not be assured by exercise of the power of mortgaging or leasing contained in the will, the Court would order a sale.

Roche v. Roche, 22/211.

CHARGING JURY.

See JURY, 7.

CHARTER.

See COMPANY, HALIFAX, CITY OF, INCORPORATED TOWN.

CHATTEL MORTGAGE.

See BILL OF SALE.

CHEQUE.

See BILLS AND NOTES, 23.

CHILD.

Generally.]—See INFANT.

Custody in certain cases.]

See HABEAS CORPUS.

Injury to child.]

See NEGLIGENCE, 7—PLEADING, 63.

CHOSE IN ACTION.

1. **Notice of assignment.**]—The following letter was held to be sufficient notice of assignment of a chose in action, to enable the assignee to maintain action in his own name:—

"Pictou, Nov. 21st, 1878.

"Alex. Grant, Esq.,

"Admr. Estate of Alexr. McDonald, deceased.

"Dear Sir:—You are hereby notified in accordance with c. 94 of the Revised Statutes (4th Series), s. 357, that the debt due by the above estate to Finlay Thompson, has been assigned by him to Alexander D. Cameron, who hereby claims payment of $1,200, the amount of the said debt so assigned to him.

"S. H. HOLMES,

"Att'y of Alex. D. Cameron."

Cameron v. Grant, 23/50, 18 S.C.C. 716.

2. **Notice of assignment.**]—The assignee of a chose in action not having given the debtor notice in writing as required by O. 61, cannot avail himself of O. 43 (attachment of debts).

O'Donnell v. Smith, 23/208.

3. **Notice of assignment.**] — Notice of assignment of a chose not having been given to the debtor, the parties to the action are in exactly the same position as though no assignment had been made.

McKay v. McDonald, 31/316.

4. **Notice not given.**] — Semble, per Meagher, J., McDonald, C.J., concurring, where a party has assigned a chose in action, but notice thereof has not been given as required by Jud. Act O. 61, he may still maintain action in respect thereof.

Brownell v. Atlas Assurance Co., 31/348.

5. **Assignment — Parties plaintiff.**] — The defendant was sued as maker of a promissory note to plaintiff. The only defence was that before action brought the right of action had been assigned to one McD., of which the defendant had had due legal notice. The reply set out that the action was brought with the knowledge, privity and consent, and for the sole benefit of McD. The County Court Judge decided in favor of the defendant on the ground that the writ of summons did not show that the plaintiff sued in a representative capacity, and that after notice of assignment, the defendant's liability to him personally had ceased. On appeal the Court was equally divided.

Per Townshend, J., Ritchie, J., concurring, allowing appeal. The assignee alone has a right to maintain action; but he has a choice of methods, either to sue in his own name, or in the name of the assignor. All rights, legal and equitable, are transferred to him, and one of these is the right to make use of the name of the assignor.

Weatherbe, J., dismissing appeal, agreed with the decision below.

Per McDonald, C.J., that the words of the statute making assignments of choses in action cognizable in Courts of law, (1) "The right to maintain in his own name such personal action," (2) "He shall be considered to all intents and purposes . . . in the place of the original owner," and (3) ". . . the right of the assignor . . . to sue . . . shall wholly cease," precluded the use of the assignor's name as a party.

McCurdy v. McRae, 23/40.

6. **Averment of assignment in writing — Amendment.**] — Plaintiff, who was assignee in insolvency of H., sued in his own name for a debt due by defendant to H., alleging in his statement of claim, "that H. duly assigned the said debt to said plaintiff." The County Court Judge considered that on the merits, plaintiff should succeed, but not having alleged that the assignment was in writing, the statute was not complied with, for which reason judgment was for defendant:—

Held, that it was the duty of the Judge to have made the necessary amendment. Amendment ordered by the Court, plaintiff to have costs of trial, no costs of appeal.

Dempster v. Fairbanks, 29/456.

7. **General assignment—Presumption of suing for another.**] — Plaintiff brought action the day following his discharge

from custody under the Indigent Debtor Act, having made a general assignment to his creditor of all his real and personal property. On an affidavit by defendant establishing these facts, and swearing to a meritorious defence:—Held, that the presumption of suing for the benefit of another person, was so strong against the plaintiff as to warrant an order that he give security for costs.

Ryan v. O'Neil, 21/286.

8. **Pension — Retired city official.**]—The pension of a retired Stipendiary Magistrate of the City of Halifax having been held liable to attachment for debt, and equitable execution ordered:—Held, such pension is not a debt in respect to which the creditor might employ garnishee process.

Imperial Bank v. Motton, 29/368.

9. **Salary of school teacher.**]—Is attachable for debt. But the right to receive it having been assigned under the Collection Act, this is not an assignment of a chose, on which the plaintiff may maintain action against the inspector of schools, on notice in writing, etc.

Dunbar v. Ross, 32/222.

CHURCH OF ENGLAND.

1. **Unincorporated church association.**] Meeting for purpose of building. Those voting to proceed held liable.

See COMPANY, 20.

2. **Church endowment fund.**] — Construction of instrument defining trust. Right of a parish to participate.

See TRUST, 12.

COLLECTION ACT.

1. 1890, c. 17—**Held constitutional.**]—Question reserved by a Judge for the opinion of the Court, as to whether this Act, as relating to insolvency (Cf. the Collection Act), was within the powers of the Province:—Held, on the authority of the Privy Council, that it was.

Gould v. Ryan, 26/461.

2. **Imprisonment for fraud — Invalid order.**]—The Court ordered the discharge of a debtor imprisoned under 1890, c. 17, ss. 3, 4, for making a fraudulent disposition of his property, on grounds that the order did not set out facts showing fraud, that the Act did not define "fraudulent disposition," that the Commissioner made no finding, and that there was nothing to enable the Court to know whether there had been an offence committed. Application by habeas corpus, costs refused.

Re James Zwicker, 26/124.

3. **Order for imprisonment set aside.**]—The order of a Commissioner under Acts of 1890, c. 17, ss. 3, 4 (now repealed and embodied in the Collection Act), was set aside as not showing on its face that the examination was "held in the county in which the debtor resides," as required by section 2 of the Act. The application was by habeas corpus.

In re Jacob Baltimore, 25/106.

4. **Disobedience of order—Contempt—Imprisonment — Costs.**]—The Collection Act, c. 4 of the Acts of 1894, s. 1, forbids the imprisonment of any person for disobedience of any order "adjudging the payment of money," except as in that Act provided. Motion was made to commit the defendant for contempt in disobeying the order of a Judge directing him to pay over a certain fund to a receiver:—

Held, that under the "Collection Act," such an order could not be made. As to the applicability of contempt process there is a distinction between disobedience of an order directing payment of a certain sum of money, and one directing the paying over of a certain fund found in the hands of the person to whom the order is directed. Contempt applies in the latter case, but the "Collection Act" does not authorize such an order.

Defendant not having opposed the passing of the order, but only the attachment proceedings, was not allowed costs.

Commercial Bank of Windsor v. Scott, 30/401.

5. **Salary of school teacher—Assignment under Act.**]—The salary of a public

school teacher is attachable for debt by means of equitable execution. But the right to receive it having been assigned under the terms of the Collection Act, this is not an assignment of a chose, on which the assignee may maintain action, on notice in writing, against the inspector of schools.

Dunbar v. Ross, 32/226.

COLOR OF TITLE.

See POSSESSION.

COLOR OF OFFICE.

See DE FACTO OFFICER.

COLT.

Property in colt when foaled does not pass to the holder of a bill of sale of the dam.

Hirschfield v. City of Halifax, 22/52.

COMMISSION TO TAKE EVIDENCE.

See EVIDENCE, 53.

COMMISSIONER.

Of dykes.]—See DYKELANDS.

Of streets.]—See MUNICIPALITY.

Of the Supreme Court.]—

1. **Description of office.**]—A Commissioner of the Supreme Court in granting an order capias, sufficiently describes his office by appending to his signature, "A Commissioner of the Supreme Court in and for the County of . . . ."

Spike v. Golding, 27/370.

2. **Must show jurisdiction.**]—An order by a Commissioner being the order of an inferior Court, must show jurisdiction on its face. Consequently such an order not setting forth the place at which it was made is bad, as not showing that the Commissioner acted within his territorial jurisdiction. Nor will an indorsement naming the place cure the defect, as the Court cannot judicially notice the fact that that place is within the county for which he holds office.

Sydney & Louisburg Ry. Co. v. Kimber, 23/338.

3. **Affidavit sworn in New Brunswick.**]—Held, that an affidavit sworn at Moncton, N.B., before "A.B., a Commissioner for taking affidavits to be read in the Supreme Court of New Brunswick, and I do hereby certify that there is no Commissioner for Nova Scotia here," is receivable under O. 36, R. 6.

Humphrey v. LeVatte, 24/187.

4. **Order for imprisonment set aside.**]—The order of a Commissioner under Acts of 1890, c. 17, ss. 3, 4 (now repealed and embodied in the Collection Act), was set aside as not showing on its face that the examination was "held in the county in which the debtor resides," as required by section 2 of the Act. The application was by habeas corpus.

In re Jacob Baltimore, 25/106.

5. **Power to grant certiorari.**]—Since the adoption of the Crown Rules, 1891, providing a different practice, a Commissioner can no longer grant certiorari.

It was argued that this jurisdiction having been exercised by Commissioners before 1867, the Judges in adopting the Crown Rules could not abolish it, unless the Statute of Canada under which those Rules were framed especially empowered them. Can. Stat., 1889, c. 40:—Held, that that Act had done so by conferring power to regulate "pleading, practice and procedure" in criminal matters, and the "duties of officers of the Court," a Commissioner being an officer of the Supreme Court, subject to its orders and rules, and not a separate Court in himself.

Queen v. Grant, 23/416.
Queen v. Conrad, 24/58.
Queen v. King, 24/62.

COMMON CARRIERS.

See CARRIERS.

COMPANY.

See also RAILWAY, STREET RAILWAY.

1. **"Joint stock company"—Definition.**]—In its Act of incorporation, defendant company was called the "company":—Held, every company is a joint stock company, except those private corporations which are incorporated without joint stock or shares, such as societies, trustees, etc.; and the designation is not to be understood as restricted to companies organized under Ch. 79, R.S. "Of Joint Stock Companies."

Hamilton v. Stewiacke Valley Ry. Co. and Dickie, 30/10.

2. **Construction of charter—"Commencing operations."**]—Section 18 of the charter of the plaintiff company read, "This company shall not commence operations until 50 per cent. of its capital stock is subscribed, and 25 per cent. of such subscription paid up":—

Held, that the words "commence operations" were not intended to prevent calls being made on stock subscribed for, nor to prevent the board of provisional directors created by the Act from doing any acts, for and in the name of the company, within their power, so long as such acts fell short of what might properly be termed commencing operations. The subscription and payment called for were not made a condition precedent to the creation of a body corporate, but were intended as a limitation on the power of the company to commence operations until those pre-requisites were complied with.

N. Sydney Mining & Transportation Co. v. Greener, 31/41.

3. **President or director not agent.**]—The president or director of a company is not its agent to make engagements binding on the company without special authorization shown, or such a holding out of the agent by the company as to bind it by way of estoppel.

Almon v. Law, 26/440.

4. **Nor to make admissions** of fact binding on the company, in matters outside of the ordinary scope of their duties.

Black v. Bank of Nova Scotia, 21/448.

5. **Authority of manager** of gold mining company to bind the company. Ordering material for construction of a boarding house for employees. Where necessary to the effective operation of the mine it is within the scope of the manager's authority.

See PRINCIPAL AND AGENT, 15.

6. **Asquiescence in act of agent—Illegality.**]—Where a bank has acquiesced in the illegal act of the cashier acting on its behalf, by which a felony has been compounded, it cannot, when the time comes to realize under the illegal arrangement, deny the authority of the cashier, but must stand or fall with him.

People's Bank v. Johnson, 23/302, 20 S.C.C. 541.

7. **Hiring by provisional directors—Authority to bind.**]—Plaintiff brought action against defendant company for wrongful dismissal from their employ, under a special agreement in writing as follows:—

"We, the undersigned, jointly and severally agree to engage and hire C.M.O., engineer, for the period of one year from this date at a salary of $250 per month. The services to be performed to be in connection with railway and other surveys."

A. C. R.
W. J. F.
J. McK.

May 8th, 1893.

These persons were named with others as provisional directors of defendant company, by its Act of incorporation, passed 28th April, 1893, but the company was not organized until August, 1893.

Up to October, 1893, plaintiff was directed and paid by the above-named R., thereafter, and until the end of June, 1894, the date of the dismissal, by defendant company:—

Held, there being no resolution of the board of directors, either in relation to the employment or the dismissal, that the above contract was not made, and did not purport to be made on behalf of defendant company, and even if so intended, was beyond the powers of three out of eight provisional directors before organization. (McDonald, C.J., dissented.)

Quære, had plaintiff chosen to bring action in respect to a general contract of yearly hiring, evidenced by the recognition by defendant company of the existence of an arrangement similar to that of May 8th, instead of relying solely on that contract, might he have recovered at least a month's salary in lieu of notice?

O'Dell v. Boston and Nova Scotia Coal Co., Ltd., 29/385.

8. **Powers of directors—Interim injunction restraining shareholders.**]—By its Act of incorporation the Yarmouth Gas Co. was empowered "to borrow such sum of money, not exceeding the amount of its capital stock, as the directors shall deem necessary for carrying out any of the objects or purposes of this Act." The 10th by-law of the company gave power to the directors to borrow, etc., etc. At a special meeting called for the purpose, a majority of the stockholders and a minority of the directors passed a resolution in favor of borrowing for certain purposes, which resolution the directors refused to carry out, and obtained an interim restraining order, pending a decision as to powers, to restrain the stockholders from acting in the premises:—Held, that the provision of the Act and the by-law restricted the power of borrowing to the directors.

One of the purposes of the proposed borrowing was to purchase the patent rights for Canada in an appliance known as the "Rossney Gas Governor and Purifier":—Held, it was doubtful whether such a purchase could be authorized by a special meeting called by a notice "to add to and make changes in the plant and works, and the purchase of an electric light and water gas plant." Also that the case came within the principles governing interim injunctions.

Cann v. Eakins, 23/475.

9. **Implied powers — To borrow — To mortgage — To pay bonus — Right of shareholder to maintain action.**]—Prima facie, and unless the contrary appear in its Act of incorporation, a company has power:—

(1) To borrow money.

(2) To mortgage its real property.

(3) To incorporate into a mortgage contract a provision binding it to pay a bonus, necessary to obtain the amount required. And where the mortgaged property is a gold mine, and so highly speculative security, a bonus of $6,000 for an advance of $34,000 is not excessive or unreasonable. And borrowing may be resorted to while a portion of capital stock remains unpaid, and a power conferred to increase the capital stock has not been tried.

Also, as such a matter is one which is within the authority of a majority of the shareholders to decide, action in relation thereto may only be maintained by such majority, and not by a single shareholder in his own name, unless fraud is alleged.

Farrell v. Caribou Gold Mining Company, 30/199.

10. **Corporate powers — Interference with private rights.**]—A provision of an Act of the Legislature, incorporating a company and conferring on it powers to manufacture and supply illuminating gas, and "to do any matter or thing necessary to carry out the above objects," is not to be so construed as to do away with the right of an adjoining property owner to be relieved of a nuisance incidental to the company's operations.

See NUISANCE, 5.

11. **Trading company—Power to make note.**]—The defendant company by its Act of incorporation (1888, c. 45), was given power to carry on a general mercantile business, and to buy, sell and

otherwise deal in real and personal property. Being sued in respect of a certain note given on its behalf by one S., who professed to be the company's agent, for the price of land conveyed to the company, the defence was that the company had no power to make a note, and that S. was not its agent to make one:—

Held, that apart from the special power given by the Act of incorporation, the defendant company was a trading corporation which might make a note, and that its ratification of S.'s act by taking possession of the land, obviated the question as to his authority.

Ryan v. Terminal City Co., 25/131.

12. **Trading company—Secretary exceeding authority.**]—Indorsing accommodation paper. Liability of company.

See PRINCIPAL AND AGENT, 27.

13. **Irregular service — Judgment set aside — Abuse of process.**] — Plaintiff caused a writ to be issued against defendant company which was insolvent, and to be served on himself as president. Thereafter he entered judgment by default:—

Held, at the instance of the trustees for the bondholders of defendant company (who had applied to the plaintiff-president-defendant for leave to use the name of the company on an application to re-open and defend, and been refused), that the judgment entered should be set aside as an abuse of process, being founded on service which was bad, there being other modes of service appropriate to such a case, provided by the company's Act of incorporation, and by O. 9, R. 8. And that the Chamber's Judge in setting it aside had acted properly under O. 27, R. 14.

Per Weatherbe, J., dissenting, the applicants being strangers not prejudiced by the judgment, they had no status on which to move.

Holmes v. Stewiacke Railway Co., 32/395.

14. **Service on foreign company.**]—Plaintiffs obtained leave under O. 11, R. 1 (e), to serve the defendant company out of the jurisdiction. On an application to set aside the service, it appeared that the company was incorporated under the English Joint Stock Companies Act, and had an office in London, but the principal place of business, and real head office, was at Guelph, Ontario:—

Held, that service was properly effected on the principal officers of the company in Guelph.

W. H. Johnson Co. v. Bell Piano and Organ Co., 29/84.

15. **Discovery—Examination of officer.**]—The provisions of O. 40, R. 44, do not extend to authorizing an order to be made for the examination of one who some time before action brought was the vice-president and a director of a company against which a party seeks to enforce execution.

No such order should be made ex parte. And service of the summons on which such an order is made, on one who has been solicitor of the company, up to final judgment, is not presumed to be either actual or constructive notice to the party affected.

Hamilton v. Stewiacke Valley, etc., Co., and Dickie, 30/92.

16. **Mandamus—To produce books.**]—A notice of motion to compel the production of the books of a company for inspection, should be addressed to the company, not to one or more of its officers. Leave to amend, or to renew application without costs, granted.

Quære, is mandamus the proper method of proceeding in such a case?

Queen v. Clements, 24/64.

17. **Compelling production of books, etc.**]—Under the Judicature Act, R.S., 1900, s. 39 (9), the Court may grant an interlocutory order for a mandamus to compel a company to produce its books for the inspection of a shareholder, and to furnish a list of stock, and stockholders, and to comply with provincial statutes regarding the filing of certain statements with the Provincial Secretary, the Registrar of Deeds, etc., but under that section such an order would not be "just and convenient," where the effect would be to determine the whole

matter by affidavit, leaving nothing to be considered on trial.

Merritt v. Copper Crown Mining Co., 34/416.

18. **Foreign company—Liable to pay license fee — Provincial powers.**]—The Provincial Legislature has power to require that "every company doing business in the City of Halifax . . . shall be assessed in respect of the real and personal property owned by the said company . . . in the same way as other ratepayers are assessed, and in addition thereto, shall pay an annual license fee of one hundred dollars."

And that an English steamship company having a chief office in Liverpool, G.B., represented by the defendants as agents in Halifax, and making regular trips between England and Nova Scotia, is "a company doing business, etc.," liable to take out a license.

City of Halifax v. Jones, 28/452.

19. **Proceedings to forfeit charter—Quo warranto—Interests of public.**]—The Attorney-General, acting in the interests of the public, may maintain action in the Supreme Court (or by quo warranto on the Crown Side) to inquire into the compliance by the defendants claiming to be organized as a railway company, under an Act of the Legislature, with the terms of the charter. And without showing any special public injury.

And tests of the existence of an interest in the public are furnished by the facts that the object of incorporation is to attain a matter of public convenience, and that the sovereign power of eminent domain has been delegated, and is liable to be illegally exercised.

The Attorney-General may proceed independently of any relator.

Attorney-General v. Bergen, 29/135.

20. **Unincorporated association—Building church — Persons composing held liable.**]—Defendants were present at a meeting of adherents of the Church of England, called to consider the building of a church in the Town of W., took part in its proceedings, supported resolutions favoring building, and awarding the work of construction to the plaintiff. During the progress of the work the dealings of the plaintiff were with M., who was rector of the parish, and who had been chairman of the meeting.

Held, that M. was the agent of the defendants, and that they were liable for the price agreed on, notwithstanding that plaintiff did not know all of them in the matter, and that no agreement in writing was entered into.

Also, that defendants might recover on a counterclaim for defective work, materials, etc. (Weatherbe, J., dissented.)

McQuarrie v. Calnek, 27/483.

21. **Unincorporated company.**]—Action by person using business style. Application to stay. Right waived by pleading. Amendment substituting real plaintiff.

See PARTIES, 7.

22. **Action for calls—Subscribers prior to incorporation not liable.**]—Actions for calls on stock in plaintiff company alleged to have been subscribed for by defendants. The company was incorporated by Act of the Legislature, 19th May, 1891. Prior to organization, the defendant McM. had signed for 25 shares on a list headed, "We, the undersigned, agree to take the number of shares opposite our names in the H. O. Co., and to pay the amount when called upon by said company," but had attended no meetings, and before incorporation repudiated the transaction. No shares in the company were ever allotted to him.

Held, that even if the subscription list constituted a contract among the subscribers, there was nothing in the subsequent legislation vesting its benefits in the company. Before incorporation there are no shares, therefore no shareholders.

Halifax Street Carette Co. v. McManus, 27/178.

23. The case of the defendant here differed from the above in that he was active in promoting the company, and did not repudiate his subscription before incorporation, and that for a time he acted on a committee known as "provisional directors," but was not among the applicants for incorporation. After incorporation he attempted to relieve himself

from supposed liability by an offer of compromise to the company:—Held, that he also was not liable, his acts after incorporation not being such as would bind him to the company in themselves, and his offer of compromise being merely an effort to "purchase peace."

Halifax Street Carette Co. v. Lane, 27/178.

24. The case of the defendant here differed in that after incorporation, but before organization of the company, he had given a promissory note, now sued on, to W. and T., as trustees, for the amount of his subscription before incorporation, which note had been indorsed to the company:—Held, it was without consideration.

Halifax Street Carette Co. v. Downie, 27/180.

25. The defendant here had signed the subscription list before incorporation for 25 shares and had done nothing further:—Held, he was not liable.

Halifax Street Carette Co. v. Glassey, 27/181.

26. **Calls on stock—Resolution authorizing—Liability of subscriber before incorporation.**]—Action for calls on stock alleged to have been subscribed for by the defendant. In April, 1891, the defendant had subscribed the name of a business firm of which he was a member, to a subscription list of a proposed company, called the "Halifax Omnibus Co." It was incorporated in May, 1891, by the name of the "Halifax Carette Co.," the defendant being named in the Act as an incorporator. The meeting to organize the company was held in September, 1891. Before this, calls had been made on subscribers to the above list, and afterwards the directors passed a resolution authorizing further calls, but not naming a time and place for payment thereof:—

Held, that all calls made prior to the meeting for organizing were clearly informal, there being no directors who under the Act of incorporation might authorize such calls, and that the resolution of the directors authorizing the further calls, was informal in not having set a time and place for payment.

Also, that though it was competent for the legislature to have adopted the offer of the defendant's firm contained in the subscription list, it could not be held to have done so by naming the defendant individually as an incorporator. He, having been so named, was a member of the company, but there was nothing to fix liability on him for a subscription to stock.

Halifax Carette Co. v. Moir, 28/40.

27. **Liability of subscriber to stock—Validity of transfer.**]—Defendant being sued by trustees for bondholders of an insolvent company, set up that he had transferred his stock long before to H., who was president of the company. The company's Act of incorporation provided that transfers should be "valid and effectual for all purposes, from the time such transfer is made, and entered on the books of the company." There was no evidence of such an entry in defendant's case, nor that any "books of the company" existed, but it appeared that H. had accepted and acted on defendant's transfer to him:—

Held, that the transfer was effectual to divest defendant's liability. Having done all he could to effect transfer, he should not be prejudiced by the default or omissions of officers of the company. (Affirmed in Sup. Ct. Can.)

Also, R.S. 5th Series, c. 53, s. 22 (Railway Act), is confined in its operation to the rights of shareholders and transferees against the company, and does not profess to cover the status of shareholders in respect to creditors.

Hamilton v. Grant, 33/77, 30 S.C.C. 566.

28. **Execution against shareholders.**]—A creditor who has obtained judgment against a company may proceed to enforce it against shareholders by an application under O. 40, R. 23, as well as by the formerly-employed writ of scire facias.

Hamilton v. Stewiacke Valley Ry. Co. and Dieckie, 30/10.

29. **Execution against shareholders.**]—O. 40, R. 23, provides that "where a party is entitled to execution against any of

the shareholders of a joint stock company, upon a judgment recorded against such company . . . "

Held, that the rule is complied with by recording the judgment at the Registry of Deeds in the county in which the works and railway of defendant company are situated, though the words "recorded against the company" have a different signification under the provisions of the English "Companies Act," which do not exist here.

Hamilton v. Stewiacke Valley Ry. Co. and Dickie, 30/10.

30. **Execution against shareholders—Conditional subscription.**]—On an application for execution against a shareholder for unpaid stock, a prima facie case of liability only need be shown; and an affidavit producing the subscription list and stating deponent's belief that defendant's signature there appearing is genuine, and that he paid $1,000 on account, is sufficient to set up a prima facie case.

Defendant had subscribed to a list "for the special purpose of construction of the Hant's County branch of company's line," a part of the undertaking. Quære, was he a conditional shareholder and so not liable, and was the condition, if any, a condition precedent to payment? Or was it a condition subsequent, inasmuch as such subscriptions must be paid before the work on the branch could be proceeded with? Issue directed.

Hamilton v. Stewiacke Valley Ry. Co. and Fraser, 30/166.

31. **"Provisions respecting corporations," sec. 13.**]—Liability of shareholder. By the bare Act of incorporation a shareholder in a company is relieved of liability for the company's debts. By R.S. 5th Series, c. 78, s. 13, respecting corporations generally, a shareholder is made "liable as a partner to the same extent as if no corporation existed . . . unless the special Act creating the corporation shall exempt its members from such liability."

Execution was applied for against a shareholder in a company whose special Act contained a section:—"No member of the corporation shall be made liable . . . for the liabilities of the corporation to a greater amount in the whole than the amount of stock held by him. . . ."

Held, it is untenable to maintain that section 13 only applies to companies where the liability is unlimited, and that there was nothing in the special Act incorporating defendant company to reimpose liability of its shareholder, in any degree.

Hamilton v. Stewiacke Valley Ry. Co. and Dickie, 30/10.

32. **Shareholders v. promoter—Misrepresentation.**]—Plaintiff brought action on behalf of himself and all other stockholders of the D. C. Company, who should contribute, claiming damages in respect to his contract of purchase of shares in the company's common stock, as procured by the fraudulent representations of the defendant, who he alleged was at the time in full control of the company:—

Held, that such an action should ordinarily be brought in the name of the company, and was not maintainable in this form unless it was alleged that defendant was also in control of the major part of the stock when the action was brought.

Also, that the joinder of other stockholders not entitled would not prevent the granting of relief to which plaintiff was alone entitled.

Also, as plaintiff's claim was damages, estimated by the difference between the price he had paid and the present value, and not rescission, his case was not met by defendant offering to take over his stock at the price paid and interest. If there had been fraud and misrepresentation, plaintiff was entitled to at least nominal damages, but such an offer might be considered in mitigation of damages, but need not be pleaded.

Quære, if pleaded might it be struck out under O.19, R. 27? (Cf. O. 19, R. 4, O. 21, R. 4.)

Weatherbe v. Whitney, 30/49.

Subsequently, plaintiff moved the full Court to add a plea to the effect that defendant W. was in control of defendant company at the time of action brought.

Held, refusing application, that were such a plea successful, judgment would stand in the name of defendant company, in which event action should have been brought for its exclusive benefit, and not confused with claims personal to plaintiff.

Weatherbe v. Whitney and Dominion Coal Co., 30/104.

33. **Suing foreign company—Attachment while in liquidation—Parties.**]—The defendant company was incorporated in England, and did business in New Brunswick. It had been put into liquidation in the Supreme Court of New Brunswick under R.S.C. c. 129, and a liquidator had been appointed. Plaintiff, chancing to come across a cargo of laths belonging to defendant company at Port Hawksbury in transit to Boston, attached the same for an amount due in respect of a bill of exchange accepted and payable in New Brunswick, and the liquidator moved to set his proceedings aside. Plaintiff objected that the liquidator, not being a party to the proceedings, had no status from which to move:—

Held, that either by R.S.C. c. 129, ss. 30, 31, 34, or by s. 12 (5) of the Judicature Act, the liquidator of a company had status enough to enable him to proceed to set aside the attachment, and that the fact of the liquidation proceedings in New Brunswick were sufficiently proved by his affidavit.

Also, as soon as winding-up proceedings are taken in the interests of creditors under the Winding-up Act, attachment can no longer issue at the suit of a single creditor, who should seek relief in connection therewith.

Also, that O. 47, R. 1, which authorizes actions against foreign companies doing business in Nova Scotia, refers to such companies as are regularly and continuously doing business therein, and not to those who may have a few isolated transactions here.

Also, that as the bill sued on was accepted payable in New Brunswick, and default thereon was made there, the cause of action had not arisen wholly or in part in Nova Scotia, which is necessary to found jurisdiction in our Court.

Salter v. St. Lawrence Lumber Co., 28/335.

34. **Winding-up — Foreign company—Foreign proceedings pending.**]—The Halifax Sugar Refining Co. had been incorporated and operated under the English Companies Act to do business in Nova Scotia. A company of the same name had been incorporated by the Provincial Act; but it did not appear that any steps had been taken to organize thereunder. The company was in course of liquidation under the English Winding-up Act, and a liquidator had been appointed by the Chancery Division. The petitioner had filed a claim as a creditor with the liquidator, who had partially allowed and partially disallowed it. He now sought to have a liquidator appointed, and the winding-up brought under the operation of the Canadian Act:—Held, that even assuming that ancillary proceedings could be had here, there was in this case no purpose to be served by them, and that the application ought to be dismissed with costs.

In re the Halifax Sugar Refining Co., 22/71.

35. **Insolvent bank—Winding-up—Appointment of liquidators—Discretion of Judge.**]—Application was made to the Judge at Chambers to appoint three liquidators for the insolvent Bank of Liverpool. The creditors and the shareholders each submitted three names for appointment. The Bank of Nova Scotia was the only interested party recommended by the creditors. The creditors objected to the nominations of the shareholders on the ground that as shareholders and contributories they were opposed in interest to the proceedings. The Judge having appointed the nominees of the creditors, on appeal:—Held, by Townshend, J. (McDonald, J., concurring), that the Judge having acted in a matter left to his discretion, his action was not reviewable on appeal, unless it could be shown that he acted on some erroneous principle, per Weatherbe, J. (Smith, J., concurring), that the Judge had mistakenly acted under the belief that the shareholders had no interest, in consequence

of which there was no exercise of discretion.

In re Bank of Liverpool, 22/97.

On appeal to Supreme Court of Canada:—Held, that there was nothing in the Winding-up Act to require that both shareholders and creditors should be represented on the board of liquidators, and that (if the Judge's discretion was reviewable on appeal) it had been wisely exercised in this instance.

Forsyth v. Bank of Nova Scotia, 18 S.C.C. 707.

36. **Winding-up — Director may purchase property.**]—As soon as a company is in the hands of the Court under proceedings in liquidation, a director becomes a director only in name, and his duties and obligations towards the shareholders cease to be different from those of an ordinary shareholder. Consequently, he may become purchaser of property of the company.

(Re Alexandra Hall Co., W.N., 1867, 67, followed; Re Iron Clay Brick Co., 19 Ont. 120, distinguished.)

Re Mabou Coal and Gypsum Co., 27/305.

37. **Street railway Co.—Foreclosure of mortgage — Appointment of receiver—Rights of transferees of equity of redemption.**]—Plaintiff as trustee for bondholders applied on affidavit to foreclose two mortgages made by the Halifax Street Ry. Co., and for the appointment of a receiver. The mortgage under which the application was made, provided that in default of payment of interest on the bonds, the principal should become due, and thereupon the trustee was authorized to commence proceedings for the collection of the amount; and it was provided that upon the commencement of such proceedings, the trustee should be entitled to have a receiver appointed as to the income pending such proceedings. The affidavits showed that default had been made in the payment of the interest, that the whole amount, in accordance with the provisions in the mortgage, had become due, and that it was doubtful whether the property mortgaged was of sufficient value to pay the amount of the bonds in full.

After the making of the mortgages under the Acts of 1890, c. 193, the road was transferred to the N. S. Power Co., who constructed a branch line, built new cars, purchased a number of new horses, and an entirely new outfit of harness, and who, in order to raise funds for these and other purposes, issued bonds, and executed a mortgage to a trustee to secure bondholders.

The application for the appointment of a receiver was resisted on the grounds, among others, (1) that the properties encumbered by the plaintiff's mortgages were so mixed up with those not encumbered, that it was impossible to separate the income derived from the plaintiff's properties from that derived from the rest of the road; (2) that the first mortgage conveyed only an equitable title, of which the defendants had no actual notice, and that the second mortgage, confirming the first, was not filed in compliance with the Bills of Sale Act, being a mortgage to secure future advances, and not having the statutory affidavit, R.S. c. 92. The order for a receiver was granted. On appeal:—Held:—

(1) That under the facts set out, the case was one where in the interests of all parties legally entitled to the property, a receiver should be at once appointed.

(2) That the property was taken by the N. S. Power Co., subject to all the legal and equitable claims of plaintiffs under the first two mortgages, and, even if there was some doubt on this point, that it was a proper exercise of his discretion, on the part of the Judge, who granted the order appealed from, to make the order for the protection of the property, and not allow it to remain in the uncontrolled possession of defendants.

(3) That the fact that a portion of the road operated by the N. S. Power Co., as well as a portion of the equipment, was not covered by the mortgages, was no ground for the non-appointment of a receiver; that the addition, by the purchasers, of the property, of new rolling stock, horses, etc., could not affect the rights of the original mortgagees in

such a way as to prevent them from obtaining protection of their property to which they would be otherwise entitled.

(4) That the subsequent mortgagees having been notified of the bringing of the action before the making of the order appealed from, and having failed to make application to be joined as parties, it was not open to them to raise the objection of their non-rejoinder.

Per Graham, E.J., inter alia, that the trustee for the bondholders of the N. S. Power Co. should be joined as a party, but that the non-joinder was not sufficient ground for displacing the order for the appointment of a receiver.

Weatherbe, J., dissented.

Haley v. Halifax Street Ry. Co., 25/140.

38. **Railway—Default of interest on bonds.** Construction of mortgage. Power of sale on notice. Foreclosure.

See MORTGAGE, 24.

COMPOUNDING FELONY.

See CONTRACT, 7.

COMPOUNDING INTEREST.

See INTEREST, 3.

COMPROMISE.

See ACCORD AND SATISFACTION.

CONDITION PRECEDENT.

See CONTRACT, 1, INSURANCE, SALE, 1.

CONFLICT OF LAWS.

Place of contract.]—Agreement made in Ontario. Retaining property in vendor of goods brought into this Province. Application of Bills of Sale Act.

See BILL OF SALE, 19.

CONSIDERATION.

See BILLS AND NOTES, 5, CONTRACT, 4.

CONSTABLE.

1. **Constable de facto.**]—A constable de facto, while acting in the discharge of what he conceives to be his duty, is entitled to the same measure of protection as if his right to fill the office were undisputed.

Queen v. James Gibson, 29/4.

2. **Notice of action.**]—A constable wrongfully levying for county rates and taxes, is not entitled to the notice of action called for by R.S. 5th Series, c. 56, s. 91, as he does not hold office under that chapter.

Wallace v. Stewart, 22/340.

3. **Wrongful levy for taxes—Second levy—Notice to peruse warrant.**]—Action against defendant, a constable, for wrongful levy and sale of plaintiff's goods under a warrant for taxes, and appeal from the County Court awarding judgment to plaintiff. The defendant levied on certain goods and impounded them on plaintiff's premises pending the settlement of a difference of opinion as to the amount due. Returning subsequently he was unable to get at said goods, so that he levied upon and sold others.

One of the defences was that no notice of demand to peruse the warrant or for a copy was served on defendant (R.S. c. 19):—

Held, that this was not necessary, unless it was desired to make the issuing justice liable.

That the second levy was a trespass, unless the defendant could show that the first was rendered ineffectual by some act or agency other than his own.

Per Townshend, J., that he should have made reasonable efforts to regain possession of the goods first levied, if necessary breaking open the door of the place in which they were contained.

Whitford v. Mills, 27/227.

4. **Warrant of commitment—Breaking in.**]—Following Queen v. Calhoun, 20/

329, which decides that a prosecution such as one under the Canada Temperance Act constitutes a criminal case, a constable in the execution of a warrant of commitment may break in.

The defendant having thus effected an entrance, the plaintiff, whose apprehension he sought, ran out of the house, pursued by defendant, and concealed himself. Thereupon defendant returned and directed a carpenter who was replacing a broken panel in a door to remove it, thus effecting a second entry:—Held, that having once effected a lawful entry, this second entry was lawful.

Vantassel v. Trask, 27/329.

5. **Acting under general warrant**—Search warrant—Authorizing search of "any other house" or arrest of "any other person"—Delegation of Magistrate's discretion to act on suspicion.

See WARRANT, 1.

6. **Acting under void or voidable warrants**—Liability of constable.

See CANADA TEMPERANCE ACT, 18, CAPIAS, 12, FALSE ARREST, 4.

CONSTITUTIONAL LAW.

1. **Prerogative of Crown.**]—The Crown is not to be prejudiced in the assertion of a right of action, by the mal-feasance or non-feasance of its officer.

See CROWN.

2. **English Statute 5 Geo. II., c. 7—Lands in colonies.**]—Per Thompson, J. The English statute which made lands in the colonies liable to execution in the same manner as personalty, is no longer in force. "In my opinion the statute has had no force in this Province since the first session of our Legislature, when a statute inconsistent with its provisions was adopted. The latter statute has since been continued in a modified form. I have no doubt of the power of our Legislature to repeal or modify the provisions of the English statute in so far as they applied to this Province, and it is worthy of observation that in Ontario, a Provincial statute modified the provisions of the English statute by providing that the execution should not go against real and personal property at the same time, as could have been done under the English statute."

Murphy v. McKinnon, 21/308.

(NOTE.—Contra, however, see PROBATE COURT, 21.)

3. **Land covered with tide water—Provincial Act.**]—Plaintiff, on the death of her husband, applied to have her dower set off from lands conveyed by her husband to the defendant company. Part of the lands in question were situate below high water mark. The defendant company set up a provision of its act of incorporation (1881, c. 73, s. 15), by which the Legislature ratified the company's title in all property both real and personal, reserving only, to any person, "the right to compensation for any interest at the time of such purchase," by the company:—Held, that this would defeat the unvested right of dower of plaintiff, except (Ritchie, J., dissenting), that as it was clearly beyond the power of the Province to deal with lands covered by tide water, the section could not be understood as intending to affect interests therein.

Sword v. Sydney & Louisburg Ry. Co., 23/214, 21 S.C.C. 152.

4. **Inland fisheries.**]—Held, following Queen v. Robertson, 6 S.C.C. 52, that the Parliament of Canada has power to enact that no net shall be set for the capture of fish on inland streams, between Saturday evening and Monday morning, and that this carries with it power to authorize entry upon private land for the purpose of seizure and forfeiture of such nets, and that forfeiture is not an excessive use of such power.

Bayer v. Kaizer, 26/280.

5. **Unrepealed Provincial Act—Power to amend—Sunday observance.**]—R.S. 3rd Series, passed before Confederation, contains a chapter, "Of Offences against Religion," s. 2 of which remains unrepealed and unsuperseded by Dominion legislation. This section was amended

by the Provincial Legislature (1889, c. 5; 1890, c. 22; and 1891, c. 32), and under these amendments a Stipendiary Magistrate proceeded to hear an information against defendant company, for a violation in directing the performance by its employees, of servile labor on the Lord's day:—

Held, McDonald, C.J., dissenting, directing a writ of prohibition to issue, that the amendments were ultra vires the Provincial Legislature. As appearing in R.S. 3rd Series, the subject matter was treated as relating to the general safeguard of public morals, and so formed part of the criminal law, now a matter of exclusively Dominion jurisdiction. Also that the ground could not be covered by Provincial legislation as being a matter of a merely "local or private nature," but that the end desired might be secured by different legislation coming under the head "Property and Civil Rights," and regulating the relationship that shall subsist between employer and employee.

Queen v. Halifax Electric Tramway, 30/469.

6. **Legislative powers—Grand Jury.**]—The Provincial Act of 1898, c. 38, reduced the number of grand jurors necessary to a panel from 24 to 12; and the number necessary to return a true bill from 12 to 7.

A conviction having been made on a bill found by a panel where only 10 of the 12 summoned attended and were empanelled:—Held, quashing the conviction, that under the British North America Act, the Province may fix the number of jurors necessary to form a panel, that being a matter connected with the constitution of a criminal Court (Townshend, J., not deciding, Henry, J., dubitante).

But may not fix the number of that panel necessary to find a true bill, that being a matter of criminal procedure, and as such exclusively of federal jurisdiction.

Queen v. Cox, 31/311.

7. **Act relating to insolvency.**]—Held, on authority of the Privy Council dealing with a similar Act, that the Act of 1890, c. 17 (now embodied in the Collection Act) dealing with insolvency, imprisonment for debt, payment by instalments, etc., is within the powers of the Provincial Legislature.

Gould v. Ryan, 26/461.

8. **Privileges of House of Assembly—Constitution of Province—Criminal jurisdiction.**]—The House of Assembly has power under R.S. 5th Series, c. 3, to adjudicate that wilful diobedience of the order to attend in relation to a libel upon its members is a breach of privilege and contempt, and to punish that contempt with imprisonment.

In an action for assault and imprisonment against members of the House of Assembly who had voted for such imprisonment:—Held, that the sections of the above chapter which create the jurisdiction of the House and indemnify members against legal proceedings in respect of their votes therein are a complete answer to an attempt to enforce civil liability for acts done and words spoken in the house.

Those sections, except so far as they may confer criminal jurisdiction, otherwise than as an incident to the protection of members, are intra vires of the local Legislature as relating to the constitution of the Province, within the meaning of B.N.A. Act, s. 92, and under the authority of the Colonial Laws Validity Act (28 & 29 Vic., c. 63) recognized by the B.N.A. Act, s. 88.

Fielding v. Thomas, 1896, A.C. 600.

9. **Crown Rules.**]—The Judges of the Supreme Court in framing the Crown Rules are within their powers in abolishing the jurisdiction of the Commissioners of the Supreme Court to grant certiorari.

See COMMISSIONER, 5.

10. **Liquor traffic.**]—Powers of Province in relation to regulating liquor traffic.

See LIQUOR LICENSE ACT.

CONTEMPT.

1. **Collection Act — Disobeying order.**]—One who fails to comply with the order of a Judge for the payment of a sum of money into the hands of a receiver, under the "Collection Act," is not in contempt.

As to the question of contempt; there is a distinction between disobedience of such an order directing the payment of a certain amount of money, and one directing the paying over of a certain fund ascertained to be in the hands of a person to whom the order is directed. Contempt enters into the latter case, but the "Collection Act" does not contemplate such an order.

Commercial Bank of Windsor v. Scott, 30/401.

2. **Contempt of Supreme Court**—Making false and evasive return.

See HABEAS CORPUS, 9.

3. **Contempt of House of Assembly**—Power to award imprisonment.

See ASSEMBLY, HOUSE OF.

CONTINUANCE.

See PRACTICE, 13.

CONTRACT.

Agency.]—See PRINCIPAL AND AGENT.

Damages for breach.]—See DAMAGES.

Fraud, element of.]

See FRAUD AND MISREPRESENTATION.

Hiring.]—See MASTER AND SERVANT.

Negotiable instruments.]

See BILLS AND NOTES.

Sales—of goods.]—See SALES.

Sales—of land.]—See DEED, LAND.

Sales—of chose in action.]

See CHOSE IN ACTION.

Suretyship.]

See PRINCIPAL AND SURETY.

1. **Condition precedent — Mutual and independent contracts.**]—Plaintiff agreed to do certain excavating, in consideration of which he was to be credited an account outstanding, to receive certain goods, which were delivered, and the balance in money. This action was for such balance, which defendant declined to pay on the ground that the work was not properly executed:—

Held, that the contracts were mutual and independent, and defendant not having specially conditioned that payment of the balance should depend on the due performance of his undertaking by plaintiff, was not warranted in withholding payment, but must depend on claiming damages for whatever shortcoming on plaintiff's part there might be.

Wright v. Polson, 30/437.

2. **Condition precedent—Consideration —Assignment of judgment—Mutuality.**]—Appeal from the County Court ordering judgment for defendant, upon the following written contract:—

"In consideration of W. (plaintiff) assigning to me the judgment which he holds against V. B., on which there is now due $150 or thereabouts for principal, interest and sheriff's fees, I hereby guarantee $140 to the said W., to be paid by yearly instalments of $20 each, first payment to be made 15th November, 1877. R. M."

The County Court Judge found that there had been no payments on account of this agreement, and no assignment of the judgment, which he held to be a condition precedent to the right to demand payment.

On appeal:—Held, and a new trial ordered, that such assignment was not a condition precedent. Per Meagher, J.: "If by agreement of parties two acts are to be done, and time is limited for the doing of one, and no time for the other, then, if the nature of the thing will bear it, that thing is to be done first for which the time is limited.

Also, a contract is not bad for want of mutuality because from the time of making it each party may not maintain action on it. Both parties might be required to do something, the agreement for one being the consideration for the promise of the other, i.e., the agreement of W. to assign the judgment here, was consideration for the promise of defendant to pay the yearly instalments.

Wallace v. Motton, 25/81.

3. **Condition precedent.**]—Defendant agreed with plaintiff, who was a contractor with the Government of Canada for the construction of a pier, to furnish and put in position all the stone required for ballasting the "cribs," at certain times and in certain quantities. Plaintiff agreed to pay therefor $400, in instalments of $100 each, according to the progress of the work, and if demanded, to find security in the sum of $500.

Defendant having failed in the performance of his undertaking, plaintiff sued for breach. The defence was plaintiff's failure to pay the first instalment, when due, and failure to find the security agreed on:—

Held, that neither amounted to a breach of a condition precedent to the performance of the contract which would warrant defendant in repudiating it.

Campbell v. McLeod, 24/66.

4. **Consideration—Forbearance to sue.**]—Action for goods sold, money advanced and commissions. The plaintiff also relied upon an account stated, upon which occasion defendant had given a draft in settlement, as follows:—"Pay to the order of B. and S. the sum of $204, and charge to same to freight on cargo of schooner 'Josie' consigned to you.

"To T. W. James, Bermuda.

"C. H. McLeod."

The defence was that the indebtedness was an advance on freight which was discharged by the loss of the vessel before the freight was earned, also that the order was obtained by threat of arrest under capias:—Held (Graham, E.J., dissenting), apart from the question as to whether the amount claimed was an advance on freight or not, the defendant had altered his position by giving the draft and thus obtaining plaintiff's forbearance to sue, until such time as the draft could be presented at Bermuda. Per Townshend, J., Ritchie, J., concurring, forbearance to sue a doubtful claim is good consideration for a contract.

Beer v. McLeod, 22/535.

5. **Compromise—Payment into Court—Costs.**]—Action for goods sold and money lent. Defendant set up a counterclaim, after which it was agreed in writing, that plaintiff should accept $240 in satisfaction of all claims, and discontinue. Defendant's solicitor next day tendered the amount agreed on, but plaintiff declined to accept the same, treating the settlement as an offer on his part which he had a right to revoke, and of which revocation he had given notice. Defendant then pleaded as an added defence the agreement to settle:—Held, he was entitled to succeed thereon with costs. Plaintiff contending that he was not entitled to costs because he had not paid the same into Court:—Held (Ritchie, J., dissenting), that he was not bound to have done so, and that plaintiff not having gone to trial on the non-payment into Court, but on the original action, could not recover as to costs.

Forsyth v. Moulton, 25/359.

6. **Agreement to compromise debt—Evidence to vary—Consideration.**]—Plaintiff accepted a bill of exchange drawn on him by defendant. He became involved, and was unable to meet it, and

defendant, in writing, agreed to accept, and did accept goods of less value than the amount of the bill, in payment, and undertook to retire the bill which had been indorsed to the H. Bank. The indorsee having brought action and compelled plaintiff, as acceptor, to pay the bill, he now brought action to recover the amount thereof from defendant.

The trial Judge admitted evidence to show that defendant took the goods at their market value, and that plaintiff had afterwards agreed to pay the difference, when able, at some future time:—

Held (and affirmed in the Supreme Court of Canada, unreported, see Digest), that such evidence to vary and add to the written contract was wrongly admitted, and that goods were taken thereunder in accord and satisfaction of defendant's claim, and that plaintiff's promise to pay a debt which had been discharged was voluntary and without consideration.

Seeley v. Cox, 28/210.

7. **Illegality—Duress — Stifling prosecution.**]—In an action on a bond executed by defendant to secure an indebtedness of L., his son-in-law, who, being agent of plaintiff bank at S., had been guilty of embezzlement, it appeared that the means used to obtain the security was threat of prosecution, or "allowing the law to take its course":—Held, that this was an illegal consideration, and defendant not liable on the bond.

Peoples Bank v. Johnson, 23/302, 20 S.C.C. 541.

8. **Assignment obtained by threat of prosecution—Valid unless agreement to stifle.**]—Plaintiff had executed, and now sought to have set aside, an assignment in which he had preferred defendants under threats of criminal prosecution by them for embezzlement. The jury found that there was no agreement, express or implied, on the part of the defendants to abstain from prosecuting.

Held, this being the case, there was nothing unlawful in the application of threats. "It seems clear generally, that where the threats made are only to do that which may lawfully be done, there is no duress, so that although the threat of unlawful imprisonment may be duress, it is not so if the threat be of lawful imprisonment."

Semble, there is a distinction if the compulsion be applied to a third person who is under no obligation to the person applying threats.

Fulton v. Kingston Vehicle Co., 30/463.

9. **Conveyance under duress—Destroyed by maker.**]—The owner of land having died intestate leaving several children, one of them, W. R., received from the others a deed conveying to him the entire title to the land, in consideration of paying all debts against the intestate estate and those of a deceased brother. Subsequently W. R. borrowed money from a sister, and gave her a deed to the land, on learning which B., a creditor of W. R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a reconveyance of the land to him and then gave a mortgage to B. The reconveyance, not having been properly acknowledged for registry purposes, was returned to the sister to have the defect remedied, but she having taken legal advice in the meantime, destroyed the deed. B. then brought an action against W. R. and his sister to have the deed to the latter set aside, and his mortgage declared to be a lien on the land. In the Supreme Court of Canada:—

Held, affirming the decision of the Supreme Court of Nova Scotia, that the sister was entitled to a first lien on the land for the money lent to her brother; that the deed of reconveyance to W. R. had been obtained by undue influence (W. R. being an inexperienced country bred lad and B. a man with considerable acquaintance with business), and should be set aside, and B. should not be allowed to set it up.

B., claiming to be a creditor of the father and deceased brother of the defendants, wished to enforce the provision in the deed to W. R. by his brothers and sister for payment of the debts of the father and brother:—

Held, that this relief was not asked for in the action, and if it had been, the

said provision was a mere contract between the parties to the deed of which a third party could not call for execution, no trust having been created for the creditors of the deceased father and brother.

Burris v. Rhind, 30/405, 29 S.C.C. 498.

10. **Illegality—Hiring out prisoners.**]—Action by a municipality on a contract by which it had hired two prisoners to defendant, one half of the wages to go to municipality, one half to prisoners. The prisoners were undergoing sentence of imprisonment with hard labor under the criminal law of Canada. The common gaol being unsuitable for the performance of hard labor, the sheriff, with the consent of the warden of the municipality and of the prisoners, entered into the above arrangement:—Held, the thing was most improper and illegal, and the wages could not be recovered.

Municipality of Lunenburg v. Smith, 24/104.

11. **Illegal contract—Betting on fraudulent race.**]—A party cannot be allowed to set up his own illegal act without a plea, unless the interests of justice be best served thereby. Costs.

See GAMBLING, 3.

12. **Illegality.**]—Sale of liquor to person not licensed under the Liquor License Act void. Surety for price discharged.

See SALES, 15.

13. **Immoral agreement — Court will not enforce—Costs.**]—Plaintiff, her husband L., and defendant, a solicitor, entered into an agreement under which defendant was to commence proceedings in the name of L. against plaintiff for divorce, on the ground of adultery with a person named. At the same time it was agreed that certain other persons, with whom plaintiff alleged she had committed adultery, should be threatened with legal proceedings involving publicity, and that any moneys obtained from such persons in settlement of the proceedings, should be applied in payment of the debts of the divorce proceedings, and the balance held in trust for plaintiff or L., or one of them. A considerable sum of money having been obtained by defendant from the persons threatened, plaintiff sued to recover the proportions of the sum to which she claimed to be entitled:—

Held, that the agreement was one to which the Court would not lend its assistance. No costs to either party.

In the Supreme Court of Canada:—Held, that there was not enough evidence to warrant a finding for plaintiff.

Byron v. Tremaine, 31/425, 29 S.C.C. 445.

14. **Remuneration for services—Promise to provide by will.**]—M., on his father's death, at the age of three years, went to live with his grandfather W. W. sent him to school till he was 16 years of age, then took him into his store, where he continued as clerk for eight or nine years. There was evidence that W. had induced M. to remain with him till he died, in consideration of setting aside property for him as compensation. W. died without effecting this, and shortly afterwards M. died, both intestate.

This action, by the administrator of M. against the administrator of W., was tried before McDonald, C.J., and a jury, and resulted in a verdict for plaintiff for $2,700.

On appeal:—Held, Graham, E.J., dissenting, that the appeal should be allowed with costs, that as W. stood in loco parentis to M. there was nothing from which to infer liability to compensate him for his services. Per Meagher, J., that there should be a new trial on the ground that the damages accorded were excessive.

On appeal to the Supreme Court of Canada:—Held, reversing the above, Gwynne, J., dissenting, that there was sufficient evidence that M.'s services were to be remunerated, to rebut the presumption growing out of the fact that W. stood in loco parentis to him, and there having been no gift by will, the estate of W. was liable for the value of the services as estimated by the jury.

Murdoch v. West, 25/172.

15. **Remuneration for services — Provisions of will.**]—Plaintiff was a niece

of the deceased wife of defendant's testator, and sued to recover wages for services as his housekeeper and for attendance on him during his last illness. It appeared that she had lived with deceased for some years as a member of his family, assisting in the housekeeping during her aunt's life, and afterwards taking full charge. On 24th April, 1891, deceased paid her $1,000 and caused the following receipt to be signed by her:—

"Dartmouth, April 24th, 1891.

"Mr. D. W.

"For services from July 1st, 1885, to date, $1,000.

"Received from D. W. the sum of $1,000 as above, the sum being in full to this date for my services, and for all or any demand of any kind or nature, that I may or might have against him."

A few days later he made his will, bequeathing her $2,000. By a later codicil he added $2,000 more. December 10th he died, and this action was for wages at the rate of $300 per year for the period between date of receipt and testator's death.

The learned Judge on trial found that the only evidence of a contract to remunerate was to be implied from the receipt, but that in reality plaintiff was treated as testator's own child. That the legacies were intended to be compensation for services, and that plaintiff should not recover anything, she having admitted to one of the defendants that deceased had said that he "intended to make her one of the family when he made his will." Appeal dismissed.

Sherry v. Waddell, 27/312.

16. **Implied contract—Agency for selling.**]—Claim for commission on sale effected by principal. Course of dealing.

See PRINCIPAL AND AGENT, 8.

17. **Unincorporated church building association.**]—Meeting to authorize building. Persons voting to proceed liable to contractor.

See COMPANY, 20.

18. **Place of contract—Breach of contract for sole agency.**]—Action for breach of contract, under which plaintiffs were to have the exclusive right to sell goods manufactured by defendant company within the Province of Nova Scotia, in that defendant company had sold through other agents. On the part of the defendant company it was objected that it being a foreign company doing business in Ontario, where the contract was made, the Court was without jurisdiction:—Held, that as the breach complained of had taken place within Nova Scotia, action might be brought there.

W. H. Johnston Co. v. Bell Piano & Organ Co., 29/84.

19. **Place of contract**—Agreement made in Ontario—Retaining property in goods in vendor—Assignment—Bills of Sale Act does not apply.

See BILL OF SALE, 19.

20. **Novation — Substitution of third person—Preponderance of evidence.**]—In an action on a debt, the defence was that the plaintiff had agreed to accept C. as his debtor in substitution for the defendant. Plaintiff denied the arrangement, but admitted that C. told him that he would pay him $365 for defendant, and that on the day on which the money was to be paid, he went to C.'s shop and received goods to the amount of $325.30. The evidence showed further that C., who was indebted to the defendant, settled his account by undertaking to pay plaintiff the sum of $365, and giving his promissory note for the balance. Also, that plaintiff in his account with defendant, charged him with the sum of $373, and credited him with "amount to be paid by C. $365," and with a balance of $8 cash:—

Held, that there was novation, by which C. was substituted, and defendant absolutely released. Though there must be mutuality of consent, it is not necessary that all three parties should be personally present at the same time. And though here, there was some conflict of testimony, yet it greatly preponderated in favor of the defendant.

Lewis v. D'Entremont, 29/546.

21. **Building contract—Forfeiture clause — Waiver.**] — Plaintiff entered into a written contract with the city of Halifax for the removal of an old building and the erection of a new one in its place. One of its clauses provided that if at any time the work was not being proceeded with at the rate to insure its completion by May 1st, 1888, the city board of works might take possession and complete, in which which case the plaintiff was to suffer a deduction of 15 per cent. of the value of the work thereafter done.

In March, 1888, when it had long been evident that the work could not be completed within the contract time, the city took over the work and ejected plaintiff. The plaintiff alleged that the work had not been proceeded with proper diligence during the previous year, when no action had been taken by the city, and that the city, by allowing him to resume work in the previous December, when it was obvious that he would not be able in any case to complete it within the contract time, had waived its rights under the forfeiture clause:—

Held, that the city was not bound to have exercised its right as soon as it had reason to suspect that the work would not be completed, but without waiving it's right, might delay action until the fact became established beyond all doubt. Also, that the plaintiff's resumption of the work was through no act of the city, but of his own motion at a time when he was in the best position to know whether he could fulfil the terms of his undertaking.

Milliken v. City of Halifax, 21/418.

22. **Action on building contract — Counterclaim** for damages for defective workmanship — Measure of damages — Costs.

See DAMAGES, 19.

23. **Contract for railway construction — Terms and conditions — Forfeiture clause — Determination of rights after forfeiture.**] — Plaintiffs and defendant company entered into a contract in writing, under which plaintiffs were to do certain work on defendant's railway. One of the terms of the contract was that before each payment was due, plaintiffs were to furnish evidence satisfactory to defendant, that all laborers employed by plaintiffs on any work, had been paid:—

Held, that the defendant was precluded from setting up this condition by having measured the work and materials and paid plaintiffs or their laborers, all that defendant admitted to be due. Also, that plaintiffs having received sufficient to pay their men in full, did not prevent them from recovering any further amount found to be due them.

The agreement contained a condition under which the defendant company was enabled to terminate the contract after five days notice, in case plaintiffs failed to push the work forward in a satisfactory manner:—

Held, that plaintiffs were entitled to payment for work completed at the time of termination, but only where, as provided, the work had been completed in strict accordance with the plans and specifications, and was in every way satisfactory to the defendant's engineer and the engineer of the Province:—

Held, that the burden was on plaintiffs to show that the measurements and quantities allowed for by the company were erroneous. Also, that the obtaining of the certificate of the company's engineer, as to the character of the work done, was a condition precedent which must be performed to entitle plaintiffs to payment. And that notwithstanding the fact that the contract was put an end to by defendant, plaintiffs were still bound by its terms in arriving at a decision as to what was due them.

Sorette v. Nova Scotia Development Co., 31/427.

24. **Architect — Agreement as to remuneration —Commission.**] — Defendant employed plaintiff, an architect, to prepare plans and specifications for a hotel building, to cost not more than $4,000 or $5,000, for which he was to receive a commission of two per cent. on the cost, and one per cent. more for superintendence. Instructions as to size, number of rooms, etc., were given by defendant. Before completion, changes were made in

the plans involving additional expenditure to the extent of $1,500.

Plans were approved by defendant and the work was begun. It was then found that owing to advances in the price of materials, the work would cost more than anticipated, and it was stopped:—

Held, plaintiff was entitled to recover two per cent. on the estimated cost of the building, with the additions and alterations approved by defendant.

Hutchinson v. Conway, 34/554.

CONTRACTOR.

1. **Disqualification as councillor—Contractor with town.**]—Acts of 1888, c. 1, s. 50 (c), disqualifies for election or acting as councillor of an incorporated town, "any person directly or indirectly, by himself or his partner, having any contract . . . with, by or on behalf of the council":—Held, that a surety on the bond of the town inspector of licenses, for the faithful performance of his duties, is such a contractor.

See ELECTION, 1.

2. **Negligence of contractor** with the city of Halifax for street lighting—Lights out—Causing accident—The city not liable—Respondeat superior.

See NEGLIGENCE, 28.

CONVENTIONAL LINE.

See LAND, 15.

CONVERSION.

1. **Agreement to return or pay for property.**]—Plaintiff leased a brewery to defendant containing a number of casks, hogsheads, etc., part of its equipment. By a covenant in the lease the defendant undertook to return the same, or pay a fixed price therefor:—Held, that trover in relation thereto by the landlord, would not lie.

Weatherbe, J., dubitante.

McDuff and McDougall, 21/251.

2. **Partnership — Lien — Evidence of conversion.**]—Plaintiff and defendant entered into an arrangement by which they were to buy empty sugar bags, to be cleaned, mended, and stored by defendant, and sold by either party as opportunity offered. For his services the defendant was to receive one quarter of a cent per bag and half of the profits upon sale. The plaintiff sought to regain possession of the bags and began action, claiming (1) their return or their value, (2) damages for conversion. The defence was (1) partnership, (2) an unsatisfied lien, (3) money advanced towards the purchase of the bags. The evidence was conflicting:—Held, whether or no there was partnership, or a lien the detention was justifiable, and conversion would not lie. New trial ordered.

McFatridge and Holstead, 21/325.

3. **Trover against tenant in common.**]—Plaintiffs were owners as tenants in common with M., of certain hay, grain and straw. The property was taken by the sheriff in execution against M., and sold to defendant, who re-sold a portion and used the balance:—

Held, there was such a taking and carrying away as deprived the plaintiffs of the use and benefit of the property, and that they might therefore maintain an action for conversion against the purchaser of the interest of the tenant in common.

McLellan v. McDougall, 28/237.

4. **Ownership of lime excavated.**]—The defendant wrote to plaintiff proposing an arrangement for quarrying and burning lime on plaintiff's land. Receiving no reply, he entered and burned lime. The plaintiff afterwards came to the spot, ratified defendant's action, and agreed to buy all the lime he burned, and to supply the barrels. Plaintiff having refused to accept a lot of lime on the ground that it was not delivered within the time agreed on, the defendant shipped it to another party. Plaintiff then brought action for the conversion of his property:—

Held, the action could not be maintained. Per Weatherebe, J., a lease was

consummated, and plaintiff assented to defendant's dealing with the lime, when he visited the property.

Per McDonald, C.J., Ritchie and Townshend, JJ., because the defendant's lien on the lime was undischarged.

McLachlan v. Kennedy, 21/271.

5. **Conversion by agent—Damages for detinue—Pleading—Costs.**]—B., being in possession of a mare belonging to plaintiff, with authority to sell and meanwhile to use her, disposed of her to defendant in satisfaction of a personal debt due. There having been no holding out of B., by plaintiff, as an agent with larger authority:—

Held, he might recover in trover against defendant, and (Ritchie, J., dissenting), damages for the detinue without a plea.

Also, the element of agency entering into the case should not affect the usual rule as to costs, or warrant a Judge in withholding them.

Garden v. Neily, 31/89.

6. **Sheriff levying against equity of redemption** under O. 40, R. 31—Bill of sale—Property vesting in grantee on levy or attachment—Sheriff may not remove the corpus of the mortgaged goods.

See EXECUTION, 24.

7. **Right of mortgagee** out of possession, to maintain trespass—And of owner of equity of redemption.

See MORTGAGE, 14.

CONVICTION.

1. **Form of conviction.**] — Departure from the exact form of a statute does not invalidate a conviction, if the terms of the law are followed.

See LIQUOR LICENSE ACT, 15.

2. **Adjournment sine die.**]—A conviction by a magistrate after an adjournment without naming a day is bad.

Queen v. Morse, 22/298.

Queen v. Gough, 22/516.

3. **Postponement.**]—But if at the time fixed for return of a summons the magistrate merely postpone beginning (defendant not having appeared), without taking proof of service, he does not lose jurisdiction.

See CANADA TEMPERANCE ACT, 12.

4. **Conviction after adjournment — Amendment — Notice to defendant.**] — After hearing a charge for violation of the Liquor License Act, the magistrate adjourned to a day named for the purpose of determining the sufficiency of the proof of a previous conviction alleged. At the adjourned hearing, neither the accused nor his counsel being present, he heard and granted a motion to amend the summons in the case by changing the date of the previous conviction:—Held, a conviction made thereafter was bad.

Queen v. Grant, 30/368.

5. **Must show jurisdiction.**]—A conviction under the Liquor License Act, 1886, not setting out that the offence was committed within the previous 90 days was quashed, as not showing that the magistrate had jurisdiction under the Act.

Queen v. Ida Adams, 24/559.

6. **Plea of previous conviction.**]—To a civil action for assault the defendant pleaded that he had been previously convicted before a magistrate for the same assault, and consequently that the action was barred by R.S. Canada, c. 178, s. 75 (Criminal Code, s. 866):—

Held, that the plea was bad unless it alleged also that the conviction was at the instance of the plaintiff.

Ross v. McQuarrie, 26/504.

7. **Municipal regulation — Summary Convictions Act.**]—Rule nisi to quash a conviction under the Summary Convictions Act, for leaving open a gate ordered placed on a pent road by a by-law of the municipality under an enabling statute of the Legislature:—Held, the conviction was bad for not alleging

that the gate in question was one so ordered.

Queen v. Cameron, 21/382.

8. **Conviction under city ordinance—Must set out ordinance.**]—Certiorari to remove a conviction by the stipendiary magistrate, for that the defendant "did unlawfully purchase old iron known as marine stores, contrary to the ordinance to amend Ordinance 29 of said city, passed on the 27th day of April, 1871, etc."

There was no such ordinance, but there was an ordinance passed on the 27th day of April, 1881, for the licensing of junk dealers, etc.:—

Held, that the conviction was bad as not properly setting out the ordinance or by-law.

Also, as not setting out that the defendant had a shop, store, boat, scow, vehicle, etc., in connection with his business to make a subject for license under the words of the ordinance. That merely purchasing "old iron," without employing one or other of these adjuncts to the business of a junk dealer was not an offence against the ordinance requiring a license to be taken out.

Queen v. Silas Townshend, 24/357.

9. **Profane language—Not setting out words used.**]—A conviction for that the defendant "being on one of the streets of the said city of Halifax, did openly use profane language," was quashed for not setting out the words used.

The informer and the convicting magistrate having opposed the motion for certiorari, costs were ordered against them.

Queen v. Sarah Smith, 31/468.

10. **Service of summons—Amending conviction.**]—Where a summons for an offence against the Liquor License Act, 1886, was left at the defendant's place of business an hour or two before it was returnable, and defendant swore he never received it, and the trial was adjourned, but no notice thereof given defendant other than a verbal message through a constable to the effect that he was instructed by someone not shown to be connected with the prosecution, to inform him that his case "would come up on Monday at 10 o'clock," a magistrate who convicts is without jurisdiction.

Where a bad conviction has been made and filed, a good conviction cannot be made out and returned, to a writ of certiorari which has issued.

Queen v. McKenzie, 23/6.

11. **Conviction under Act not in force.**]—Certiorari to bring up a number of convictions in the County of Colchester, on the ground that at the time of the offences, the "N.S. Liquor License Act, 1886," under which the convictions were made, had been superseded by the proclamation to bring the Canada Temperance Act into force. To sustain the convictions it was urged that the election prior to the proclamation was irregular. A scrutiny had been demanded by an elector, but he had done nothing further in prosecution of his demand:—Held, the Canada Temperance Act was in force, and that the convictions must be quashed.

Queen v. Casson, 21/413.

CORONER.

Coroner acting as sheriff.]—There is no distinction between the liability of a coroner acting in a case where the sheriff is an interested party, and that of a sheriff. The coroner becomes in such cases by the common law, ex officio sheriff, so that not only all the common law, but all the statutory liabilities, as well as the rights of the office of sheriff, attach to him while acting in that capacity. Am. & Eng. Enc. Law (1st ed.), vol. 4, 181.

Consequently, if he accept a single surety on a bond in replevin, and the security prove insufficient to respond the judgment finally rendered, he, like the sheriff, is personally liable.

Horsfall v. Sutherland, 31/471.

CORPORATION.

See Banks and Banking, Company, Halifax, City of, Incorporated Town, Municipality, Railway, Street Railway.

COSTS.

1. **Appeal.**]—There is no appeal from an order at Chambers making costs of an interlocutory matter, costs in the cause.

Freeman v. Mitchell, 30/513.

2. **Discretion as to costs.**]—The Court refused to interfere with the discretion of the Chambers Judge who awarded costs on a motion to strike out a counterclaim.

Lindsay v. Crowe, 31/406.

3. **Judge's discretion reviewed.**]—The only question was in whose favor the balance stood, on a settlement of cross-accounts. It proved to be in favor of the defendant, but the County Court Judge withheld costs on the ground that the defendant had led plaintiff to think that the matter was otherwise, and thereby warranted him in litigating:—

Held, Ritchie, J., and Graham, E.J., dissenting, that the reason was insufficient, and that the usual rule should have been followed.

Townshend v. Smith, 32/305.

4. **Motion to vary judgment.**]—Plaintiff moved to vary an order for judgment as to costs of his counterclaim in which he succeeded on trial herein some years before, on the ground of omission by a mere slip:—Held, that if mention had been made of costs in the judgment on which the order was based, the matter might be considered on that ground, but not in any case after so long a delay.

Palgrave Mining Co. v. McMillan, 31/196.

5. **Abandoned appeal.**]—Where an appeal has been abandoned, O. 58, R. 6, by non-entry on the first entry day after notice of appeal: "If the respondent has incurred any costs in preparing to oppose the appeal, he will be entitled to an order for their payment, but no costs of the application for the costs of the abandoned motion can be allowed, unless the applicant has made a previous demand for payment, which has not been complied with."

O'Neil v. Madore, 26/129.

6. **Amendment—Point not pleaded.**]—Action on a promissory note payable at a particular place, but with no averment of presentation. Defendant did not raise objection to this in his defence, but on trial opposed plaintiff's motion to amend, except on unreasonable terms. The County Court Judge did not make the amendment, but gave judgment for plaintiff on the merits. Defendant appealed. —Held, that plaintiff could not succeed without proving presentation, and that the amendment should have been made, and must be made now, and a new trial ordered. But as the defendant had not raised the point when he first pleaded, so that the matter might have been disposed of without expense, the costs of his appeal should abide the event of the new trial.

Pigeon v. Moore, 23/246.

7. **Succeeding on point not pleaded.**]—Where a defence, which would succeed, was not pleaded, the Judge received evidence thereof and made the necessary amendment, but on account of the omission, no costs were allowed the defendant.

Hart v. Scott, 23/369.

8. **Amending on appeal.**]—Defendants having successfully resisted an action to set aside conveyances as fraudulent, applied on argument of plaintiff's appeal, to amend their defence in conformity with the evidence given, and not contra-

dicted:—Held, they were entitled to do so, and the action having been tried as if the amendment asked for were then on the record, the amendment should not affect the question for costs.

Also, that it was too late for plaintiff to apply to amend in order to allege other frauds against defendants.

Bauld v. Challoner, 28/205.

9. **Additional evidence on appeal.**]—Plaintiff only succeeding by being allowed to put in additional evidence after argument, the defendant was awarded the costs of his appeal. Plaintiff not having properly succeeded on trial, as the case was then presented, no costs of trial were awarded to either party.

McGregor v. McKenzie, 30/214.

10. **Amendment.**]—The plaintiff M., suing under the name of M. & Co., brought an action against defendant for the conversion of goods. At the time of the conversion complained of, M. was doing business with C. under the firm name of M. & C. After the conversion the partnership was dissolved, C. assigning to M. all the assets. No notice of assignment was given to the defendant. At the trial application was made for leave to amend by setting out that plaintiff sued as successor to M. & C., but subsequently at the close of the trial, there was a motion on notice to the other side, for leave to withdraw the previous application, and for leave to amend by substituting M. & C., as plaintiffs, in place of M. & Co.

The motion having been granted, and judgment given for the substituted plaintiffs with costs, except of the motion for leave to substitute M. & C. for M. & Co., defendant appealed as to costs:—

Held, allowing appeal, that defendant was entitled to the costs of the withdrawn motion and of the motion to amend, and also to the costs of the action and trial up to the time that the amendment was made.

McKay v. McDonald, 31/316.

11. **Neither party wholly succeeding.**]—Where neither party succeeds to the full extent of his pleadings, no costs should be awarded to either.

Rice v. Ditmars, 21/146.

Russell v. Murray, 34/548.

12. **Appeal only partly successful.**]—Where the whole of a judgment or order was appealed from and the appeal was only allowed as to a part, costs were refused in,

Gray v. Curry, 22/262.

Sampson v. Sampson, 23/38.

Clish v. Fraser, 28/163.

Weatherbe v. Whitney, 30/49.

Kirk v. Northern Assurance Co., 31/325.

McDonald v. Mahoney, 31/523.

13. **Succeeding fully—And in part.**]—Plaintiff made two motions at Chambers, in one of which he succeeded fully, in the other, in part. The Judge having refused costs in both, on appeal:—Held, that he must be allowed costs of the motion on which he succeeded fully, though the matter be within the discretion of the Judge under O. 63, R. 1, and there be no appeal therefrom under O. 57, R. 4.

Palgrave Gold Mining Co. v. McMillan, 24/340.

14. **Both parties at fault.**]—Plaintiff in his reply set up what was held to be a new case. Defendant failed to apply to strike out the pleas, and proceeded to trial on immaterial issues. A new trial was ordered, without costs to either.

Cogswell v. Holland, 21/168.

15. **Both parties failing in part.**]—Both parties failing as to substantial points urged on argument of an appeal, no costs were awarded either.

Re Estate of McRae, 26/214.

16. **Only partly succeeding.**]—The defendant being sued for the price of a lot of hay, counterclaimed for a portion not delivered. He had refused to accept it. The jury having found for plaintiff limited damages to the value of the hay delivered:—Held, that this mea-

sure of success did not entitle defendant to costs.

Laurie v. Croucher, 23/293.

17. **Not succeeding on all issues.**]—Plaintiff brought action (a) for possession of a certain piece of land awarded him by arbitration with the defendant; (b) damages for defendant's trespass thereon; (c) a declaration of the terms of the award defining the bounds of the land to which he was entitled. The defendant was found not to be in possession of the land.

Held, plaintiff was entitled to the costs of the action except as to the issues relating to recovery of possession and the trespass which were awarded to defendant.

Costs of appeal refused, plaintiff not having succeeded fully.

Clish v. Fraser, 28/163.

18. **Both parties successful.**]—On a case stated for direction as to the distribution of an estate, both parties being partly successful in their contentions, costs of both were ordered to be paid out of the estate.

Williams v. Thurston, 21/356.

19. **Construction of will.**]—An application to the Court for the construction of a will, in which several persons contingently interested were heard, being necessary because of the confused and doubtful language of the testatrix, the Court, following Foot v. Foot (15 S.C.C. 705), directed all costs to be paid out of the estate.

Re Caroline Lawson, Jordan v. Fairie, 25/454.

20. **New question.**]—A question coming before the Court for the first time, no costs were allowed.

Queen v. Simon Fraser, 22/505.

In re Ross, 27/296.

Clairmont v. Prince, 30/258.

21. **New question.**]—On a decision (reversed in the Supreme Court of Canada), that the ordinary English rule of allowing no compensation to a trustee where the instrument creating the trust is silent, is not in force in this Province, no order was made as to costs.

Power v. Meagher, 21/193.

22. **Motion unopposed.**]—But if the application is necessary, costs will be awarded notwithstanding.

See JUDGMENT, 19.

23. **Application not opposed.**]—After foreclosure and sale and purchase by plaintiff, plaintiff applied under O. 48, R. 1, for a writ of possession:—Held, he was entitled, but as no one opposed his motion, without costs.

Eastern Canada Savings & Loan Co. v. McKinnon, 26/523.

24. **Application not opposed—Certiorari.**]—An application for certiorari not being opposed, no costs were awarded the successful defendant.

Queen v. McFarlane, 24/54.

Queen v. Silas Townshend, 24/357.

Queen v. McLeod, 30/191.

25. **Application unopposed on merits.**]—Defendant gave notice to set aside an order made by a Judge at Chambers, purporting on its face to be "By the Court." Plaintiff offered to consent except as to costs:—Semble, he should have offered to pay costs up to the date of his offer to consent, in order to entitle him to the consideration of the Court in granting defendant's application without costs.

O'Gorman v. Westhaver, 22/314.

26. **Laches.**]—More than one year from the granting of an order for arrest, and after the action had been tried, the defendant applied to set aside the order for a patent defect. His application being refused, he appealed. Appeal allowed, but without costs.

Sydney & Louisburg Ry. Co. v. Kimber, 23/338.

27. **Unnecessary application.**]—On a third application to strike out different parts of a defence, all of which might have been included in the first, no costs were allowed plaintiff succeeding on the motion.

Bank of British North America v. Yetman, 26/481.

28. **Unnecessary appeal.**]—On motion by plaintiff to strike out pleas of a defence as evasive, the Chambers Judge refused the application, but offered defendant leave to amend on payment of costs. Defendant did not avail himself of that leave, and this afforded plaintiff reason for appealing. Appeal allowed without costs. Costs below to be costs in the cause.

McDonald v. Lowe, 34/531.

29. **Excessive pleading.**] — Plaintiff brought action to restrain defendant from using his trade mark, and for damages. His statement of claim alleged that the trade mark was "forged or counterfeited," and used "fraudulently, and with the intention of selling . . . as plaintiff's fish . . . " involving serious charges which he failed to prove. On appeal, as to costs, from the decision of the trial Judge, awarding an injunction, nominal damages and costs:—Held, that the order must be so varied as to give the defendant costs on the issues found in his favor. No costs of appeal to either.

Robin v. Hart, 23/316.

30. **Excessive printing.**]—The Court refused to award the costs of unnecessary printing done by a party succeeding on appeal. If counsel could not have agreed in limiting the volume of the printing to that actually necessary, an application should have been made to a Judge to settle the case.

Fraser v. Kaye, 25/102.

31. **Motion needlessly opposed.**]—Plaintiff's solicitor, in ignorance of the fact that a debt had been paid to his client after the matter had been placed in his hands, issued a writ and entered judgment by default. The defendant moved to set the judgment aside, which was needlessly opposed by plaintiff. For that reason it was set aside with costs.

Imperial Oil Co. v. Deming, 29/98.

32. **Appeal by receiver.**]—A receiver who appeals without leave, merely runs the risk of not being reimbursed his costs in the event of failing.

See PARTNERSHIP, 10.

33. **Appeal by executor.**]—Costs on failure ordered to be paid by him personally, not out of the estate.

See PROBATE COURT, 11.

34. **Costs against executor personally.**] —Semble, in every case commenced by an executor or administrator in which the defendant becomes entitled to costs, the order therefor ought to be against the executor or administrator personally.

See PROBATE COURT, 3.

35. **Canada Temperance Act.**]—Costs cannot be included in a conviction under the Canada Temperance Act for want of a provision to that effect in the Act.

Queen v. Oakes, 21/481.

Cf. CANADA TEMPERANCE ACT, 22.

36. **Certiorari.**]—A defendant failing on certiorari is liable to the prosecutor for costs, and according to the practice of the Court for a long time, may be awarded costs against the prosecutor.

Per Ritchie, J., dissenting, the English rule applies, under which costs on certiorari are never awarded against the prosecutor.

Here costs were awarded to a defendant on quashing a conviction under the Canada Temperance Act.

Queen v. Freeman, 21/483.

37. **Certiorari opposed—Costs against Magistrate and prosecutor.**]—A motion for certiorari having been granted and a conviction quashed, costs were awarded against the convicting Stipendiary Magistrate and the prosecutor, who opposed the motion.

Queen v. Sarah Smith, 31/468.

38. **Collection Act—Contempt.**] — Defendant had not shown cause when an order passed against him under the Collection Act, directing the payment of a sum of money, but succeeded when plaintiff moved his commitment for contempt

in disobeying it:—Held, he should not have costs.

Commercial Bank of Windsor v. Scott, 30/401.

39. **Crown Rules—Indorsing affidavits.**]—The Court having quashed a conviction by a Justice of the Peace, refused costs to the successful defendant, on the ground that it was his duty to have seen that the affidavits produced on behalf of the prosecutor were properly indorsed under Rule 15, to show who was opposing his motion.

Queen v. Morse, 22/298.

40. **Damages less than $8.**]—The plaintiff in an action for slander recovered $1 damages, and thereupon applied to the trial Judge for an order for costs, which was refused:—Held, that under O. 63, R. 1, qualified by Appendix N. (See R.S. 5th Series, p. 1143), he was not entitled to costs unless the Judge in his discretion should see fit to award him the same.

(Note.—March 29th, 1889, as part of an order revising Costs and Fees, the above Appendix N. was repealed, and another substituted, in which the portion relating to the award of costs in certain actions does not appear. O. 63, R. 1 now stands alone and the result is that the practice is reversed. See Appendix to Statutes of 1893.)

Adams v. McKenzie, 22/50.

41. **Award of $5 damages.**]—Plaintiff sued defendant for slanderous words spoken by the latter's wife in an altercation which was provoked by plaintiff's wife. Defendant denied publication, and attempted to prove that plaintiff had a bad reputation, but failed:—Held, in view of this, the trial Judge who awarded $5 damages erred in withholding costs.

Croft v. Jodrey, 28/78.

42. **Execution against partner** on judgment against firm.]—Partner not served liable for costs, though, not having been served, he had no share in incurring them. His recourse is against other partners.

See PARTNERSHIP, 17.

43. **Foreign costs.**]—Costs awarded on recovery of a judgment in a foreign Court may be sued on in this Province.

Corse v. Moon, 22/191.

44. **Habeas corpus.**]—Costs refused to an applicant by habeas corpus on his discharge from imprisonment under 1890, c. 17, ss. 3, 4 (now part of the Collection Act), for a fraudulent disposition of his property. The discharge was for defects on the face of the order for imprisonment.

Re James Zwicker, 26/124.

45. **Habeas corpus—Discharge.**]—It is within a Judge's discretion to award costs against the prosecutor on the discharge of an applicant for habeas corpus, but the power should be exercised only in extreme cases, if at all.

In re Walter Murphy, 28/196.

46. **Habeas corpus — Costs — Jurisdiction.**]—A prisoner convicted summarily of theft by a Stipendiary Magistrate, having been discharged by a Judge of the County Court as a Master of the Supreme Court, on the ground that he had not consented to be so tried, an order was made directing costs against B., alleged to have been the informer and prosecutor.

Held, that as the record of conviction did not disclose it, and as there was only the prisoner's affidavit to show that B. was informer and prosecutor, the order as to costs was bad.

Queen v. Bowers, 34/550.

47. **Interpleader issue—Rights of execution creditor.**]—Under judgment alleged to have been paid to assignee thereof. Conditional order as to costs.

See PRACTICE, 22.

48. **Interim injunction — Costs.**]—Though on the granting of an interim injunction, costs are usually ordered to abide the event, yet if the purpose be to restrain a continuing nuisance, and the main facts are not disputed, costs are properly awarded to the applicant.

Francklyn v. People's Heat & Light Co., 32/44.

49. **Judgment—Setting aside.**]—Leave to defend. Terms as to costs.

See JUDGMENT, 16.

50. **Municipal election petition.**]—By R.S. 5th Series, c. 57, no costs in excess of $100 are taxable in connection with a municipal election petition.

Thomas v. Thompson, 26/53.

51. **Payment into Court — Tender — Costs.**]—To an action for commissions, etc., defendant pleaded payment of an amount sufficient into Court, and tender of the same amount before action brought. The trial Judge found the amount of the payment into Court sufficient, but no evidence of the tender:—Held, "When the defendant pays money into Court, either in the alternative or as a sole defence to the action, and the plaintiff replies that the sum paid in is not sufficient; if the cause goes on to trial and the sum paid in is found sufficient to satisfy the plaintiff's claim, the defendant has succeeded upon an issue going to the root of the action, and is entitled to have judgment entered in his favor, and to recover the general costs of the action, as well as the costs of the other issues, if any, on which he has succeeded. The plaintiff is entitled to the costs of all the issues upon which he has succeeded."

Defendant to have the general costs of the action, and all issues on which he succeeded, plaintiff to have costs of the issue as to tender and all others, if any, on which he succeeded. Costs to be set off; no costs of argument; costs of printing to be equally divided.

Hart v. Davies, 28/303.

52. **Payment into Court.**]—Costs generally.

See PAYMENT, 14.

53. **Action and counterclaim—Payment into Court—Costs.**]—To an action for $709, balance of goods sold, defendant counterclaimed damage suffered to the extent of $450, by reason of plaintiff's non-fulfilment of his contract within the agreed time, and paid into Court $269 as enough to satisfy what remained of plaintiff's claim. He likewise set up a counterclaim as to the same amount, $450, being the difference between the price of the goods at the time plaintiff ought to have made delivery, and the price defendant was afterwards compelled to pay other persons:—

Held, the defence being no answer, plaintiff was entitled to recover his whole claim and costs. Defendant to recover and set off the amount of his counterclaim and costs.

Bauld v. Fraser, 34/178.

54. **Restitution of goods levied—Costs.**] Certain goods of defendant were taken under execution herein and on sale were bought by defendant.

The judgment on which the execution issued having been set aside on appeal and a new trial ordered, defendant applied for an order for restitution of the goods. There were several adjournments of the matter, and in the meantime the second trial took place and resulted in judgment for the plaintiff, who again issued execution and bought in the goods.

Held, that on the facts as they existed at the date of the application, defendant was entitled to succeed, but as plaintiff had by the second execution perfected his title to the goods, the order for restitution could not be made, but that defendant should have his costs of application.

Whitford v. Zinc, 30/193.

55. **Sheriff's fees.**]—See SHERIFF.

56. **Technicalities in summary action.**]—On an appeal from the decision of a County Court Judge, striking out pleas in a summary suit as bad in law, the Court held that fine pleading technicalities should not be entertained in summary matters, and allowed the appeal, but without costs.

Mantley v. Griffin, 25/117.

Power v. Pringle, 31/78.

57. **Security for costs—Insolvency—Presumption of suing for another.**]—Plaintiff brought action the day following his discharge from custody under the Indigent Debtor Act, having made a general assignment to his creditor of all his real and personal property. On an affi-

davit by defendant establishing these facts and swearing to a meritorious defence:—Held, that the presumption of suing for the benefit of another person was so strong against the plaintiff as to warrant an order that he give security for costs.

Ryan v. O'Neil, 21/286.

58. **Security for costs—Insolvency.**]—Plaintiff appealing, admitted having some time before made an assignment for benefit of creditors and that he had not now any assets, also that none of his creditors had been paid:—Held, he should be ordered to give security for costs of his appeal.

Quære, does O. 57, R. 13 apply?

Shand v. Eastern Canada Savings & Loan Co., 33/241.

59. **Insolvency.**]—Security will not be ordered on the ground of insolvency of the appellant, where it has only been shown that he has no personal property.

Dixon v. Dauphinee, 34/546.

60. **Security for costs — Bond.**]—An order directing security for costs, the bond "to be approved of by defendant's counsel," should be in that respect reformed.

Duyon v. LeBlanc, 34/215.

61. **Security on appeal—Appeal not prosecuted—Costs on motion to dismiss.**] An order had been made ordering defendant to give security for costs on appeal and staying the hearing until given. The cause was entered but not proceeded with, and on December 16th, notice of motion to dismiss for want of prosecution was given, to be heard on the 19th. The affidavits were filed on the 17th, before 11 a.m.:—

Held, that this was the proper practice, and that there was no rule requiring affidavits to be filed (except under the special rule in the case of awards and attachment, which seems to negative the necessity in other cases), before the motion is heard, unless there be not time to answer, in which case there should be a postponement.

Also, plaintiff having had reason to know that the appeal would not be prosecuted, on motion to dismiss, he was entitled only to costs of the motion, not of the appeal itself.

Knauth Nachod v. Stern, 30/295.

62. **Security for costs—Failure to comply—Practice.**]—Where an order requiring security for costs to be given within a certain time, "and in case default is made in giving security within the time aforesaid, the action be dismissed with costs," has not been complied with, the action is not dead ipso facto, because O. 63, R. 5, contemplates that "the Court or a Judge, on a special application for that purpose," may otherwise order. The proper practice is to move again ex parte to dismiss on non-compliance with the order for security. This, in contradistinction to the case of an action dismissible for want of prosecution under O. 27, R. 1, where the plaintiff being bound to deliver a statement of claim, an order may be had, by virtue of which the action expires on his failure to proceed.

A Judge, therefore, has jurisdiction to consider an application extending the time for furnishing security for costs.

Ordway v. LeBlanc, 33/185.

63. **Setting off costs.**]—A Judge, not necessarily the trial Judge, may make an order setting off the costs of one party on an interlocutory proceeding against the costs taxed by the other on final judgment in the Supreme Court of Canada.

Kearney v. Oakes, 24/63.

64. **Setting off actions.**]—N. recovered against H. in an action for excessive distress, the amount of the excess and damages. H. recovered against N. for goods sold and delivered. No costs were allowed either party, and the judgments were ordered set off, the holder of the larger to have execution for the difference.

Netting v. Hubley, 26/497.

Hubley v. Netting, 26/497.

65. **Setting off.**]—Costs of appeal on a minor point ordered set off against judgment against the successful party already rendered in the main action.

McLaughlin Carriage Co. v. Fader, 3-/534.

Dixon v. Dauphinee, 34/546.

66. **Barrister and Solicitor.**]—Acts of 1899, c. 27, s. 69. Rendering signed bill for costs and charges before action brought thereon. The section, relating to procedure, has a retroactive effect.

See BARRISTER AND SOLICITOR, 12.

67. **Client's costs.**]—The fact that a litigant has employed a solicitor who has not taken out a certificate as required by 1899, c. 27, s. 27, should not affect his right to costs.

Wallace v. Harrington, 34/1.

68. **Solicitor's lien for costs — As against attachment — Garnishee.**]—W. had been solicitor for P. in litigation with M., and had failed in the Supreme Court, but had succeeded on appeal to the Privy Council. The result was a judgment against M. for $1,400, representing costs only. Before W. could obtain a charging order under the statute, O. obtained a judgment against P., and garnisheed all debts due him by M. in M.'s hands.

W. had served no notice as to his lien, when on an application by O. that the garnishee be ordered to pay over the amount of the judgment, W. appeared, under O. 53, R. 6, and asserted his lien on the fund, which the Chambers Judge disallowed.

Held, per Meagher, J., Townshend, J., concurring, that "an attorney or solicitor cannot perhaps be said to have a lien upon a judgment recovered by him for his costs, in the strict technical sense in which the word lien is generally understood by lawyers. But he has what the Courts have regarded as the same thing, in effect, namely, to the interference of the Court, to protect his rights and secure the payment of his costs, through the medium of the fund recovered by his exertions." Also, because the attacher must be presumed to have been aware that the fund was subject to deduction for the costs of the solicitor who has conducted the litigation which has been successful, unless he has been guilty of some mala fides, or has stood by while the fund was being dealt with to the prejudice of others. And an attacher's rights are no greater than those of the judgment debtor. O. 63, R. 11, also recognizes the existence of the lien for solicitor's costs.

Per Ritchie, J., dissenting, the lien extends only to the costs of recovering the judgment, and is not general.

Palgrave v. McMillan, 31/488.

69. **Judgment for solicitor's costs — Quaere,** can judgment (on a specially endorsed writ) be entered for solicitor's costs before such costs have been taxed?

Smith v. Horton, 23/255.

70. **Notice of taxation.**]—O. 63, R. 13, which requires one day's notice of taxation of costs does not mean one clear day. Notice given before 7 p.m. is good for 11 o'clock next morning. And O. 68, R. 8, as to estimating time applies, notwithstanding the plural form of term "any particular number of days."

Barowman v. Fader, 31/29.

71. **Re-taxation of costs—C. 36 Acts of 1885,** creating the office of taxing master, does not affect the right to re-taxation before a Judge (O. 63, R. 23).

On appeal from such a re-taxation, the Court will only interfere in an extreme case, the discretion of the Judge being ample.

Palgrave Gold Mining Co. v. McMillan, 31/198.

COUNSEL, APPEARANCE BY.

See PRACTICE, 5.

COUNTERCLAIM.

See PLEADING, 21.

COUNTY COURT.

Jurisdiction, 1.
Practice, 17.

1. **Disqualification of Judge — County Court Act.**]—The County Court Act provides that whenever a Judge is disqualified from acting "by reason of sickness, disability, absence by leave or other cause," he may call in another Judge:—Held, that the words "other cause" are not to be construed by the strict rule of ejusdem generis, and that a Judge has a right for his own protection, to take judicial notice of matters affecting or involving his jurisdiction, and he may refuse to act if disqualified within his own knowledge, and without evidence from other sources.

Belden v. Chapman, 21/100.

2. **Whether distinct tribunals** in different districts—Affidavit headed "In the County Court" without specifying district—Amendment.

See AFFIDAVIT, 2.

3. **Distinct tribunals.**]—A writ issued out of the County Court for District No. 1, returnable in District No. 4 is bad, and should be set aside.

Morrison v. Corbett, 21/369.
Morrison v. Stewart, 22/1.

4. **The Judge** of the County Court for District No. 1 has full jurisdiction to set such a writ aside.

Morrison v. Corbett, supra.

5. **Statutory Court—Limits of jurisdiction.**]—Plaintiff brought action against S. in the County Court, to which S. pleaded a defence and counterclaim. Before final judgment S. died, and on application ex parte by plaintiff, his administrators were substituted as defendants under O. 17, R. 4, 5. They did not appear or plead, and plaintiff moved for and entered judgment against them as administrators, without proving his claim under O. 34, R. 22, or taking means to dispose of the original defence and counterclaim filed by S.

Considering that by their default defendants had admitted assets in the estate, which he failed to find by execution, plaintiff now brought action in the Supreme Court, on the record of the County Court, against defendants personally, alleging a devastavit:—

Held, that the judgment of the County Court, the basis of this action was illegal and without jurisdiction according to its constitution and practice.

Per Meagher, J.: "The record must be examined and tried by itself. . . . It must be borne in mind that the judgment was pronounced by a statutory Court, a Court not proceeding according to the common law, and that the nature and extent of its jurisdiction as well as the practice prevailing in that Court are well known to us, and of which we may take judicial notice. It is therefore incumbent on us to inspect that record and determine therefrom and from our knowledge of the practice and jurisdiction of the Court from which that record comes whether that Court had jurisdiction to pronounce it. . . . The record before us is no more conclusive than the record of that Court would be, if upon its face it disclosed that in an action to recover $250—a sum within its jurisdiction—the Court gave judgment for $1,000, a sum beyond its jurisdiction."

Per Ritchie, J.: "The County Court is an inferior Court of record with a limited jurisdiction created by statute which defines the jurisdiction and prescribes the practice, and it does not proceed according to the course of common law. The record of such a Court is bad if it does not show jurisdiction, or if it appears from something set out on the record that the decision was wrong."

McDonald, C.J., agreed that the judgment of the County Court was irregular and void.

Per Graham, E.J., dissenting, the defendants were in the same position as if served with a writ of summons, and not having appeared were liable to have judgment pass against them under O. 13.

Stewart v. Taylor, 31/503.

6. **Jurisdiction — Reduction of claim below.**] — Appeal allowed from a judgment in favor of plaintiff for $80, balance of an account stated, where part of the amount was shown to represent compound interest wrongly charged, deduction of which would reduce the claim to

an amount below the jurisdiction of the trial Court.

Hart v. Condon, 22/334.

7. **Jurisdiction — Claim under $20.**] — Plaintiff sued for $117. It appeared that defendant had given plaintiff in part payment, a draft on R., which plaintiff had taken no pains to collect, and had not returned to defendant until recourse on R. had gone, owing to his departure from the Province. The Court holding that the plaintiff by his conduct had made the draft his own, and consequent payment before action brought to the extent of its face, $100, the amount remaining, $17, was below the jurisdiction of the Court, but the part payment not having been specially pleaded, the defendant could not avail himself of the point. (Per Ritchie, J., Graham, E.J., concurring, McDonald, C.J., and Meagher, J., not deciding the matter of pleading.)

Hart v. McDougall, 25/38.

8. **Jurisdiction—Joining claims in the aggregate beyond.**]—The summons in this action included four district claims each by itself within the jurisdiction of the County Court, but aggregating an amount beyond. Each claim was separately set out in an affidavit for attachment:—Held, that the action was within the jurisdiction, under the County Court Consolidation Act, 1889, c. 9, s. 34.

Harris v. Morse, 29/105.

9. **Claims separately below.**] — Defendant was indebted to plaintiff in two separate amounts, $10 and $15, for insertion of an advertisement in two separate publications:—Held, that the two claims united exceeding $20, the matter was within the jurisdiction of the County Court.

Sharp v. Power, 33/371.

10. **Jurisdiction—Penalty for bribery.**] —An action to recover a penalty for bribery is clearly a civil, not a criminal proceeding, and may be brought in the County Court, though that Court has (1889) no criminal jurisdiction.

Morrison v. Stewart, 22/1.

11. **Jurisdiction — Certiorari.**] — The local Legislature has no power to confer jurisdiction or to legislate at all in reference to proceedings taken under the Canada Temperance Act, a Dominion Act.

The authority which the Legislature has conferred on the County Court, to grant writs of certiorari must of necessity be limited to those matters over which it has power to legislate.

Queen v. DeCoste, 21/216.

12. **The County Court has no general or original jurisdiction** to grant certiorari but only where it has been specially conferred by statute, as for instance in connection with the liberty of the subject, under c. 117, R.S. 5th Series. Nor will an intention of the Legislature to confer such jurisdiction be inferred from sections of statutes indicating that the Legislature at the time was acting on the erroneous belief that the Court possessed it already.

Writ of prohibition granted to restrain the County Court Judge from proceeding.

Ross v. Blake, 28/543.

13. **Criminal Jurisdiction** of County Court.]

See CRIMINAL LAW, 31.

14. **Election petition—Jurisdiction.**]—A Judge of the County Court sitting in Cape Breton County, set aside the election of a municipal counsellor for the County of Richmond:—Held, that he had no jurisdiction to do so, and on appeal, his decision was set aside, and the matter remanded back for trial de novo.

Catherine v. Morrison, 21/291.

15. **Equitable execution.**]—The County Court has power to grant equitable execution by the appointment of a receiver. Cf. Acts of 1889, c. 9, ss. 20, 22, 26, 28 and 29.

Imperial Bank v. Motton, 29/368.

Barrowman v. Fader, 32/284.

16. **Habeas corpus.**]—The County Court has no jurisdiction to grant the writ of habeas corpus. It has concurrent jurisdiction with the Supreme Court under the Liberty of the Subject Act.

Re Edwin G. Harris, 26/508.

17. **Further evidence on appeal.**]—O. 57, R. 5, which permits the Court to hear further evidence on appeal, is limited to actions which have originated in the Supreme Court.

Hickman v. Baker, 31/208.

18. **Land**—Agreement for sale—Mutual and dependent covenants—Question of title—Whether within the jurisdiction.

See LAND, 7.

19. **Overholding proceeding.**]—There is no appeal from the decision of the County Court in an application for a warrant of possession against a tenant for overholding, under s. 62 of the County Court Consolidation Act, c. 9, Acts of 1889, that proceeding not being an "action," within the meaning of the interpretation clause of the Judicature Act, which is the proper guide to the meaning of the word, when used in the County Court Act.

Hill v. Hearn, 29/25.

(NOTE.—Now see interpretation clause County Court Act, R.S. 1900.)

20. **No appeal.**]—Matters as to which there is no appeal from County Court.

See APPEAL, 2.

21. **Rescinding order made inadvertently.**]—Defendant moved ex parte and obtained an order dismissing an action for want of prosecution. Plaintiff applied to restore the action, and the Judge made an order rescinding the above order on the ground that it was made inadvertently. From this defendant appealed:—Held, under the amendments to the County Court Act, 1889, 1891, c. 15, s. 2, a Judge has power to rescind his order. Ritchie, J., dissenting. Per Graham, E.J., concurring, unless it be in pursuance of a judgment rendered.

Smith v. Horton, 26/41.

22. **Rescinding judgment and hearing further affidavits.**]—After hearing an application for security for costs the County Court Judge reserved his decision. Before it was rendered, notice was served of an application to read further affidavits in support of the motion. Before this application could be heard the Judge filed his decision, dismissing the application for security:—

Held, that the second application had become abortive, as there was no longer a matter pending.

On a subsequent renewal of the motion for security for costs, the Judge re-opened his decision:—Held, Ritchie, J., dissenting, that he had power to do so, and that the matter was one within his discretion, from which there was no appeal.

Snyder v. Arenburg, 27/247.

23. **Setting aside verdict.**]—Notwithstanding Acts of 1891, c. 15, s. 2, a Judge of the County Court, in setting aside the verdict of a jury, is to be governed by the same rules which apply to the like case in the Supreme Court.

Grant v. Booth, 26/171.

24. **Stay of proceedings in County Court—Removal of inquiry.**]—Plaintiff in another action had succeeded in obtaining a decree for the reconveyance by defendant M. of certain lands held in trust. Before the reconveyance was made, defendant L., colluding with defendant M., purchased at small cost a judgment against plaintiff, and applied to the County Court for leave to issue execution thereon against the lands in question.

This action was, amongst other things, for a declaration that L. held such judgment in trust for plaintiff, and pending trial to stay his application to the County Court. On motion for injunction:—Held, as there was some doubt as to the jurisdiction of the County Court to entertain such an enquiry as the present, or to grant full relief, and as all the parties were not before that Court, and as the balance of convenience was in favor of the Supreme Court as a forum, L. should be enjoined from proceeding with his application to the County Court.

Clattenburg v. Morine, 30/221.

Cf. PRACTICE, 22.

25. **Trial ex parte—Practice.**]—When an appeal from the decision of a stipendiary magistrate was called in the County Court, the appellant was not present, and the respondent called witnesses and took judgment:—

Held, that this practice in the County Court would have been proper as following that of the Supreme Court, but for the Act of 1889, c. 9, s. 54, which directs that in such a case motion for judgment shall be made on the last day of the term. Appellant, however, agreeing to go to trial on the merits, no costs allowed except that of printing.

Fillis v. Conrod, 30/441.

COVENANT.

Running with the land.]

See DYKELANDS, 2, LEASE, 5.

To pay taxes.]—See LAND, 6, LEASE, 5.

To repay mortgage loan.]

See MORTGAGE, 3.

Warranty of title.]—See DEED, 1.

CRIMINAL LAW.

1. **Instructing Grand Jury.**]—A Judge has no power to order that depositions taken abroad under Statutes of Canada, c. 37, s. 23, shall be read before the Grand Jury. The Grand Jury has a right to judge of what material it will use, which may not be inquired of by the Judge. (McDonald, C.J., contra.)

Queen v. Chetwynd, 23/332.

2. **Jury attending church—Remarks in sermon.**]—During progress of a trial for murder the jury, under the charge of a deputy sheriff, attended a church service. As part of his sermon on the "Prodigal Son," the preacher recognizing the presence of the jury, said that "though he realized that it was not for him to instruct them in the matter, yet he felt it was his duty to remind them that unless they were clearly satisfied of the guilt of the prisoners their judgment should be tempered with equity":—

Held, that the irregularity was not sufficient to nullify the verdict afterwards rendered. The remarks were in the interest of the prisoners, but if it could be shown that their interests were in anywise prejudiced, the proper recourse was to executive clemency.

Queen v. Preeper, 22/174, 15 S.C.C. 401.

3. **Legislative powers—Grand Jury.**]—The Provincial Act of 1898, c. 38, reduced the number of grand jurors necessary to a panel from 24 to 12; and the number necessary to return a true bill from 12 to 7.

A conviction having been made on a bill found by a panel where only 10 of the 12 summoned attended and were empanelled:—Held, quashing the conviction, that under the British North America Act, the Province may fix the number of jurors necessary to form a panel, that being a matter connected with the constitution of a criminal Court (Townshend, J., not deciding, Henry, J., dubitante);

But may not fix the number of that panel necessary to find a true bill, that being a matter of criminal procedure, and as such exclusively of federal jurisdiction.

Queen v. Cox, 31/311.

4. **"Offence" against Provincial law.**]—Information was laid against the defendant for writing a letter to M., threatening to accuse him of an "offence" against the Liquor License Act, a Provincial Act, with intent to extort money. On motion for a writ of prohibition to prevent a magistrate from hearing the information:—Held, that the word "offence," as used in the Criminal Code, s. 406, includes breaches of Provincial law.

Queen v. Dixon, 28/82.

5. **Boy under 14—Unnatural offence—Code 10.**]—As at common law, so since the Code, a boy under 14 cannot commit

rape, or an unnatural offence on the person of another boy.

Per Ritchie, J., Code 10 refers to mental ability to distinguish between right and wrong, not to physical ability to commit crime.

But if the offence was committed against the will of the other boy, the prisoner was guily of an assault under Code 260.

Queen v. Hartlen, 30/317.

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6. **Failure to provide — Code 210 — Words "likely to be permanently injured."**]—The evidence showed that the prisoner, being regularly in receipt of wages amounting to $6 per week, had refused to provide for his wife, who was pregnant, and so incapacitated from work. On a case reserved:—Held, sustaining conviction, that this was evidence on which a Judge might find that the wife was "likely to be permanently injured," and that those words appearing in the Criminal Code, have no technical meaning, and in each case, the question of their application is one of fact.

Queen v. Bowman, 31/403.

7. **Decision of like tenor** in, Queen v. McIntyre, 31/422.

8. **Keeping bawdy house—Continuous offence.**] — Defendant was convicted by the stipendiary magistrate of the city of Halifax, of the offence of "keeping a disorderly house, that is to say, a common bawdy house, on the 21st April, 1901, and on divers other days and times during the month of April, 1901," and in default of fine paid was imprisoned with hard labor.

To an objection taken on motion for habeas corpus:—Held, that the words used indicated one continuous offence, not several separate offences.

(NOTE.—The Court refused to hear objection based on proceedings in the Court below, prior to conviction. Subsequently, on a renewal of the application, and on production of the record, Weatherbe, J., discharged the defendant. 4 Can. Crim. Cases 495; 37 Can. Law Times 858—Reporter.)

The King v. Keeping, 34/442.

9. **Larceny—Defective specification.**]—The prisoner was convicted of larceny after trial under the Speedy Trial Act. The warrant on which he was tried set out "that he did feloniously, break into the factory of R. T. and did steal, take, and carry away (certain goods) of the value of $20."

On a case reserved:—Held, that the conviction was bad by reason of the omission of the word "feloniously" in connection with the stealing, etc., the offence for which he was convicted.

Per Ritchie, J., dissenting, that it was not necessary to use the word "feloniously" twice, as the charge should be considered one count.

Queen v. Inglis, 25/259.

10. **Obtaining under false pretences—Sufficiency of proof.**]—The defendant was foreman of work on roads, and certified to the inspector A. that certain persons had worked under him and were entitled to pay. He also produced orders for this pay purporting to be signed by those persons, but which in fact were not genuine. The inspector A. delivered the money to D., his agent, with instructions to pay it to the defendant if satisfied of the genuineness of the orders. On an indictment for obtaining money under false pretences from D. the defendant was found guilty, and a case was reserved for the opinion of the Court as to whether (1) there was evidence of false pretence to D., (2) whether the indictment should not have set forth false pretence to A.:—Held, the conviction was proper.

Queen v. Cameron, 23/150.

11. **Obtaining goods under false pretences—Pretences too remote—Meaning of term "owner" of a ship.**]—Case reserved on the conviction of defendant for obtaining goods and money under false pretences, by representing himself to be owner of a vessel, whereas at the time he had transferred ownership to another person who had again transferred to defendant's wife. The representation that he was owner to the prosecutor, was made some three or four months before, and was by appending the style

"owner" to his signature to a letter in relation to another matter:—

Held, Ritchie and Meagher, JJ., dissenting, that the pretence was too remote to warrant a conviction. And that the term "owner" has no definite meaning in law, and does not mean "registered owner" of a ship.

Queen v. Harty, 31/272.

11a. **Must relate to existing matters.**]—To render a defendant liable, his false representation must have been with regard to a past or existing matter, not to a future undertaking, as that he will pay for goods on a certain day.

Mott v. Milne, 31/372.

12. **Railway station—Stealing "in or from"—Code** 351.]—On motion by habeas corpus for the discharge of a prisoner convicted summarily by the stipendiary magistrate of Halifax, under s. 351 of the Code, for that he "did steal nine bottles of whisky . . . in or from a certain railway building":—Held (Weatherbe and Meagher, JJ., contra), that the conviction was not bad as referring to two distinct and separable offences, depending on whether the words "in" and "from," as used in the section, are synonymous. Cf. Code 752, 798, 800, 955.

The King v. White, 34/436.

13. **Receiving with intent to defraud—Code** 368—**Assignment.**]—Defendant, who had been legal adviser to C. & Co., and was their assignee under an assignment for the benefit of creditors containing preferences, was convicted under Code 368 for receiving among the assets of C. & Co. a certain boiler and engine, with the knowledge that C. & Co. had, before making the assignment, promised to give the makers thereof a lien for a balance of the purchase price.

On a case reserved:—Held, per Townshend, J. (McDonald, C.J., concurring, Ritchie, J., dubitante), "There is nothing in our law to prevent a debtor from assigning all his property to a trustee for the benefit of his creditors, even though he make such preferences as will practically cut out all but those preferred from getting any benefit. It may be fraudulent and void under the Statute of Elizabeth, and yet not amount to the offence created by this section. I do not think on such evidence even C. & Co. could be rightly convicted. It evidently contemplates such an abstraction, or doing away with property, as, if carried out, would completely rob the creditors, or any of them, of any benefit whatever. At least, I think we should so construe a statute, making that an offence which borders so closely upon civil rights and remedies. It is perhaps somewhat difficult to draw the line precisely—to say exactly where, and under what circumstances, fraudulent dealing with property becomes an offence under this statute, but I feel justified in arriving at this conclusion, that an assignment to a trustee, even with preferences, where the property has been handed over to the trustee in accordance therewith, is not a violation of it, even if made by the debtor in breach of prior agreements to prefer other creditors."

(NOTE.—Decided April 14th, 1895.)

Per Henry, J., Graham, E.J., concurring, that the conviction was bad as based on the promise to give security, because no mere non-performance or breach of a promise constitutes a fraud.

Also, becoming a party to a breach of the Statute of Elizabeth, creates liability under Code 368.

Quaere, might not the complaining creditor have followed his right to a lien against the assignee; or might he have succeeded in an action to have the assignment set aside as fraudulent under the Statute of Elizabeth?

Queen v. Shaw, 31/534.

14. **Threatening letter—Comparison of handwritings—May be made by jury.**]—On trial of the accused for sending a threatening letter to the prosecutor, the learned Judge in charging the jury, after all the evidence was in, allowed them to compare the threatening letter with one admitted to have been written by the accused, and which had been put in evidence by the defence on a former trial, and to draw their own conclusions as to the identity of authorship.

On a case reserved:—Held, that all that is necessary to enable a jury to compare a disputed with an admitted writing is that the two should be in evidence for some purpose in the cause, and that a document having been once received, is before the Court for all purposes at every subsequent stage of the proceeding, without being tendered a second time.

Per Weatherbe and Henry, JJ., dissenting, that in the absence of proof of handwriting the letter was improperly submitted.

(NOTE.—The majority were, however, of opinion that there was ample proof of guilt, apart from any result reached by the comparison of the letters.)

Queen v. Dixon, 29/462.

15. **Estreating recognizances — Crown Rules.**]—C. having failed to appear when called to answer a charge under the criminal law of Canada, his recognizances were declared forfeited, and an order passed estreating the same. No notice was given to the sureties as required by Rev. Stat. Can., c. 179, s. 12, and Crown Rules (1889) 84 and 86 (Code 919):—

Held, setting aside the order, that the Crown Rules apply to recognizances taken under the Criminal Procedure Act, and must be complied with. Also, the passing of those Rules was within the powers of the Judges under the enabling legislation of the Parliament of Canada.

Queen v. Creelman, 25/404.

16. **Habeas corpus—Writ of error.**]—A prisoner on conviction was sentenced to two years imprisonment in the county jail, and application was made by habeas corpus to review the sentence as illegal, in the Supreme Court:—Held, discharging the rule nisi that after conviction by a Court of superior criminal jurisdiction, habeas corpus does not apply (In re Sproule, 12 S.C.C. 140, followed), and that the only recourse is by writ of error. Further (Weatherbe, J., dubitante), that the Supreme Court has undoubted jurisdiction to entertain such a proceeding, not only expressly and impliedly by statute, but also as sharing in criminal matters, the original common law jurisdiction of its prototype, the Court of Queen's Bench in England. And that the convicting and reviewing tribunal was theoretically one and the same Court, was not an objection.

(NOTE.—Now, however, see Criminal Code 743.)

In re D. C. Ferguson, 24/106.

See also 24 post.

17. **Habeas corpus — Costs — Jurisdiction.**]—A prisoner convicted summarily of theft by a stipendiary magistrate, having been discharged by a Judge of the County Court as a Master of the Supreme Court, on the ground that he had not consented to be so tried, an order was made directing costs against B., alleged to have been the informer and prosecutor:—

Held, that as the record of conviction did not disclose it, and as there was only the prisoner's affidavit to show that B. was informer and prosecutor, the order as to costs was bad.

This being so, B. was not bound to have appeared to the rule nisi, under which prisoner was discharged, nor were the magistrate and jailor, also served.

Quaere, had the County Court Judge jurisdiction?

Queen v. Bowers, 34/550.

18. **Information need not be sworn.**]—An information on which a summons issues for an offence triable summarily (e.g., under the Canada Temperance Act), need not be under oath. Nor unless a warrant afterwards issues for the arrest of the defendant.

Queen v. Wm. McDonald, 29/35.

19. **Indictment — Words "against the form, etc," omitted.**] — An indictment charging the crime of breaking and stealing, in due form, but not concluding with the words "against the form of the statute in such case made and provided, and against the peace of Our Lady the Queen, her Crown and Dignity," is sufficient.

Queen v. Doyle, 27/294.

20. **Indictment—Not indorsed "a true bill."**]—Section 760 of the Code provides that in this Province a calendar of the

criminal cases shall be sent by the clerk of the Crown to the Grand Jury, in each term, together with the depositions taken in each case, etc., and no indictment, except in the County of Halifax, shall be made out until the Grand Jury so directs. In this case the indictment was indorsed with the name of the cause and with the name of the foreman of the Grand Jury, and over the name of the foreman the words, "indictment for assault on a peace office, and for resisting and preventing apprehension and detainer." The words "a true bill" did not appear:—

Held, that inasmuch as the indictment could not exist until found by the Grand Jury, and drawn up by its direction, nothing but "a true bill" could be presented, consequently, the words "a true bill" were unnecessary. (Townshend and Meagher, JJ., dissenting.)

Semble, it is otherwise in the County of Halifax.

Queen v. Townshend and Whiting, 28/468.

21. **Indictment—Witnesses' names not initialed.**]—By s. 645 of the Code, the name of every witness examined or intended to be examined shall be indorsed on the indictment and initialed by the foreman of the Grand Jury. By s. 760, in the Province of Nova Scotia outside of Halifax, no indictment shall be prepared until directed by the Grand Jury. In this case, originating outside of Halifax, the names of the witnesses appeared on the indictment, but were not initialed by the foreman of the Grand Jury:—

Held, that the intention of s. 645 was that the names of the witnesses to be examined should be supplied to the Grand Jury by being indorsed on the indictment, and the initialing was for the purpose of showing which of them had been examined prior to the finding of the bill. That s. 760, under which, outside of Halifax, no indictment could be prepared beforehand, it was unnecessary to show by initialing which of the witnesses had been examined, though it might be necessary that the names should be indorsed thereon, and that the names appearing in the document of record by which they had been conveyed to the Grand Jury should be initialed to show which of them had been examined.

Townshend and Meagher, JJ., dissenting.

Semble, the usual practice applies to the County of Halifax.

Queen v. Townshend and Whiting, 28/468.

22. **Prosecuting attorney—Power to prefer an indictment.**]—The Act of 1887, c. 6, s. 2, provides that the Attorney-General shall appoint a competent barrister at each sittings in each county by instructions under his hand, which, on presentation to the presiding Judge, "shall, in the absence of the Attorney-General, be a sufficient authority for any barrister to take charge, on behalf of the Crown, of criminal business, and to conduct the trial of criminals in any sittings or term."

At the opening of the term W., a barrister, produced a written authority under this section, general in its terms, and not entitled in any particular case.

In charging the Grand Jury in the case of the defendant Whiting the presiding Judge, of his own motion, directed them that it was their duty to find a bill against the defendant Townshend, whereupon W. preferred a bill upon which the defendant Townshend was tried and convicted.

On a case reserved, which did not state that this was ordered by the Court:—Held, that the conviction of the defendant Townshend must be quashed. The delegation by the Attorney-General of power to prefer an indictment must be special, and relate to a particular case. The conviction of the defendant Whiting to stand, he not having been prejudiced by being tried with defendant Townshend.

Queen v. Townshend and Whiting, 28/468.

23. **Authority to prefer indictment.**]—Defendant was committed for trial on a charge of assaulting W., who was bound over in regular form to prosecute. At the next term the Grand Jury found an indictment. W. was not present, and

was not examined as a witness. The Attorney-General was not present, and no one had any special directions from him to prefer an indictment. The point was reserved as to whether the indictment should not be quashed as not preferred by anyone authorized under Code 641. Under the Provincial Act of 1887, c. 6, crimes such as that for which defendant was indicted, are prosecuted by an officer appointed by the Attorney-General at each term of the Court, or in default of such appointment, by the Court:—

Held, per Townshend and Ritchie, JJ. (McDonald, C.J., concurring), that under these circumstances the presence of the prosecutor was not necessary, and no special direction from the Attorney-General, or written consent of the Judge, or order of the Court was necessary to make the indictment valid.

Quaere, does Code 641 apply elsewhere in the Province than in Halifax County?

Per Weatherbe, J., and Graham, E.J. (Henry, J., concurring), that the indictment not having been preferred in accordance with s. 641, the conviction was bad and should be quashed.

Queen v. Hamilton, 31/322.

24. **Order made out of term—Nullity—Recourse—Abuse of process.**]—A bill was preferred against the defendant, at a criminal sittings, which the Grand Jury ignored. Thereupon an application was made to the presiding Judge for an order directing the prosecutor to pay costs. Judgment was reserved, and on the 8th October the Court adjourned sine die. On the 10th the Judge filed a memorandum stating that he granted the application, and accordingly made an order dated the 8th. Prosecutrix appealed:—

Held, per Meagher, J. (Ritchie, J., concurring), there being no appeal in criminal matters except as provided by statute, there was no jurisdiction in the Court, inherent or otherwise, to enable it to entertain the matter. If, however, the order was properly made, the delay between the 8th and 10th being occasioned by the act of the Court, the parties should not be prejudiced, and it properly read nunc pro tunc.

Per Graham, E.J. (Henry, J., concurring), the order was bad, even if made in a civil case, there being no judgment of the date it bore, and there being no special circumstances to warrant an order nunc pro tunc.

That the Court retains all original or inherent powers in criminal matters of the old Court of Queen's Bench, not specially divested by statute, and (following In re Sproule, 12 S.C.C. 140), should set aside such an order, on which execution might issue, to prevent an abuse of process.

Queen v. Mosher, 32/139.

25. **Reserving case — Deductions from evidence.**]—A Judge of the County Court having convicted a prisoner of larceny, reserved questions as follows, for consideration of the Court:—

(a) Whether or not there was any legal evidence to support the conviction?

(b) Whether he was justified in drawing from the facts stated, a presumption sufficiently strong to justify him in finding a judgment of guilty?:—

Held (viewing the facts, Weatherbe, J., contra), that the first question might be answered in the affirmative. But as to sufficiency, or the deductions to be drawn from the evidence, there was no question properly before the Court, such being for the trial Judge taking the place of a jury. New trial ordered under Code 746.

Semble, the Judge having thrown doubt on the propriety of his deductions, there was a mis-trial.

Queen v. McCaffery, 33/232.

26. **Case reserved--Insufficiently stated.**]—Case quashed where no facts or evidence were furnished upon which the question of law reserved could be based.

Queen v. McKay, 34/540.

27. **Reserving case—Stipendiary magistrate** of the city of Halifax has no power to reserve a case tried summarily before him except under s. 900 of the Code.

Queen v. Hawes, 33/389.

See also 37 post.

28. **Sentence—Juvenile offender—Can. Stat. 1890, c. 37—"Faith."**]—Reading 810

with 820, on the conviction of a juvenile offender for theft, and his commitment to an institution, it is not necessary that the conviction should show that he is under the age of 16 years. The fact that the magistrate has proceeded under 810 shows that the magistrate was of opinion that the prisoner was of suitable age, and 820 dispenses with the necessity for his recording his opinion.

Acts of Canada 1890, c. 37, s. 34 (Code 550), allows such a boy of "Protestant faith" on a conviction for an offence rendering him liable to imprisonment, to be committed to the Halifax Industrial School for a period not exceeding five years:—Held that the matter of "faith" need not be inquired of prior to conviction, as it only concerns the place of imprisonment.

Queen v. Herbert Brine, 33/43.

29. **Alternative penalties—Enforcement of fine — 872.]** — Defendant was found guilty under Code 501 of wilfully killing a dog, and sentenced under that section to pay a fine, or in default thereof, to imprisonment with hard labor:—

Held, the conviction was bad. Under that section of the Code, either fine or imprisonment might be awarded, but not both, nor might the fine be enforced by imprisonment, for which purpose the magistrate should have had recourse to 872 (b), which deals with the enforcement of fines. Undertaking not to prosecute imposed as a condition. No costs.

Queen v. Horton, 31/217.

(NOTE.— See Amendment Act of 1900.)

30. **Warrant not indorsed for county.]** —In an action for illegal arrest and imprisonment, alleged to have been made under a warrant which was bad because not indorsed for execution in the county where the arrest was made, it is open to the defendant to show that he acted under Code 25, the offence charged having been one for which no warrant was necessary. And the trial Judge having excluded evidence to this effect, a new trial was ordered.

Jordan v. McDonald, 31/129.

31. **Charge — 1889, c. 47.]** — Semble, under the Speedy Trials Act a formal written charge, to which the defendant may plead as to an indictment, had best be presented. (Code 767.)

Queen v. Inglis, 25/259.

32. **Separate charges—Verdict must be rendered at conclusion of each.]** — A prisoner was tried under the Speedy Trials Act on four distinct, but similar, charges of theft. At the conclusion of the first, second and third, the Judge of the County Court reserved his verdict until all should have been tried, preferring to hear all the evidence. He then found the prisoner guilty of all four. On a case reserved:—

Held, that the convictions were bad. The prisoner was entitled to be tried, and to be tried only, on the evidence given in relation to a particular charge on which he is then indicted, to the exclusion of all extraneous matter which might affect the mind of the Judge.

Per Henry, J., because such a course is a departure from immemorial practice for which no authority can be found.

Queen v. McBerny, 29/327.

33. **Where no commitment—Jurisdiction.]**—The prisoner was arraigned before the County Court on a charge of larceny, and having elected to be tried under the Speedy Trials Act, was acquitted. The prosecuting counsel then asked leave to prefer another charge under s. 12 of the Act, and upon the prisoner consenting to be tried was convicted (Code 773):—

Held, on a Crown case reserved, that having been acquitted of the charge for which the commitment read, he was entitled to his discharge and was no longer in custody, consequently he could not be tried on a fresh charge for which there was no commitment, and that the Judge so trying him was without jurisdiction, as such cannot be conferred in criminal matters by consent.

McDonald, C.J., dissenting.

Queen v. Lonar, 25/124.

Queen v. Smith, 25/138.

34. **Noticed and approved in,**

Seary v. Saxton, 28/289.

35. **Speedy Trials Act applies only to persons "committed."**]—On the hearing of an information for an assault on a peace officer, the magistrate held the accused to bail, which was furnished, but neglected to commit him for trial (Code 596). After trial and conviction by the County Court under the Speedy Trials Act (Code 765), motion was made to quash the conviction:—

Held, that as the provisions of the Code 765 only applied to "persons committed to jail for trial," the conviction was bad, and the County Court without jurisdiction.

Queen v. James Gibson, 29/4.

36. **Approved and followed** where the circumstances of commitment were precisely similar, but the accused was rendered back into custody by his sureties, and thereupon brought before the County Court Judge under the Speedy Trials Act.

Queen v. Smith, 31/411.

(NOTE.—Now see Code 765 as amended by the Act of 1900.)

37. **Limits of appeal.**] — There is no appeal to the Supreme Court from criminal trials before the County Court Judge but by way of a case reserved, and that Judge cannot reserve a case or submit any question depending on the facts or the weight of evidence, which must be decided by him alone taking the place of a jury.

Semble, unless the Attorney-General shall consent.

Queen v. McIntyre, 31/422.

See also 27 ante.

38. **Waiver as to jurisdiction.**] — Per Townshend, J., Henry, J., contra, the rest of the Court expressing no opinion, an accused who elects to be tried before the County Court, loses his right to object to the territorial jurisdiction of the magistrate who committed him for trial.

Queen v. Brown, 31/401.

39. **Criminal intent—Similar acts.**]—On trial of a charge of theft accomplished by a peculiar method of presenting a bank bill of large denomination in making a small purchase, and managing to receive back too much change.—Held, that evidence of a similar practice in other cases was receivable to show criminal intent.

Queen v. McBerny, 29/327.

Cf. EVIDENCE, 22.

40. **Dying declaration.**]—On trial of an indictment for murder, the Crown offered as a dying declaration of the deceased, testimony of a witness as follows:—"He said he was shot." I said, "Do you really say you are shot?" He said, "I am shot in the body. I am going fast." I said, "Can't you take my arm and I will take you away?" He said, "I can never walk again." I said, "For God's sake who shot you?" He said, "Henry Davidson shot me. God help him. I hope he will not be hanged for it":—

Held, that the evidence indicated such a complete expectation of death as rendered it admissible as a dying declaration. And that a subsequent proposal by the deceased to send for a doctor was not necessarily inconsistent with the idea that all hope was gone.

Queen v. Davidson, 30/349.

41. **Qualification of expert witness.**]—On trial of an indictment for murder a physician, called as an expert witness, having testified that "there are indicia in medical science from which it can be said at what distance small shot were fired at the body. I have studied this—not personal experience, but from books;" stated that the gun in this case had been held at a distance of from twenty inches to three feet.

On a case reserved as to his capacity in this behalf:—Held, McDonald, C.J., dissenting, that having prima facie established his qualification, it was for the defence to test it by cross-examination or evidence in rebuttal.

Queen v. Preeper, 22/174, 15 S.C.C. 401.

Cf. EVIDENCE, 51.

42. **Res gestae—Proof of witness contradicting former testimony—Secondary evidence.**]—Defendant was arrested, tried and convicted of an assault causing

bodily harm on S., but execution of sentence was respited, pending determination of a question reserved.

At the trial the defendant sought to prove by one who was present at the preliminary hearing before a magistrate, that one of the principal witnesses for the prosecution had then given evidence at variance with his evidence now given, as to conversation between the principals which lead up to the assault; which mode of proof the trial Judge refused to permit. The depositions taken by the magistrate had been lost:—

Held, ordering a new trial, per Henry, J. (Graham, E.J., concurring), and Townshend, J., that the evidence should have been admitted on proof that the deposition was lost, not as secondary evidence of the deposition, but as a substituted mode of proof of what the witness had said.

Per Ritchie, J. (McDonald, C.J., concurring), that the testimony might be given under Code 700, without reference to the deposition.

Also, that the evidence sought to be introduced was part of the res gestae.

Queen v. Troop, 30/339.

Cf. MALICIOUS PROSECUTION, 2.

43. **Wife failing to testify—Comment by prosecuting attorney.**]—On trial of an indictment for theft, the prosecuting counsel, no doubt inadvertently, referred to the failure of the accused to produce his wife as a witness:—

Held, on a case reserved, that this was an infraction of the Act (1893, c. 31, s. 4), which permits a wife to testify, and there must be a new trial.

Queen v. Corby, 30/330.

CROWN.

Prerogative — Non-feasance of public officer.] — In an action by the Crown against the surety of a defaulting Government Savings Bank agent, the defendant set up that it was the duty of the Minister of Finance to have caused inspections, etc., which he had not done. On demurrer to this plea as bad in substance:—Held, that both on grounds of prerogative and of public policy, the Crown in asserting its rights is not to be prejudiced by the neglect of its servant.

Queen v. Chesley, 23/552.

CROWN CASE RESERVED.

See CRIMINAL LAW, 25.

CROWN RULES.

1. **Rule nisi.**] — Proceedings on the Crown side must be rule nisi, not by notice of motion. The rules of the Judicature Act do not refer to proceedings on the Crown side. (Feby. 1889, but see rules now in force.)

Queen v. Nichols, 21/288.

2. **Costs—Indorsement of affidavits.**]—The Court refused costs to a defendant succeeding on certiorari, on the ground that it was his duty to have seen that the affidavits produced on behalf of the prosecution were properly indorsed, to show who was opposing his motion.

Queen v. Morse, 22/298.

3. **Estreating recognizances.**] — The Crown Rules apply to the estreating of recognizances for appearance to answer under the criminal law of Canada, and must be complied with.

See CRIMINAL LAW, 15.

4. **Execution.**]—The Crown Rules 1889, s. 138, direct that execution on the Crown side shall follow the form in use on the civil side as nearly as may be. When the rule was adopted imprisonment for debt had not been abolished, and the form of execution contained a clause directing the defendant's arrest. Subsequently this clause was omitted.

On motion to set aside an execution for costs under the Canada Temperance Act, on the ground that it contained the arrest clause, and so did not follow the civil form:—Held, the form of execution of the Crown side had not

changed with that of the civil side.

Queen v. Roberts, 27/381.

5. **Non-compliance—Rule 29.**]—A Judge has no power to dispense with compliance with Rule 29 of the Crown Rules, which requires that "No notice of motion for a writ of certiorari shall be effectual, nor shall any writ be granted therein, unless the recognizance and affidavit of justification shall have been filed . . .," nor may he grant leave to file additional affidavits where those presented on motion are defective.

McIsaac v. McNeil, 28/424.

6. **Non-compliance—Rule 31.**]—Appeal from an order at Chambers to remove a conviction. The affidavit on which this order was granted, set out that "the defendant was served with the paper writing or minute of conviction, . . . being the minute or memorandum of the conviction or judgment made . . .":—

Held, allowing appeal, that Crown Rule 31 was not complied with, which requires production and proof of a copy of the conviction itself, in the absence of which there was no proof that a conviction had been made.

Queen v. Wells, 28/547.

CUSTOM.

1. **Shipping—Freights.**]—Semble, in the custom of merchants the term "drawing freights" means drawing freights already earned. The term "drawing against freights" means drawing on consignees on security of freights not yet earned.

Pitcher v. Bingay, 21/31.

2. **Railway freights—Basis for settlement.**]—Semble, according to the custom of merchants where goods are to be shipped at a certain price to a certain point prepaid, and the vendee elects delivery of the whole or any part at other points, he is bound to settle freight charges on such, at a figure determined by distance from the first point, as first agreed on. And the matter is not affected by falls in rates.

Sumner v. Thompson, 31/481.

3. **Custom of mariners—Deviation.**]—In the case of a small coasting schooner is there a custom of mariners as to seeking shelter, to countervail the defence of deviation?

See INSURANCE, 18.

4. **Rule of the road**—Management and passing of teams—Element entering into negligence.

See NEGLIGENCE, 6, cf. 5.

5. **Selling through agents.**]—Whether there is a local custom as to selling carriages through agents in country districts, so well established that a purchaser has notice of agency, and must be on inquiry as to its extent?

See PRINCIPAL AND AGENT, 28.

DAM.

See EASEMENT, LEASE, 9.

DAMAGES.

1. **Need not be pleaded in defence.**]—Circumstances in mitigation of damages need not be pleaded (O. 21, R. 4), but if pleaded, may be struck out under O. 19, R. 27 (Cf. O. 21). The point noticed, but not decided.

Weatherbe v. Whitney, 30/49.

2. **Damages less than $8.**]—The plaintiff in an action for slander recovered $1 damages, and thereupon applied to the trial Judge for an order for costs, which was refused:—Held, that under O. 63, R. 1, qualified by appendix N. (see R.S. 5th Series, p. 1143), he was not entitled to costs unless the Judge in his discretion should see fit to award him the same.

(NOTE.—March 29th, 1889, as part of an order revising costs and fees, the above "Appendix N." was repealed, and another substituted in which the portion relating to the award of costs in certain actions, does not appear. O. 63, R. 1, now stands alone, and the result is that the practice is reversed. See appendix to statutes of 1893.)

Adams v. McKenzie, 22/50.

3. **Conversion—Damages for withholding.**]—In trover, to recover possession of property, damages for loss of use because of the withholding, may be recovered without a special plea.

Garden v. Neily, 31/89.

4. **Lord Campbell's Act—Particulars of claim.**]—R.S. 5th Series, c. 116, s. 4, requires full particulars of the nature of the claim in respect of which damages are asked, to be served with the writ of summons. The Judge on trial allowed an amendment, not materially varying the particulars furnished. On objection to this course:—Held, that the defendant had had ample notice of the nature of the matter introduced, by the first particulars, and that if they had been insufficient, objection should have been raised by the pleadings.

McLeod v. Windsor & Annapolis Ry., 23/69.

5. **Lord Campbell's Act—Distribution of damages.**]—The jury having awarded damages for the killing of M., at the suit of his administratrix, did not distribute them among the several beneficiaries under R.S. 5th Series, c. 116, s. 2:—Held, that this was no reason for setting aside the verdict, as the Court could, if necessary, make the distribution.

Graham, E.J., dissenting.

McLeod v. Windsor and Annapolis Ry., 23/69.

6. **Nuisance.**]—Semble, where a nuisance is a continuing one, no compensation in damages to an injured party can be considered adequate, and an injunction ought to issue, though otherwise the operations of a chartered business company ought not to be interfered with.

Francklyn v. People's Heat and Light Co., 32/44.

7. **Towns Incorporation Act, 1895.**]—The limitation of section 295 does not apply to an action respecting a continuing nuisance, except as to recovering damages for more than a year before action brought.

See NUISANCE, 3.

8. **Police officer—Illegal arrest.**]—Exemplary damages should not be allowed against an officer who makes or causes an illegal arrest, unless he acts in bad faith, or is guilty of some oppression or misconduct.

Jordan v. McDonald, 31/129.

9. **Assault and false imprisonment—Solicitor.**]—The plaintiff, a solicitor, having been guilty of misconduct before the Stipendiary Magistrate's Court, was by his order punished by being removed from the room. In about five minutes he returned and without further order from the Magistrate was forcibly ejected and for a time locked in a cell. In an action against the policemen concerned, for assault and false imprisonment, the jury under the direction of the trial Judge found the second expulsion unwarrantable and illegal, and awarded $700 damages:—

On appeal, Held, per McDonald, C.J., delivering the judgment of the Court:—"The damages considering the circumstances of the defendants, are perhaps larger than I would have considered sufficient, but the indignity to the plaintiff was such that I do not consider myself at liberty to interfere with the finding of the jury."

Bulmer v. O'Sullivan, 28/406.

10. **Trespass—Death of plaintiff—Continuing cause.**]—If action is continued by an executor, damages may be assessed down to date of assessment. O. 34, R. 46.

See TRESPASS, 1.

11. **Reduced on appeal—No special damage.**]—In an action of replevin to recover possession of 108 bushels of gravel worth $25, the County Court Judge found for plaintiff and awarded damages. On appeal the damages were reduced to $25, on the ground that there was no evidence of special damage.

O'Regan v. Williams, 24/165.

12. **Premature entry of judgment—Levy—No special damage.**]—Defendant entered judgment by default against plaintiff, levied, but did not remove the property. Thereupon an arrangement

was made under which plaintiff paid $100 on account of the judgment, and was to pay the balance by instalments. Immediately after the payment was made, plaintiff discovered that the judgment had been entered prematurely, and applied and had it set aside. He then brought this action to recover his payment and for damages. The jury awarded him the amount of the payment and $1,000 more as damages.

Held, that as the payment was not made under compulsion to prevent an illegal levy, or to relieve the property, but in discharge of a debt due, plaintiff could not recover it back.

And the evidence not showing that plaintiff had suffered special damage by reason of the illegal levy, the award of the jury was reduced to $50.

Johnston v. Miller, 31/83.

13. **Verdict — Excessive damages.**]—The Court will not interfere with the verdict of a jury on the ground that they have awarded excessive damages, unless it appears on the face of the evidence that they have made wrong deductions in fixing the amount.

McDonald, C.J., dissenting.

Gillies v. Brookman, 22/10.

14. **Misdirection causing excessive award.**]—In an action for the negligence of the defendant's servants in letting fall a plank from the roof of a house, thereby injuring plaintiff's leg, so that for a long time he was confined, etc., the jury fixed damages at $2,300. The trial Judge had instructed them, "that plaintiff was entitled to recover all the expenses he had been put to, which included . . . the amounts paid for additional help in his business, while he was not fully able to attend to it, . . . and they were not bound to restrict the amount awarded for expenses, to what was actually proved in dollars and cents. That his exertions in getting to his business as soon as possible, contrary to the advice of his doctor, had probably saved a large amount of expenses in employing other superintendence, for which defendant would have been liable . . ."

Held, that there was misdirection which had resulted in the award of excessive damages, for which reason there should be a new trial.

Per Meagher, J., dubitante, that the new trial should relate only to the matter of damages.

Smith v. N.S. Telephone Co., 26/275.

15. **Negligence—Excessive damages.**]—In an action against a municipality for neglect to repair a hole of long standing, in the approach to a bridge under its control, it appeared that the plaintiff had received such injuries as not only prevented him from earning his living, but from taking exercise sufficient to maintain his health. It also appeared that the injury had founded a disease which caused fits of an epileptic nature, and which had to some extent affected his mind and disposition, and from which he could not expect to recover. The trial Judge (without a jury) fixed damages at $7,250, not, however, basing the sum on a capitalization of what plaintiff had been accustomed to earn, or might have looked forward to earning. On appeal, Held, in view of all the circumstances, the amount was not excessive.

(Note—Case reversed in Privy Council, but on other grounds. See MUNICIPALITY, 2.)

Geldert v. Municipality of Pictou, 23/483.

16. **Negligence causing death.**]—In an action by the husband and parents of a deceased person, under Lord Campbell's Act, for damages for negligent maintenance of defendant's wharf, whereby deceased fell into the water and contracted disease which occasioned her death, the Supreme Court of Canada held the damages awarded by the jury, $1,500, to be excessive.

York v. Canada Atlantic S.S. Co., 24/436, 22 S.C.C. 167.

17. **Negligence—Permanent bodily injury.**]—The defendant's negligence in maintaining an open excavation, having caused permanent bodily injury to plaintiff, the jury's award of $2,500 damages was not considered excessive.

Davis v. Commercial Bank of Windsor, 32/366.

18. **Slander imputing unchastity.**]—In an action for slander in imputing unchastity to a female plaintiff, the jury awarded $500 damages. On appeal, the Court considered the sum excessive and ordered a new trial unless the plaintiff should consent to a reduction.

Creelman v. Tupper, 25/334.

19. **Action for work done—Counterclaim for unskilfulness—Measure of damages—Cost.**]—Plaintiff brought action on a note given for work done in connection with the reconstruction and refitting of a sawmill. Defendant counterclaimed damages for plaintiff's lack of skill, and negligence in performing the work, whereby he had lost the use of the mill, had been compelled to have sawing of logs done elsewhere, at greater expense, etc. Each being entitled to succeed as to his claim:—

Held, that the proper measure of defendant's damages was either such loss as was the natural and obvious outgrowth of plaintiff's breach of contract, or such as could be said to have been within the contemplation of the parties in making the contract. Generally speaking, the rental value of the mill for the time it was idle and the value of worthless parts installed, might be awarded, but not compensation for loss occasioned by defendant's having had sawing done by other persons, as in this way he would profit by having had his mill idle.

Defendant having succeeded in the main, to have costs of his appeal. Damages to be adjusted as above and set off against plaintiff's judgment in the action. If a balance remain due plaintiff, he to have the general costs of action.

Bruhm v. Ford, 33/323.

20. **Dog killing sheep—Owner liable for damage done.**]—Evidence to fix measure.

See DOG, 2.

21. **Negligence of solicitor—Measure.**]—A solicitor failed either to collect or to return to his client a promissory note placed in his hands for collection:—Held, that he was liable to him in damages, the measure of which was prima facie the face of the note and interest, the burden of establishing a different measure on the facts to be on the defendant.

He is also liable to his client for loss occasioned by his returning another note without mentioning that he had collected the same, whereby the client incurred costs in an unsuccessful action to collect from the maker, the measure of damages being the amount of the costs thrown away. (Henry, J., dissenting, as to the construction of facts.)

Gould v. Blanchard, 29/361.

22. **Overflow—Injury to land—Measure of damages.**]—In an action for damages for injury to land caused by the overflow of water through the negligence of defendant:—Held, that the proper measure of damages is the reduction in selling value caused by the injury, without considering loss of profits, or the amount it would take to restore the land to its former condition, or damage to growing crops, based on the assumption that they would have matured.

Lloy v. Town of Dartmouth, 30/208.

DEATH.

Proof of death.]—The death of a person is sufficiently proved by the incidental reception of his will in evidence, without objection.

Doull v. Keefe, 34/15.

Death of Judge.]—Effect on motion pending.

See PRACTICE, 29.

DEBTOR.

See INDIGENT DEBTOR.

DECISION.

See also JUDGMENT, RES ADJUDICATA.

1. **Equal division of Court—Whether there is a decision.**]—The issues in this action and another being the same, it was agreed in writing by solicitors, that the decision in the other on trial and on

appeal, if any, should be the decision in this. On trial of the other judgment was for the plaintiff. On appeal the Court was equally divided, and the defendant insisted on his right to be heard on appeal in this action, contending that there had been no decision of the appeal in the other.

The Court was again equally divided.

Per Weatherbe and Meagher, JJ., that the word "decision" in the agreement meant "judicial determination," and that the order dismissing the appeal in the other case applied to this.

Per Townshend and Graham, JJ., that where the Court is equally divided, no decision has been reached, and that the appeal in this action should therefore be heard.

Naas v. Backman, 28/504.

2. **County Court.**]—The Judge of the County Court may not re-open a matter upon which he has filed his decision, on an application to read fresh affidavits.

See COUNTY COURT, 21.

3. **But an order made inadvertently** may be rescinded on that ground.

See COUNTY COURT, 22.

4. **Doubtful decision.**]—Payment. Recovery.

See PAYMENT, 4.

DEED.

1. **Covenant of warranty.**]—A covenant of warranty is simply a covenant for quiet enjoyment, and a covenant for quiet enjoyment is, as the very words indicate, "an assurance against disturbance consequent upon a defective title." Where there is no pretence of an eviction, no action exists against a person who has made such a covenant.

Redden v. Tanner, 29/40.

2. **Warranty of quiet possession—Construction—Rectification.**]—Defendant by deed containing a general covenant of warranty, had conveyed to plaintiff "all the estate, right, title, interest and claim in lands situated . . . ." He was possessed at the date of the deed of only four-sixths of the property. A., the owner of one of the remaining sixths of the property, brought action against plaintiff for partition, whereupon he began this action against the defendant on his covenant for quiet possession.

Defendant counterclaimed rectification of the deed, alleging that the parties had meant to deal with only four-sixths of the land. The evidence showed that after the making of the deed, the plaintiff had endeavored to acquire from the several owners the other two-sixths, and now raised no question as to one of the shares which he had succeeded in acquiring.

Held, under these circumstances, that the trial Judge was right in finding that the parties had referred to only four-sixths of the property, and in decreeing rectification.

But, generally, the above words, "all the estate, etc.," should be held to refer to the entire interest, not merely to such interest as might be found in the grantor.

Also, there being an express warranty in the deed, no other warranty would be implied; nor, in any case, from the words "heirs and assigns forever," employed in the habendum, simply to create an estate in fee simple.

Also, though the judgment of a Court of competent jurisdiction has been held to amount to a breach of a warranty for quiet possession, yet the mere fact that an action has been brought is not sufficient.

Schnare v. Zwicker, 31/177.

3. **Rectification of deed — Misrepresentation of boundaries—Solicitor's mistake.**]—Plaintiff in 1892 purchased a farm from defendant, represented by him to run "to the LaHave River." Together they went to the office of a solicitor, who, on information furnished by defendant, prepared a plan (and afterwards a deed), showing the river as a boundary. Plaintiff entered into possession and cultivated the property as described for eight years, when he was ejected from a small jib-shaped portion of the land, which proved to belong to

defendant's father, and which lay along the whole river front of the property.

In an action for rectification of the description, or if defendant was not the owner of the portion in question, then for damages on the covenant of the deed for title, the trial Judge found that defendant had represented the land as bounded by the river, and awarded damages for deceit at common law, based, not on the value of the shortage as farming land, but on its value in relation to the rest of the property, the river and the road.

Held, on appeal, per Weatherbe, J., McDonald, C.J., concurring, there appearing to be some doubt as to the nature of defendant's representation, the fault was in the solicitor who was employed by plantiff to investigate the transaction at the time, and recourse, if any, against him.

Per Graham, E.J., Ritchie, J., concurring, dismissing appeal, that the defendant's misrepresentation, not the solicitor's error, was the proximate cause of the damage.

Ramey v. Meisner, 33/339.

4. **Description—Term "in front of."**]—A deed granted, by metes and bounds, a triangular lot, one side of which was a road which ran near, and generally parallel to, the shore line of Gabarus Bay. It further granted, "the land in front of said land to high water mark."

Held, the side of the lot which lies along the road is the "front" of the lot, and the term "in front of," is to be understood as referring to a rectangular lot of even width, not to what might be included by producing the side lines of the triangle to high water mark.

McIntyre v. McKinnon, 31/54.

5. **Rectification—Strip omitted in description—Vendor estopped—Amendment by court.**]—Plaintiff brought trespass to land. Defendant counterclaimed that the locus was intended to have been included in a contract of sale completed between him and plaintiff, and to have the description of the deed rectified. The Supreme Court of Nova Scotia, Henry, J., dissenting, was of opinion that plaintiff had represented the locus as part of the lands sold, but had not intended to include it in the deed, for which reason the description could not be rectified as counterclaimed, for mutual mistake, though in a different form of action, defendant might have recourse against plaintiff for fraud.

In the Supreme Court of Canada, however:—Held, under the Nova Scotia Judicature Act, it was the duty of the Court to have made any amendment necessary for determining the real question at issue, and that a vendor of land who wilfully misstates the position of a boundary and thereby leads a purchaser to believe that he is acquiring a strip not included in the deed, is estopped from afterwards making claim to that strip.

The Supreme Court of Canada enjoying like powers of amendment (R.S.C. c. 135, ss. 63-65), the decision below was reversed.

Feindel v. Zwicker, 31/232, 29 S.C.C. 516.

6. **Description—Construction—Terminal point.**]—A specific lot of land was conveyed by deed, and also: "A strip of land 25 links wide, running from the eastern side of the aforesaid lot along the northern side of the railway station about 12 rods unto the western end of the railway station ground, the said lot and strip together containing one acre, more or less."

Held, reversing the decision of the Supreme Court of Nova Scotia, Taschereau, J., dissenting, that the strip conveyed was not limited to twelve rods in length, but extending to the western end of the station ground, which was more than 12 rods from the starting point.

Doyle v. McPhee, 24 S.C.C. 65.

7. **Deficiency in acreage.**]—To an action for the price of land sold the defendant set up that the land was less in acreage than represented by plaintiff:—Held, in the absence of fraud, the description in the deed given precluded him from succeeding.

Brown v. Banks, 21/388.

8. **Rectification—Proof of fraud.**]—In an action of trespass to lands, the de-

fence was that the lands were included in an agreement for the sale by F. & Co. to M. & Co of the lands connected with the business of F. & Co. on the P. River, but were fraudulently omitted from the deed purporting to convey such lands. The defendants counterclaimed a rectification, and also a reduction of the purchase price on account of a deficiency in the quantity of the land conveyed. The jury found among other things that the land in question was a portion of the lands of F. & Co., connected with their business on the P. River, and a rectification of the deed was ordered on that ground:—

Held, that the burden was on defendants to establish by clear evidence the fraud relied on, and that in the absence of such evidence, the findings of fraud, so far as they were appealed against, must be set aside. But as defendants were entitled to the rectification decreed on other grounds, there was no occasion to order a new trial.

Freeman v. Mitchell, 30/513.

9. **Description—Plan of lots filed—Dispute as to boundary—Rectification—Parties.**]—By deed in 1875, A. conveyed to K. lands described therein as "part of a division of Roman's Field, so called, and numbered 23 and 28 of said division filed in the Crown Land Office," and proceeded to describe such lots as of a width of 50 feet each. According to the plan produced they were of a width of 40 feet each. K. conveyed these lots to plaintiff by deed following the same description.

By deed at the same time A. conveyed to G. lots 24 and 29 on said plan, further described as "beginning at the north-east corner of lot 28, etc." In this way the ownership of a strip of land 10 feet wide fell into dispute, and plaintiff brought trespass against defendant, who had come into possession of the latter lots by inheritance from G. Defendant and G. together had, with the knowledge of plaintiff, kept the strip enclosed for 18 years, taking plaintiff's lots to be of a width of 40 feet each:—

Held, that what was meant to be conveyed to plaintiff was lots 23 and 28 as shown on plan, and there appearing to be of a width of 40 feet each, and the mention of a width of 50 feet in the deed must be considered to be a mistake.

In anticipation of this construction, plaintiff had incorporated in his action a claim to have his deed rectified, maintaining that the intention of the original grantor A. was to convey lots 50 feet wide, without regard to the plan:—Held, that the Court might reform the deed to make it conform to the contract entered into between the original parties, but there was no theory enabling the plaintiff to claim benefits growing out of that contract, to which he was a stranger, or at all events he could not maintain an action in relation thereto against the defendant, who was a bona fide purchaser from A. without notice.

Quære, could plaintiff maintain an action against A. or his representatives, and is not the deed, being a reduction of the contract into solemn form under seal, the best evidence of what the contract really was?

Held, also, that plaintiff's right to rectification was barred by his laches in acquiescing in the course of defendant and his predecessor in title for 18 years.

(The Court considered that the plan tendered in evidence by defendant was properly received, but disposed of plaintiff's exception thereto on the ground that he must rely on it in support of his claim for rectification.)

McFatridge v. Griffin, 27/421.

10. **Sale by administrator—Misrepresentation.**]—Defendant K., as a creditor, obtained administration of the estate of H. He then applied for and obtained a license for the sale of the lands of the estate, in satisfaction of his claim and another.

H., prior to his decease, with the knowledge of the defendant K., had conveyed an undivided half interest in certain lands to his son, J.H. (also a defendant herein), but the deed of conveyance had not been recorded.

At the sale of the lands under the license the defendant K. acted as auctioneer, and represented that all interests but the dower of H.'s widow were being

offered. Plaintiff became purchaser and received a deed from the defendant, K., as administrator, but before he could record his deed, the defendant J.H. recorded the above-mentioned deed from H., and thus secured priority as to an undivided half interest. Plaintiff thereupon returned K.'s deed and asked to be relieved of the sale:—

Held, under the circumstances the sale should be rescinded, and that the defendant J.H., being an heir, was properly made a party.

Hirtle v. Kaulbach, 22/338.

11. **Setting aside—Fraud—Undue influence — Return of consideration.**]—Plaintiff brought action to set aside a deed of land made by her to defendant on the ground of fraud, misrepresentation and undue influence. The consideration paid was shown to be grossly inadequate. Defendant associated himself with plaintiff, who was the widow of his brother, in the administration of her husband's estate, representing himself as specially qualified in such matters from having once been a Registrar of Probate. He made false representations as to the validity of deceased's title to land in question, also to his liabilities which he undertook to assume. He further advised her not to seek legal advise:—Held, the deed must be set aside. Also, that the objection that a tender of a return of the consideration had not been made before action, was sufficiently met by the fact that the note therefor being in plaintiff's hands, and in Court, the parties could be restored to their original positions.

Lockhart v. Lockhart, 22/233.

12. **Certified copy—Proof as evidence.**] General objection was taken that a deed was placed in evidence by certified copy, without the affidavit required by R.S. 5th Series, c. 107, s. 8. The Court on argument considered there would be no injustice in allowing additional time for filing the affidavit, as this would probably have been the course of the trial Judge, had special objection been taken before him.

Doull v. Keefe, 34/15.

13. **Consideration.**]—Where a deed expresses the consideration as having been paid, the burden of proof of any further condition or agreement in relation thereto is on the person attacking the deed.

Harvey v. Harvey, 24/492.

14. **Conveyance under duress — Destroyed by maker.**]—The owner of land having died intestate, leaving several children, one of them, W.R., received from the others a deed conveying to him the entire title to the land, in consideration of paying all debts against the intestate estate and those of a deceased brother. Subsequently W.R. borrowed money from a sister, and gave her a deed to the land, on learning which, B., a creditor of W.R., accused the latter of fraud and threatened him with criminal prosecution, whereupon he induced his sister to execute a reconveyance of the land to him, and then gave a mortgage to B. The reconveyance not having been properly acknowledged for registry purposes, was returned to the sister to have the defect remedied, but she, having taken legal advice in the meantime, destroyed the deed. B. then brought an action against W.R. and his sister to have the deed to the latter set aside, and his mortgage declared to be a lien on the land. In the Supreme Court of Canada:—

Held, affirming the decision of the Supreme Court of Nova Scotia, that the sister was entitled to a first lien on the land for the money lent to her brother; that the deed of reconveyance to W.R. had been obtained by undue influence (W.R. being an inexperienced country-bred lad, and B. a man with considerable acquaintance with business), and should be set aside, and B. should not be allowed to set it up.

B., claiming to be a creditor of the father and deceased brother of the defendants, wished to enforce the provision in the deed to W.R., by his brothers and sister, for payment of the debts of the father and brother:—

Held, that this relief was not asked for in the action, and if it had been, the said provision was a mere contract between the parties to the deed, of which

a third party could not call for execution, no trust having been created for the creditors of the deceased father and brother.

Burris v. Rhind, 30/405, 29 S.C.C. 498.

15. **Delivery—Retention by grantor.**]—Action by the administrator of an intestate against the grantees of a deed made by him of all his real and personal property, to recover possession of the deed. The deed was duly "signed, sealed and delivered," and attested to by the witness thereto for registry, but had been retained in the possession of the grantor until death, and there was evidence that he seemed to consider the disposition testamentary.

Held, by the Supreme Court of Canada, reversing the decision of the Supreme Court of Nova Scotia, that the fact that it was retained by the grantor was not sufficient evidence that it was never so delivered as to take effect as an executed instrument. The evidence in favor of the due execution of such a deed is not rebutted by the facts that it comprised all the grantor's property, and that while it professed to dispose of such property immediately, the grantor retained the possession and enjoyment of it until his death.

Zwicker v. Zwicker, 31/333, 29 S.C.C. 527.

16. **Deed of trust—Signed but not delivered.**]—Ineffective to pass title. Intention of grantor. Wife's separate property. Reduction into possession.

See HUSBAND AND WIFE, 6.

17. **Lease not delivered—Indorsement thereon—Effect** as an admission against the lessor.

See LEASE, 7.

18. **Deed given as security.**]—Agreement as to repayment and redemption. The two held to be a mortgage. Construction of words "within a year." Interest.

See MORTGAGE, 17.

19. **Deed given as security.**]—Construed as a mortgage.

See MORTGAGE, 18.

20. **Unrecorded deed—Effect of cancellation by grantee.**]—Though mere cancellation by a grantee of his unrecorded deed will not divest his title, nor revest title in the grantor, yet if he sell to a third person, and return the deed to the grantor, with a request that he convey to that third person, the title of such third person will be good as against a judgment recovered against the grantor after the date of the last conveyance.

Bauld v. Ross, 31/33.

21. **Wife joining in deed.**]—The effect of a wife's uniting in a conveyance with her husband is not to vest any estate in the grantee, separate and distinct from that of her husband, but rather to relinquish an inchoate right in the nature of an incumbrance. (Schouler 451, Washburn, Vol. 1, 400.)

Redden v. Tanner, 29/40.

DE FACTO OFFICER.

1. **Presiding officer — Irregularly appointed.**]—In a municipal election the appointment of the presiding officer was irregular under the statute, but he took the oath, and the election proceeded in a manner not complained of, and resulted in the return of the defendant as Councillor. His return being petitioned against:—Held, that the presiding officer was a de facto officer and the irregularity of his appointment should not prejudice third parties or the public, in consequence of which the election of the defendant should be considered valid.

Casey v. Smith, 26/177.

2. **Constable de facto.**]—A constable de facto, while acting in discharge of what he conceives to be his duty, is entiled to the same measure of protection as though his right to act were undisputed.

Queen v. James Gibson, 29/4.

Office filled de facto.]—Mandamus to induct rival claimant therefor cannot be granted.

See MANDAMUS, 1.

DEFAMATION.

See SLANDER AND LIBEL.

DEFENCE.

See PLEADING, 28.

DEFINITIONS.

See WORDS.

DEMURRER, PROCEEDINGS IN LIEU.

See PLEADING, 43.

DEVASTAVIT.

Administrator—Failing to plead—Estoppel.]—An Administrator substituted as a party defendant, under O. 17, R. 4, for his intestate, who fails to appear and allows judgment to pass, thereby admits assets in the estate. And if action on the judgment so recovered is brought against him personally, alleging devastavit, semble, he is estopped.

See EXECUTORS AND ADMINISTRATORS, 10.

DEVIATION.

See INSURANCE, 17.

DEVISE.

See WILL.

DEVOLUTION OF ESTATE.

See WILL, 12.

DIOCESAN FUNDS.

See TRUST., 12.

DIRECTOR.

See COMPANY, 3, 7.

DISCONTINUANCE.

See PRACTICE, 8.

DISCOVERY.

See EXAMINATION.

DISMISSAL.

See WRONGFUL DISMISSAL.

DISTRESS.

See LANDLORD AND TENANT, 1.

DOCKET.

See PRACTICE, 19.

DOG.

1. **Killing dog frightening horse, to avert an accident.**]—The defendant was driving a horse of a nervous, fiery disposition along a highway, accompanied by B. They were approaching a steep decline in the road, and it was partially dark. Plaintiff's dog flew out, barked and jumped at defendant's horse, frightening him, then fell back barking and snarling at defendant's dog, which was in the carriage, and in endeavoring to get at him actually jumped into the carriage and out again. This state of things continuing and the horse growing more and more unmanageable, the defendant, to avert the likelihood of an accident, shot the dog. B.'s attention was entirely taken up with controlling their own dog. The defendant's action was found to be without malice:—

In an action for the value of the dog:—Held, McDonald, C.J., dissenting, that the defendant's act was justifiable.

Quigley v. Pudsey, 26/240.

2. **Sheep killing—Measure of damages—Evidence.**]—In an action to recover the value of a number of sheep alleged to have been killed by defendant's dog, the evidence showed that after a number of sheep had been killed a watch was kept, when defendant's dog and another were detected in the act, defendant's dog having hold of a sheep at the time. Also, that on several previous occasions two dogs had been heard barking in the neighborhood. Also, that after defendant's dog was sent away the depredations stopped.

Held, per Meagher, J., Townshend, J., concurring, that the trial Judge was right in awarding the value of the sheep the dog was known to have killed, and (Graham, E.J., Henry, J., concurring, contra), was warranted in drawing the inference that one half of the previous damage was due to defendants' dog, and awarding damages accordingly.

Williams v. Woodworth, 32/271.

DOMESTIC RELATIONS.

See Husband and Wife, Infant, Married Woman's Property Act.

DOMINION OFFICIAL.

Government railway employee.]—Must assist in removing snow from highway.

See Highway, 1.

DONATIO MORTIS CAUSA.

1. **Words of gift—Possession by donee—Delivery wanting.**]—To an action in replevin and for conversion of certain live stock, gathered crops, etc., by the administrator of a deceased person, against his son, the defence was a donatio mortis causa of the property. Shortly before his death the deceased had gone to live with the defendant, and in this way the property was in his possession. The words of intention to bestow the goods on the defendant, after death, made use of by the deceased, were strong, but there was no delivery, actual or symbolical:—Held, that words, however strong, could not, without some delivery effect a donatio mortis causa, and that the defect was not supplied by the fact that the property was already in the possession of the donee, as his possession under the circumstances was as trustee for the deceased. Also, that there was no gift inter vivos, as the words indicated that the gift was not to vest until after the death of the donor.

McKinnon v. McKinnon, 28/189.

2. **Delivery to third person—Question of agency.**]—Several years before his death, W. placed a number of promissory notes and other property in envelopes, one addressed to each of his children, intending to dispose of his property in this way. Shortly before his death he sent for one D., caused him to take possession of and inspect the envelopes, then to seal them up and return them to the desk where they were kept. He thereupon delivered the key of this desk to D., and requested him to see to the distribution of the envelopes after his death.

Held, per Graham, E.J., Henry, J., concurring, that D. being merely the agent of the donor, there was no delivery sufficient to effect a donatio causa mortis, and that the appeal should be dismissed.

Per Townshend and Weatherbe, JJ., that there was a sufficient delivery.

In the Supreme Court of Canada:—Held, adopting the opinion of Townshend, J., that the delivery was sufficient D. having received the property, not as the agent of the donor, but to the use of the donees. Also, that apart from the manual delivery of the property to D., the delivery of the key of the desk was sufficient in itself.

Foster v. Walker, 32/156, 30 S.C.C. 299.

DOWER.

1. **In equity of redemption.**]—The wife of the owner of the equity of redemption is not a proper party defendant in foreclosure. Neither before nor since the

"Married Woman's Property Act, 1884," was there dower in that equitable estate.

Parker v. Willet, 22/83.

2. **Wife joining in deed.**]—The effect of a wife's uniting in a conveyance with her husband, is not to vest any estate in the grantee, but rather to relinquish an inchoate right in the nature of an incumbrance. (Schouler, 451, Washburn, Vol. 1, 400.)

Redden v. Tanner, 29/40.

3. **Not defeated by executory devise over.**]—A married woman is entitled to dower out of an estate of her husband in fee simple, notwithstanding the defeat of such estate by an executory devise over to another, in case of his death without issue.

But such right of dower not having been assigned to him, will not avail the grantee of the husband as a defence to an action of ejectment brought against him by the remainderman.

Zwicker v. Ernst, 29/258.

4. **Dower lands — Estover—Firewood and fencing.**]—The widow's rights under the Act extend to her tenant.

See MARRIED WOMAN'S PROPERTY ACT, 12.

DRUNKENNESS.

Master and servant.]—Drunkenness is a sufficient cause for dismissing an employee engaged under a written contract of hiring.

See WRONGFUL DISMISSAL, 3.

DURESS.

See CONTRACT, 7.

Payment under compulsion.]—See PAYMENT, 9.

DYING DECLARATION.

See CRIMINAL LAW, 40.

DYKELANDS.

1. **Dyke rates—Rights of owners.**]—A motion was made to quash and set aside a rate imposed by Commissioners of a dyke acting under Cap. 42, R.S., 5th Series. (1) On the ground that their office in imposing the rate being a judicial one, they were disqualified by interest as part owners:—Held, that if their office was judicial they might claim authority under Cap. 109, if not judicial, then under the Act above referred to. (2) On the ground that expenses for travel were included in the amount assessed. These expenses were incurred in connection with obtaining a subsidy for the work, from the Provincial Government, and were deducted from the subsidy so obtained:—Held, the outlay was reasonable and in the interests of the work. (Re Bishop's Dyke, 20/263, distinguished.)

One owner complaining that he was assessed for too large an acreage:—Held, he having refused, when called on by a surveyor to point out his boundaries, was estopped by section 26 of the Act from complaining.

In re Wallace Bay Aboiteau, 22/269.

2. **Liability to contribute—Apart from the Act—Covenant running with the land.**]—In 1847, T. purchased from R. a portion of a large tract of dykeland, retained by a dyke constructed by R. From the time of the purchase to his death in 1886, T. contributed, either in money or work, to the maintenance of this dyke.

In an action by plaintiffs, claiming as to other portions, under R., against defendant claiming under T., to recover a proportion of the cost of rebuilding the aboiteau connected with the dyke, it appeared that the locus had never been brought under the operation of the Act (R.S. 5th Series, c. 42), but that the provisions of the Act had been followed in relation to the calling of meetings of the proprietors, the apportionment of cost of maintenance, etc. There was also evidence of an agreement consenting to liability to contribute, signed by R., which was lost, but the exact contents was not known.

Held, that after the lapse of time, in view of the position of the parties and the necessity of the work for their protection, the requirements of the Act and the facts shown in relation to payments made and work done, there was evidence from which to infer the existence of an agreement for maintenace, constituting a covenant running with the land, by which defendant was bound.

Roach v. Ripley, 34/352.

EASEMENT.

See also RIGHT OF WAY.

1. **Right to maintain dam—User not continuous.**]—L. erected a dam for the purpose of improving and flooding a meadow above, and also as a reservoir in connection with another dam further down stream. It having been found that the meadow used by L. was included in land owned by plaintiff, an agreement was made between plaintiff and L., that L. should rebuild and keep up the dam and receive hay from the meadow in consideration thereof. Under this arrangement L. maintained the dam until 1869, a period of 10 or 11 years. In that year the land occupied by L. was conveyed to M. and S., who, by a similar agreement with plaintiff, built a new dam on or near the site of the old one. In 1870 M. and S. sold to D., and in 1874, with the assent of the owners C. and M., for their own purposes and independently of plaintiff, built another dam a short distance down stream. Plaintiff made use of this dam for 10 or 11 years, then rebuilt on the old site. This dam the defendant D. as owner of the land removed, and plaintiff sought damages.

Held, that the removal was justifiable. To establish his easement the plaintiff must show a user implying a grant, which user must be continuous for 20 years, and which had been broken when plaintiff abandoned the site in question, and made use of the C. and M. dam.

Mason v. Davison, 27/84.

2. **Mill dam—Backing up of water—Derivation of title — User.**]—Plaintiff claimed damages for the carrying away of his mill dam by a press of lumber coming down, the result of defendant's dam, higher up stream, having been carried away. Defendant counterclaimed damages for the backing up of water on his land, from plaintiff's dam. This plaintiff met by pleading an easement derived from his predecessor in title. The derivation of both titles was precisely the same.

Held (in the Supreme Court of Canada, dismissing appeal from the Supreme Court of Nova Scotia), that where 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 cannot claim to use a dam on his land in such a way as to cause backing up of water and injury to the land of the other, where such a right, or quasi-easement, if ever enjoyed by the former owner, had been abandoned for years.

Hart v. McMullen, 32/340, 30 S.C.C. 245.

3. **Pleading — Obstructing right of way.**]—What the statement of claim should allege. Before and since the Judicature Act. Statute of Limitations.

See PLEADING, 58.

EJECTMENT.

1. **Executors plaintiff—Proof of status—Plea of possession.**]—In an action to recover land, defendant objected to plaintiffs' right to recover as executors of D., on the ground that they had not proved his death:—Held, that the objection could not be raised without a special plea under O. 21, R. 5, a general plea of possession under O. 21, R. 20, not being sufficient. Also, the death of D. was sufficiently proved by the reception of his will in evidence, without objection.

Doull v. Keefe, 34/15.

2. **Possession founding title.**]—Held, following Cunard v. Irvine, James Rep. 36, where a party claiming land in ejectment does not derive his title from the Crown, he is bound to start from some one in possession of the land, possession being in such a case, prima facie evidence of a title.

And the evidence of such possession must be unequivocal.

McLeod v. Delaney, 29/133.

3. **Possession as against written title.**]—In an action of ejectment the written titles of both parties were derived from J. In addition the defendant had title by possession for upwards of 20 years. After this title had matured, the plaintiffs had recovered in ejectment against J., and the Sheriff under a writ of habere facias, had put them into nominal possession:—Held, that though the possession given by the Sheriff be valid, and the person found in occupation (who was defendant's tenant) had attorned to the plaintiffs, yet the title of the defendant was superior, and he might have maintained ejectment against the plaintiffs.

Shea v. Burchell, 27/235.

4. **Denying vendor's title—Defences not available.**]—Plaintiff and defendant entered into an agreement for the sale and purchase of a lot of land, price to be paid and deed executed at a future date. Defendant entered into possession, but at the time agreed on did not complete his contract, when plaintiff brought ejectment:—

Held, that the defendant could not raise as defences against the plaintiff vendor: (a) Irregularity in foreclosure proceedings, part of plaintiff's chain of title, both because of Acts of 1890, c. 14 (now adapted into R.S. 1900, c. 136, s. 24), and because a vendee in ejectment is absolutely estopped from denying his vendor's title. (b) The tenancy of G. under plaintiff of which defendant was aware, that fact being notice of the whole extent of the tenant's interest.

Hesslein v. Wallace, 29/424, 29 S.C.C. 171.

5. **Foreclosure — Purchase and ejectment by mortgagee—Rights of persons not joined—Charge.**]—J. T. devised certain lands to the firm of T. & Co. (in which McK. was sole partner), subject to a payment of an annuity for life to his three daughters, and appointed McK. executor of the will. In his lifetime J. T. had mortgaged the lands (1) to a building society, (2) to B., which mortgages were outstanding at the time of his death.

With the concurrence of the holders of the mortgage, (1) B. foreclosed the mortgage, (2) and McK. became purchaser at the sale by the sheriff, and mortgaged the property (3) to the plaintiff.

This mortgage (3) having been foreclosed, the plaintiff purchased the property, and now sought to eject the executor and others claiming under the will of J. T. Plaintiff also held by assignment from the building society, the mortgage (1). The defence set up was that McK., being executor of the will of J. T. and trustee for the chargees thereunder, his purchase of the land on foreclosure of the mortgage (2), was subject to the trusts of the will:—

Held, that such purchase by McK. was not void, but voidable, and that the chargees under the will, not having counterclaimed in their pleadings as to the annuity, the Court could not consider the question of re-opening the foreclosure proceedings under which the plaintiff acquired the title of McK., the maker of the mortgage (3).

To the objection that the legatees under the will of J. T. had not been made parties to such foreclosure proceedings:—Held, that the provisions of our procedure make the joinder of cestuis que trust unnecessary.

To the objection that J. M., who had become purchaser of the equity of redemption in a portion of the lands mortgaged, after the making of the mortgage (3):—Held, he not having asked to redeem, the legal title of the plaintiffs must prevail:—

Held also, that plaintiff, having lent money to McK., who was at least a trustee with power to sell and mortgage, took a valid title thereunder, and were

not bound to see to the application of the money lent.

Quaere, might the chargees under the will, and J. M., the holder of the equity of redemption of a portion of the land, successfully assert their claims by a different form of action?

Parker v. Thomas, 25/398.

ELECTION.

Parliamentary, 1.
Municipal, 7.
Incorporated Town, 15.

1. **Election petition—Affidavit of verification—Form of petition.**]—By 54 & 55 Vic., c. 20, s. 3 (d), amending the Controverted Elections Act, an election petition must be accompanied by the affidavit of the petitioner, "that he has good reason to believe, and verily does believe, that the several allegations contained in the said petition are true." The petitioner in his affidavit used the exact words of the Act:—

Held, that the respondent to the petition was not entitled, on the hearing of preliminary objections, to examine him as to the grounds of his belief.

Also, that it was not necessary that the petition should be annexed to or otherwise identified by the affidavit, as in the case of an exhibit, the references in the affidavit being sufficient to show what petition was referred to.

It is no objection to an election petition that it is too general (as by the Act it may be in any prescribed form), if it follows the form that has always been in use in the Province. Moreover, any inconvenience from generality may be obviated by particulars.

(In the Supreme Court of Canada. Not reported below.)

Lunenburg Election Case—Kaulbach v. Sperry, 27 S.C.C. 226.

2. **Right to conduct—Third persons—Service.**]—Application was made to the Court on behalf of B. and H., who claimed the right to be heard in a motion before the Court to set aside as void the service of an election petition against the respondent:—

Held, that no one but the petitioner could apply for an order touching the mode or time of service, and until the time prescribed by s. 32 (Dominion Controverted Elections Act), for the intervention of third parties had expired, the petitioner had the entire control and carriage of proceedings upon the petition, subject to those applications which the statute enables any other party to the petition to make.

Semble, if a petitioner should present a petition and abstain from serving it, there is no machinery provided by either the Act or the rules to compel him to effect service, and none to enable any other person to assume or direct the matter of service.

McLean v. Mills, 29/452.

3. **Extension of time for trial—Order for short service—Effect of initialing summons—Day for trial cannot be fixed in term—Affidavit for extension—Jurisdiction—Waiver—Premature motion.**]—The petition complaining of the undue return of defendant was presented on April 22nd. Preliminary objections were filed on the 14th of July, but were not disposed of until the 29th of September, when they were dismissed.

On the 19th October, a summons was granted returnable on following day, to extend the time for trial beyond the six months fixed by R.S.C. c. 9, s. 32. No order for short service was made, and there was nothing on the face of the summons to indicate that short service was ordered, beyond the fact that it was granted on the 19th, returnable next day, and was initialed by the Judge:—

Held, per Meagher, J. (McDonald, C.J., concurring), that the granting of the summons under the circumstances, was a violation of O. 54, R. 4, in the absence of an order prescribing the time within which service must be made. Per Ritchie and Townshend, JJ., that the initialing by the Judge amounted to an order.

By R.S.C. c. 9, s. 33, s.-s. 2, no trial of an election petition shall be commenced or proceeded with during any term of the Court of which the Judge who is to

try the same is a member, or at which such Judge is by law bound to sit. On the 16th of November notice was given of application to fix the time and place of trial, or in the alternative, to further extend the time. The motion was heard on the 19th, when an order was made fixing the 8th of December as the day of trial, and enlarging the time until then. That day was the day fixed by statute for the opening of the appeal term of the Supreme Court, hearing motions for new trials, etc.:—

Held, per Meagher, J. (McDonald, C.J., concurring), the words of the Act were prohibitory, and applied to the whole period prescribed for the annual session or terms of the Court, and were not confined merely to the period during which business might require the Court to sit.

Per McDonald, C.J., Townshend and Meagher, JJ., that no order could be made fixing the date of trial at a time when no trial could legally be had. Also, that the exercise of the power to enlarge the time of trial, was conditional upon the production of sufficient proof by affidavit to satisfy the Judge that an enlargement was necessary in the interests of justice, the condition as to notice not being imposed for the benefit of the respondent alone, but also for the benefit of the public. Also, that a question of jurisdiction being involved, the taking of the order by the respondent was not a waiver of the want of evidence required by the statute. Per Ritchie, J., that as the statute did not prohibit the setting of the cause down for trial for a day in term, but only provided that the trial should not be then commenced or proceeded with, the motion to rescind the order, made December 8, was premature.

Also, Rule 25 of the Election Rules having delegated the power of fixing the day to the trial Judge, quaere, the Court could interfere to alter the day.

(Before McDonald, C.J., Ritchie, Townshend and Meagher, JJ.)

Paint v. Gillies, 26/526.

4. **Extension of time for trial—Affidavit necessary—Waiver not permitted when public interests are involved—Procedure—Judicature—Rules apply when no other procedure is provided.**]—Respondent obtained an order staying proceedings pending an appeal to the Supreme Court of Canada from an order dismissing preliminary objections. By one of the paragraphs of the order the time for the commencement of the trial was extended by the length of the period during which the stay of the proceedings should operate. No affidavit was read in support of the application for the extension of the time:—

Held, that under the Controverted Elections Act, s. 33, an affidavit is imperatively necessary, and that when the public interests are involved there could be no waiver of any requirements of the statute.

Also, that following Paint v. Gillies, supra, that the time for trial of the parties could not be set for a day within the term of the Supreme Court.

Per McDonald, J., that under the Judicature rules, which govern where no other procedure is provided, a motion to enlarge the time for trial cannot be made, ex parte.

Per Ritchie, J., dissenting, that where the Judge is satisfied from reading the original orders made in the cause that the requirements of justice render the extension necessary, he may make the order without requiring the affidavit. Also, that the respondent could not be allowed to set aside his own order after it had been served and acted upon, because not founded on sufficient material. Also, that the public interests would be better served by sending the petition to trial than by dismissing it on a technical ground, and that the absence of an affidavit was a technical ground within s. 49 of the Act, which provides that no proceeding shall be thus defeated.

Inverness, McDonald v. Cameron, 27/1.

Annapolis, Ray v. Mills, 27/1.

5. **Extending time for trial—Effect of order.**]—An order extending the time for trial of an election petition to a time beyond the period of six months fixed by the statute, can only be obtained on affidavit showing that the interests of justice require such extension.

An order fixing a day for trial more than six months off will not of itself have the effect of extending the time.

Per Ritchie, J., dissenting, where a date beyond the limited period is fixed for commencing the trial, it must be presumed, if the Court had jurisdiction, that the time for going to trial was also extended.

La Prairie Election Case, distinguished.

Antigonish, McGillivray v. Thompson, 27/11.

6. **Order extending time — Estoppel — Setting down case.**] — Respondent, with the consent of the petitioner, obtained an order staying the proceedings, pending an appeal to the Supreme Court of Canada against an order dismissing preliminary objections. Respondent's order contained a clause extending the time for the commencement of the trial, during the length of the stay of proceedings, the Judge to whom the application was made having declined to grant the stay except on that condition. No affidavit was made in support of the application, but under the notice of motion all the papers on file were before the Judge when the order was made, and among these were several affidavits:—

Held, per Weatherbe, J., that the respondent, having acquiesced in the decision of the Judge to whom his application was made, and having submitted to the insertion of the condition as to extension of time in his order, so as not to lose the advantage of the stay of proceedings, was estopped from moving to set the order aside. Also, that the case having been assigned to the trial Judge, and fixed for trial when the motion was made, the functions of the Court were at an end and the matter was solely within the jurisdiction of the trial Judge. Also, that the words of the Act to the effect that no election petitions shall be commenced or proceeded with during any term of the Court, are merely directory and were not applicable, terms of the Court having been abolished in Nova Scotia, and the Court being always open and with power to assign Judges to particular duties.

Per Ritchie, J., that the case was distinguishable from McDonald v. Cameron, supra, and that the decision in that case as to the necessity for an affidavit was not binding, and that the motion to set aside the order extending the time should be dismissed for the reasons there stated. That as to setting down the case for trial during the term there was no distinction.

Per Meagher, J., that for the reasons given in previous cases respondent's motion should prevail.

(Before Weatherbe, Ritchie and Meagher, JJ.)

Pictou, McColl v. Tupper, 27/27.

7. **Mandamus not applicable — Office sought filled — Quo warranto.**] — Motion for mandamus to compel the warden and clerk of the municipality of C. to swear in the prosecutor as county councillor. Before notice of the application was served on C., who, as rival contestant for the office, was chiefly, if not solely concerned in opposing it, C. had been sworn in as councillor:—Held, that as the office was de facto filled, mandamus was no longer the proper mode of procedure; and that the prosecutor should have moved for quo warranto.

Queen v. Burke, 29/227.

8. **Election petition—Jurisdiction.**]—A Judge of the County Court sitting in Cape Breton County, set aside the election of a municipal councillor for the County of Richmond:—Held, that he had no jurisdiction to do so, and on appeal, his decision was set aside, and the matter remanded back for trial de novo.

Catherine v. Morrison, 21/291.

9. **Costs.**]—Under R.S. 5th Series, c. 57, no costs in excess of $100 are taxable in connection with a municipal election petition.

Thomas v. Thompson, 26/53.

10. **Presiding officer — Irregularly appointed.**] — In a municipal election the appointment of the presiding officer was irregular under the statute, but he took the oath, and the election proceeded in a manner not complained of, and resulted in the return of the defendant as

councillor. His return being petitioned against:—Held, that the presiding officer was a de facto officer, and the irregularity of his appointment should not prejudice third parties or the public, in consequence of which the election of the defendant should be considered valid.

Casey v. Smith, 26/177.

11. **Corrupt practices—Presiding officer—Secrecy of ballot.**]—The respondent R. was presiding officer at an election for the municipal council, at which the petitioner was the unsuccessful, and the respondent S. the successful candidate. The Act provides for a secret ballot. During the polling the presiding officer opened three ballots face towards, but on trial swore that he had not read them. He also swore that he had kept a tally of the votes cast for his own amusement. The ballots used for the petitioner were written, those used for the respondent were printed:—

Held, per Weatherbe, Ritchie and Graham, JJ., that there was a violation of the Act requiring secrecy, which voided the election.

McDonald, C.J., and Townshend, JJ., dissented as to the construction to be put on the evidence.

Hiltz v. Skerry, 22/281.

12. **Return set aside—Nomination paper refused.**]—The return of the respondent was complained of because the returning officer had refused to receive the nomination paper of the petitioner, though proved to have been tendered in time. The County Court having dismissed the petition, on appeal it was allowed. The Court also refused to entertain on argument, the objection that the nomination paper was not filed in time, that point not having been taken below.

Perry v. Greenwood, 25/136.

13. **Nomination paper—Election void.**]—Chapter 56 R.S. 5th Series, s. 11, provides that a candidate for a municipal council shall be nominated in writing by at least six persons qualified to vote, etc. The only nomination of the defendant in this case was the letter of a number of voters requesting him to offer, and promising support:—Held, that this was not a sufficient nomination, and the election was void. But as no objection was taken until after the election was over, and as the electors had no notice that the defendant was not legally nominated, the learned County Court Judge who tried the petition, was right in not awarding the seat to his opponent.

Burgess v. Donaldson, 22/155.

14. **Town election—Contractor with town—Quo warranto—Method of questioning election.**]—Section 50 (c) of c. 1, Acts of 1888, renders "any person, directly or indirectly, by himself or his partner, having a contract . . . with the council, etc." ineligible for election or sitting as a town councillor. On quo warranto proceedings to test the validity of the respondent's election:—

Held, that being a surety on a bond for the due performance of his duties by the inspector of licenses for the town, rendered him ineligible, but the validity of a town election might only be inquired of under R.S. 5th Series, c. 57.

Semble, the act of illegal sitting might be investigated under the Crown Rules, if properly presented.

Queen v. Kirk, 24/168.

ELECTRIC STREET RAILWAY.

Collision—Rate of speed—Element of negligence.

See NEGLIGENCE, 3.

ELIZABETH, STATUTES OF.

See FRAUDULENT CONVEYANCE.

EQUITY OF REDEMPTION.

In land.]—See MORTGAGE.

In personalty.]—See EXECUTION, 24.

ERROR, WRIT OF.

See CRIMINAL LAW, 16.

ESTATE TAIL.

See WILL, 13.

ESTOPPEL.

1. **Denying fact stated under seal.**]—Plaintiff and defendant executed a reference to arbitration under seal, which recited that defendant was the owner in fee simple of certain land. In an action to enforce the award, for possession, etc., it appeared that M., not defendant, was owner.

Per Meagher, J.: "The defendant should not, as between himself and the plaintiff, especially in proceedings arising out of that reference, or connected with it, be permitted to deny the truth of what he there alleged under seal, viz., that he was the owner, and upon faith of which plaintiff entered into the reference and incurred expenses and loss of time. . . ."

Clish v. Fraser, 28/163.

2. **Rectification—Strip omitted in description—Vendor estopped—Amendment by Court.**]—Plaintiff brought trespass to land. Defendant counterclaimed that the locus was intended to have been included in a contract of sale completed between him and plaintiff, and to have the description of the deed rectified. The Supreme Court of Nova Scotia (Henry, J., dissenting) was of opinion that plaintiff had represented the locus as part of the lands sold, but had not intended to include it in the deed, for which reason the description could not be rectified as counterclaimed, for mutual mistake, though in a different form of action, defendant might have recourse against plaintiff for fraud.

In the Supreme Court of Canada, however:—Held, under the Nova Scotia Judicature Act, it was the duty of the Court to have made any amendment necessary for determining the real question at issue; and that a vendor of land who wilfully misstates the position of a boundary and thereby leads a purchaser to believe that he is acquiring a strip not included in the deed, is estopped from afterwards making claim to that strip.

The Supreme Court of Canada enjoying like powers of amendment (R.S.C. c. 135, ss. 63-65), the decision below was reversed.

Feindel v. Zwicker, 31/232, 29 S.C.C. 516.

3. **Denying vendor's title.**]—On making a contract to buy lands and taking possession under it, though strictly, the relation of landlord and tenant is not then created, yet the vendee in ejectment by the vendor against him, is absolutely estopped from either showing title in himself or setting up outstanding title in another. Tillinghast's Adams 276; 2 B. & C. 498; 16 C.B. 807. See also Board v. Board, L.R. 9 Q.B. 48.

Hesslein v. Wallace, 29/424, 29 S.C.C. 171.

4. **Validity of grant—May not be questioned by party depending for title thereon.**]—Plaintiff, a widow, brought action to have her dower set off from certain lands which defendant company held as grantees of her husband in his lifetime. Defendant company set up that the grant, under which her husband had acquired the lands, was void, as beyond the power of the Province to issue:—

Held (and affirmed in the Supreme Court of Canada, Strong and Gwynne, JJ., dissenting), that as the defendant company, likewise with plaintiff, depended on this grant for title, it was estopped from disputing its validity as against her.

Sword v. Sydney & Louisburg Ry. Co., 23/214, 21 S.C.C. 152.

5. **Paying legacy where estate is insolvent—Creditor not estopped by acquiescence.**]—The executors of a deceased person paid out of the estate, under a provision of the will, $504 for the board and maintenance of a daughter by a deceased wife. The estate proved to be insolvent:—

Held, that the claim was properly disallowed, and that the surviving wife, who was the principal creditor, was not estopped from complaining, by her knowledge and acquiescence in the payment, where she was ignorant of the fact that the estate was insolvent.

Re Estate Edwin Ryerson, 29/81.

6. **Probate Court—Questioning jurisdiction—License to sell.**]—In the Supreme Court of Canada:—Held, that a creditor by receiving payments, the outcome of a license to sell land, recognizes the license in such a way that he may not afterwards question the jurisdiction of the Court in granting it.

See PROBATE COURT, 18.

7. **Devastavit—Failing to plead.**]—An administrator substituted as a party defendant for his intestate, who fails to appear and allows judgment to pass against him, thereby admits assets. And if action on that judgment be brought against him personally, alleging a devastavit, semble he is estopped.

See EXECUTORS AND ADMINISTRATORS, 10.

8. **Participation in sale.**]—A judgment creditor is not estopped from proceeding on execution against lands, by reason of having acted as conveyancer on a sale of such lands by the judgment debtor to A., nor by being present on the passing of the deed, where A. was aware of the judgment.

See LIMITATION OF ACTIONS, 13.

9. **Representation to a stranger.**]—In an action for trespass and conversion by removing certain fixtures, brought by a mortgagor of the freehold, the defendants, who claimed under a bill of sale of these fixtures as personalty to A., set up that the plaintiff was estopped by having represented to A. that he regarded these fixtures as personalty subject to removal:—Held, per Ritchie, J. (affirmed in Supreme Court of Canada), that he was not so estopped, as he had not authorized the communication of his representation to the defendants.

Brown v. Brookfield, 24/476, 22 S.C.C. 398.

10. **Construction of deed — Attaching after acquired property—May only be set up by person claiming under.**]—A. executed a mortgage to B. of property known as lots 5 and 6. The description of these lots was followed by the general words "also all and singular the water lots and docks in front of said lots, and all the right and title of the said A., in and thereto, with the wharves, stores and erections thereon." A. conveyed his equity of redemption in lots 5 and 6 to the defendant's grantor, subject to the mortgage. B. having required payment of the mortgage by A., A. arranged with plaintiff to take over the mortgage, by way of assignment, which he did. Plaintiff having begun foreclosure proceedings in trust for A., defendant set up that certain water lots, docks, etc., answering to the description in the mortgage, had after the making thereof, come into the hands of A., and should be included in the foreclosure order and contribute to the payment of the sum due.

The Court was of the opinion that such was the intention as to the after acquired property when the mortgage was made, and that A. would be estopped from denying its liability, if set up by the mortgagee or any person claiming title under him. But inasmuch as the deed to B.'s grantor described no more than lots 5 and 6, and as he was a stranger to and derived no title under the mortgage, the principle of estoppel did not operate for his benefit against A.

Breffit v. Campbell, 24/389.

Imrie v. Archibald, 25 S.C.C. 368.

11. **Agent exceeding authority—Principal not estopped.**]—A person employed by an insurance company to inquire into and report on a loss, has no authority to waive or extend a condition of the policy requiring an account of the loss to be given within fifteen days. Therefore, if he authorizes the insured to delay his account beyond the time limited, the company is not estopped from insisting on the condition precedent.

Brownell v. Atlas Assurance Co., 29 S.C.C. 537.

Margeson v. Commercial Union Ass. Co., 29 S.C.C. 601.

12. **Dyke owner**—R.S. 5th Series, c. 42.]—A dyke owner who refuses to go with a surveyor when notified, and point out the boundaries of his holding, is precluded by s. 26 from disputing the correctness of an assessment.

In re Wallace Bay Aboiteau, 22/269.

13. **Acquiescence in order** as settled by a Judge.]—A party cannot avail himself of the benefit of one portion, and dispute another, imposed as a condition.

See ELECTION, 6.

14. **Action against surety of trustee**—Acquiescence by one who is at once the settlor and cestui que trust in trustee's default—Peculiarity in the case of a woman—Non-notification of surety—No estoppel.

See PRINCIPAL AND SURETY, 1.

15. **Release under seal**—Authority to sign must also be under seal—And where it is not, the principal is not bound by the execution by the agent, unless estopped by ratification or participation in benefits of the affair.

See ASSIGNMENT, 6.

16. **Sealed agreement, sale of land**—Estoppel from claiming rights thereunder by concurrence in arrangement which renders its performance impossible.

See LAND, 5.

ESTOVER.

See MARRIED WOMAN'S PROPERTY ACT, 12.

ESTREAT.

See CRIMINAL LAW, 15.

EVICTION.

See LANDLORD AND TENANT, 6, 9.

EVIDENCE.

See also CRIMINAL LAW, 39.

ADMISSIONS.

1. **Untruthful admission inoperative.**]—In an action for specific performance of an agreement to purchase land, the only writing to satisfy the Statute of Frauds was contained in a letter written by defendant to a third person, referring to having pledged himself orally to complete the purchase. On trial defendant swore that the statement in the letter was not true, and was made simply as an excuse for declining to lend that third person money:—Held, this being the case, that the statement could not be taken as an admission, no matter how greatly the untruthfulness might be condemned.

McNeil v. McDonald, 25/306.

2. **Similarly, per Townshend, J.**]—In an action in replevin against the sheriff, where the sheriff by handbills advertised the goods as having been "levied and taken," whereas there had been nothing done to amount to a levying and taking, the statement was not an admission, and there was no estoppel.

Gates v. Bent, 31/557.

3. **To third person—Bank president—Res gestae.**]—In an action by a surety to recover back money paid defendant bank for a debt of L., the issue was whether defendant bank appropriated a sum paid by L. to the discharge of the assured debt, or another. An admission of the manner of appropriation of this sum, contained in a letter written by the president of the bank (regarded in this behalf as an agent acting beyond the scope of his office), to X., is not an admission against defendant bank, unless it forms part of the res gestae.

Black v. Bank of Nova Scotia, 21/488.

4. **President of a company,** or one of the directors, is not the agent of the company to make engagements binding on it, unless expressly authorized, or there has been such a holding out as to operate to estop the company.

Almon v. Law, 26/340.

BURDEN OF PROOF.

5. **Burden of proof shifting.**]—Plaintiff, suing for wrongful dismissal, proved a yearly hiring by production of a written agreement, and swore that he was dismissed by defendant. The only defence was that plaintiff had left the employment voluntarily. The parties being in direct conflict, and the weight of evidence appearing to be little, if any, in favor of defendant:—

Held, plaintiff should recover, the burden of establishing his defence resting on defendant. Meagher, J., dissenting.

McInnes v. Ferguson, 32/516.

6. **Abatement of legacies.**]—The burden of proof is on the party seeking priority, to show conclusively from the will an intention by the testator that, in case of abatement, there should be a distinction in favor of those claiming exemptions.

Re Estate Waddell, 29/19.

7. **Assignments Act—Bill of sale.**]—Where a bill of sale is attacked under the Assignments Act as constituting a preference, and the insolvency of the grantor is established, the presumption is against the bona fides of the transaction, and the burden of rebuttal rests on the person claiming under the bill of sale.

McCurdy v. Grant, 32/520.

8. **Alteration in will.**]—The burden of proof that alterations in a will in the handwriting of testatrix, were made before execution, where they are not attested as required by statute, is on the party who seeks to incorporate them.

Re Caroline Lawson, 25/454.

9. **Property of married woman.**]—Where goods found in possession of the husband or in the joint possession of husband and wife are levied under execution against the husband, the wife claiming, must prove property.

Adams v. Crowe, 21 S.C.C. 342.

Cormier v. Mattinson, 27/354.

10. **Preponderance of testimony.**]—In an action claiming damages for certain slanderous words alleged to have been spoken by the defendant, during the progress of a trial before a magistrate, six witnesses called by plaintiff testified to the use of the words, while four called by the defence, including the magistrate, said that they had not heard the words used:—Held, that the County Court Judge erred in finding a preponderance in favor of defendant, and there must be a new trial.

Zwicker v. Zwicker, 33/284.

CUSTOM.

11. **Custom of merchants—Meaning of terms.**]—Evidence admitted to show that locally in Nova Scotia, at all events, the expression "drawing freights" means drawing freights earned, while "drawing against freights" means drawing on consignees against freights not yet earned.

Pitcher v. Bingay, 21/31.

12. **Railway freights—Semble,** according to the custom of merchants, where goods are to be shipped at a certain price to a certain point, prepaid, and the vendee elects delivery of the whole or any part at other points, he is bound to settle freight charges on a basis determined by the distance, greater or less, from the first point. And the contract is not affected by falls in rates of freight.

Sumner v. Thompson, 31/481.

13. **Custom of mariners—Deviation.**]—Quaere, in the case of small coasting schooners, is there a custom of mariners as to seeking shelter from anticipated bad weather, to countervail a defence of deviation?

See INSURANCE, 18.

JUDICIAL NOTICE

14. **Judicial notice—Prohibited waters.**]—In an action on a policy of marine insurance, the Court referring to a chart will take judicial notice that a place laid down thereon, is within waters prohibited by the terms of the policy.

Hart v. Boston Marine Ins. Co., 26/427.

15. **Location of town.**]—It will not judicially notice that Sydney is within the County of Cape Breton.

Sydney & Louisburg Coal Co. v. Kimber, 23/338.

16. **Nor that Middleton** is within the County of Annapolis.

Phinney v. Morse, 22 S.C.C. 563.

17. **Where defined by statute.**]—But the Court will judicially notice the location of a town where it can be inferred from public statutes, connected with the administration of government, etc.

Queen v. McDonald, 29/160.

Ex parte James W. Macdonald, 27 S.C.C. 683.

PRESUMPTIONS.

18. **Public officer—Registrar of deeds.**]—No evidence of the attestation of the subscribing witness appearing on a deed proved to have been regularly delivered to the registrar of deeds for registry, and by him mislaid, unregistered, but subsequently found:—Held, that the reception of the deed by the registrar, a public officer, raises the presumption that the deed was duly proved before him.

Jost v. McCuish, 25/519.

19. **Public Act—Presumption of regularity.**]—Though a party attacking the validity of a school meeting, and whose duty it was to have posted notices under the Public Instruction Act, 1895, swear that he did not do so, yet the presumption is in favor of regularity, so that he must bear the burden of proving that notice was not given, or be corroborated.

Meisner v. Meisner, 32/320.

20. **Indorsement on counterpart of lease—Presumption of delivery.**]—A memorandum indorsed on the counterpart of a lease in the handwriting of the lessor (and on trial after his decease of the right to possession of the demised premises, coming out of the hands of his agent), setting forth that a fine had been paid and a renewal granted, is to be regarded as an admission against the lessor, and those claiming by descent from him. Being on a counterpart, the presumption arises that a similar indorsement was made on the lease itself, and delivered to the lessee, whereas had the document produced been the lease itself, there might arise a contrary presumption that it was held in the possession of the lessor for reason, as for the non-payment of the fine required.

Pernette v. Clinch, 26/410, 24 S.C.C. 385.

RELEVANCY.

21. **General reputation for veracity—Cross-examination.**]—On trial of an action for negligently maintaining an obstruction in a street, defendant town produced witnesses against plaintiff's general reputation for veracity. On cross-examination of one of these witnesses, plaintiff's counsel proposed to ask, "What do individual neighbors think of his character? Whose opinion do you know?" which was not permitted:—

Held, the ruling was erroneous, but (in this case) it had not caused "a substantial wrong or miscarriage, etc."

Messenger v. Town of Bridgetown, 33/291.

22. **Fraud—General course of dealing.**]—To an action on a written contract, the defendant proposed to prove that his signature was obtained by fraud, by showing that a number of other persons had been similarly dealt with and defrauded by plaintiff:—Held, that on principle and on authority, evidence might be received as to plaintiff's general course of dealing.

Kidd v. Henderson, 22/57.

23. **Infant—Proving own age.**]—In an application to open up a judgment entered by default, and for leave to defend on the ground of infancy:—Held, that the affidavit of the applicant is sufficient proof prima facie of the fact of infancy.

Leaman v. Murray, 23/298.

24. **Libel—Proof of publication.**]—Evidence admitted to prove the identity of a newspaper published in its evening edition under a different name from that used in the morning edition.

See SLANDER AND LIBEL, 14.

25. **Libel — No names mentioned.**] — Evidence as to persons referred to.

See SLANDER AND LIBEL, 15.

26. **Libel—Inexactness** of description does not affect the matter.

See SLANDER AND LIBEL, 12.

27. **Slander—Meaning of words.**]—In actions for slander, the meaning of words complained of is a matter of fact for the jury.

Archibald v. Cummings, 25/555.
Shea v. O'Connor, 26/205.
Gates v. Lohnes, 31/221.

28. **So also,** is the motive of the defendant in writing a libellous letter.

Miller v. Green, 32/129.

29. **Testamentary intentions.**]—After a person resisting the admission of a will to probate had closed his case and rebuttal evidence had been given, he tendered evidence as to declarations of testamentary intentions at variance with the will, made by the testator about one year previous to his death. This was rejected by the Judge of probate:—Held, that the matter was one clearly within the discretion of the Judge.

Re Estate John A. P. McLellan, 28/226.

30. **Conversation of deceased persons.**] On an issue as to whether C. meant by his will to create a joint tenancy or a tenancy in common, evidence of a conversation between the tenants (since deceased), forty-one years previously, was rightly rejected.

Clark v. Clark, 21/381, 17 S.C.C. 376.

31. **Hearsay—New trial.**]—Semble, a new trial will not be ordered because of the admission of hearsay, not objected to on trial.

Creelman v. Tupper, 25/334.

32. **Deposition before magistrate.**]—As to whether a deposition taken down in writing on a hearing before a magistrate is the best evidence of what the witness said, or whether proof by other means is entitled to the same rank and credit? (Cf. pro and contra.)

Milner v. Sanford, 25/227.
Queen v. Troop, 30/339.

33. **Judge's notes** taken for his own convenience, semble are not to be so considered.

Milner v. Sanford, supra.

VARYING WRITTEN DOCUMENTS.

34. **Varying written contract—Fraud alleged.**]—In an action on a written contract the defendant sought to introduce evidence to the effect that he was induced to sign the same by fraud, etc. The trial Judge refused to receive the evidence:—Held, there must be a new trial.

Belden v. Chapman, 21/100.

35. **Varying deed—Plan referred to.**]—A plan of lots referred to in the description of a deed is properly received in evidence as showing the property meant to be conveyed. And where it appears that it was intended to convey certain lots as numbered on that plan, measurements shown there outweigh measurements mentioned in the description.

Semble, the other party loses his right to object to the reception of the plan, if he himself must rely on it in support of one of his contentions.

McFatridge v. Griffin, 27/421.

36. **Description in mortgage** — Parol evidence admitted to show that property after acquired by the mortgagor was meant to be included by certain words—And to identify property.

See MORTGAGE, 15.

37. **Receipt at variance with deed.**]—Plaintiff sought an accounting in respect to a mining property. Defendant contended that plaintiff had parted with his entire interest (one quarter) to F., and produced his receipt to F. to that effect. The deed or transfer to F. transferred only a quarter interest:—Held, that the deed was the best evidence, and should govern.

Sim v. Sim, 22/185.

38. **Varying writing — Supplementing draft agreement.**] — To an action for salary as manager of a mine, the defence was that plaintiff's rights were set forth in a written agreement (produced, but

unsigned), by which salary was only payable out of profits. Plaintiff's contention was that this was a draft memorandum, not embodying all terms. The Court crediting this, allowed him to proceed to the proof of further terms by parol.

Townshend v. Adams, 26/78.

39. **Mode of payment.**]—Evidence may be given to show that a price mentioned in a written contract was intended to be paid by contra account for goods furnished.

See SALE, 18.

40. **Varying written contract of sale.**]—Evidence of verbal warranty may not be given, at all events after delivery where rescission cannot be had because it is impossible to restore parties to their original position.

See SALE, 4.

41. **Varying written agreement.**]—Parol evidence wrongly admitted to rebut or qualify an agreement in writing, to accept goods of smaller value, in satisfaction of a debt due.

See CONTRACT, 6.

42. **Written agreement,** sale of land.]—Substitution, and parol rescission may be proved.

See LAND, 5.

43. **Varying written instructions—Meaning of "grade."**]—Plaintiff agreed in writing to do certain work for defendant city under the instructions of the city engineer. The engineer furnished him with written instructions in which the word "grade" occurred twice in reference to different parts of the work. Plaintiff, misapprehending his instructions, was compelled to undo and do over again some of his work, and now sought to recover the loss suffered thereby. His right to recover depended on a different meaning being attached to the word "grade," where it occurred a second time in the instructions:—Held, that the trial Judge had rightly rejected expert evidence of civil engineers as to a special and unusual meaning of that word.

McDonald v. City of Halifax, 28/84.

44. **Ownership of timber cut—Appropriation—Varying written contract.**]—Plaintiff sold lands to S. by an executory agreement in writing containing a clause by which S. was not to cut thereon more than a certain quantity of timber in any one year.

Certain logs and deals cut, having been taken by defendant sheriff under execution against S., plaintiff laid claim under an alleged oral and supplementary agreement, by which he was to receive the same and credit the value on the price of the land:—

Held, he might not give evidence of such an agreement.

Blaikie v. McLennan, 33/558.

45. **Proof by copy—Loss of original not proved—Who may use copy.**]—In an action for the price of lumber, the question was the amount delivered. The only evidence as to this was an entry in a book of account copied from "tally boards," or rough memoranda, made by an employee of plaintiff, as the lumber was going through the mill. The County Court Judge having admitted this book as evidence, without proof of the loss of the "tally boards," and of a search made, etc., found for plaintiff:—

Held, there was no proof as to the quantity delivered. Assuming that the book could be taken as the original entry, of which there is some doubt, it could only be used to refresh the memory of the person who made the entry therein, and he had no knowledge of the quantities delivered. And the book could not be used by the person who marked the tally boards, for though he had a knowledge of the correctness of his account, he had not compared it with the copy entered in the book.

Tupper v. International Brick and Tile Co., 24/256.

See also 20 ante.

46. **Bill of sale—Independent sale and delivery.**]—Where there has been a sale and delivery of goods, and an appropriation by the purchaser sufficient to pass the title, and it appears that on the same day the vendor executed a bill of sale to the vendee, on which he does not

choose to rely for title, the bill of sale is not to be considered the best evidence of the contract.

And the vendee in asserting his rights against a levy by a creditor of the vendor, may proceed to parol proof of the sale and appropriation without producing the bill of sale.

Kennedy v. Whittie, 27/460.

(See also BILL OF SALE, 13 et seq.)

WITNESSES, EXPERT, HOSTILE, ETC.

47. **Contradicting own witness.**] — "Although the Evidence Act is somewhat obscurely worded, it appears that it is competent for a party producing a witness to give contradictory evidence. The question is discussed in note 47, Stephen's Dig. Ev., and authorities are there cited to show that it always was competent to do so, and that the statute does not take away the right."

Almon v. Law, 26/340.

48. **Contradicting hostile witness.**] — Where a witness proves to be hostile, and is contradicted in pursuance of R.S. 5th Series, c. 107, s. 20, as to a particular statement, it does not follow that all the rest of that witness' evidence must be rejected.

Gates v. Lohnes, 31/221.

49. **Hostile witness—Party to suit.**] — New trial refused on an application on the ground inter alia that the trial Judge had refused to admit evidence to show that the husband of the female plaintiff, also a party plaintiff, seeking to recover for slander, was a hostile witness. Such might be assumed from his joinder as a party.

Creelman v. Tupper, 25/338.

50. **Expert witness—Propriety of question to.**] — The following question was propounded to the physician who had attended a deceased person in his last illness:—"Would you say that the deceased, in his condition, at the time the notes for his will were taken, was in a condition of sufficient mental intelligence to dispose of his estate?"

Per Henry, J., the question is beyond any which may be put to an expert medical witness, as it presupposes a knowledge, not only of medicine, but also of law.

Re Estate John A. P. McLellan, 28/233.

51. **Qualification of expert.**]—Must be tested by cross-examination — Medical witness—Propriety of question.

See CRIMINAL LAW, 41.

52. **Deposition — Witness not previously sworn.**]—On argument of an appeal objection was made that the evidence of a witness examined abroad was improperly received, because he had not testified on oath. He was sworn when he signed the deposition:—

Held, that if this method was at variance with the instructions, the deposition should have been moved against on notice. On his deposition the witness could not escape a prosecution for perjury.

Wurzburg v. Andrews, 28/405.

53. **Examination de bene esse—Of a party—Word "witness."**] — Defendant's solicitor, in consenting to the passing of an order for the examination of witnesses abroad, was not aware that it was intended in this way to secure the evidence of one of the plaintiffs. On his application, setting out the misapprehension he was under, the order was set aside. Though both parties to an action are contemplated in the word "person" in O. 35, R. 4, yet the Court will only authorize the examination of a party in this way under special circumstances shown.

Also, McDonald, C.J., contra, the word "witness" appearing in R.S. 5th Series, c. 107, s. 30, does not refer to parties to an action.

Seymour v. Doull, 23/364.

54. **Evidence of dealings with deceased —R.S. c. 107, s. 16.**]—On final settlement of the estate of a deceased person the administrator included in his account a claim of his own for board of a relative

of the deceased: -Held, that under the above section neither he nor his wife should be permitted to testify.

Re Estate Heatley, 22/302.

55. **Ruling of probate Court disallowed.**]—The ruling of the Judge of probate allowing an account for services rendered a deceased person, but supported only by the evidence of the claimant, was disallowed.

Re Estate John Condon, 28/208.

56. **Uncorroborated testimony.**]—The jury should be warned to take uncorroborated testimony against a deceased person with extreme caution. Having found adversely to the testimony, the verdict was not disturbed.

McDonald v. McDonald, 24/241.

57. **Dealings with deceased.**]—The statute which forbids interested persons to give evidence of dealings with deceased, does not refer to evidence as to testamentary capacity.

Re Estate John Farquharson, 33/261.

58. **Against administrator's claim.**]—Nor does it forbid the reception of the evidence of one called in opposition to a claim against a deceased person asserted by an administrator.

Re Estate Eliza Robertson, 22/402.

59. **Canada Evidence Act**—Indictment for theft—Wife failing to testify—The prosecuting attorney having commented thereon a new trial was ordered.

See CRIMINAL LAW, 43.

EXAMINATION.

See also EVIDENCE, 47, PRACTICE, 43.

Discovery—Examination of officer.]—The provisions of O. 40, R. 44, do not extend to authorizing an order to be made for the examination of one who sometime before action brought was the vice-president and a director of the company against which a party seeks to enforce execution.

No such order should be made ex parte. And service of the summons on which such an order is made on one who had been the solicitor of the company up to final judgment, will not be presumed to be either actual or constructive notice to the party affected.

Hamilton v. Stewiacke Valley, etc., Co. & Dickie, 30/92.

EXECUTION.

1. **Wrong name.**]—In an action against a sheriff for wrongful levy it appeared that the defendant was called in the execution "Donald A.," whereas his proper name was "Daniel A." The jury found that he was well known by both names:—Held, that this cured the defect.

Adams v. Crowe, 26/510, 21 S.C.C. 342.

2. **Not entitled in cause.**]—An execution not entitled in the cause is perfectly valid. "In the body of it there is a description of the judgment giving the names of the parties which renders it quite sufficient to protect the sheriff."

McAskill v. Power, 30/189.

3. **Not signed.**]—Held, by the Supreme Court of Canada, reversing the decision of the Supreme Court of Nova Scotia, that an execution not signed by the prothonotary is valid. It is the seal not the signature which gives validity.

Hubley v. Archibald, 22/27, 18 S.C.C. 116.

Leary v. Mitchell, 21/367.

4. **Irregularity of judgment docket—Omission of name—Effect on execution.**]—In entering a judgment by default under R.S. 4th Series, c. 94, s. 243, the clerk omitted to insert the name of one of two plaintiffs. On motion to set aside an execution issued in the cause, as not

following the docket, it appeared that the names of both plaintiffs appeared throughout, and in the judgment roll, and in the execution:—Held, that the execution was correct in following the judgment roll, which was the proper evidence of the judgment, and in not repeating the mistake of the clerk in entering up the docket.

Per Graham, E.J.: "There might be some ground for setting aside or amending the docket, but then the party applying would have to account for his long delay (13 years) in moving."

Armstrong v. Dunlap, 24/334.

5. **Interest collectible.**]—Six years interest may be levied on an execution against real estate. Twenty years on an execution against personalty.

Anderson v. Cunningham, 21/344.

6. **Limitation as to execution—Where leave is necessary.**]—A defendant sought to set aside an execution on the ground that it had been issued more than six years after the date of the recovery of the judgment, and without leave obtained:—Held, that a former execution having been issued within six years, it is not necessary to obtain leave to issue a second, during the lives of the parties, or those of them during whose lives execution might formerly have issued (before the Practice Act, R.S. 4th Series, c. 94), within a year and a day, without a sciere facias.

The only difference made by the Judicature Act in cases where it is necessary to obtain leave, is that the order of the Court or a Judge takes the place of proceedings by writ of revivor, or of entering a suggestion by leave.

Anderson v. Cunningham, 21/344.

7. **Proving judgment.**]—Action against a Sheriff for wrongful levy of the goods of a married woman under an execution against her husband:—Held, in the Supreme Court of Canada, reversing the decision of the Supreme Court of Nova Scotia, that a Sheriff sued in trespass or trover for taking goods seized under an execution, can justify under the execution without showing the judgment. McLean v. Hannon (3 S.C.C. 706), followed.

Adams v. Crowe, 26/510, 21 S.C.C. 342.

8. **Abandonment of levy—Breaking in.**]—The defendant Sheriff levied goods under execution and advertized them for sale. At the time of the levy the execution debtor's wife and W.N. were in the house. He told W.N. that he was coming back and that they had no right to lock him out, and that if that was done he would have to break in. He put a watchman to watch the premises, and returned twice before the sale, but found the house locked. On the day of the sale he forced open one of the doors:—Held, there had been no abandonment of the levy.

Reid v. Creighton, 27/90, 24 S.C.C. 69.

9. **Second execution—Before return of first.**]—A second execution issued after an attempt to enforce the first, and before a return has been made, is clearly irregular, and should be set aside.

Dunbar v. Ross, 32/222.

10. **Evading execution—Assignment.**]—An assignment or transfer of property, not otherwise fraudulent, is not so because made to evade execution at the suit of a creditor. (Note.—Before the Assignments Act.)

Mulcahy v. Archibald, 30/121, 28 S.C.C. 523.

11. **Restitution of goods levied—Costs.**]—Certain goods of defendant were taken under execution herein and on sale were bought by plaintiff.

The judgment on which the execution issued having been set aside on appeal, and a new trial ordered, defendant applied for an order for restitution of the goods. There were several adjournments of the matter and in the meantime the second trial took place and resulted in judgment for the plaintiff, who again issued execution and bought in the goods.

Held, that on the facts as they existed at the date of the application, defendant was entitled to succeed, but as plaintiff had by the second execution perfected his title to the goods, the order

for restitution could not be made, but that defendant should have his costs of the application.

Whitford v. Zinc, 30/193.

12. **Arrest for debt—Consent to discharge—Second execution—Irregularity.**]—Defendant (1888) having been arrested for debt, made application for his discharge under the Indigent Debtors' Act. Before a hearing was had, his solicitor arranged a compromise with a solicitor who was agent for plaintiff's solicitor, by which defendant gave certain notes, and resumed his liberty. Some months afterwards plaintiff's solicitor received a payment on account. Notwithstanding, several years later he issued a second execution on the judgment.

Held, setting it aside, that the receipt of money by plaintiff's solicitor, at a time when he could not have thought that defendant was still in custody, was strong evidence that he had consented to his discharge, in which case he did not pretend that he could ever after take proceedings to enforce the original judgment.

Also, the second execution having issued after an attempt made to enforce the first, with no return made, was clearly irregular, and for that reason alone should be set aside.

Dunbar v. Ross, 32/222.

13. **Under Crown Rules.**]—The Crown Rules, 1889, s. 138, direct that execution on the Crown side shall follow the form in use on the civil side as nearly as may be. When the rule was adopted, imprisonment for debt had not been abolished, and the form of execution contained a clause directing the defendant's arrest. Subsequently this clause was omitted.

On motion to set aside an execution for costs under the Canada Temperance Act, on the ground that it contained the arrest clause and so did not follow the civil form:—Held, the form of execution of the Crown side had not changed with that of the civil side.

Queen v. Roberts, 27/381.

14. **Against land—Limitation.**]—A levy and sale by the Sheriff after the lapse of twenty years from the recovery of a judgment, is not an "entry or distress," or "an action to recover land," within R.S. 5th Series, c. 112, s. 11.

See LIMITATION OF ACTIONS, 13.

15. **R.S. 5th Series, c. 124—Sale of lands under process—Writ of possession.**]—

See POSSESSION, 17.

16. **Owner not seized—Judicial sale.**]—Though an owner not seized may not convey his title, because the policy of the common law prohibits the transfer of causes of action, and the Statute 32, Henry VIII. c. 9, makes such transfers a crime, yet execution and judicial sales are not within the inhibition, the transference being involuntary.

Doull v. Keefe, 34/15.

17. **English Statute, 5 Geo. II., c. 7—Land in colonies.**]—Per Thompson, J., The English statute which made lands in the colonies liable to execution in the same manner as personalty, is no longer in force. "In my opinion the statute has had no force in this Province since the first session of our Legislature, when a statute inconsistent with its provisions was adopted. The later statute has since been continued in a modified form. I have no doubt of the power of our Legislature to repeal or modify the provisions of the English statute in so far as they applied to this Province, and it is worthy of observation that in Ontario, a Provincial statute modified the provisions of the English statute by providing that the execution should not go against real and personal property at the same time, as could have been done under the English statute."

Murphy v. McKinnon, 21/308.

(Note.—Contra, however, see PROBATE COURT, 21.)

18. **Probate Court.**]—May not enforce its decrees by execution except (under section 64 of the Probate Act), as to costs.

Re Estate McWilliams, 22/367.

Re Estate Lake, 22/244.

19. **Equitable execution — County Court.**]—The County Court has power to grant equitable execution by the appointment of a receiver.

Imperial Bank v. Motton, 29/368.

Barrowman v. Fader, 32/284.

20. **Equitable execution—Receiver.**]—The Court will not authorize equitable execution by the appointment of a receiver, merely to facilitate or expedite recovery, where ordinary modes are, or will be, applicable.

N. S. Mining Co. v. Greener, 31/189.

21. **Salary of school teacher attachable — Equitable execution.**] — Under the terms of the Public Instruction Act, the contract of a teacher in the public schools, not being directly or indirectly with the Government, his salary is liable to attachment for debt.

And as such salary is not to be reached by ordinary modes, equitable execution by the appointment of a receiver may be had.

Semble, though the right to receive the salary has been assigned by defendant to plaintiff under the Collection Act, this is not an assignment of a chose on which the assignee may maintain action against the Inspector of Schools, after notice, etc.

Fraser v. McArthur (12 N.S.R., p. 498), reviewed in part.

Fisher v. Cook, 32/226.

22. **Pension of retired city official—Liable to execution—Residing out of jurisdiction — Equitable execution — Receiver.**]—The defendant was a retired official of the City of Halifax, and in receipt of a pension of $1,000 per annum for life out of the city revenue; he was not to perform any duties for it, and there was nothing in the legislation enabling the city to pay the pension, regulating the time or mode of payment to defendant, or to prevent him from assigning it.

Held, that the pension was liable for defendant's judgment debt. The defendant residing out of the jurisdiction and ordinary modes of collection, not being available, plaintiffs were entitled to the appointment of a receiver.

Also, that since the passage of the Judicature Act, the Court has power to grant equitable execution by the appointment of a receiver, where, as in this case (a pension being in no sense a debt) garnishee process does not apply.

Imperial Bank of Canada v. Motton, 29/368.

23. **Equitable execution—Against beneficial interest in lands.**]—The only property found in defendant to satisfy plaintiff's judgment, was a beneficial interest in lands which defendant had agreed to purchase and on which he had made a payment. Under the terms of this agreement defendant was in possession, and in receipt of the rents and profits, but the legal estate remained in the vendor.

Held, that defendant's interest being wholly equitable, ordinary modes of execution did not apply, and equitable execution might be had by the appointment of a receiver as to the rents and profits. Also, before applying, it is not necessary for the judgment creditor to go through with the useless form of issuing a legal execution.

Barrowman v. Fader, 32/284.

24. **Equity of redemption under chattel mortgage—Condition vesting property in grantee on any levy—Levy under O. 40, R. 31—The corpus of the goods must not be interfered with.**]—Plaintiff held an undisputedly valid chattel mortgage of property of G., one condition of which was that if "any of the property should be attached or levied on . . . then it should be lawful for the grantee to take immediate possession of the whole granted property to her own use." Defendant Sheriff, seeking to levy on G.'s equity of redemption under O. 40, R. 31, entered his place of abode, and "put his hand on the stove and sewing machine, and said he took them under execution," but made no removal and left no one in charge. Afterwards he advertised the goods for sale as "levied and taken under execution."

Before the day set for sale, the Sheriff's deputy, who was not in corporeal possession, having refused to abandon

the levy, plaintiff brought conversion and replevied. On appeal from the finding of the trial Judge for plaintiff, the Court was equally divided.

Per Meagher, J., dismissing appeal (McDonald, C.J., reading a decision, not reported, reaching the same result), that the defendant sheriff on the face of his pleadings not disputing that a levy had been made, or that there had been an abandonment thereof, or a restoration on demand, had been guilty of a wrongful interference with plaintiff's rights of property under the chattel mortgage, which accrued by the fact of the levy. There having been no execution against an equity of redemption in personalty prior to the adoption of the Judicature Act, the Sheriff is restricted by the terms of O. 40, R. 31, to proceedings against the equity only, and may not interfere with the mortgaged goods in any way. (Semble, until after sale of the equity.)

Per Townshend, J., allowing appeal, Ritchie, J., concurring, inasmuch as there was no removal of the goods after levy nor placing of anyone in charge, nor any further act on the part of the Sheriff, except the posting of a notice to the effect that he proposed to sell them as "levied and taken under execution," replevin, a process to recover a possession, which in this instance was never severed, does not apply.

Also, the levy having been abandoned when the Sheriff left the premises without leaving anyone in charge, his subsequent use of the words "levied and taken," not expressing the true state of the case, could not found an action against him, and for the same reason could not be considered as an admission on his part.

Also there is no means of giving effect to O. 40, R. 31, but by seizure and sale of the goods themselves, thus enabling the purchaser to stand, as regards the chattel mortgage, in the exact position of the owner of the equity.

Gates v. Bent, 31/544.

25. **Equity of redemption—O. 40, R. 31—Bill of sale.**]—Defendant Sheriff, under execution, sent his deputy to the premises of M., with instructions to levy on property over and above the amount due under a bill of sale to plaintiff. The deputy visited the place, made a list of articles, told M. that he had levied, but made no removal and left no one in charge. The Sheriff afterwards advertised for sale "all the right and interest of M., etc." In replevin by the holder of the bill of sale, and for damages:—

Held, that the Sheriff had not exceeded his powers under O. 40, R. 31, and the action would not lie.

Semble, the Sheriff should have left some one in charge, pending sale, otherwise, in case of a removal, he might have rendered himself liable.

McKay v. Harris, 32/150.

26. **Execution against partner—Service—Costs.**]—Plaintiffs having recovered judgment against defendant firm, discovered that B. was a partner therein and applied for execution against him under O. 40, R. 10. Defendants had been served as a firm under O. 9, R. 6. B. opposed the application for execution, disputing his liability for costs of the judgment on the ground that as he had not been served, he had no share in incurring them.

Held, he was liable notwithstanding, and his recourse, if any, was against his partners, who had contested plaintiff's claim, on a winding-up of the partnership.

Banque d'Hochelaga v. Maritime Ry. News Co., 31/9.

27. **Execution against shareholders.**]—O. 40, R. 23, provides that "where a party is entitled to execution against any of the shareholders of a joint stock company, upon a judgment recorded against such company . . ."

Held, that the rule is complied with by recording the judgment at the Registry of Deeds in the county in which the works and railway of defendant company are situated, though the words "recorded against the company" have a different signification under the provisions of the English "Companies Act," which do not exist here.

Hamilton v. Stewiacke Valley Ry. Co. and Dickie, 30/10.

28. **Execution against shareholders.**]—A creditor who has obtained judgment against a company may proceed to enforce it against shareholders by an application under O. 40, R. 23, as well as by the formerly employed writ of sciere facias.

Hamilton v. Stewiacke Valley Ry. Co. and Dickie, 30/10.

29. **Setting aside execution.**]—Stay of proceedings. Interpleader issue directed.

See PRACTICE, 22.

EXECUTORS AND ADMINISTRATORS.

See also PROBATE COURT, WILL.

1. **Appointment of administrator with the will annexed—Deductions from will—Appointing a stranger.**]—The will of M. S. directed the executors of her late father to hold her interest in her father's estate for the benefit of her infant sons until they reached full age, "wholly and entirely separate and apart from my husband, J.S." She appointed no executors, and C. and X., the executors of her father's estate, applied for administration with the will annexed, which was opposed by the husband, J.S., who claimed the right. The Court of Probate refused to appoint either, and recommended them to agree on a third person, which they failed to do. The Court then appointed the Eastern Trust Co., and C. and X. appealed.

Held, that the mere fact that the applicants could not agree was no reason for appointing a stranger, and that the case not being one of intestacy, the statute did not govern, but the appointment was for the discretion of the Court of Probate, to which it should be remitted back to make an appointment on further evidence.

Obiter, the rule of practice for cases not governed by statute, is that the right to administration follows the interest conferred by the will, even to the exclusion of the next of kin. Here the sole interest was in the infant legatees, who under the will were to be represented by C. and X., who would therefore seem, prima facie, the proper persons to appoint, under all the circumstances. The right of the father, which, as natural guardian of his children, would have been superior, fails because of the intention to exclude him to be drawn from the will itself.

That the mere fact that C. and X., as executors of testatrix's father, would have to account to her administrator, did not, unless they were in default, render then ineligible appointees.

Semble, under the actual circumstances, the appointment of a stranger might be proper.

Re Estate Mary F. W. Smith, 28/221.

2. **Appointment of executor** to take the place of a deceased executor. Principles governing. Appointment of relative.

See TRUST, 3.

3. **Administration de bonis non—Principles governing.**]—On settlement of the estate of C., a large sum of money was found to be due D., the administrator, but there were no assets out of which payment could be ordered. After D's death unexpected assets were discovered, and the petitioner, who was administrator of D., applied for administration de bonis non of C.

Held, that the power of the Court of Probate to grant letters was undoubted. That the right to administration in the present case was in the next of kin of C. at the time of his decease, not in those who might be his next of kin at the time of the application. Failing these, the right was in the largest creditor, whose administrator was the petitioner.

Re Estate of Cunningham, 31/264.

4. **Paying legacy where estate is insolvent—Creditor not estopped by acquiescence.**]—The executors of a deceased person paid out of the estate, under a provision of the will, $504 for the board and maintenance of a daughter by a deceased wife. The estate proved to be insolvent.

Held, that the claim was properly disallowed, and that the surviving wife, who was the principal creditor, was not estopped from complaining, by her knowledge and acquiescence in the payment,

where she was ignorant of the fact that the estate was insolvent.

Also, that the Probate Court rightly disallowed solicitor's charges for services rendered to the deceased, where there was no evidence that they were either agreed upon, or taxable.

Re Estate Edwin Ryerson, 29-81.

5. **Agreement as to commissions—Accounting.**]—W. H. died in October, 1892, leaving a will under which his wife, H.H., was residuary legatee. She died in December following, leaving a will in which A.H. was sole legatee. P. was appointed administrator with the will annexed in both estates. By agreement among the parties concerned, the two estates were blended and treated as one, and P. was to have a commission of 5 per cent. of the estate of W.H., for his services in both, and also some charges for personal expenditures.

Subsequently, in the interests of P., it was suggested that there should be an accounting in the estate of H.H., and it was agreed that P. should take charge of the settlement, the expenses to be paid by A.H.

Held, that P. having had the advantake of the agreement as to commissions, must be held to its observance, and was not entitled to an extra commission in connection with the accounting, and that so much of the decree of the Judge of Probate as allowed such a commission must be set aside.

In re Estate of Hamilton, 29/249.

6. **Removal of administrator—Balance due him—Term "vouchers"—Citation—Section** 57.]—B. was removed from the office of administrator and another appointed, at a time when he was absent from the Province, and there was a balance in his favor. He presented a petition to the Court, praying for a citation, and final settlement of the estate. The new administrator having appeared, the Judge proceeded to settle the estate.

Held, that a citation should have issued under section 57, calling upon creditors, next of kin, etc., to attend the settlement. Also that B. was entitled to be indemnified out of the estate for outlays in the matter of costs of litigation. Also that he was not precluded under section 61, from recovering amounts above $8, by the absence of receipts therefor, the term "vouchers" in that section not being limited to "receipts."

Re Estate of McRae, 26/214.

7. **Action by executor—Personal liability for costs—Citation.**]—An administratrix having brought action against O. for trespass to lands of the estate, and failing, the award of costs should be against her personally. If she has paid them personally, she may present them as a claim against the estate on final settlement, when the merits of the question may be passed on. But O., having presented his claim for these costs as a debt of the estate, which the Judge of Probate disallowed (appealed from), the matter is res adjudicata in a subsequent action against the estate, though the personal liability of the administratrix be unquestionable.

Also, O. not being "a creditor, or other person interested," had no status under Section 57 to apply for a citation.

Granger v. O'Neil, 31/462.

8. **Administrator—Lands of intestate available as assets.**]—Action against the administrator on a mortgage bond made by the deceased, after foreclosure and sale for less than the amount of the mortgage. The defence was that the administrator had "fully administrated all the personal effets which were of the said (deceased), or which had ever come into his hands as administrator de bonis non aforesaid to be administered, and that he had not at the commencement of this suit, nor had he since any personal estate of the deceased . . . in his hands to be administered.

It appeared on trial that besides personal property, there had been a large amount of valuable real estate of the deceased which the administrator might have made available as assets, but which he had not done, nor had the value thereof been realized for the benefit of the estate:—Held, that under the Probate Act and practice he was bound to have

done so and on account of his failure was chargeable.

Per Weatherbe, J., dissenting, that the administrator was not so bound, and that his plea of plene administravit was good, and that the proper course was for the creditor himself to have applied to administer the land.

Northrup v. Cunningham, 24/188.

9. **Action against executor—On interlocutory decree, will not lie.**]—The Judge of Probate on the final settlement of the estate of G., found the sum of $500 due the estate by the executor. On appeal to the Supreme Court, the proper amount was fixed at $300, and an order was made remitting the matter back to the Probate Court, "and that the said Court do proceed as if the final decree on the account had been to that effect."

On this decree the plaintiff, who was sole beneficiary of the estate, brought action and recovered judgment in the Supreme Court. On appeal, however:—

Held, that the action was not maintainable, the decree being interlocutory, not final, and the proper remedy was, in some cases by attachment, in others by execution, in the Supreme Court always by execution.

Greenwood v. Chesley, 25/203.

10. **Devastavit against administrator—Decree of insolvency—Protects only the insolvent estate.**]—Plaintiff brought action in the County Court against S., who pleaded a defence and counterclaim. S. having died before trial, an order was made, on application ex parte of plaintiff, substituting his administrators as defendants. They did not appear or plead, and plaintiff (irregularly, see COUNTY COURT, 5), procured judgment against them as administrators. Execution having been returned unsatisfied, plaintiff brought this action on the judgment of the County Court against the administrators personally, alleging devastavit. In this action the defendants moved a stay of proceedings, on an order procured from the Court of Probate under section 56, declaring the estate of their intestate insolvent.

Held, removing stay, that the defendants by failing to appear to the action in the County Court had admitted assets in the estate, which (were the resulting judgment regular) would estop them from denying devastavit; and that the protection of section 56 of the Probate Act only applies to the estate of the deceased insolvent, not to the administrator personally.

Stewart v. Taylor, 31/503.

11. **Action on bond—Defences available.**]—In an action on an administrator's bond to recover an amount decreed by the Court of Probate to be divisible amongst the next of kin, the defences were that the decree was without jurisdiction, the husband of the administratrix not having been cited, that a certain other citation was outstanding, and that the decree awarded costs against the administratrix without ten days' notice as required by the statute:—Held, that these objections might have been taken in the Probate Court, but not by way of defence to an action on the bond.

Cowling v. Gates, 21/78.

12. **Special discretion to executor—Does not continue to one substituted.**]—Deceased appointed plaintiff (his son-in-law) executor of his will to carry into effect certain dispositons of his property. By a codicil he gave him a discretion, if he thought fit, to pay certain legacies in land at a valuation to be fixed by himself. Subsequently he conveyed all his estate to his daughter, the defendant, upon certain trusts during his life, thereafter to dispose of his estate according to the conditions of his will. By a last codicil he appointed her his sole executrix, in substitution for plaintiff:—

Held, that defendant, not plaintiff, was trustee for carrying out the provisions of the will, but that the discretion as to paying legacies in land, "at a valuation to be fixed by himself," was of a personal nature, and did not continue to defendant, but that the Court might take over the function, and order a sale for the purpose of paying the legacies.

Townshend v. Brown, 22/423.

13. **Administratrix de son tort—As a defence—Appropriation of payments.**]—The female plaintiff sued for goods sold and moneys paid. The defence was that her late husband was largely indebted to defendants, and that in furnishing the goods and paying the money, plaintiff had acted as administratrix de son tort of S., and derived her means of doing so out of his estate. It appeared that plaintiff, immediately after the death of S., had purchased his business from his executors, and that defendants at the time plaintiff had made the payment, had not at first appropriated it to the debt of S., but had rendered his executors an attested account for the whole:—Held, that under the evidence, plaintiff was not acting as administratrix de son tort, and was personally entitled to recover.

Dart v. Davidson, 26/220.

14. **Abatement — Trespass — Death of plaintiff.**]—Held, construing R.S. 5th Series, c. 113, s. 1, that an action for acts of trespass committed within six months next preceding the death of a testator, may not only be begun by an executor, but as to that period an action begun by the testator may be continued (on application to be added as plaintiff) by the executor. And if the trespass be a continuing one, applying O. 34, R. 46, damages may be assessed down to the date of assessment.

Miller v. Corkum, 32/358.

Grant v. Wolfe, 32/444.

15. **Evidence of dealings with deceased—R.S. c. 107, s. 16.**]—On final settlement of the estate of a deceased person, the administrator included in his account a claim of his own for board of a relative of the deceased:—Held, that under the above section neither he nor his wife should be permitted to testify.

Re Estate Heatley, 22/302.

16. **Ruling disallowed.**]—The ruling of a Judge of Probate allowing an account for services rendered a deceased person, but supported only by the evidence of the claimant, was disallowed.

Re Estate John Condon, 28/208.

17. **Evidence against executor.**]—But the section above does not apply to the evidence of a witness called in opposition to a claim asserted by an executor against his testator.

Re Estate Eliza Robertson, 22/402.

18. **Uncorroborated testimony.**]—The jury should be warned to take uncorroborated testimony against a deceased person, with extreme caution. Having found adversely to the testimony, the verdict was not disturbed.

McDonald v. McDonald, 24/241.

19. **Right of retainer—Claim by executor—Dealings with deceased.**]—Under the Probate Act the executor has no right to retain assets to meet his individual claim. In granting preferences out of an insolvent estate, he must follow strictly the directions of the Act, which do not so favor an executor.

If a claim filed by an executor, as a creditor of the deceased, is challenged, it must be proved like any other account, and under R.S. 5th Series c. 107, s. 16, neither he nor his wife may support it by their own testimony.

It having developed in the course of settlement of this estate, that the executor had removed certain articles of household furniture of the deceased and omitted them from the inventory, the Judge of Probate ordered him to credit the estate with the value thereof:—Held, that under section 68 of the Probate Act he had power to do so, that section conferring on the Judge of Probate the same power that a Court of Chancery has in maters of accounts of a deceased person.

Re Estate of McNutt, 24/264.

EXHIBITION, PROVINCIAL.

Regulations governing entries.]—See RACE.

EXPERT WITNESS.

See CRIMINAL LAW, 41, EVIDENCE, 50.

FAILURE TO PROVIDE.

See CRIMINAL LAW, 6.

FALSE ARREST AND IMPRISONMENT.

See also MALICIOUS PROSECUTION.

1. **Form of action—Incorrectly tried.**]—The trial of an action, which on the face of the pleadings appeared to be one for false arrest, having proceeded as though it were for malicious prosecution, involving the consideration of malice, reasonable cause, etc.:—Held, defendant's appeal must be allowed with costs, and a new trial had.

McKenzie v. Jackson, 31/70.

2. **Canada Temperance Act—Conviction bad.**]—A conviction under the Canada Temperance Act, afterwards set aside, but under which the plaintiff had been imprisoned. In an action of false imprisonment against the prosecutor, it appeared that he had not only laid the information and attended the trial, but had been active in securing the plaintiff's arrest and opposing his application for discharge under habeas corpus. The trial Judge withdrew the case from the jury, considering that there was no evidence for them, and plaintiff appealed:—Held, ordering a new trial, that a prima facie case having been made out, it should have been submitted to the jury, also where a conviction is bad on its face, no act done in pursuance of it can be justified.

Oakes v. Blois, 22/167.

3. **False arrest—Town by-law—Pedlar's license—Policeman exceeding authority.**]—The Town of Sydney Mines passed a by-law imposing a license fee on transient merchants for the privilege of selling, and providing that in default of payment they should be "hindered from selling." The Mayor of the town directed a policeman to seize the plaintiff's horse and waggon under the by-law. In addition to doing this the policeman arrested the plaintiff, who sued for false arrest.

The jury found that there was an arrest, that the defendant town had authorized the seizure of the horse and waggon, and assessed damages at $25. The trial Judge entered a verdict for the town and plaintiff appealed:—

Held, that the arrest was in excess of the necessities of the case to "hinder from selling," and in excess of policeman's instructions. That selling was effectually "hindered" by seizure of the horse and waggon. That the jury had negatived the authority to make the arrest, but there being no appeal against the finding, or complaint that the question was not properly submitted to the jury, there was no miscarriage of justice which would warrant the Court in ordering a new trial of its own motion.

Gresham v. Town of Sydney Mines, 27/320.

4. **Code 25—Warrant not endorsed for county.**]—In an action for illegal arrest and imprisonment, alleged to have been made under a warrant which was bad because not indorsed for execution in the county where the arrest was made, it is open to the defendant to show that he acted under Code 25, the offence charged having been one for which no warrant was necessary. And the trial Judge having excluded evidence of this character, a new trial was ordered.

And in actions of this sort against an officer for causing an illegal arrest, exemplary damages should not be ordered unless he has acted in bad faith, or has been guilty of some oppression or misconduct.

Jordan v. McDonald, 31/129.

5. **Action against magistrate.**]—He is entitled to notice of action under R.S. 5th Series, c. 101, s. 19:—Semble, the fact that he was misled by a barrister is not a mitigation.

See MAGISTRATE, 20.

FALSE PRETENCES.

See CRIMINAL LAW, 10.

FEES.

Generally.]—See COSTS.

Sheriff's.]—See SHERIFF.

FILIATION.

See BASTARD.

FIRE INSURANCE.

See INSURANCE, 3.

FIREWARDS.

See HALIFAX, CITY OF, 3.

FISHERIES.

1. **Inland waters—Powers of Dominion Parliament.**]—Trespass and trover for illegally entering and removing a net set in a stream on plaintiff's land. The defence was that by R.S. Canada c. 95, s. 14, from 6 o'clock Saturday evening until 6 o'clock Monday morning, in non-tidal waters, nets for catching fish must be raised or so adapted as to allow the free passage of fish, and that any nets set in violation were liable to seizure and forfeiture. And that defendant under the instructions of a fishery officer had entered and seized a net so set.

Held, that the defendant was justified in so doing, that the provision was within the powers of the Parliament of Canada, which must also have power to authorize entry of private lands to enforce the section, and that the forfeiture of the net was not an excessive penalty in the premises. (Queen v. Robertson, 6 S.C.C. 52, followed.)

Bayer v. Kaiser, 26/280.

2. **Foreign vessel—Convention of 1818—Three mile limit.**]—Where fish had been enclosed in a seine more than three miles from the coast of Nova Scotia, and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached, within the three mile limit, her crew engaged in the act of bailing the fish out of the seine:—

Held (in the Supreme Court of Canada, Strong, C.J., and Gwynne, J., dissenting. Not reported below), affirming the decision of the Court below, that the vessel when so seized was "fishing" in violation of the Convention of 1818 between Great Britain and the United States, and of the Imperial Act, 59 Geo. III. c. 38, and of R.S. Canada c. 94, and was consequently liable, with her cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited.

Ship "Frederick Gerring" v. Queen, 27 S.C.C. 271.

FISHERMAN.

1. **Wages.**]—A deep sea fisherman, being also a seaman, his wages or interest in the catch are exempt from attachment, under the "Merchants Shipping Act," etc.

See SHIPPING, 2.

2. **Vessel on "quarter lay."**]—Owners are not liable for supplies furnished crew.

See SHIPPING, 3.

FIXTURE.

1. **Fixture—Right of removal—Statute of Frauds.**]—A lease of land for five years gave the tenant a right to remove a certain building at its expiration, unless the landlord elected to purchase it at its value. The building stood upon piers, and earth had been dumped in around to the level of the sill:—Held, that the building was a fixture attached to the freehold, but that the right of removal enabled tenant to sell the building to the defendant, and that his contract in so doing did not come within the Statute of Frauds.

Oswald v. Whitman, 22/13.

2. **Engine connected with mine—Mortgage—Filing bill of sale.**]—Plaintiff

claimed as prior mortgagee under a mortgage made by S., and registered under the Mines Act, against the defendant, who had levied on an engine used in connection with the mine, under a judgment recovered against S. The engine was inside the "pump house." Several pieces of timber were laid horizontally in the pit, covered by another tier on top, and a third tier above that to which the engine was bolted. The bolts ran through the three tiers of timber. The ground was then levelled over the timber and a floor put down. The defendant's contention was that the engine was a moveable chattel, to which the plaintiff's title was defective, because his mortgage was not registered as a bill of sale in the county "where the grantor resides."

Held, that the engine was a fixture which would pass as part of the land under a mortgage filed under the Mines Act.

Also, as the grantor was a foreign company with a head office abroad, the provision as to filing did not in any case apply.

Don v. Warner, 28/202, 26 S.C.C. 388

FLYING SHUNT.

On railway, causing fatal accident. Dangerous operation. Action under Lord Campbell's Act.

See NEGLIGENCE, 12.

FORECLOSURE.

See MORTGAGE.

FRAUD AND MISREPRESENTATION.

1. **Money paid on fraudulent misrepresentation.**]—The defendant obtained $50 from plaintiff by fraudulently representing to him that he had lost the benefit of an arrangement he had made with B., by which B. was to pay that amount for the privilege of using defendant's mare for breeding purposes during the season, because plaintiff's colt had broken defendant's close and got the mare with foal. Plaintiff paid $50, as in the nature of damages, and was to have the foal. The mare proving not to be with foal, and plaintiff discovering defendant's fraud, brought action to recover the payment:—Held, he might recover and that the matter was within the jurisdiction of a Justice of the Peace, under R.S. 5th Series c. 102.

Fraser v. McLanders, 25/542.

2. **Misrepresentation to surety.**]—Recovery of payment made by him in consequence. Appropriation of payments. Laches.

See PRINCIPAL AND SURETY, 6.

3. **Warrant to confess—Procured by misrepresentation—Ratification.**] — The Judge at Chambers having set aside a warrant to confess on the ground that it had been obtained by misrepresentation, the judgment creditor appealed. It appeared from the evidence, which was somewhat contradictory, that the defendant was a woman in business and in difficulties; that B. & Co. had taken proceedings against her as an absconding debtor. In anticipation of these proceedings being set aside the plaintiff visited her, provided with a warrant to confess, which he represented would have the effect of protecting her property from B. & Co., whose claim she appeared to be specially anxious to defeat. It did not appear that she knew at the time exactly what she was signing, but she knew shortly afterwards the nature of a warrant to confess, and expected to be indulged by the plaintiff and continued in business.

Held, per Graham, E.J., after reviewing the evidence, that as the defendant was not illiterate, and not in distress, and at the time of signing had sufficient knowledge of business to know what a bill of sale was, and the nature and effect of the proceedings which B. & Co. had instituted against her, and as the conversation she had with the plaintiff was such as to enable her to infer that he sought some benefit to himself, the

warrant should not have been set aside. Per Ritchie, J., even assuming that the misrepresentation was absolute, the warrant would be voidable, not void, and she had elected to ratify it by a course of dealing with and asking favors of the plaintiff after she found its true nature, and only sought to set it aside as a last resort.

Smith v. Nichol, 23/382.

4. **Sale by administrator—Misrepresentation.**]—Defendant, K., as a creditor, obtained administration of the estate of H. He then applied for and obtained a license for the sale of the lands of the estate, in satisfaction of his claim and another.

H., prior to his decease, with the knowledge of the defendant K., had conveyed an undivided half interest in certain lands to his son, J.H. (also a defendant herein), but the deed of conveyance had not been recorded.

At the sale of the lands under the license, the defendant K. acted as auctioneer, and represented that all interests but the dower of H.'s widow were being offered. Plaintiff became purchaser and received a deed from the defendant, K., as administrator, but before he could record his deed, the defendant J.H. recorded the above-mentioned deed from H., and thus secured priority as to an undivided half interest. Plaintiff thereupon returned K.'s deed and asked to be relieved of the sale.

Held, under the circumstances the sale should be rescinded, and that the defendant J.H., being an heir, was properly made a party.

Hirtle v. Kaulbach, 22/338.

5. **Rectification of deed—Strip omitted in description.**]—Represented by vendor as included. He is thereafter estopped from asserting property. Court should make amendment.

See DEED, 5.

6. **Misrepresentation as to boundary.**]—Property not owned by vendor. Damages for deceit. Solicitor's mistake.

See DEED, 3.

7. **Contract for sale of mine—Fraud of agent or partner of purchasers—Collusion with vendors.**]—Defendants, who were lessees of a mine, agreed to dispose of same to D. for $70,000. D. thereupon induced plaintiffs and others to join him in the purchase, allowing all, with the exception of T. and I. to believe that the price to be paid was $100,000. He had a secret agreement with defendants by which, upon the conclusion of the sale for $100,000, he was to receive as commission from them $30,000, the difference between the amount of his option and the price to be paid by his associates. This sum he agreed to share with T. and I. and one W. (who was afterwards made manager of the mine) in consideration of their assistance in effecting sale.

The sale having been concluded in August, 1889, defendants paid D. the $30,000, and plaintiffs entered on the working of the mine, which they continued until December, 1890, realizing about $20,000, when they lost the lead, and discontinued, and allowed the mine to become flooded and to deteriorate in value.

In October, 1890, the plaintiffs got information of the facts connected with the secret agreement, of which they had previously heard rumors, which they had refused to credit. In January, 1891, they were approached by one of the defendants with a proposition to lease the mine, but, failing to agree on terms, and the said defendant admitting certain particulars connected with the secret agreement, plaintiffs threatened proceedings to rescind the contract of the sale of the mine, which defendants intimated they would contest. Much time was consumed in correspondence, collecting evidence, etc., but the resolution of plaintiff company to begin action was passed in October, 1891, and the writ was issued in January, 1892.

Held, that plaintiffs' delay in beginning action, and in working mine after knowledge of the fraud, did not amount to a waiver, or disentitle them to recover. That they were not bound to act on rumor, but might wait for confirmation before proceeding.

That on account of the delay in commencing proceedings, and the abandonment of the mine while in plaintiffs' possession, and consequent deterioration, it was not possible to restore all parties to their original positions, so that rescission would not be decreed, but that plaintiffs were entitled to recover from defendants the amount paid by them to D. in fraud of his associates.

Per McDonald, C.J., that under the circumstances defendants were bound to have communicated all the facts in relation to the purchase price necessary to have put plaintiffs on inquiry.

Per Townshend, J., that D. was the agent of defendants in defrauding plaintiffs, and the partner of plaintiffs in the undertaking, who as such, could not take any benefit of the same in which they might not share. That the agreement between defendants and D. was not an option of purchase in the ordinary sense, as the circumstances rebutted the idea of a sale to him, but an arrangement to enable him to perpetrate a fraud, for which defendants were liable.

Per Ritchie, J., dissenting, that the plaintiffs were not disentitled by their laches, but as the parties could not be restored to their original position, the contract should not be rescinded, but the remedy was in damages. But as the sole question tried was the right to a rescission of the contract, when judgment was for the defendants, that judgment might not be disturbed, as the Court, not being a Court of first instance, might not deal with issues not dealt with on trial.

Northrup Mining Co. v. Dimock, 27/112.

8. **Sale of mine—Misrepresentation—Misconduct** of agent—**Further evidence after trial.**]—Action by L. and others to rescind a sale of a mine, and to recover a part payment of the price, on the ground of misrepresentation as to the character of the property. At the time of the sale the mine was disused and full of water, and it was understood that inspection could not be made.

The misrepresentation relied on was to the effect that defendant S. had handed L. a written report on the mine made by his co-owner and co-defendant, H., an expert, but it appeared that at the same time S. told L. not to rely on H.'s report absolutely, but to use his own judgment and knowledge. On the conclusion of the sale, L. and his associates pumped out the mine and worked it for a time, but finally abandoned it and brought this action.

On trial:—Held, on findings of fact as above, and that plaintiffs had not proved that the mine was not as set out in the report, that defendants were entitled to judgment.

After trial an order was granted unopposed, enabling plaintiffs to produce further evidence to the effect that L. had acted collusively with S. to the injury of his associates, by agreeing to accept a loan from defendants to enable him to share in the venture. The Court was equally divided.

Per Weatherbe, J., Ritchie, J., concurring, viewing the evidence on trial differently, that plaintiffs' appeal should be allowed. And defendants having consented to the passing of the order admitting further evidence, could not afterwards object on the ground that such evidence was known to and open to plaintiffs' solicitor on trial.

Per Meagher, J., McDonald, C.J., concurring, dismissing appeal, that such evidence was not contemplated by O. 58, R. 5, and plaintiffs with knowledge of all the facts, having selected the ground on which to go to trial, could not afterwards be allowed to shift, and thus prolong litigation.

Leckie v. Stuart, 34/140.

9. **Undue influence.**]—Deed set aside at suit of grantor.

See DEED, 11.

10. **Partnership — Dealings between surviving partner and widow of deceased partner.**]—Fiduciary relationship. Undue influence. Release improperly obtained. Laches. Joinder of parties.

See PARTNERSHIP, 6.

11. **Note made in fraud of partner.**]—Liability of partner. Notice to holder.

See PARTNERSHIP, 7.

12. **Oral transfer of business—To evade execution—Not fraudulent if consideration real.**]—W., operating on his own account two trading vessels registered in the name of plaintiff, his sister, bought a large quantity of fish from B., which he did not pay for. Being pressed for payment and served with a writ at the suit of B., he verbally agreed with plaintiff to transfer his business to her in consideration of an indebtedness, and that he should thereafter only be master of one vessel, and manager of both for her benefit.

B., having matured his judgment against W., and levied on part of the property transferred, this was replevin against the sheriff.

Held, that the transfer, though made in consideration of a debt due, having been made orally and being therefore practically revocable between the brother and sister, and having been made pending the writ, was not bona fide, and was void as designed to defeat creditors. (The fact of a benefit retained in the assignor (cf. Kirk v. Chisholm, FRAUDULENT CONVEYANCE, 7, 13) in his continuing to be employed as master, noticed p. 132.)

But in the Supreme Court of Canada:—Held, that a transfer to a creditor for good consideration, with intent to avoid execution by another creditor, or to delay or to defeat him in his remedies, is not void if made to secure an existing debt, and the transferee does not make himself an instrument for subsequently benefiting the assignor.

Mulcahy v. Archibald, 30/121, 28 S.C.C. 523.

13. **Fraudulent transfer—To evade distress under Canada Temperance Act—Married woman.**]—Defendant had seized under distress warrant certain stock in trade which plaintiff claimed as transferee of A., against whom the distress was issued. Plaintiff was a sister of A., and lived with her and assisted her in carrying on the business. The transfer was made immediately before A.'s conviction and the consideration was said to be a small cash payment (borrowed from their mother), and three promissory notes. There was no change of possession, or of the relationship of plaintiff and A. with reference to such stock in trade.

A. was a married woman doing business in her own name, but without having filed the consent of her husband.

Held, under the evidence, the transfer to plaintiff was a fraudulent attempt to defeat the warrant, and was therefore void. Also, A., not having complied with the Married Woman's Property Act, the goods were her husband's, and she had no general right to transfer title to them as a whole, but only by retail in the ordinary course of business.

Rhodenhiser v. Cragg, 27/273.

14. **Fraudulent or colorable lease.**]—To evade liability for breaches of Liquor License Act.

See LIQUOR LICENSE ACT, 30.

15. **Holding land in name of third party—Whether fraudulent as against judgment creditors—Suit for declaration of trust—Relief granted.**]—In 1875, G.M. entered into an agreement for the purchase of a lot of land in the City of Halifax, entered into possession, and commenced to build a house. In 1877 he was called upon to carry out his agreement and to pay the purchase money, but, being financially embarrassed, could not do so. He applied to a building society, but there being judgments recorded against him which would have priority over any mortgage he might execute, it was arranged that the title from the vendor under the agreement should be taken absolutely in the name of defendant, who was a nephew and employee of G.M., when the building society would advance the money required. Defendant afterwards took possession of the property, and this action was brought against him by G.M., to compel him to convey the same, and for an account of the rents and profits. The trial Judge held that the transaction was fraudulent as tending to hinder and delay creditors, and refused relief.

On appeal:—Held (and affirmed in the Supreme Court of Canada), that it did not appear from the evidence that, in

taking the deed in the name of his nephew, plaintiff had intended to defraud his creditors, some of whom were cognizant of the transaction, and who had not been prejudiced and had not complained. That the parties were not in pari delictu, and that plaintiff, as the more excusable of the two, was entitled to relief.

McKenzie v. McKenzie, 29/231, Cout. Dig. 269.

16. **Evidence of similar transactions and general course of dealing.**]—May be given in support of a defence.

See EVIDENCE, 22.

17. **Prospecting license — Fraudulent dropping of rights** and conniving at renewal by another person, to avoid a mortgage.

See MINES AND MINERALS, 23.

18. **Sale of goods—Rescinding** sale for fraud of vendee. Buying with no intention of paying. Evidence necessary to support.

See SALES, 20.

FRAUDS, STATUTE OF.

1. **Section 3—Oral trust void.**]—The plaintiff having recovered judgment against an insolvent, received from him a general assignment of his interest in a trust of lands declared in writing by the defendant. Claiming to take the place of the insolvent in the trust he demanded a conveyance from defendant, as the insolvent might have done, and upon refusal brought an action for specific performance. To this defendant set up that the insolvent was indebted to B., who held security on some shipping which he threatened to sell, and to protect which he had, at the instance of the insolvent, entered into a verbal undertaking with B., to see him paid, in consequence of which his original relationship to the insolvent had changed:—Held, that the verbal trust in favor of B. was void under section 6 of the Statute of Frauds, and afforded no obstacle to the plaintiff's right to specific performance.

Harding v. Starr, 21/121.

See also TRUST, 4.

2. **Section 5—Fixture—Right to remove.**]—A lessee having a right to remove a building attached to the freehold, at the expiration of his tenancy, under a provision of the lease, verbally sold his right to defendant:—Held, the contract did not come within the Statute of Frauds.

Oswald v. Whitman, 22/13.

3. **Section 5—Contract to sell land—Sufficiency of memorandum—Part payment.**]—April 9th, 1889, negotiations took place between plaintiff and defendant, which resulted in the delivery of two written memoranda, one by either party to the other, as follows:—"I, H.L., owner of the property in the City of Halifax bounded, etc. . . . agree to sell to H.M.W. for the sum of $42,500. Terms and deeds, etc., to be arranged by 1st May next. H.L."; and "I, H.M.W., agree to purchase from H.L. all the property contained in the square bounded . . . for the sum of $42,500, subject to the encumbrances thereon. Terms and deed to be arranged and signed by the 1st May next. H.M.W."

On the same day the plaintiff, H.M.W., by his solicitor, paid the defendant, H.L., the sum of $500, and the defendant added to the memorandum signed by him the following:—"Terms—$500 cash this day, $500 on the delivery of the deed of the P. property, $800 with interest every three months until the $6,500 are paid, when the deed of the entire property will be executed. H.L.," and a receipt for $500, "on account of the purchase of the P. property."

It appeared from extrinsic evidence offered by the defendant that all of the property contracted for, together with other property owned by him, was subject to a mortgage for the sum of $36,000, which, added to the above mentioned $6,500, made up the sum of $42,500.

Held, McDonald, C.J., dissenting (and affirmed in the Supreme Court of Canada, Patterson, J., dubitante), that the

memoranda in writing were not a complete contract, as there were terms left to be arranged at a future time, consequently specific performance could not be decreed.

Williston v. Lawson, 22/521, 19 S.C.C. 673.

4. **Section 5—Agreement respecting land—Statute as between purchasers—Executed agreement.**]—Plaintiff and defendant had entered into an executory agreement for the purchase of lands from B., and went into possession jointly, cutting and dividing hay, etc. After a time they failed to agree, and plaintiff consented, in consideration of $75, to abandon his rights under the agreement with B., and to endeavor to procure a conveyance to defendant alone. This action was for the consideration, $75, and the defence was that it concerned an interest in land, within the Statute of Frauds.

Held, per Meagher, J., Ritchie, J., concurring, that there being no agreement in existence which could be enforced against B., no interest in lands in these parties had been called into existence, therefore the Statute of Frauds did not apply, and that plaintiff was entitled to recover.

Per Townshend, J., Graham, E.J., concurring, that as there was an agreement in writing in the hands of B., enforcible by him against both defendant and defendant, and as they had entered into possession, plaintiff had an equitable interest in the lands. That his agreement in relinquishing such was within the Statute of Frauds. But, as the agreement was a completely executed one on his moving off and procuring a conveyance to defendant, it was excepted from the operation of the Statute.

Weatherbe, J., dissented as to the construction of the evidence.

Murdoch v. Currell, 25/293.

5. **Section 5—Parol agreement respecting lands.**]—Where it concerns consideration for deed. Part performance.

See TRESPASS, 12.

6. **Section 5—Memorandum—Letter to third person.**]—Quære, in an action by A. against B., for specific performance of an agreement to purchase land, is the following letter, written by B. to C., a family connection, a sufficient writing under the statute?

"About the loan of $10 you asked for. I cannot see my way clear, for I have engaged to buy that house of Mr. A.'s for $1,000, and furniture about as much more, and it will take a hard shake on money, and knowing you are not pressed for money . . ."

The Court refused specific performance on the ground that the admission contained in the letter was not an admission of fact, but was merely a representation for the purpose of avoiding making the loan to C.

McNeil v. McDonald, 25/306.

7. **Section 5—Lease of mining areas—Oral transfer.**]—To an action for an accounting by one partner against another, in respect of mining areas, the defendant offered evidence of an oral transfer to him by plaintiff of his interest, in exchange for certain shares of the S. Prospecting Co.:—Held, he was precluded from doing this by the Statute of Frauds.

Sim v. Sim, 22/185.

8. **Section 5—Interest in mine—And in proceeds of sale—Distinction.**]—Plaintiff formerly brought action for specific performance of an oral agreement with the defendant for the transfer of a share of defendant's interest in a mining property, or for a declaration of partnership, in which he failed because of the Statute of Frauds. Defendant had denied any agreement to transfer a share in the mine, but in the course of his evidence admitted that he had promised that the plaintiff should be entitled to a share of the proceeds of his interest in the mine when the same should be sold, but maintained that the promise on his part was voluntary and without consideration.

A sale of the mine having taken place, the plaintiff brought this action for a share of the money realized by defendant. The evidence being a repetition of

that formerly given, plaintiff claimed that he might adopt defendant's version of the bargain:—Held, on trial, that though the position of the parties was peculiar, yet it was the duty of the Court to decide what the transaction actually was, and inasmuch as an agreement respecting money to be derived from the sale of the lands is not an agreement respecting an interest in land, there was justification for finding for plaintiff.

On appeal:—Held, per Weatherbe, J. (McDonald, C.J., and Ritchie, J., concurring), that plaintiff could not ask the Court to believe him in part and the defendant in part, and to disbelieve him in part and defendant in part, a process necessary to enable him to recover, as his action depended on his version as to the promise being false and defendant's true, and his version as to the consideration being true and defendant's false. If he wished to avail himself of defendant's admission, he must take it as a whole, in which case the transaction was nudum pactum. Also that the subject matter was res adjudicata.

But, in the Supreme Court of Canada:—Held, that the present action being different in form, was not res adjudicata, and that plaintiff was entitled to recover the promised interest in the proceeds of the sale of defendant's share, not being an interest in land within the meaning of the Staute of Frauds. Fournier and Taschereau, JJ., dissenting.

Stuart v. Mott, 24/526, 23 S.C.C. 384.

9. **Section 5—Hiring—Not to be performed within a year.**]—Plaintiff in an action for wrongful dismissal, failed, the contract of hiring not being one which was to be wholly performed within the space of one year.

There was evidence that during the term of service there had been a change in the employers' business by their amalgamating with another concern, the whole becoming incorporated as a company, and that plaintiff had continued for a time in the service of the company:—Quære, if properly pleaded might he have recovered in respect of an implied contract with the company, not affected by the Statute of Frauds?

Strong v. Bent, 31/1.

10. **Section 9—Goods above $40 in value—Purchase in two lots.**]—Action against a Sheriff for wrongful levy under an attachment against J.J., of goods in the possession of plaintiff, and which plaintiff claimed as his own property by purchase from JJ. One of the defences was that the sale was bad under the Statute of Frauds, as the goods exceeded the value of $40. The plaintiff had taken the property as payment of a debt outstanding:—Held, that this satisfied the statute. (Meagher and Henry, JJ., expressing no opinion.)

Johnson v. Buchanan, 29/27.

11. **Section 9—Sale of casks of lime juice—Non acceptance—Evidence of appropriation.**]—Marking of bungs. Evidence of re-sale of part.

See SALES, 2.

12. **Section 9—Statute inuring to benefit of third person—Statute not pleaded Amendment.**]—N. obtained certain goods from A., under an agreement for hiring and sale, by which property was to remain in the vendor until payment of a price agreed. After breach of this agreement, entitling the vendor, under its terms, to recover possession of the goods, N. died, and his administrator sold them to plaintiff on his verbal agreement to pay $50 for them in nine months' time. Before plaintiff could gain possession, defendant, as agent for the original vendor, A., demanded and received the goods from a stranger in whose possession they were, and this action is in trover.

Held, that the action was not maintainable, as the sale to him by N.'s administrator, on which his title depended, was within the Statute of Frauds.

Though the defendant succeeded on trial on the above ground, he had not pleaded the Statute of Frauds (except by replication, invalid for want of leave under O. 22, R. 2), yet no objection had been made, and the matter had been tried as if the pleadings were amply sufficient:—Held, that his omission should

be considered as if amended. Per Ritchie, J. (Meagher, J., contra), the action being trover, in which plaintiff had not set out the details of his title (which he was not bound to do), defendant could not tell what he had to meet, so that he should be allowed the benefit of any defence developed by the trial, whether pleaded or not.

In the Supreme Court of Canada:—Held, further, that only in actions between the parties to the contract is it necessary that the Statute of Frauds should be pleaded.

Kent v. Ellis, 33/549, 31 S.C.C. 110.

FRAUDULENT CONVEYANCE.

See also ASSIGNMENT.

1. **Voluntary conveyance—Form of decree.**]—Defendant, H.M., executed a conveyance, admitted to be voluntary, to his infant children, in trust for the benefit of his wife. The effect of this was to put practically all of his property beyond the reach of his creditors. In an action by a creditor against grantor and grantees to have the deed set aside:—Held, that without direct proof of fraudulent intent, grantor's indebtedness at the date of the deed, taken in connection with the act of denuding himself of practically all of his property, would be enough to render the conveyance fraudulent and void:—Also, that there was evidence of admissions on the part of grantor of a purpose to defeat his creditors; also that voluntary donees without notice of the fraud are not within the exceptions in favor of bona fide purchasers. The form of the decree setting aside the deed, having at the trial been made general, was changed, limiting its benefits to plaintiffs.

Hart v. McLean, 23/1.

2. **Voluntary deed to wife—Preferred creditor.**]— Plaintiff sued defendants as administrators for money loaned their intestate, and after amendment, to set aside a voluntary conveyance made by the intestate, just before his death, to one of the defendants in favor of the other (his widow). The defendants set up among other pleas that plaintiff was a secured creditor, as holder of a bill of sale of personal property of the deceased, upon which he was at liberty to realize. This bill of sale had been made and filed by the deceased without delivery to the plaintiff, or his assent thereto, though he had notice of it:—Held, reversing the decision of the trial Judge that he could not be considered a preferred creditor, and was entitled to have the conveyance in favor of the wife set aside.

Shortell v. Sullivan, 21/257.

3. **Voluntary deed—In anticipation of liability as surety.**]—In 1876 the defendant Bonnett became surety for a trustee, on a bond to the plaintiff, an officer of the Court. In 1886 the trustee was removed from office, and was found on an accounting before a Master, to be indebted to his trust in the sum of $1,900. About two months after this the defendant Bonnett executed a conveyance of all his property to the defendant E. B. G., who was his adopted daughter. The consideration alleged, was a parol agreement in 1877, whereby the said E. B. G., on her marriage, agreed to remain with the grantor in his old age, to take care of him, etc.; a legacy of $100 not accounted for by the said Bonnett to the said E. B. G., and an old debt of $400, open to suspicion, for services rendered. The only evidence of this consideration was that of the parties directly interested. The jury having found a verdict supporting the conveyance:—Held, there must be a new trial. Per Graham, E.J., that the parol agreement could not have been enforced at the time of the settlement, which of itself rendered it inadequate consideration under the Statute of Elizabeth. That he could not after a silence of nine years be allowed to set up a secret parol agreement, which, if disclosed at the time, would have rendered him unfit to be a surety, and would no doubt have led to his removal.

Holmes v. Bonett, 24/279.

4. **Conveyance on beginning lawsuit—Possible future creditor—Bad as against**

other future creditors.]—Defendant being about to begin a lawsuit against X., in which he was afterwards successful, in order to guard against possible loss should he fail, made a voluntary conveyance to his son, then (1878) six years of age, of property on which he continued to reside. At the time he was indebted to plaintiff in the sum of $172, and continued to deal with him, increasing his indebtedness to the sum of $640 in 1884, of which $240 was paid before action brought. The defendant was possessed of other property.

This action was to set aside the deed as fraudulent under the Statute of Elizabeth:—

Held, that the deed was void. Being expressly intended to defeat a particular creditor, and for that purpose alone it was actually, and not merely constructively fraudulent, and fell "within the very language of the law." The fact that the particular debt, against which it was the fraudulent "intent and purpose" to provide, did not come into existence, was immaterial, what was to be regarded being such "intent and purpose." That "if notwithstanding the actual fraud, the transfer may not be set aside, because the fraud turns out in the event, not to have been necessary for the purpose intended, it would seem to follow that in a case where the purpose is specifically to defraud a person, who after the transfer actually becomes a creditor, the rights of other future creditors to set aside a transfer, would be extinguished, if the debt of the particular creditor were realized either by payment or execution out of other property, a result clearly at variance with the letter and spirit of the statute. In such a case the rights of all creditors except the one specifically intended to be defrauded, would be absolutely in the control of the settlor, whenever he could manage to get a discharge of the particular debt."

As to the possession of other property by the settlor, in cases of actual fraud, as distinguished from constructive fraud, in which external circumstances and the condition of the settlor's affairs will be considered, a deed will be set aside because it is in point of fact a fraud and a sham. In order to stand, a deed in itself must be "not fraudulent."

Munro v. McDonald, 26/349.

5. **Delaying future creditors—Fraudulent intent absent.**]—Plaintiff, in 1895, sought to set aside as fraudulent, on behalf of himself and other creditors, two mortgages made by defendant R. to defendant M., in 1888. Plaintiff's debt was incurred in 1893. There was no evidence that any debt other than this, and a small balance admitted by R. to be due X., was unpaid at the time action was brought. Also, there was no evidence as to the exact time the indebtedness to X. was incurred, or that the conveyances were made with intent to delay future creditors, or that at that time R. was unable to meet all his obligations:—Held, that fraud was a fact to be proved by the person seeking to set aside the conveyances, and was not to be presumed, hence plaintiff could not succeed. And that the case was distinguishable from Munro v. McDonald, supra, in that there the intent to delay future creditors was fully shown, and was in fact admitted by the defendant.

Graham, E.J., dissenting as to the facts established.

Hayward v. McKay, 28/152.

6. **General assignment—Preference.**]—An assignment for the benefit of creditors which provides for the payment of certain named persons by the assignee, the remainder to go to the assignor, is void under the Statute of Elizabeth, as tending to delay the unnamed creditors.

Hubley v. Archibald, 22/27, 18 S.C.C. 116.

7. **But a general assignment,** though containing preferences, which provides that the assignee shall pay "all other creditors," before the assignor, is not to be so considered.

Kirk v. Chisholm, McPhie v. Chisholm, 28/111, 26 S.C.C. 111.

8. **Assignment for benefit of creditors—Preference for larger sum than actually due.**]—Action by assignee under an assignment for the benefit of creditors

against the defendant sheriff, for wrongful levy of the assigned property, at the suit of T. against the assignor. The defence was that the assignment was void under the Statute 13 Eliz., c. 5. It appeared that the plaintiff was preferred thereunder for an amount made by adding together a debt due him and an amount which he undertook to pay to certain creditors of the assignor, who were not made parties to the assignment. These creditors were paid after the assignment went into operation out of the funds of the estate:—

Held, that the deed was not fraudulent under the statute, being made bona fide, and not for the purpose of retaining any benefits to the maker thereof.

But on appeal to the Supreme Court of Canada:—Held (Taschereau, J., dissenting), that inasmuch as the creditors whom the plaintiff undertook to pay, were not parties to the assignment, and could not enforce their rights against him, nor against the assignor who had parted with all his property, they were to be considered as hindered and delayed, therefore the assignment was fraudulent and void.

Cummings v. McDonald, 27/53, 24 S.C.C. 321.

9. **General assignment—Provisions for creditors.** —A general assignment for the benefit of creditors is not fraudulent as tending to hinder and delay creditors because it contains:—

1. A release of the assignor from all claims by a creditor wishing to participate.

2. A special provision for accommodation indorsers, not then, but afterwards to become creditors, by retiring outstanding bills, etc. (But, quære, if such a creditor should not retire, or should not fully retire at maturity, the obligation in respect to which he is provided for?)

3. A clause directing distribution of the assets, "by such instalments, and at such times as the trustee shall find convenient."

4. A clause requiring arbitration between creditors and the insolvent estate in case of a dispute.

5. Nor because it contains what may be an admission on the part of the assignor, of a purpose to prevent a sale and sacrifice (e.g., under execution), in the interests of creditors, but:—Semble, not if the purpose is to protect his own remote interest.

Nor will any two or more of these clauses taken in combination be considered as having the effect of hindering or delaying creditors.

And a fraudulent intent on the part of the assignor will not be drawn from the fact, not pleaded, that the wife of the assignor four months later became the purchaser, by tender, of the property of the estate.

Or from the fact, not pleaded, that the assignor remained in possession of the estate as the employee of the assignee, a thing not only permitted, but which may be necessary.

Semble, as to the matter of preference of the accommodation indorsers, per Graham, E.J., it would be a safer thing to direct the surety to be paid only after he has paid the bill holder, rather than to direct him to be paid the amount before the liability is fixed, and then to depend on him to take up the note. One can suggest the chances of secret benefit like that which was suggested in McDonald v. Cummings, ante.

(Appeal dismissed in Supreme Court of Canada.)

Hart v. Maguire, 29/181, 28 S.C.C. 272.

10. **Assignment for benefit of creditors —Set aside as a fraudulent conveyance —Recovery of payments to preferred creditor—Notice—Repayment may be ordered in action setting aside deed.**]—H.F.W. executed a general assignment for the benefit of creditors, containing a preference of M.W., his wife, to the extent of $35,000. At the suit of C., on behalf of himself and all other creditors, against assignors, assignees, and M.W., the assignment was set aside as fraudulent under the Statute of Elizabeth, and the Court directed an inquiry as to the date upon which M.W. and the assignees had notice that the assignment was fraudulent and void against plaintiff, and

as to the amount paid to M.W. thereunder by the assignees, after notice.

The date of notice being reported, and that M.W. had thereafter received the sum of $14,000, the Court decreed that such sum should be paid by her to plaintiff, who had been appointed receiver of H.F.W., or into Court. From this decree M.W. appealed, her main contentions being that as the payment to her would, if made by H.F.W. before executing the assignment, have been unrecoverable by him or his creditors, the fact of the assignment had not altered the case; and that the assignment having been set aside, plaintiff's remedy in this action was complete, and he should be left to follow the money paid to M.W. by ordinary methods.

Held, that the equitable principle governing the case was that even a perfectly innocent party can retain no benefit under a fraudulent conveyance unless there is some valuable consideration passing from him to the original assignee, which had not taken place in the case of M.W. And even though she were a grantee for valuable consideration, she held with notice of the fraud, and the result should be the same, as she could be returned to the same position she had occupied before the funds were paid over to her.

Also, that the actions to set aside the deed and for an accounting and payment were properly combined, and the deed having been set aside further relief could be afforded. (But see post 11.)

Per Townshend, J., dissenting, that the decree should be varied in so far as it directed repayment by M.W. That the rights of a creditor in proceeding against a fraudulent conveyance stopped when it was set aside, leaving him to proceed against other creditors by other means, unless he could show that his equities were superior. Here the equities of M. W. were equal to those of plaintiff, therefore "better is the condition of him who is in possession."

Cox v. Worrall, 26/366.

11. **Payments to preferred creditors—May not be recovered—Though under fraudulent conveyance.**]—Held (in the Supreme Court of Canada, reversing Taylor v. McKinnon, 29/162), that, in an action to have a deed of assignment set aside by creditors of the grantor, on the ground that it is void under the Statute of Elizabeth, neither moneys paid to preferred creditors nor trust property disposed of in good faith by the assignor or persons claiming under him, can be recovered, nor can persons holding under the deed be held personally liable for moneys or property so received by them. Cox v. Worrall, supra, overruled, pro tanto.

Taylor v. Cummings, 27 S.C.C. 589.

12. **Payment to preferred creditor—Void assignment — Execution.**]—Where an assignment has been held void under the Statute of Elizabeth, and the result of such a decision is that a creditor who had subsequently obtained judgment against the assignor, and, notwithstanding the assignment, sold all the debtor's personal property so transferred, becomes entitled to all the personal property of the assignor levied by him under his execution, such creditor has no legal right and no equity to an account, or to follow moneys received by the assignee or paid by him under such assignment, in respect to which he has not secured a prior claim by taking the necessary proceedings to make them exigible.

Cummings & Sons v. Taylor, 28 S.C.C. 337.

13. **First preference to assignee's firm.**]—Held, by the Supreme Court of Canada, that an assignment is void under the Statute of Elizabeth, as tending to hinder and delay creditors, if it gives a first preference to a firm of which the assignee is a member and provides for an allowance of interest on the debt of such firm until paid, and the assignor is to continue in the same control of the business as he previously had, though no one of these provisions taken singly would have that effect.

A provision that the assignee "shall only be liable for such moneys as shall come into his hands as such assignee, unless there be gross negligence or fraud on his part" will also avoid the instru-

ment under the Statute of Elizabeth.

Authority to the assignee not only to prefer parties to accommodation paper, but also to pay "all costs, charges and expenses in consequence" of such accommodation paper, is a badge of fraud.

Kirk v. Chisholm, McPhie v. Chisholm, 28/111, 26 S.C.C. 111.

14. **Badges of Fraud.**]—Held, that the following facts connected with a general assignment rendered it void under the Statute of Elizabeth, as tending to hinder or defraud creditors:—

(a) That the assignee was a person wholly ignorant of the business assigned and incapable of properly executing the trusts of the assignment.

(b) Discretion was given him in connection with the sale of goods and purchase of new stock.

(c) The assignee was the brother-in-law of one of the assignors, and lived with him, and had power to employ, and did employ, the assignors to manage the business in such a way as to continue them in full control and enjoyment.

(d) The supervision actually exercised by the assignee was purely nominal.

Also, that the deed was highly objectionable in that the estate was small and was encumbered to about two-thirds of its value by a bill of sale held by the first preferred creditor, leaving only a small margin for all others.

Culton v. Harris, 30/112.

15. **Preference to assignee—Indefinite accounts—Combination of facts.**]—In 1887, G., having taken administration of her deceased husband's estate and paid his debts, continued to carry on his business and to employ, as he had done, her son, defendant H., as clerk and manager, relying solely on him, being herself almost illiterate and knowing nothing of the details of affairs.

The arrangement between G. and H. appears to have been rather indefinite, but it appeared in a general way that G. was to receive her living only, H. $40 per month and board. H. had not been in the habit of drawing all that was due him.

Judgment for a large amount having been recovered by plaintiffs, G. made a general assignment to H., preferring him for a large sum. In an action to set this assignment aside as fraudulent, it appeared that charges and entries going to show the details of G.'s obligation to H., for which he had been preferred, were not made until the eve of assignment, and that some entries had been made by estimating and averaging.

Held, setting the assignment aside, that each case of this sort must be judged by itself, and though an isolated fact is not sufficient in itself to void a conveyance, yet a combination of such facts may irresistibly lead to that conclusion.

Delong v. Gillis, 31/61.

16. **Retaining benefit to grantor—Meritorious consideration—Agreement to support.**]—Shortly before a judgment by default was entered against him by plaintiff, defendant A. executed to his son, defendant B., a deed of his farm, all he possessed. Plaintiff having brought this action to set aside this deed as fraudulent, it was alleged on trial that the deed was executed in pursuance of an agreement made some years previously, under which the father undertook to make the conveyance if the son should remain at home and support "the family." At this time the son was aware of the debt to plaintiff, and that the farm was all his father had with which to satisfy it. The value of the farm was inadequate to the son's undertaking.

Held, McDonald, C.J., dubitante, that the deed was void under the Statute of Elizabeth, in that it retained a benefit to the grantor (support and maintenance), at the expense of his creditor.

And, though founded on consideration, that consideration was not valuable, but meritorious only, so that the attacking creditor need not prove fraud.

McNeil v. McPhee, 31/140.

17. **Form of action—Amendment by Court.**]—The plaintiff as a creditor having sued to set aside a conveyance as fraudulent under the Statute of Elizabeth, on his own behalf only, instead of on his own behalf and that of all other

creditors, and having prosecuted his case to argument before the full Court, the Court made the amendment in the form of his action necessary to enable him to succeed.

Shortell v. Sullivan, 21/267.

18. **Oral transfer to avoid execution.**]—Not fraudulent if for consideration, and no benefit is retained in the transferor.

See FRAUD, 12.

19. **Holding land in name of third person.**]—Action for declaration of trust. Fraud of creditors. The parties held not to be in pari delictu, and relief granted.

See FRAUD, 15.

20. **Criminal Code 368 — Fraudulent disposition of property.**]—Quære, to what extent does being a party to a transfer fraudulent under the Statute of Elizabeth make a party guilty under the Criminal Code?

See CRIMINAL LAW, 13.

21. **Mortgage — Assignment—Lis pendens.**]—Obiter, though the Court for certain reasons refuse to set aside a conveyance as fraudulent under the Statute of Elizabeth, yet under that statute an action may be maintained by creditors to frustrate a fraudulent disposition of the consideration paid for the conveyance.

See MORTGAGE, 11.

FRAUDULENT PREFERENCE.

See ASSIGNMENT.

GAMBLING.

1. **A bona fide holder** for value may enforce payment of a promissory note given for a gambling debt.

Laurence v. Hearn, 21/375.

2. **Bet on election—Liability of stakeholder after notice of rescission.**]—Plaintiff and M. made a wager on the result of an election. Each bet his own watch against that of the other, and both watches were deposited with defendant as stakeholder. On the morning of the day of the election, plaintiff and M. met and agreed to call the bet off, of which the stakeholder had notice while plaintiff's watch was still in his possession. Some days afterwards he delivered both watches to M.:—Held, he was liable to plaintiff for the value of plaintiff's watch.

Logue v. McCuish, 21/75.

3. **Illegal contract—Betting on fraudulent race—Pleading.**]—Plaintiff loaned defendant a sum of money to bet on D., one of the contestants in a race. Both parties and L., the other contestant, had arranged with L. to lose the race. The scheme failed because D. had entered into a similar arrangement, and made it impossible for L. to lose. Plaintiff sued to recover back his money. There was no plea of illegality of object as a defence.

County Court Judge for plaintiff:—Held, that the action was such as the Court might refuse to consider and that

On appeal from the judgment of the defendant should not be allowed to set up his own illegal act, without a plea, specially required by O. 19, R. 15, but that the ends of justice would be best served by permitting the amendment and allowing defendant's appeal without costs.

Baker v. Wambolt, 27/345.

GARNISHEE.

See ATTACHMENT.

GAS WORKS.

See NUISANCE, 5.

GIFT.

See also DONATIO MORTIS CAUSA.

1. **Conditional gift—Letter—Whether**

testamentary.]—Plaintiff as administrator of C.W.S., brought action for money had and received to the use of C.W.S. The defence was that the money was received by the defendant from C.W.S. as a gift inter vivos. The only evidence was the following letter written by C. W.S. to the defendant.

"Bordeaux, France, July 22nd, 1889.

"Dear Brother,—I have written J.B. & Co. of London, England, to send you £411 and charge the same to my account. Now I want you to use the money and allow me 4 per cent. if I live, and if I am cut short, it is for you and yours. We will come to New York. Leave here last of August. Inclosed is an order on J.B. & Co., which you are to send him if he don't send the money before. P.S.—I got lots of trouble with the family and crew, and many things, so I won't last. If you get the money before, tear up the order."

Held, that the letter did not show a gift inter vivos. If the gift was to take effect when the writer was "cut off," then it was testamentary and invalid as such. It left the writer free to treat the money as still his own at any time during life.

Shaw v. Shaw, 27/171.

2. **Evidence of gift.**]—Action to recover possession of a cow. Defendant had received it from plaintiff to keep for its milk during the winter, to be returned in the spring, which was done. Defendant subsequently married plaintiff's daughter. The cow had been called hers while she was at home:—Held, there was no evidence of gift, either at the time defendant took possession of the cow, or at all. Nor was plaintiff estopped from asserting property by the fact that at the time defendant took possession of the cow to keep, he may have represented that it was the property of his daughter.

Rhodenheizer v. Bolliver, 31/236.

3. **Probate Court—Jurisdiction.**]—The Court of Probate has no jurisdiction to adjudicate upon property rights growing out of an alleged gift inter vivos of property of an intestate, and the settlement of the administrator's account should be adjourned pending the settlement of this question in a Court of general jurisdiction.

Re Estate Maria Wheelock, 33/357.

GOVERNMENT RAILWAY.

See RAILWAY.

GRANT.

1. **Adverse possession—Good against grant of Crown—Old grant—Judgment binds equitable interest.**]—In an action of ejectment, plaintiff depended on his purchase at a sale by the Sheriff under execution on a judgment recovered against A. in 1871, revived in 1884. A. had long held possession and exercised ownership under an arrangement by which he had procured the land to be conveyed to Z. by the former occupier, who was a squatter, and whose occupation, combined with that of A., equalled 69 years. There was some evidence of a debt outstanding in relation to this land, between A. and Z., of payment of interest, and of a sale of a portion by and with the knowledge of the heirs of Z.

The defendant's title was a grant from the Crown dated 1892. There had been a former grant of the same lands, under which neither party claimed, in 1759, and no proceedings had ever been had to revest the title in the Crown.

Held, the transaction between A. and Z. was to be construed as a mortgage, not as a conditional sale to A., so that the equitable ownership vested in him, and passed to plaintiff on the sale under the judgment.

And the possession of A. was sufficient to raise the presumption of title, and the land having in 1759 been granted and no proceedings afterwards taken to revest the title in the Crown, no estate passed to defendant under his Crown grant in 1892.

(Affirmed in Supreme Court of Canada.)

Robinson v. Chisholm, 27/74, 24 S.C.C. 704.

2. **Possession under color of title—As against grant—Notice to Crown—Registry Act.**]—Plaintiff claiming by possession under color of title, brought trespass against defendant, who was the grantee of the Crown. The acts of possession relied on were frequent and long-continued, going on the land, which was wild and unfenced, and cutting poles, removing stones, etc.:—Held, that these acts were insufficient evidence of completeness and continuity of possession to make it necessary for the Crown, before granting, to take steps to re-vest the title in itself, and that the doctrine of Smyth v. McDonald (1 Old. 274), making such a course necessary after 20 years' possession by the subject, is not to be extended.

Plaintiff also relied on a series of deeds made by different persons, registered, and some of them covering the area in dispute, as assisting his rights against the grant:—Held, that the Crown is not affected with notice by the registry of a deed of a stranger to the title. "There is nothing in the Registry Act which says that the Crown, or anyone else, is bound to take notice of the registry of a deed made by a stranger conveying land which the owner has not granted, and there is nothing notorious in such a transaction, without such a law."

McKay v. McDonald, 28/99.

GUARDIAN.

1. **Nomination by deceased parent—Must be in writing—By infant of fourteen—Trust.**]—Plaintiff's deceased father verbally requested defendant to act as guardian for his infant daughter in the event of his death, chiefly in and about the getting in and administering of a sum of $5,000, to become due on a life insurance policy. The amount was by the policy payable to defendant "in trust for Gertrude G. Loasby" (plaintiff). After the father's death defendant applied to the Probate Court and was appointed guardian. A year later the plaintiff, who had attained the age of fourteen years, petitioned the Probate Court to revoke defendant's appointment, and to appoint her grandfather, O.A.B., in his stead, which was done. He resided out of the jurisdiction.

This action was to have defendant declared a bare trustee, and not entitled to withhold the above sum of money from plaintiff or her guardian.

Held, by the majority of the Court, that the appointment of defendant as guardian by the father must be in writing. That the Court of Probate, under the statute, had power to change the guardian when the infant arrived at the age of fourteen years and wished to have a different guardian, that the appointment of the grandfather was a proper one. That if the father wished to create a trust until the infant arrived at the age of 21, it should have been in writing. If the trust was as set out in the policy it was a mere naked trust payable to plaintiff if of age, if not, to her guardian.

Meagher, J., dubitante, expressed no opinion.

Loasby v. Egan, 27/349.

2. **Misconduct and misappropriation of funds—Action by surety against guardian for indemnity—Removal of guardian—Receiver—Powers of Court.**]—Defendant, an aged woman, was appointed by the Probate Court guardian of her infant grandson. The plaintiff was one of her sureties and brought action to obtain indemnity for misapplication of funds alleged, to restrain proposed further misapplication by making a mortgage loan of the infant's funds to her husband on insufficient security, and for her removal. The income of the infant's estate was about $125. Among the acts of misapplication were making an unnecessary trip to New York, at an expense of $300, to get the custody of the infant, paying a claim of $116 against the infant's deceased father upon insufficient proof that it was due, paying solicitor's charges, etc. The trial Judge gave judgment for plaintiff and appointed a receiver for the infant's estate, thereby making him a ward of the Court, and had restrained the defendant from further interference. On appeal:—

Held, the learned Judge's course was a

proper one. Whether or not the Court can remove a guardian appointed by the Probate Court, there is no doubt that it can supersede her by committing the discharge of her duties to other hands. This applies to testamentary guardians and there is no reason why appointees by the Probate Court should occupy a higher plane.

Also, that though the rule is generally strict that a guardian may not trench upon the principal moneys of an infant's estate except under judicial direction, yet there may be cases of reasonable and judicious outlay which the Court might pass in the accounts, but such a course is always imprudent and attended with risk of personal loss to the guardian.

Also, that any person who suspects that an infant's affairs have been, or are being mismanaged, may in the capacity of his next friend, with or without his consent, or even against his strongest remonstrances, institute proceedings on his behalf. The question whether the infant himself shall be a party plaintiff or defendant is within the discretion of the Judge to direct. In this case the infant having been made a party plaintiff by M., his next friend, even though M. seemed to act more in the interest of the plaintiff surety than in that of the infant, the joinder was not improper, as there was a community of interests between him and the surety.

Also, that the proposed loan to defendant's husband on insufficient security justified a restraining order.

Pope v. Carroll, 27/467.

HABEAS CORPUS.

1. **Discharge from custody not reviewable.**]—Where the discharge from custody of an applicant under habeas corpus has been ordered by a tribunal of competent jurisdiction, that order is not reviewable by way of appeal or otherwise.

In re Sproule (12 S.C.C. 141) distinguished.

Re E. G. Blair, 23/225.

2. **Costs on discharge.**]—It is within a Judge's discretion to award costs against the prosecutor on the discharge of an applicant, but the power should be exercised only in extreme cases, if at all.

In re Walter Murphy, 28/196.

3. **Supreme Court of Canada—Jurisdiction.**]—An application for habeas corpus was made to a Judge of the Supreme Court of Nova Scotia, who referred the matter to the Court, which dismissed it. Thereupon a further application was made to Sedgwick, J., of the Supreme Court of Canada, under section 32 of the Supreme Court Act, which confers original jurisdiction in habeas corpus.

Held, by Sedgwick, J., that though his jurisdiction under the section referred to might be co-ordinate and equal to that of a Judge of the Supreme Court of Nova Scotia, it did not extend further or constitute him a Court of Appeal with jurisdiction to void the decision of the Supreme Court of Nova Scotia.

Re Patrick White, 31 S.C.C. 383.

4. **Supreme Court of Canada—Limits of jurisdiction.**]—The jurisdiction of a Judge of the Supreme Court of Canada in matters of habeas corpus in criminal cases, is limited to an enquiry into the cause of imprisonment as disclosed by the warrant of commitment.

Ex parte James W. Macdonald, 27 S.C.C. 683.

5. **County Court—Liberty of Subject Act.**]—The County Court has no jurisdiction to issue a writ of habeas corpus. It has concurrent jurisdiction with the Supreme Court under the Liberty of the Subject Act.

Re Edwin G. Harris, 26/508.

6. **Judge County Court.**]—Quære, has a Judge of the County Court as a Master of the Supreme Court, jurisdiction to hear an application by habeas corpus for the discharge of a prisoner tried summarily by a stipendiary magistrate, the ground of the application being that the prisoner had not consented to be tried summarily?

Queen v. Bowers, 34/550.

7. **Conviction by stipendiary magistrate.**]—Habeas corpus to review a conviction made summarily under the Code, for theft, by the stipendiary magistrate of the City of Halifax.

The King v. White, 34/436.

Queen v. Bowers, 34/550.

8. **Illegal sentence—Writ of error.**]—A prisoner on conviction was sentenced to two years imprisonment in the county jail, and application was made by habeas corpus to review the sentence as illegal, in the Supreme Court:—Held, discharging the rule nisi, that after conviction by a Court of superior criminal jurisdiction, habeas corpus does not apply. (In re Sproule, 12 S.C.C. 140, followed), and that the only recourse is by writ of error. Further (Weatherbe, J., dubitante), that the Supreme Court has undoubted jurisdiction to entertain such a proceeding, not only expressly and impliedly by statute, but also as sharing in criminal matters, the original common law jurisdiction of its prototype, the Court of Queen's Bench in England. And that the convicting and reviewing tribunal being theoretically one and the same Court, was not an objection.

(Note.—But now, Criminal Code, s. 745, seems to abolish the jurisdiction.)

In re D. C. Ferguson, 24/106.

9. **Evasive return.**]—A writ of habeas corpus was issued directing defendant, the patroness of a benevolent institution for destitute children, to produce certain children, alleged to have been placed by their father, the petitioner, with her in Edinburgh, Scotland, and by her illegally removed to this Province, after demand made upon her for their custody. To this defendant returned that the children were not then in her custody, possession, power or control, and that the petitioner was an unfit person to have possession of them. This return was set aside by the Judge at Chambers as evasive, and an amended return was made, containing further particulars, but not justifying the legality of her course in having withheld them from the petitioner, after demand made:—Held, that inability to produce the children was no sufficient excuse for not obeying the writ when such inability was the result of previous illegal conduct, and that the amended return should be set aside and attachment for contempt allowed to issue. But (per Ritchie, J.) defendant might have a further opportunity of producing the children or of giving further particulars of how and when she disposed of them, when she last heard from them and in whose custody, and where she believed them to be, and showing that she has made every effort to obtain possession of and produce them, in obedience to the writ.

Queen v. Stirling—Re Delaney Children, 22/547.

10. The writ of attachment being held in suspension for thirty days, the defendant made a third return, setting forth as full particulars as were at her command, and the present addresses, as she believed, of the children, also that she had instructed her solicitors to take steps for their recovery. The affidavit of the solicitors set forth that they had despatched an agent to the addresses given, but could not ascertain the whereabouts of the children. It did not appear that the agent was provided with any credentials establishing his connection with defendant, or his right to investigate the matter:—Held, that the defendant should herself have gone to the addresses, should if necessary have advertised or used personal influence, or have invoked the law and should have omitted nothing "which mortal man might do," in order to purge her contempt. Not having done so, the writ should be executed and the defendant held to answer interrogatories.

In re Emma Stirling, 23/195.

11. **Custody of children—Sufficiency of return to writ.**]—A writ of habeas corpus was allowed, directed to the Halifax Infants' Home to produce two children, at the instance of their guardians lately appointed. A return and an amended return was made to the effect that the children being of suitable age, had been, under the regulations of the institution, placed with suitable persons, who under-

took to give them homes. That one had been removed to the United States, out of the jurisdiction, and that after inquiry it was found impossible to ascertain the whereabouts of the other.

It appeared that four years before, the mother of these children, who were illegitimate, was convicted, under R.S. 5th Series, c. 95, of neglecting and ill-using them, in consequence of which they were committed to the custody and guardianship of the infants' home.

Objection being made to the above return as insufficient in not properly accounting for the children:—Held, that as the custody of the infants' home was lawful, and as their guardianship had been substituted for that of the mother, and as there was nothing illegal in the manner in which the children had been disposed of, the return was sufficient.

Re Mahoney Children, 24/86.

12. **Custody of infant** in certain cases.] —See INFANT, 8.

HALIFAX, CITY OF.

City offices and departments 1.
Taxation, 6.
Negligence, 13.
Streets, sidewalks, etc., 12.

1. **Board of Words,** being a Committee of the City Council, cannot bind the city in any behalf without special authorization by the Council.

Milliken v. City of Halifax, 21/433.

2. **City Engineer.**]—Plaintiff sued the City of Halifax for extra work done under a written contract with the city, at the instance of the City Engineer, a permanent official. The contract clothed the City Engineer with certain authority, but not in relation to ordering extra work:—Held, that the city was not liable for his excess of authority.

Ellis v. City of Halifax, 29/90.

3. **Liability for acts of firewards—Destroying property—Acquiescence of owner.**]—A building owned and occupied by plaintiff as a bakery, and burned on June 16th, 1891, leaving standing high brick walls, which in the opinion of the firewards were a menace to public safety. With the acquiescence of the owner the chairman of the Board of Firewards caused these walls to be blown down and thereby injured other property of plaintiff, which had not been wholly destroyed by fire. In an action against the city, and P., the chairman of the firewards, for the damage done and for the value of the walls, which it was claimed could have been used in rebuilding, the trial Judge found for defendants on the ground that plaintiff had acquiesced in what was done, at the time.

Held, that the Board of Firewards, though appointed by the City Council, held office and performed public duties under powers conferred and regulated by a statute, and were independent of the corporation and not controlled by it as to the mode of discharging its duties. Consequently the city was not liable for its acts and the principle respondeat superior did not apply.

Held, also, as regards the liability of P., in the performance of what he conceived to be his duty, that the plaintiff had consented to the course pursued, and though such assent should have been more formally obtained, if P. intended to rely on it, yet a public officer under such circumstances should not be held personally liable unless the weight of evidence was clearly against him. By the common law of England the right of tearing down buildings to prevent the spread of a conflagration, without incurring liability to the owner, seems well established. By statute the right of firewards to take down a building, continued during the fire, but not after the danger of spreading had ceased, and did not extend to walls only considered dangerous because weakened by an extinguished fire and liable to fall. That another remedy was provided for this case. (Acts of 1878, c. 29.)

Moir v. City of Halifax, 25/241.

4. **Jurisdiction — Stipendiary Magistrate, City of Halifax.**]—Per curiam, the Stipendiary Magistrate of the City of

Halifax has jurisdiction to inquire of, and commit a prisoner for, an offence committed at McNab's Island in Halifax Harbor, being a place beyond the city limits (but within the county).

Queen v. Brown, 31/401.

5. **Conviction under city ordinance—Must set out ordinance.**]—Certiorari, to remove a conviction by the Stipendiary Magistrate, for that the defendant "did unlawfully purchase old iron known as marine stores, contrary to the ordinance to amend Ordinance 29 of said city, passed on the 27th day of April, 1871, etc."

There was no such ordinance, but there was an ordinance passed on the 27th day of April, 1881, for the licensing of junk dealers, etc.

Held, that the conviction was bad as not properly setting out the ordinance or by-law.

Also, as not setting out that the defendant had a shop, store, boat, scow, vehicle, etc., in connection with his business, to make a subject for license under the words of the ordinance. That merely purchasing "old iron," without employing one or other of these adjuncts to the business of a junk dealer was not an offence against the ordinance requiring a license to be taken out.

Queen v. Silas Townshend, 24/357.

6. **Taxes, when due.**]—City Charter, sections 362, 366, which provide that taxes shall be due on May 31st, is not so amended by Acts of 1897, c. 44, s. 22 (authorizing the City Collector to allow a discount on taxes paid before July 31st), as to change the date upon which taxes fall due to the latter day.

Barrowman v. Fader, 31/20.

7. **Lien for taxes—Construction of Act.**]—Under Acts of 1883, c. 28, the lien of the City of Halifax for taxes assessed on real estate takes priority over a mortgage already existing at the time of the passing of the Act, and inasmuch as the Act does not refer to taxes which accrued before its passing, it is not to be considered as retroactive, but merely as placing a mortgagee in no better or worse position than he would have been had he been the transferee of the fee absolutely.

But all steps under this Act, such as the preparation and certifying of assessment lists, etc., leading up to the creation of the lien must be strictly and literally observed, and payment of the taxes must be first demanded from the person assessed, before the lien is resorted to.

And a provision of the Act to the effect that the deed executed to a purchaser on a sale to enforce the lien shall be conclusive evidence of the regularity of all previous proceedings, will not be construed to refer to preceedings relating to assessment, but only to proceedings relating to the sale.

Cogswell v. Holland, 21/155, 279.

O'Brien v. Cogswell, 17 S.C.C. 420.

8. **Action for sewerage rates—Certificate of collector—Pleading.**]—Appeal from County Court where judgment was for plaintiff in an action by the City of Halifax for sewerage rates. By the Acts of 1883, c. 28, s. 65, the certificate of the City Collector is made presumptive evidence that the rates sued for are due and unpaid. This certificate was not produced:—Held, that this would have prevented the plaintiff from recovering the taxes, under the evidence given, if put in issue by the defence, which was not the case. A paragraph is too general, which merely alleges that the defendant was not legally and properly assessed, while the rules require him to deal specifically with each allegation of fact of which he does not admit the truth, and raise by its pleading all matters which assert that the action is not maintainable.

City of Halifax v. Hartlen, 26/263.

9. **Water service.**]—Semble, the city cannot hold a property owner liable for its disbursements in laying a water service pipe from the street main to the property line.

Lindberg v. City of Halifax, 31/154.

10. **Sidewalk construction — Liability of property owner.**]—By the Acts of 1861, c. 39, s. 13, the owners of real estate fronting on certain specified streets

of the City of Halifax were required to supply brick and granite curbstones for sidewalks, to be laid down at the expense of the city; provided that where brick or stone sidewalks were already laid, which, in the judgment of the Committee on Streets were good and sufficient, the section did not apply.

By the Acts of 1890, c. 60, s. 14, the City Council was empowered to borrow money for use in constructing such sidewalks as the council should determine on, one-half of the cost to be borne by the adjoining property owner.

In 1867 the defendant's predecessor in title had supplied brick, etc., to the satisfaction of the Committee on Streets, which had been laid down in front of his property in accordance with the Act of 1861. In August, 1891, the City Council authorized the construction of a sidewalk in front of defendant's property under the Act of 1890, and this was a special case submitted as to the defendant's liability in respect thereto.

Held, McDonald, C.J., and Townshend, J., dissenting, that the defendant was not liable for one-half of the cost.

In the Supreme Court of Canada:—Held, reversing the above decision, that the defendant was liable, there being no exception in the Act of 1890 in favor of a property owner who had contributed to the construction of a sidewalk under the Act of 1861, and the result not being to compel the defendant to pay twice for the same thing, the old sidewalk having become worn out and dangerous.

City of Halifax v. Lithgow, 28/268, 26 S.C.C. 336.

11. **Pipe line crossing private property —Agreement respecting.**] — Defendant city constructed a water pipe line through plaintiff's property, under an agreement which required the soil re-removed for the purpose of laying the pipes, to be "well and sufficiently closed up," and the land so broken to be "made good." The evidence showed that in places the soil covering the pipes was from two, to two and one-half, feet above the original level.

Held, this was not in compliance with the agreement. But, that the use of stones for filling up the trench, which interfered to some extent with the plowing and cultivation of the surface, was a necessary incident to the construction of the line.

Chisholm v. City of Halifax, 29/402.

12. **Title to streets.**]—The Statute of Nova Scotia, 50 Vict. c. 23, vesting the title to public highways in the Crown, does not apply to the streets of the City of Halifax.

O'Connor v. Nova Scotia Telephone Co., 23/509, 23 S.C.C. 276.

13. **Notice of non-repair of street——1890, c. 60, s. 35.**]—Whether required in action for injury causing death.

See NEGLIGENCE, 23.

14. **Negligent maintenance of streets.**] —Liability of city.

See NEGLIGENCE, 18, 23, 28.

15. **Encroachment on street — City charter, section 454—Building without permit.**]—Section 454 of the charter of the City of Halifax requires persons intending to build "upon or close to the line of any street," to apply to the City Engineer, to define such line and issue his certificate, etc. The defendant, in making alterations to his house built a porch or entry, on ground where some years before another porch had stood, without applying to the City Engineer, and in the face of warnings not to proceed.

On petition of the City Recorder, as set out in section 454, a Judge ordered the erection removed; with costs against defendant because of proceeding after notice.

On appeal:—Held, Ritchie, J., and Graham, E.J., dissenting, that the order of the Judge must be set aside because it was the duty of the city to show the location of the street line, which it had not done.

In the Supreme Court of Canada:—Held, that the evidence would have justified the Judge in basing his order on the fact that the building was "close to" the line, but as the petition referred only to the building being "on the line," which

was not shown as a fact, his decision was properly reversed.

City of Halifax v. Reeves, 26/130, 23 S.C.C. 340.

HIGHWAY.

See also STREET.

1. **Duty of removing snow—Government railway employee.**]—A section hand employed on the Government Railway is not exempt from the duty of assisting in removing snow from a highway or paying a penalty, imposed by a Provincial Act, by the fact that he is such, or that his services are required at the same time for the same service on the railway.

Fillmore v. Colburn, 28/292.

2. **Rule of the road.**]—As to the passing of teams. Element entering into negligence.

See NEGLIGENCE, 6.

HORSE.

Hack horse.]—A hack horse is one which is usually driven in a hack. The fact that a certain horse is thoroughbred does not affect the matter.

See RACE.

HOUSE OF ASSEMBLY.

See ASSEMBLY, HOUSE OF.

HUSBAND AND WIFE.

See also DOWER, MARRIED WOMAN'S PROPERTY ACT.

1. **Pledging husband's credit—Notice given by husband.**]—Appeal from the County Court from a judgment in favor of plaintiff, for goods supplied defendant's wife after notice to plaintiff and in the newspapers, that defendant would not hold himself liable for debts contracted by his wife. Per Weatherbe, J., "There is no evidence that defendant authorized the purchase of the goods, but he admits he was aware that his children got the goods in plaintiff's shop, and brought them from time to time to his house, and he consumed a portion of the goods where he lived with his children. If no other facts than these were presented to the Court, the judgment appealed from would be right," but some doubt appearing as to the period of time the published notice was meant to apply to, and as to whether the wife was living apart, there should be a new trial. Meagher, J., and Graham, E.J., concurred.

Per McDonald, C.J. (Ritchie, J., concurring), (after reviewing the whole history of the subject of a wife pledging her husband's credit), taking the facts to be proved, that ample provision was made for the support of the wife and family, by putting her in possession of ready money and forbidding her not to pledge his credit, and publishing notice that he would not hold himself liable, and plaintiff admitting that he was aware of such publication, that judgment should be for the defendant. Also, that the fact that he was aware that the goods were purchased in defendant's shop affords no evidence of an implied authority to the wife to purchase on his credit.

Powell v. Smith, 23/283.

Or Power v. Smith, 23/283.

2. **Wife disposing of husband's property to purchase necessaries.**]—Appeal from the County Court in an action for the conversion of a bull alleged to be the property of plaintiff. The animal had been purchased by defendant from the plaintiff's wife during his prolonged absence from home. The wife swore that she was forced to sell, to procure necessaries. The County Court Judge held that the wife was within her legal rights in the transaction.

On appeal by plaintiff:—Held, per Townshend, J., Ritchie, J., concurring, that the agency of the wife only extended to binding the husband's credit to procure necessaries for her support, not to disposing of his property in any case. At common law, she could not

even borrow money to be expended in necessaries, but in equity a different view was adopted, on a principle similar to which it might be possible to protect the defendant purchaser if there were evidence that the money realized by the sale was expended for necessaries, which there was not. And it did not even appear that she had made an effort to pledge the husband's credit. That the decision of the County Court was erroneous in principle, but, on a review of the evidence, the bull appeared to be the property of the wife (Married Woman's Property Act, ss. 3, 5), hence the result reached should be confirmed.

Per Meagher, J. (Graham, E.J., concurring), that the weight of authority was against the decision of the Judge below, and that the evidence did not sustain the contention that the bull was the property of the wife.

Kieley v. Morrison, 24/327.

3. **Payment by wife without authority—Insufficient under Statute of Limitations.**]—To an action for a balance due of the price of a sewing machine, the defence was that the claim was barred by the lapse of 6 years. There had been a payment of $5 on account by the wife of defendant about two years previously. This payment was made not only without the authority, but against the express command of the defendant:—Held, that the Statute of Limitations applied.

Robertson v. McKeigan, 29/315.

4. **Wife accepting order for money.**]—A wife may not bind her husband by accepting an order for the payment of money, drawn on herself, but in relation to his contract. And such an act not being one of agency, may not be subsequently made so by ratification.

Craig v. Matheson, 32/456.

5. **Wife joining in deed.**]—The effect of a wife's uniting in a conveyance with her husband, is not to vest any estate in the grantee, apart from that of her husband, but rather to relinquish an inchoate right in the nature of an incumbrance. (Schouler 451, Washburn Vol. 1, 400.)

Redden v. Tanner, 29/40.

6. **Separate estate—Reduction into possession—Deed not delivered.**]—A question arose between a widow and the children of her deceased husband by a former wife, as to the ownership of a property known as the "C. farm." The title was in the husband's name, but it had been purchased by the wife with moneys derived from her father's estate. In his lifetime the husband had incidentally by deed recognized these moneys as the separate property of the wife. Another deed, dated some years before, conveying the "C. Farm" to a trustee to the separate use of the wife, signed by the husband, but never delivered, was produced by the solicitor who drew it, and in whose possession it had for some unexplained reason remained.

Held, Graham, E.J., dubitante, that the latter deed was inoperative to pass the title, but might be taken as evidence that the husband did not consider the property as his own; and that there was no reduction into possession by him and no gift by the wife.

Semble, there being no question of creditors, the presence of children does not make the case different from that of a simple contest between husband and wife.

Routledge v. Routledge, 30/151.

7. **Restraining guardian.**]—The fact that a wife, who is the guardian of an infant grandson, proposes to make a mortgage loan on doubtful security, to her husband, is sufficient ground for a restraining order at the instance of her surety.

See GUARDIAN, 2.

8. **Indictment of husband.**]—Failure of wife to testify. Must be no comment thereon.

See CRIMINAL LAW, 43.

9. **Married woman—Non-joinder of husband** in action for negligence. Where absent over seven years.

See MARRIED WOMAN'S PROPERTY ACT, 1.

ILLEGALITY.

See CONTRACT, 10, FRAUD AND MISREPRESENTATION, SALES, 15.

IMMORAL AGREEMENT.

See CONTRACT, 13.

IMPOUNDING OF CATTLE.

1. **Sale of animal—Replevin.**]—To an action of replevin for a steer, defendant pleaded that he had bought the animal at a sale by a poundkeeper under the provisions of R.S. 5th Series, c. 67. The plaintiff contended that the sale was not lawful, inasmuch as it had not been advertised by notice posted "in the three most public places in the settlement," as required by section 14 of the Act, and because he had been misled by the misdescription of a registered ear mark in the notices posted.

Held, that as the notices had been posted at the post office, meeting house, mills and blacksmith shop, the act should be considered complied with, unless the plaintiff could show that there were more public places in the settlement; and that the misdescription of the ear-mark, if any, was due to the negligence of the plaintiff in making the same indefinite, no bad faith being attributable to the poundkeeper. McDonald, C.J., dissented.

Dodge v. Baker, 24/552.

2. **Rescuing cattle—Conviction for—Penalty—Recovery of.**]—Defendant was convicted by a Justice of the Peace and adjudged to pay $4, for having contrary to R.S. 5th Series, c. 67, s. 16, rescued some cattle from S. who was driving them to the pound.

The defendant appealed the conviction to the County Court, where it was affirmed. On appeal to the Supreme Court:—Held, (1) that the penalty was properly enforced under the Summary Convictions Act; (2) That the penalty was punitive and not designed as compensation to the party from whom the rescue was made, who could not maintain an ordinary action therefor; (3) That an appeal of a summary conviction having been made to the County Court under R.S. 5th Series, c. 103, s. 66, the decision of the County Court was final.

Queen v. Leslie, 25/163.

IMPRISONMENT.

For debt.]—See COLLECTION ACT, INDIGENT DEBTOR.

Otherwise.]—See FALSE ARREST AND IMPRISONMENT, MALICIOUS PROSECUTION, CANADA TEMPERANCE ACT, LIQUOR LICENSE ACT.

INCORPORATED TOWN.

1. **Election of town councillor—Contractor—Method of questioning.**]—The "Towns Incorporation Act, 1888," s. 50 (e), renders "any person, directly or indirectly, by himself or his partner having a contract . . . with the council, etc.," ineligible for election or sitting as a councillor. On quo warranto proceedings to test the validity of the respondent's election as such:—

Held, that being a surety on a bond for the due performance of his duties by the town inspector of licenses, rendered him ineligible, but that the validity of a town election might only be inquired of under R.S. 5th Series, c. 57.

Semble, the act of illegal sitting might be tested under the Crown Rules.

Queen v. Kirk, 24/168.

2. **Certiorari to town council — Does not apply.**]—Certiorari only lies to inferior Courts and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, not legislative or ministerial.

The action of the council of an incorporated town in passing a resolution looking to the better enforcement of the Canada Temperance Act, and providing for a division of fines to be imposed, with volunteer informers, is a ministerial

not a judicial act, and certiorari does not apply.

In re Town Council of New Glasgow, 30/107.

3. **Town clerk—Claim for salary.**] — Action by an incorporated town against a former town clerk who had quit his position, and retained town monies to respond a counterclaim which he raised for salary.

He had acted as town clerk under a special Act of incorporation superseded by the Towns Incorporation Act, 1888, and latterly under the latter Act, his salary being fixed at varying amounts from year to year by resolution of the council, in which course he had acquiesced. He was free to quit his position at any time:—

Held, there was no evidence of contract to support his counterclaim.

Town of Sydney v. Hill, 25/433.

4. **Recorder—Salary—Costs of litigation.**] — Plaintiff, a barrister, brought action for salary as recorder of the incorporated town of Truro, and for professional services in conducting litigation:—

Held, he might recover as salary the minimum amount fixed as payable to the recorder of the town of Truro by a special Act (1891, c. 19), without seeking by mandamus to compel the town council to go through the form of fixing the figure.

As to recovering costs for litigation conducted; though the rule requiring all acts of incorporated bodies to be under seal has been greatly relaxed, it still applies to all acts not specially within the purposes of incorporation. The conduct of law suits not being within the objects for which a town can be said to have been incorporated, unless plaintiff was retained by resolution under seal, he was not entitled to recover.

But this requisite having been dispensed with in plaintiff's case by the special Act above referred to, the town having had the benefit of his services should be held liable to remunerate him therefor, though the evidence disclose no definite contract of employment or retainer.

Laurence v. Town of Truro, 26/231.

5. **Recorder—Amotion of town officer—Council not the "corporation."**] — On proceedings in the nature of quo warranto directed to his successor, by the relator, who had been recorder of the town of Truro, to test the validity of his removal by the town council:—

Held, every corporation has incidental power to remove any of its officers for good cause, but such power cannot be exercised by any part (committee) of the corporation, unless specially vested in that part by prescription or charter.

Under the Towns Incorporation Act the "inhabitants," not the "town council," is the "corporation," and the recorder being an officer of the corporation, the town council may not, in the absence of express legislative authority (prescription being out of the question), remove him, though, under the Act it appointed him to office. Distinguishing In re Spence (Old. 333), where the city council of Halifax was held able to remove one of its members for cause by virtue of a specially granted authority to make by-laws, not given to incorporated towns.

Queen ex rel. Laurence v. Patterson, 33/425.

6. **Water commissioners—Remuneration.**] — Plaintiff and two others (not joined), had acted as commissioners appointed by the town council under special legislation to introduce a water supply into the town of N., and now sued for remuneration. The Legislature had provided that they should be paid "at the discretion of the council," and that body had resolved that they should receive "a reasonable amount":—

Held, plaintiff might maintain action apart from his fellow commissioners, their functions not being joint under the Act referred to. Also, he might recover without resort to mandamus to compel the council to fix the amount to be paid him. The council having resolved that the commissioners should receive a reasonable amount, the exact figure could be settled by reference to the trial Judge.

Weeks v. Town of North Sydney, 26/396.

7. **Width of new street.**]—Section 144 of the Act of 1888 forbids the opening of any new street by an incorporated town, of less width than 50 feet:—Held, enjoining the council from proceeding, that an extension of an existing street is a new street, and must conform to the Act.

Partridge v. Town of North Sydney, 25/557.

8. **Towns Incorporation Act, 1895—Limitation—Nuisance.**]—An action in reference to a continuing nuisance is not barred by the Towns Incorporation Act, 1895, s. 295, which provides that "no action ex delictu shall be brought against any town incorporated under this Act . . . unless within 12 months next after the cause of action shall have accrued," except as to damage suffered more than one year before action

Archibald v. Town of Truro, 33/401, 31 S.C.C. 380.

9. **Defective construction of sidewalk**—Defective maintenance—Injury caused by grating—Liability of town.

See NEGLIGENCE, 21.

10. **Questions of taxation** under Towns Incorporation Act and amendments.

See TAXATION.

11. **Imprisonment by stipendiary magistrate.**]—If there be no common gaol within the limits of an incorporated town, a prisoner sentenced by the stipendiary magistrate, may lawfully be conveyed to and confined elsewhere.

See CANADA TEMPERANCE ACT, 11.

12. **County stipendiary** has jurisdiction to convict for an offence committed within an incorporated town.

See MAGISTRATE, 8.

INDICTMENT.

See CRIMINAL LAW, 19.

INDIGENT DEBTOR.

1. **Consent to discharge.**]—If a debtor imprisoned (1888), for debt under execution, make application for his discharge under the Act and before a hearing is had, the judgment creditor or his solicitor, as part of a compromise, consent to his discharge, there cannot be any further process at any time to enforce the judgment.

Dunbar v. Ross, 32/222.

2. **Presumption of suing for another**—Indigent debtor bringing action after making general assignment under the Act—Security for costs ordered.

See COSTS, 57, 58.

INDORSEMENT.

Of indictment.]

See CRIMINAL LAW, 19.

Of negotiable instruments.]

See BILLS AND NOTES, 1.

Of warrant.]

See FALSE ARREST AND IMPRISONMENT, 4.

Of writ of summons.]

See PLEADING, PRACTICE, 2, 67.

INFANT.

1. **Action by infants for negligence**—Aged 10 and 2 years—Contributory negligence does not operate against young child—Nor negligence of parents—Reckless driving.

See NEGLIGENCE, 7.

2. **Adverse possession against infant.**]—The plaintiffs claimed in ejectment against defendants who had been in possession 24 years. During the first ten years the plaintiffs had been under the disability of infancy, but this action was not brought until fourteen years after the removal of the disability:—Held, that the defendants' possession had ripened into a title good against all the world.

Shea v. Burchell, 27/235.

3. **Affidavit establishing own age.**]—The affidavit of an infant swearing specifically to the fact of infancy, and stating the date of birth, if uncontradicted, is sufficient proof of infancy to justify the setting aside of a judgment entered against him. (Weatherbe and Ritchie, JJ., dissenting.)

Leaman v. Murray, 23/298.

4. **Agency of father—Settling claim of infant—Consideration.**]—Plaintiff sued on a promissory note given him by defendant in settlement of a claim for damages for assaulting plaintiff's infant son, 19 years of age. The defence was that there was no consideration as between plaintiff and defendant:—

Held, that plaintiff, as the natural guardian of his son, and as his specially authorized agent, might make the settlement on which the note was based. And, following Lyons v. Donkin, ante, see BILLS AND NOTES, 8, that plaintiff's forbearance to sue was a sufficient consideration for the note.

Also, though the settlement on behalf of the infant, and the agency of the plaintiff, were voidable at his option, yet this is for the benefit of the infant only, and cannot be availed of by an adverse party as a defence to an action to enforce rights dependent thereon.

Hubley v. Morash, 27/281.

5. **Contract of suretyship—Father and infant son**—Father becoming liable for firm in which the infant is a partner—Construction of contract of agency.

See PRINCIPAL AND SURETY, 5.

6. **Commitment to an institution—Form.**]—A committal of an infant to the custody and guardianship of an institution under R.S. 5th Series, c. 95, s. 3, is not bad because contained in one and the same instrument with the conviction of the mother under the chapter, for ill treatment and neglect, etc.: nor because it sets no time during which the custody shall continue.

Re Mahoney Children, 24/86.

7. **Contract of hiring—Voidable by infant—Quantum meruit—Set off for necessaries.**]—Plaintiff, an infant, sued by his next friend for work done and performed claiming $174. Defendant amongst other pleas set up that the work was done under a special contract with the infant by which he was to receive board, lodging and instruction as sole compensation for his services until he became of age:—

Held, that the contract being with an infant was voidable at his option, also that under the doctrine of quantum meruit he was entitled to recover the value of services rendered, also that an infant being legally able to contract for necessaries the defendant was entitled to set off such necessaries as he had supplied.

Rutherford v. Purdy, 21/43.

Cf. 4 ante.

8. **Custody — Rights of father — Religious considerations.**]—On an application by habeas corpus, to Townshend, J., by a father for the custody of his daughter, aged 13, who was residing with her maternal uncle, it appeared that the applicant was a Roman Catholic who had married a Presbyterian; that up to about three years previous to the date of this application, when his wife died, he had acquiesced in his daughter being brought up a Protestant; that on his wife's death he had voluntarily placed her in the custody of her uncle, and knew that her education as a Protestant was being continued.

There was no question as to his moral fitness to have custody of his daughter, but it appeared that he desired to bring her under Roman Catholic influences and instruction, which were repugnant to the infant herself.

The learned Judge, exercising the jurisdiction formerly appertaining to the Court of Chancery as paramount guardian, and holding that the main consideration was the welfare of the infant herself, examined her privately, and considering that her return to her father would result in great unhappiness and misery, and possibly in injury to her health, made no order, on her uncle's undertaking to continue to maintain and educate her suitably.

On appeal:—Held, per Ritchie, J., that this course was proper. Per Henry, J.,

(Graham, E.J., concurring), that the father should be awarded custody of the infant on his undertaking not to interfere with her religious views. Per Meagher and Weatherbe, JJ., that nothing had been shown to warrant interference with the father's natural rights.

In re Nellie Marshall, 33/104.

9. **Right to custody of infant in certain cases.**]

See HABEAS CORPUS, 9.

10. **Right to choose guardian.**] — An infant who has attained the age of 14 years has a right to choose its own guardian, and may petition the Court of probate to make a change.

The grandfather of the infant is a suitable person to be guardian, though residing out of the jurisdiction.

Loasby v. Egan, 27/349.

11. **Mismanagement by guardian** — Action by surety against guardian to restrain misconduct, and for indemnity —Such proceedings may be instituted by anyone—Powers of Court—Joinder of parties.

See GUARDIAN, 2.

12 **Laches of infant**—Not to be considered.

See PROBATE COURT, 12.

13. **Trusts for benefit of infant**—Maintenance—Trustees must first exhaust income of fund ultimately least beneficial to infant.

See TRUST, 14a.

INFORMATION.

Altering information.] — An information for a violation of the Canada Temperance Act purporting to be that of A. was signed and sworn to by B. In the presence of B. the magistrate afterwards erased the name of A. and inserted that of B., but did not re-swear B.:—Held, a conviction following was bad. And the defendant having raised the objection and caused it to be noted, had not afterwards waived his rights by proceeding to his defence.

Queen v. McNutt, 28/377.

See also ATTORNEY-GENERAL, 1, CRIMINAL LAW, 18.

INFORMER.

See INLAND REVENUE, LIQUOR LICENSE ACT, 23.

INITIALING.

Judge initialing summons—Whether it has the effect of an order—The Court equally divided.

See ELECTION, 3.

INJUNCTION.

1. **Action pending — Restraining proceedings.**]—Per Graham, E.J. Independent action by injunction, must not be taken to restrain proceedings in a matter pending in the Court. R.S. 5th Series, c. 104, s. 12, s.-ss. 5, 7. An action which has proceeded to the point of levy under execution on a judgment recovered therein, is a matter pending. The proper remedy is by application in the cause, as by interpleader, etc., etc.

Rogers v. Burnham, 24/535.

2. **Staying proceeding in County Court —Application to Supreme Court.**] — Semble, the prayer should be to restrain the applicant from proceeding with his application, not to restrain the Court. But the difference being small, amendment was here made at the costs of the applicant for the restraining order, fixed at $5.

Clattenburg v. Morine, 30/221.

3. **Restraining operation of statute.**]— The plaintiffs had obtained an interim injunction restraining defendants from cancelling stock, in which plaintiffs claimed ownership, in pursuance of a statute expressly directing such cancellation:—Held, dissolving injunction, that the remedy, if any, was not by injunction. The Courts will construe a statute

so as not to affect private rights, where such may be done without destroying its effect.

Kinney v. Plunkett, 26/158.

4 **Interference with chartered rights—** Gas company — Nuisance — Competing private rights.

See NUISANCE, 5.

5. **Interim injunction—Costs.**]—Though on the granting of an interim injunction, costs are usually ordered to abide the event, yet if the purpose be to restrain a continuing nuisance, and the main facts are not disputed, costs are properly awarded to the applicant.

Francklyn v. People's Heat and Light Co., 32/44.

6 **Company—Restraining shareholders** at suit of directors—Respective powers —Act of incorporation.

See COMPANY, 8.

7. **Lessees of mining rights—Surface owners.**] — The plaintiffs sought an injunction to restrain the defendant, who was owner of the fee in certain lands known as Hurricane Island, from interfering with plaintiffs' operations in making use of an old shaft sunk by a previous lessee. He based his right to an interim order on (1) An award of arbitrators under the Mines Act, of damages to the defendant as surface owner. (2) To a lease from the Crown of minerals, etc., below the surface, claiming that this carried with it the right to tunnel. Meagher, J., refused an order, the defendant undertaking to abstain from the acts prayed against pending trial. Plaintiff having appealed:—Held, that the validity of the award being in litigation and the Judge seeming to consider it invalid, he was within his discretion in refusing the injunction.

Palgrave Mining Co. v. McMillan, 25/56.

8. **Nuisance.**]—Semble, where a nuisance is a continuing one, no compensation in damages to an injured party, can be considered adequate, and an injunction ought to issue, though otherwise, the operations of a chartered business company ought not to be interfered with.

Francklyn v. Peoples Heat and Light Co., 32/44.

INLAND REVENUE.

1. **Informer—Notice of action.**]—Plaintiff, an informer, sued defendant, a preventive officer, for a share of the proportions of a seizure allowed defendant by the department of inland revenue. The form of action was "for money had and received." The plaintiff was unknown to the revenue department, and it was held on this ground the count must fail, though there was a clear agreement on the part of defendant proved to share the results of the seizure. The Court therefore made the necessary amendment and allowed plaintiff to recover. Further, that defendant in this behalf was not entitled to the notice of action prescribed by the Inland Revenue Act.

Wright v. Curless, 21/232.

Carroll v. Curless, 23/32.

2. **Forfeiture of horse and waggon for transporting goods.**]—Plaintiff, a licensed truckman of the city of Halifax, brought action against defendant, an auctioneer, for selling a horse and waggon seized under the Act for transporting goods in violation thereof:—Held, that defendant in so selling was an officer under the Act, and as such was entitled to one month's notice of action, which had not been given. Also, that the fact that plaintiff was a licensed truckman, bound under penalties, by by-law of the city, to transport any load offered him, afforded no sufficient answer to the violation of the Inland Revenue Act.

Weatherbe and Ritchie, JJ., dissented.

McDonald v. Clarke, 22/110.

INSOLVENCY.

See ASSIGNMENT, COLLECTION ACT, COMPANY, 33, PARTNERSHIP, 10, PROBATE COURT, 7.

Ground for security for costs.]—
See COSTS, 57.

INSURANCE.

ACCIDENT INSURANCE.

1. **Condition—Payment of premium.**]—A policy of insurance against accident contained a condition:—"This policy shall not take effect unless the premium be paid prior to any accident on account of which claim is made":—Held, that this applied to the original premium only, not to renewals.

Pudsey v. Manufacturers Accident Ins. Co., 29/124, 27 S.C.C. 374.

2 **Agent exceeding authority—Notice.**]—In an action to recover under a policy of accident insurance for the death of the insured by accident, it appeared that the agent of the defendant company had induced the deceased to renew his policy, taking as payment of the premium of $16 a promissory note for $15 and $1 in cash, and delivering to him the official receipt of the company. The company had in private instructions to agents, forbidden them to take notes for premiums:—

Held, in the Supreme Court of Canada (Gwynne, J., dissenting), that as the agent had been employed to complete the contract, and had been entrusted with the renewal receipt, the deceased might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority, and the policy not forbidding it.

Pudsey v. Manufacturers Accident Ins. Co., 29/124, 27 S.C.C. 374.

FIRE INSURANCE.

3 **General agent and adjuster—Power to bind company—Waiver of condition.**]—The general agent of defendant company at Halifax directed an adjuster to proceed to Antigonish and report on a loss by fire. This adjuster investigated the loss, not, however, in the usual way, prepared proofs which were signed by plaintiff, and forwarded the same to the general agent. The general agent then caused the local agent at Antigonish to inform plaintiff that the amount fixed by the adjuster as the extent of the loss, would be paid:—

Held, that the company was bound by the terms of the settlement.

A condition of the policy required the assured within fifteen days after the fire to submit as particular account of the loss as possible, which was not done:—

Held, the assured having placed every facility at the disposal of the adjuster, who did not require literal compliance, the jury was warranted in finding that the condition had been complied with.

Kirk v. Northern Assurance Co., 31/325

4 **Condition—Notice of loss—Waiver by agent.**]—Certain conditions of a policy of fire insurance required proofs, etc., within fourteen days after the loss, and provided that no claim should be payable for a specified time after the loss should have been ascertained and proved in accordance with this condition. There were two subsequent clauses providing respectively that until such proofs were produced, no money should be payable by the insurer and for forfeiture of all rights of the insured if the claim should not, for the space of three months after the occurrence of the fire, be in all respects verified in the manner aforesaid:—

Held, that the condition as to the production of proofs within fourteen days, was a condition precedent to the liability of the insurer; that the force of the word "until" in the subsequent clause could not give to the omission to produce such proofs within the time specified, the effect of postponing recovery merely until after their production, and that the clause as to forfeiture after three months did not apply to the conditions specially required to be fulfilled within any lesser period.

Also, reversing the decision of the

Supreme Court of Nova Scotia, neither the local agent for soliciting risks, nor an adjuster sent for the purpose of investigating a loss under a policy of fire insurance, has authority to waive compliance with conditions precedent to the insurer's liability or to extend the time thereby limited for their fulfilment, and as the policy in question specially required it, there could be no waiver unless by indorsement in writing upon the policy signed as therein specified.

Margeson v. Commercial Union Ass. Co., 31/337, 29 S.C.C. 601.

5. **Condition—Notice of loss—Waiver by agent.**]—A condition in a policy of insurance against fire provided that the assured "is to deliver within 15 days after the fire, in writing, as particular an account of the loss as the nature of the case permits":—Held, in the Supreme Court of Canada, that compliance with this provision was a condition precedent to an action on the policy.

And, reversing the decision of the Supreme Court of Nova Scotia, that a person not an officer of the insurance company, appointed to investigate the loss and report thereon to the company, was not an agent of the latter having authority to waive compliance with such a condition, and if he had such authority he could not after the fifteen days had expired extend the time without express authority from his principal:—

Held, also, that compliance with the condition could not in any case be waived unless such waiver was clearly expressed in writing signed by the company's manager in Montreal, as required by another condition of the policy.

Brownell v. Atlas Assurance Co., 31/348, 29 S.C.C. 537.

6. **Condition—Appointment of appraisers.**]—A condition of the policy required, in case of disagreement as to the amount of the loss, an appraisement by two competent appraisers, appointed, one by the assured, one by the company, they to agree on an umpire.

In an action for a loss, where the company alleged that there was disagreement as to the amount of the loss, and no compliance with this condition:—Held (Meagher, J., dissenting), that the company having repudiated liability under the policy, the assured was discharged from performance of this condition. It was sufficient that he had asked an appraisal and had named appraisers. And that the matter of appointment of appraisers was one of negotiation, and plaintiff having named one person who was not accepted, he was not thereby debarred from naming another.

Margeson v. Guardian Fire Insurance Co., 31/359.

7. **Conditions — Arbitration — Occupancy.**]—One condition of a fire insurance policy required that in case of loss, any difference as to amount should be submitted to arbitration at the request of either party. Another required, that until award, no action should be brought. No request having been made by either party, held, that there was no obstacle to either party bringing action.

A further condition required occupation of the buildings insured, and provided that the policy should cease to cover any building becoming unoccupied without notice. The buildings insured were a farmhouse and two barns, each insured for a separate amount.

In answer to questions, the jury found inter alia, that the house was unoccupied part of the time, and that both barns were continuously occupied.

On argument the plaintiff abandoned his right to recover in respect to the house:—

Held he could not recover in respect to the barns, the condition requiring continuous occupation of the whole premises.

Bishop v. Norwich Union Fire Ins. Society, 25/492.

8. **Condition—Giving of chattel mortgage.**]—A condition of the policy read: "This policy, or any interest in it, shall not be assignable without the consent of the company, expressed by endorsement made hereon, and all incumbrances effected by the assured must be notified within fifteen days therefrom, otherwise this policy shall be void. In the event of any transfer, sale, or change in the

title to the property assured, the liability of the company shall thenceforth cease." The defendant gave a chattel mortgage to G. of the property assured:—

Held, that the giving of the chattel mortgage was not an assignment of any interest in the policy, and was not a sale, transfer, or change of title within the meaning of the condition unless a transfer of the whole interest of the assured.

But, by the Supreme Court of Canada, held that though the chattel mortgage was not a "sale or transfer," it was a "change of title" within the meaning of the condition; and that it was an incumbrance, even if the word "incumbrance" in the condition meant incumbrance on the policy.

Salterio v. Citizens' Insurance Co., 26/16, 23 S.C.C. 155.

9. **Condition of policy—Giving of chattel mortgage.**]—A condition of a policy of fire insurance sued on was: "If during the assurance, any change takes place in the title to or possession of the property described in the policy, or in the event of any change affecting the interest of the assured therein, whether by sale, legal process, judicial decree, voluntary transfer, or conveyance of any kind . . . the consent thereto of the company in writing . . . shall be obtained and endorsed thereon."

The plaintiff gave a chattel mortgage to G., of the property described, without notice to the company:—Held, that he could not recover under the conditions.

Salterio v. City of London Fire Ins. Co., 26/20, 23 S.C.C. 32.

10. **Condition — Inventory to be furnished.**]—Action to recover a loss under a fire policy on a business stock. A condition of the policy required the assured within fourteen days of loss "to deliver as particular an account of loss or damage and of the value of the property destroyed as the nature and circumstances of the case will admit of."

The plaintiff rendered a statement that 'the property consisted of general merchandise, and the said merchandise consisted principally of dry goods, boots, shoes, groceries, and hardware contained, etc. . . . That my invoice book was burned, and I therefore have no adequate means of estimating the exact value of the property. . . . That I have made a careful estimate . . . and find the same to be between $3,000 and $4,000."

Plaintiff's clerk testified that if given time immediately after fire, she could have made a detailed account of the stock.

On appeal from judgment for plaintiff:—Held, that the condition of the policy was not complied with. (Affirmed by Supreme Court of Canada.)

The jury having failed to answer a question proposed by plaintiff as to whether he had rendered as detailed a statement as might be, and a question proposed by defendant company, as to whether he might not with the assistance of his clerk have made up a tolerably complete list, etc.:—

Held, by the Supreme Court of Canada, affirming the decision of the Supreme Court of Nova Scotia, which reversed the finding for plaintiff, that there was no occasion for a new trial, as a jury on the evidence could not find answers favorable to the plaintiff.

Nixon v. Queen Insurance Co., 25/317, 23 S.C.C. 26.

11. **Tenant for life—Insurance by.**]—S. being tenant for life of a certain house insured it against fire. The house having burned, the insurers paid her the amount of the policy. Immediately afterwards she died, and the remainderman laid claim to the insurance:—

Held, S. not having been under any legal obligation to insure, nor to restore in case of fire, yet had an insurable interest, and having insured out of her own monies for her own benefit, the resulting fund belonged to her estate.

Re Estate Susan Curry, 33/392.

Life Insurance.

12. **Application — False or evasive answer.**]—In an action to recover the amount of a policy of life insurance, the defence set up was breach of warranty, voiding the policy, in that a false or

evasive answer was made to a question contained in the application for insurance, by the deceased. Opposite a question as to whether he had ever had syphilis, the deceased set inverted commas or quotation marks, enclosing a blank space, thus " ," immediately under the answer "No," to the preceding question:—

Held, that whether this was meant as "No," or was an evasion of the question, it was fatal to the policy, the deceased having had the disease.

FitzRandolph v. Mutual Relief Society, 21/274.

13. **Note taken for premium—Payable to agent.**]—S. having induced the defendant to insure his life, took his promissory note for the first premium, payable to "S., agent of the O. Life Ins Co.," and indorsed it to plaintiff, who was another agent of the same company:—Held, that S., or his transferee, might maintain action, the note being in his favor and not in favor of the insurance company, and the words "Agent, etc.," being merely descriptio personae. Also, that there was a good consideration for the giving of the note.

McDonald v. Smaill, 25/440.

Marine Insurance.

14. **Constructive total loss—Partial loss—Sale—Prohibited waters—Renewal of policy.**]—Plaintiff's schooner was insured with defendant company under a time policy expiring on December 31st, 1892, with liberty to the assured to renew for one, two or three months before expiration of the first period, the risks to terminate at any port at which the vessel first arrived during the extended time. By the policy the waters of the Gulf of St. Lawrence were prohibited between November 1st and May 10th, but on December 3rd, on payment of an additional premium, a memorandum was endorsed on the policy giving permission to make one trip to Bay of Islands and return, which involved use of the prohibited waters. On December 28th, plaintiff made verbal application for an extension of the policy, which was refused. Later he made another application of a more formal character, which was objectionable on several grounds, and was also refused. The vessel sailed on her return trip from Bay of Islands on December 29th. On January 2nd, she put into a place called Frenchman's Cove, where there were three houses, a wharf and a store, to make repairs necessitated by stress of weather. After making repairs and taking in a further supply of wood and water, she proceeded on her voyage on January 4th.

On the evening of the same day she got ashore in consequence of an accident to her sails and rigging, and commenced to pound on the rocks with a sea breaking over her. A survey was held on January 5th, and she was sold on the 6th. The report of the surveyors disclosed nothing which would suggest a total loss, or any necessity for a sale. No attempt was made to get the vessel off before selling, though she changed her position with the tide, showing that she was not fast aground. There were plenty of men and boats in the neighborhood whose assistance could have been had in removing cargo; the assured could have been communicated with to procure funds if necessary, and the event showed that the purchaser at the sale with the assistance of men and boats did extricate the vessel from her position without difficulty, and kept her afloat with the pumps, and half of her cargo remained in her until she reached a port, where she was repaired at small expense. Under the policy the defendant company was exempted from liability for partial loss, or general average less than 500 dollars. No evidence was given at the trial of loss amounting to that sum, the evidence being confined to the claim for total loss.

Per curiam, the plaintiff could not recover for a constructive total loss.

Per Graham, E.J., that there was a fair case for trial as to a partial loss.

Hart v. Boston Marine Insurance Co., 26/427.

15. **Constructive total loss—No facilities for repair—Sale by master—Notice of abandonment.**]—Plaintiff's vessel

sailed from Turk's Island laden with salt for Lockport, N.S. Soon after leaving she encountered heavy weather and was forced to return, leaking badly, and was beached to prevent her sinking. There were no facilities at Turk's Island for repairing, and repairs would have exceeded her value, and her condition would not admit of her removal. There were no means of reasonably speedy communication with the owners, and the vessel was in danger of further destruction so that the master sold her:—

Held, that the vessel was a constructive total loss, and that the sale was justifiable, and that the necessity therefor was great enough to pass the property in her. Also, that the circumstances excused the master from first communicating with the owners, and that they having simultaneously heard of the loss and of the justifiable sale were excused from giving notice of abandonment to the underwriters, there being in such a case nothing to abandon.

In the Supreme Court of Canada:—Held, that if the vessel could have been taken to a port where repairs could have been effected, though at an expense far exceeding her value, there could not be, in the absence of notice of abandonment, a constructive total loss. But if the vessel could not have been removed, nor repaired where she was, nor the owners communicated with for some weeks during which she would have been in danger of further damage, the master acting bona fide for the benefit of all concerned, was justified in selling, and the sale excused notice of abandonment.

Churchill v. Nova Scotia Marine Ins. Co., 28/52, 26 S.C.C. 65.

15a. **Acceptance of abandonment—"Boston clause"—Acts of agents.**]—Plaintiff's vessel, insured by defendant companies as to hull and freight, left Trinidad for Vineyard Haven, with a cargo of molasses. Shortly after leaving port she encountered heavy weather and put into St. Thomas in a leaky condition. A survey resulted in an order to discharge and store cargo and to place vessel on the slip for repairs, but before anything was done, agents arrived simultaneously on behalf of owners and insurers, and several interviews took place without determining on anything definite. plaintiff's agent insisted that the cargo should be transhipped, and the vessel after temporary repairs should be taken to a northern port for full repairs. The agent for the insurers insisted that permanent repairs should be made at St. Thomas, the cargo thereupon to be reshipped. Before the arrival of the agents, notice of abandonment had been given.

In consequence of the failure to agree, plaintiff's agent withdrew from the project of repairing, which was thereupon proceeded with by defendant companies' agent alone.

After these repairs were completed and the cargo reshipped the vessel was found to be still leaky and unseaworthy and that it would again be necessary to discharge the cargo to which the repairers refused to consent. Disbursements having run up to two-thirds of the value of the vessel, and an attempt to raise money on bottomry having failed, she was finally sold under process to recover claims for repairs.

The policies contained what is known as the "Boston clause," that "the acts of the assured or the insurers, in recovering, saving and preserving the property insured, in case of disaster, shall not be considered a waiver or acceptance of an abandonment." The jury having found that there was an acceptance of the abandonment:—

Held, that the underwriters having intervened for the purpose of making permanent repairs, such repairs must be thorough and made within a reasonable time, otherwise they must be held to have accepted the abandonment. And that the "Boston clause" refers rather to cases where the owner neglects or refuses to save the ship, than to cases where he attempts to save her. Also, the plaintiff was clearly prejudiced by the interference of defendant's agent, as the expenses of repairing at St. Thomas were excessive, and as the vessel could not be re-metalled or reclassed there, whereas if she had been taken north as proposed by plaintiff's agent,

repairs could have been more satisfactorily effected at much less cost.

(New trial ordered in Supreme Court of Canada on certain terms as to costs. No reasons stated; semble, because of the obscure and contradictory character of some of the evidence on trial.)

McLeod v. Insurance Company of North America, 30/480, 29 S.C.C. 449.

On appeal after retrial, ordered as above:—Held, that the acts of defendant company's agent in taking possession of the vessel and proceeding to effect permanent repairs, worked an acceptance of abandonment, notwithstanding that the companies themselves had refused to accept notice thereof when given, unless in another view, such acts might be considered such a wrongful conversion of the vessel as would equally preclude defendant companies from setting up non-acceptance.

McLeod v. Insurance Co. of North America, 34/88.

16. **Constructive total loss—Policy on freight—Frustration of voyage.**]—Plaintiff's steamer, while on a voyage from Halifax to Havana with a cargo of fish and potatoes, was disabled by the breaking of her shaft, and was towed into Bermuda. It was not possible to repair the ship there in time to enable her to carry her cargo forward in time, and at the request of the shippers thereof the cargo was returned to them and brought back to Halifax. The ship was sold and towed to Philadelphia where she was repaired. Plaintiff brought action against defendant company for freight thus lost.

The jury found in answer to questions, that the ship could not have been repaired at Bermuda without a lapse of time which would have caused material deterioration in the cargo, or its becoming worthless, and that the shaft was broken by the perils of the sea:—

Held, that plaintiff was entitled to recover, the cargo being one which required expedition, and the earning of the freight having been frustrated by a peril insured against there was a constructive total loss.

Musgrave v. Mannheim Insurance Co., 32/405.

17. **Deviation — Barratry — Verdict of Judge.**]—Action brought by plaintiff to recover insurance on the cargo of a vessel insured on a voyage from Pubnico to Lunenburg and (or) Halifax. The master was consignee of the cargo, and the vessel, a schooner of forty tons, laden with dry fish. She was proved to be seaworthy, and had new sails when she left Pubnico. That night, although the wind was fair for going through Barrington Passage, she put into Shelburne, where she remained until 4th January. The voyage to the port to which she was bound, could, in a fair wind, be made in seven or eight hours. Notwithstanding this, she delayed in port fourteen days in suitable weather.

The learned Judge who tried the case without a jury, found for defendant company on the ground of barratry of the master, but did not decide on the question of deviation, and plaintiff appealed. On appeal the Court questioned the sufficiency of the evidence to establish barratry, but dismissed the appeal on the ground of deviation by delay, which had been raised by the pleadings.

Weatherbe, J., expressed some doubt as to whether the finding of a Judge could be treated in the same way as the verdict of a jury.

Affirmed by Supreme Court of Canada.

Spinney v. Ocean Mutual Ins. Co., 21/244, 17 S.C.C. 326.

18. **Deviation—Coasting vessel—Custom.**]—Action on a policy on schooner "Scylla," of about 100 tons burden, on a voyage at and from Mahone Bay, N.S., to Fortune Bay, Newfoundland, thence, etc. The defence was deviation by putting into Halifax harbor, not justified by necessity:—Held (Townshend and Meagher, JJ., dissenting), that it is not deviation for a small coasting vessel on this route to put into an intermediate point to avoid threatened bad weather. (Affirmed in the Supreme Court of Canada.)

Quaere, as to whether there is a custom of mariners?

Eisenhauer v. Nova Scotia Marine Ins. Co., 24/205, Cout. Dig. 144.

19. **Insuring advances—By owners of hull—Meaning of "advances."**]—L. & Co., managing owners of the barque "Lizzie Perry," insured with defendant company on a voyage from Port Eade to Buenos Ayres, during which she was lost. The money expended was obtained from a bank on the credit of L. & Co., but it was understood to be a debt of all the owners. When the insurance was effected the words "$2,000 on advances" was filled in, in the printed form of policy, the balance was applicable to the hull. The defendant company knew that it was dealing with the owners, who could not insure advances. Plaintiffs having brought action for a total loss, the only defence was that advances of owners did not constitute an insurable interest:—Held, per Weatherbe and Townshend, JJ., that as the defendant company knew it was dealing with the owners who were the applicants, and knew that the owners could not insure "advances," the contract was referable to such interest as plaintiffs could insure, and the policy should be so read as to exclude the word "advances." (Affirmed in Supreme Court of Canada.) Per Weatherbe, J.: "The word 'advances,' though sometimes used in marine insurance agreements, is not a word which has any legal known significance."

Per Townshend, J.: "Assuming that the word 'advances' has a mercantile meaning, which the Court is bound to recognize without extrinsic evidence, it could not have had that meaning in the contract the parties were making, as each party knew that owners could not make advances."

Per McDonald, C.J., and Ritchie, J., dissenting, that the evidence did not disclose any intention of the parties to make a contract different from that expressed on the face of policy.

Law v. British America Ins. Co., 23/537, 21 S.C.C. 325.

20. **Insuring disbursements—No insurable interest in plaintiffs—Agency for owners.**]—Plaintiffs sought to recover on a policy as follows:—"By the N.S. Marine Ins. Co., S. C. & Co. do make insurance and cause to be insured, lost or not lost, $3,200 in disbursements to S.S. 'Oakdene,' at and from Halifax to Baltimore":—

Held, following Law v. British America Ass. Co., supra, that disbursements on repairs to ship meant increase in value of hull, etc., and being at risk, constituted an insurable interest as such, it not being material whether designated in the policy as insurance on hull, or whether to be understood as a fuller description to disclose the reason for additional insurance.

Plaintiffs had no insurable interest, but were agents for the owners. The underwriters knew this, and that the insurance was not effected for plaintiffs personally, and that the premium was paid by owners. In the application the question "On whose account?" was left unanswered:—Held, that the acceptance of the application by the underwriters, under the circumstances, amounted to a waiver of the question, and that plaintiffs should recover.

Cunard v. Nova Scotia Marine Ins. Co., 29/409.

21. **Misrepresentation—Rebuilding and renaming—Insuring as new.**]—The plaintiff, in 1890, purchased a small steamer called the "Effort," built in 1868, and putting her on the slip, rebuilt her from the keel up, using, however, some of the old material where it was thought to be as good as new. He utilized the same engines and boilers, and after survey re-registered her as built in 1890, by the name of "Clansman." He then insured her in defendant company, replying to the question "When built?" "1890." In an action to recover the face of the policy for a loss by fire, the defence relied on was the misrepresentation that the vessel was built in 1890, instead of 1868:—

Held, affirming the decision of the trial Judge (McDonald, C.J., and Weatherbe, J., dissenting), that the question as to age referred to the hull and was substantially true, and the only answer that could be returned, as the question was the age of the ship, not of some of the material employed.

Per Graham, E.J. (Townshend, J., concurring.)

By the Merchants' Shipping Act no change shall be made in the name of a ship, and when the "Clansman" was registered after survey, the surveyor seems to have regarded the "Effort" as having been broken up, and ceased to exist as a ship.

On appeal to the Supreme Court of Canada:—Held, that misrepresentation made with intent to deceive avoids the policy however immaterial to the risk, if honestly made it does not, unless it is of a matter material to the risk, but that misrepresentation to the effect that a vessel was built in 1890, whereas she was in fact an old vessel extensively repaired in that year, was misrepresentation fatal, whether material to the risk or not.

Stevenson v. Nova Scotia Marine Ins. Co., 25/210, 23 S.C.C. 137.

22. **Promissory representation.**] — An application for insurance on a vessel in a foreign port in answer to the questions, "Where is the vessel?" "When to sail?" contained the following: "Was at Buenos Ayres or near port 3rd February, bound up river, would tow up and back." The vessel was damaged coming down the river not in tow:—Held, that the words "Would tow up and back" did not merely express a belief or expectation, but amounted to a promissory representation of a matter material to the risk, and not having been carried out the policy was void.

Bailey v. Ocean Mutual Marine Ins. Co., 21/5, 19 S.C.C. 153.

23. **Mortgagee his own insurer.**] — Plaintiff advanced defendant money towards fitting out his vessel on promissory notes taking a mortgage as security and agreeing that defendant should insure for his benefit. Afterwards he offered to become his own insurer upon receiving from defendant the amount which would be demanded as premium by an insurance company. This defendant paid him. The vessel was lost, and plaintiff sought to collect the notes:—Held, that they were discharged by the contract respecting insurance.

Per Graham, E.J. In the absence of statutory provision there is nothing to require a valid agreement for insurance, or of insurance, to be in writing.

Per Weatherbe, J. The agreement amounted to an understanding, that for a consideration paid, the loss should be borne by plaintiff.

McKay v. O'Neil, 22/346.

24. **Particular average — Condition of policy — Evidence of stranding.**] — The schooner "Donizella," insured in defendant company "free from particular average unless the vessel be stranded, sunk, burnt or in collision," on a voyage from Porto Rico to Halifax, put into Barrington, N.S., for shelter, the wind being south-east, with a heavy snowstorm prevailing. She was anchored near the lightship with one anchor out, but as the wind increased a second anchor was put out. Subsequently, during a heavy gale that sprang up from the north-west, with thick snow, both chains parted. The vessel was then on a lee shore, studded with reefs and shoals, and the tide was low. She was abandoned by the master and crew, and the following morning was not visible from the shore. Some time afterwards she was picked up at sea by salvors, and brought into port and put on the slip and repaired. When brought in she had four feet of water in her hold, and her cargo was badly damaged. On being put on the slip it appeared that 12 feet of the shoe were off abaft the main chains, and about 12 feet more were off under the main chains. The butts on the bottom were open. The keel was more or less chafed or broken. The rudder was damaged and the rudder braces started off. There was a scar on the bilge on the port side, which looked as though the vessel had dragged or pounded on something. The sides of the keel were bruised more or less and pieces were off of it. The keel was broomed up. The flying jibboom and main boom were broken, and the foreboom was split.

Held, and affirmed in the Supreme Court of Canada, that the trial Judge

had properly refused to withdraw the case from the jury, and that there was evidence enough that the vessel had been on shore to warrant their verdict for plaintiff.

Rudolf v. British & Foreign Marine Ins. Co., 30/380, 28 S.C.C. 607.

25. **Seaworthiness—Unexplained foundering — Misdirection — New trial.**]—A vessel insured by the defendant company by a policy which contained an express warranty of seaworthiness, foundered at sea shortly after leaving port. There was no evidence to explain the cause of her sinking, but in the spring of that year she had been caulked, painted and cleaned, and a month prior to her loss, she had been put on the slip and the caulking examined and made tight, and at this time she appeared to be perfectly sound. The defendant company relied on the well-known inference, that where a vessel founders shortly after leaving port, without any external circumstances to explain the happening, she was unseaworthy when she left port, to which the plaintiff opposed the evidence of actual seaworthiness.

Held, that the question of seaworthiness was one for the jury, and that the fact that no explanation could be given for the sinking of the vessel was not enough to establish an inference that she was unseaworthy at the time she left port, in the face of the evidence to the contrary.

But the trial Judge having instructed the jury as a matter of law that the vessel was lost "by the perils of the sea," instead of leaving it as a question to be dealt with by them, there was misdirection, for which there should be a new trial.

Morrison v. Nova Scotia Marine Ins. Co., 28/346.

INTERCOLONIAL RAILWAY.

See RAILWAY.

INTEREST.

1. **Annuity charged on land.**]—Only six years of accumulations of an annuity charged on land may be sued for and no interest should be allowed thereon.

Roche v. Roche, 22/211.

2. **Execution against realty—And personalty.**]—Six years' interest may be levied against real estate.

Twenty years against personalty.

Anderson v. Cunningham, 21/344.

3. **Mortgage—Compounding Interest.**]—Interest upon interest may not be charged under a mortgage unless by express agreement. Plaintiff began foreclosure proceedings against the defendant, under a mortgage for $450. Defendant sought more time, which plaintiff granted upon receiving a new mortgage for $750, made up in part by compounding arrearages of interest. The defendant gave a promissory note for the difference between the mortgages. Subsequently plaintiff brought foreclosure proceedings and sought to charge interest upon interest which had accrued since the giving of the note.

Held, that the giving of the note amounted to an agreement by the defendant to pay compound interest to the date thereof, but that no agreement could be implied from that fact, to continue to pay compound interest thereafter.

Thomson v. O'Toole, 21/1.

4. **Meaning of "within one year."**]—Plaintiff executed an absolute deed of conveyance to defendant, and at the same time entered into an agreement in writing for the redemption of the lands upon payment of the sum borrowed and interest "within one year."

Defendant sought to show a verbal agreement by which he was entitled, as to a part of the debt, to add interest to principal, and charge interest thereon.

Held, that such agreement, being verbal, was within the Statute of Frauds. Also that the documents above taken together were a mortgage; and that the use of the words "within one year" entitled the plaintiff to redeem at any

time within the year, on payment of principal and interest to date of payment, a construction strengthened by the use of the term "in one year," in relation to the utmost limit fixed for redemption.

Anpevine v. Smith, 26/44.

INTERLOCUTORY APPLICATION.

See PRACTICE, 26, 37.

INTERNATIONAL LAW.

See TREATY.

INTERPLEADER.

See PRACTICE, 21.

JOINT STOCK COMPANY.

See COMPANY, 1.

JOINT TENANCY.

See TENANT IN COMMON, 3.

JOINT UNDERTAKING.

See PARTNERSHIP, 5.

JUDGE.

1. **Rescinding order.**]—The rule against a Judge rescinding an order made by himself does not apply to orders made ex parte. Application may be made to rescind such on the ground that they have been irregularly and improperly obtained, or made without jurisdiction.

Hamilton v. Stewiacke Valley, etc., Co. and Dickie, 30/92.

2. **Judge may correct order—Recourse is by appeal.**]—At the conclusion of a trial an order by consent was taken awarding plaintiff one dollar damages. The Judge afterwards learning that it also included costs, on motion of defendant, amended the order to read "without costs to either party." This plaintiff declined to accept, contending that his consent was based on the supposition that the intention was to award costs.

Held, that the Judge had undoubted power to amend the order. That plaintiff's only recourse was by appeal from the amendment. That the prothonotary must receive and file such an order. Being merely a ministerial officer, he could not decide as to whether the order "had been rendered abortive by the learned Judge."

McDougall v. Mullins, 30/313.

3. **Reforming order—Ex parte application.**]—A Judge of the County Court having rendered his decision, on December 18th made two orders, one that plaintiff recover the sum of 850 against defendants T. and G.; and that he have leave to enter judgment therefor with costs to be taxed; the other dismissing the action against defendant C. with costs to be taxed. Subsequently, on the same day, defendant's solicitor ex parte obtained an order setting off the costs of an issue found in favor of defendants T. and G., against plaintiff's costs. On plaintiff's appeal:—Held, that the orders of December 18th having disposed of all matters outstanding, defendant's recourse was by appeal or by application to the Judge on notice to rectify the orders, on the ground that they were not in accordance with the decision.

McLellan v. Morrison, 23/235.

See also COUNTY COURT, 21.

4. **Deciding points of law before trial.**]—Under Judicature Act, section 18 (Cf. also section 20 and O. 25, R. 1, 2, 3), a single Judge has the same power to consider and dispose of points of law before trial that he has on trial.

Knauth Nachod v. Stern, 30/251.

5. **Disqualification.**]—A Judge has a right for his own protection to take judicial notice of matters affecting or involving his jurisdiction, and he may refuse to act, if disqualified within his own

knowledge, and without evidence thereof appearing from outside sources.

Belden v. Chapman, 21/100.

6. **Disqualification—Governors of a college interested.**]—Three of the Court being Governors of D. College, resigned their Governorships upon being called upon to hear a cause in which that college was interested. Per McDonald, C.J., "I do not see any distinction between a case of that kind and a case where a Judge holds shares in a bank, and disposes of them, to enable him with propriety to try a cause in which that particular bank is interested."

Re Estate Alex. McLeod, 23/167.

Cf. MAGISTRATE, 13.

7. **Death of Judge.**]—Effect on an application outstanding, where it takes place before the return day mentioned in the summons.

See PRACTICE, 29.

8. **Commissioner of Mines.**]—His functions under the Mines Act are not judicial.

Cf. MINES AND MINERALS, 3.

9. **Warden of municipality.**]—His act in appointing an arbitrator as to surface rights, under the Mines Act, is not judicial. (Per the Privy Council.)

See MINES AND MINERALS, 15.

10. **Prothonotary,** being merely a ministerial officer, may not decide whether he will or will not file an order as altered and settled by the Court.

McDougald v. Mullins, 30/313.

11. **Judge and Surrogate Judge of Probate.**]—Question of conflict of jurisdiction. Decree signed by both null and void. Certiorari where no appeal.

See PROBATE COURT, 10.

12. **Judge charging jury—Going outside record.**]—Per Ritchie, C.J., the Supreme Court of Canada should not approve such strong observations as to facts to the jury, on the part of the trial Judge, as in effect charge fraud on a party before the Court, which was not raised by the pleadings, nor properly in issue.

Putnam v. Hardman, 18 S.C.C. 714.

See also JURY, 8.

13. **Finding of Judge.**]—Semble, the Court in dealing with the question of setting aside the finding of a Judge, based on inferences of fact drawn from the evidence, should be influenced by the same considerations as in the case of the finding of a jury.

Stuart v. Mott, 23 S.C.C. 384.

Sherry v. Waddell, 27/312.

Cf. Spinney v. Ocean Mut. Ins. Co., 21/249.

Bourgue v. Logan, 26/1.

See also APPEAL, 10.

14. **Discretion of Judge—Appeal.**]—Where a Judge has decided a matter left to his discretion, his decision is not reviewable on appeal, unless it can be shown that he exercised his discretion on some erroneous principle.

In re Bank of Liverpool, 22/97.

Forsyth v. Bank of Nova Scotia, 18 S.C.C. 707.

Ashton v. Nova Scotia Cotton Co., 22/369.

Snyder v. Arenburg, 27/247.

McLeod v. Insurance Co.'s, 32/481.

15. **Jurisdiction of Judge—Habeas corpus.**]—An application for habeas corpus was made to a Judge of the Supreme Court of Nova Scotia, who referred the matter to the Court, which dismissed it. Thereupon a further application was made to Sedgwick, J., of the Supreme Court of Canada, under section 32 of the Supreme Court Act, which confers original jurisdiction in habeas corpus.

Held, by Sedgwick, J., that though his jurisdiction under the section referred to might be co-ordinate and equal to that of a Judge of the Supreme Court of Nova Scotia, it did not extend further nor constitute him a Court of Appeal with jurisdiction to void the decision of the Supreme Court of Nova Scotia.

Re Patrick White, 31 S.C.C. 383.

16. **Capias—False arrest—Magistrate.**]—The judicial character of the act of a

magistrate in issuing a capias, regular in form, but founded on an affidavit impeached as insufficient under R.S. 5th Series, c. 102, s. 5, will protect all who have acted under it in securing the arrest—even one who after issue has interfered to describe and point out the person to be arrested. It is not so if the capias be irregular in form, and not merely voidable, but void.

Orwitz v. McKay, 31/243.

JUDGMENT.

See also DECISION, RES ADJUDICATA.

1. **Binds beneficial interest in land.**]—C.G. entered into an agreement with one S. to purchase a lot of land for $200, and paid $100. Without completing the purchase he absconded from the Province, leaving the defendant, as his agent, in possession of the lot. The plaintiff recovered judgment and filed attachment against C.G., under absconding debtor process. Subsequently the defendant completed the purchase of the lot and caused the deed to be made by S. to him. Thereupon the plaintiff applied to the Court for a decree that defendant be declared a trustee for C.G., as to the said lot of land, to the extent of the sum paid by him, and that the judgment, being registered, might be considered to attach his beneficial interest, under R.S. 5th Series c. 124, s. 6.

Held, that plaintiff was entitled to such a decree under the equitable powers of the Court (Ritchie, J., dissenting).

Quære, might the plaintiff have proceeded to levy and sell under his judgment, without applying to the Court?

Ralston v. Goodwin, 21/177.

2. **And an equitable interest.**]—See GRANT, 1.

3. **Priority.**]—A judgment more recently recorded has priority over a mortgage as to lands, or an interest therein omitted by mistake in the description. Equity of rectification.

See REGISTRATION, 2.

4. **Binding lands** not standing in the name of judgment debtor. In case of fraud only.

See REGISTRATION, 8.

5. **Probate Court—Interest of deceased—Not bound by judgment against devisees—Estoppel.**]—The Court of Probate decreed a sale of lands for the payment of debts of the deceased, which were purchased by plaintiff. This action was for a declaration that such lands were not bound by a judgment recovered against the devisees of the lands.

Held, that the interest sold was that of the deceased at the time of his death, so that the lands were not bound by a judgment against his devisees. And further, in the Supreme Court of Canada, that the judgment creditors by accepting payments out of the proceeds of the sale had so recognized the license to sell, that they could not now dispute it.

Phinney v. Clark, 27/384, 25 S.C.C. 633.

6. **Foreign judgment—Costs may be recovered.**]—Notwithstanding O. 35, R. 38, making a foreign judgment only prima facie evidence in an action thereon in this Province, the costs of recovery in the foreign Court may be recovered.

And it is not necessary to prove that the foreign judgment is final and conclusive in the foreign jurisdiction.

Corse v. Moon, 22/191.

7. **Foreign judgment.**] — Where the foreign judgment is the result of an action brought by the defendant himself in a foreign Court against the plaintiff, O. 35, R. 38 does not apply.

Law v. Hansen, 25 S.C.C. 69.

8. **Illegal judgment—Statutory Court—Limits of jurisdiction.**]—Plaintiff brought action against S. in the County Court, to which S. pleaded a defence and counterclaim. Before final judgment, S. died, and on application ex parte by plaintiff, his administrators were substituted as defendants under O. 17, R. 4, 5. They did not appear or plead, and plaintiff moved for and entered judgment against them as administrators, without proving

his claim under O. 34, R. 22, or taking means to dispose of the original defence and counterclaim filed by S.

Considering that by their default defendants had admitted assets in the estate, which he failed to find by execution, plaintiff now brought action in the Supreme Court on the record of the County Court, against defendants personally, alleging a devastavit:—

Held, that the judgment of the County Court, the basis of this action, was illegal and without jurisdiction according to its constitution and practice.

Per Meagher, J., "The record must be examined and tried by itself . . . it must be borne in mind that the judgment was pronounced by a statutory Court, a court not proceeding according to the common law, and that the nature and extent of its jurisdiction, as well as the practice prevailing in that Court, are well known to us, and of which we may take judicial notice. It is therefore incumbent on us to inspect that record and determine therefrom and from our knowledge of the practice and jurisdiction of the Court from which that record comes whether that Court had jurisdiction to pronounce it. . . . The record before us is no more conclusive than the record of that Court would be, if upon its face it disclosed that in an action to recover $250—a sum within its jurisdiction—the Court gave judgment for $1,000, a sum beyond its jurisdiction."

Per Ritchie, J., "The County Court is an inferior Court of record with a limited jurisdiction, created by statute which defines the jurisdiction and prescribes the practice, and it does not proceed according to the course of common law. The record of such a Court is bad if it does not show jurisdiction, or if it appears from something set out on the record that the decision was wrong."

McDonald, C.J., agreed that the judgment of the County Court was irregular and void.

Per Graham, E.J., dissenting, the defendants were in the same position as if served with a writ of summons, and not having appeared were liable to have judgment pass against them under O. 13.

Stewart v. Taylor, 31/503.

9. **Amendment—After final judgment—Parties.**]—The power of the Court or a Judge under O. 16, R. 2, 10, to add parties, or to amend, continues after final judgment.

Plaintiff in her personal capacity having recovered judgment, the Court and the Supreme Court of Canada, suggested that it would be desirable that a representative of her deceased husband should be a party on the record. Thereupon she applied and was appointed administratrix de bonis non, and a Judge at Chambers amended the statement of claim, by adding a paragraph setting out her appointment.

Mack v. Mack, 27/458.

10. **Revivor—Parties.**]—In proceedings had in 1884, to revive a judgment recovered in 1871:—Held, that it was not necessary to join the heirs of the original defendant. Burroughs v. Isenor (1 Old. 687), followed.

Robinson v. Chisholm, 27/74, 24 S.C.C. 704.

11. **Interest collectible.**]—Six years interest may be collected on execution against real estate.

Twenty years against personalty.

Anderson v. Cunningham, 21/344.

12. **Limitation as to execution—Where leave is necessary.**]—A defendant sought to set aside an execution on the ground that it had been issued more than six years after the date of the recovery of the judgment, and without leave obtained:—Held, that a former execution having been issued within six years, it is not necessary to obtain leave to issue a second during the lives of the parties, or those of them during whose lives execution might formerly have issued (before the Practice Act, R.S. 4th Series, c. 94), within a year and a day, without a scire facias.

The only difference made by the Judicature Act in cases where it is necessary to obtain leave is that the order of the

Court or Judge takes the place of proceedings by writ of revivor, or of entering a suggestion by leave.

Anderson v. Cunningham, 21/344.

13. **Setting aside default—Leave to defend.**]—Defendant was sued for costs as between solicitor and client. He appeared May 15th, and demanded further particulars. Plaintiff entered judgment (specially indorsed writ), in default of pleading, May 27th.

Held, that an application on the part of the defendant, on the merits shown, should have been granted by the County Court Judge. Leave granted, the judgment meanwhile to stand as security, all costs to abide the event.

Smith v. Horton, 23/255.

14. **Setting aside default—Leave to defend—Affidavit of merits.**]—On an application to set aside a judgment entered by default and for leave to defend under O. 27, R. 14, a general affidavit of merits is sufficient. There is no rule to compel the defendant to disclose his defence, unless the Judge requires it. The whole matter seems to be left to his discretion, and

Semble, where a bona fide, though irregular and abortive, effort was made by the defendant to file a defence in time, the discretion of the Judge is properly exercised for his relief.

Bigelow v. Doherty, 30/393.

15. **But the defendant,** in addition to accounting for his delay, must show in his affidavit some facts from which the Judge can, in the exercise of his discretion, see that he has a defence on the merits—that there is a bona fide question to try. Nothing short of such an affidavit will justify a Judge in permitting a defendant to defend.

And an affidavit of the defendant's solicitor, that the defendant "has a good defence," that deponent is "advised and believes" that plaintiff "had no cause of action," and that, as set out in the defence sought to be filed, the defendant denies liability, is not sufficient, as no fact is positively sworn to on which a Judge might form a judgment or exercise a discretion.

But the Court being satisfied that the defendant had intended bona fide to defend, permitted him (on terms not then settled), to file a further affidavit.

Piper v. The Kings' Dyspepsia Cure Co., 30/429.

16. **Leave to defend—Costs.**]—Defendant having been permitted as above, to renew his application, filed a further affidavit of merits and made another motion which plaintiff opposed. The Judge being satisfied that plaintiff acted unreasonably and oppressively, set aside the judgment with costs against him:—

Held, the Judge erred in doing so and that his order must be so far modified as to give plaintiff the costs of the judgment and execution, if any, and allowing defendant only the costs occasioned by plaintiff's opposing the motion.

The judgment having been regularly entered, defendant's application was to the indulgence of the Court and could only be granted on payment to plaintiff of costs thrown away.

Piper v. Kings Dyspepsia Cure Co., 33/278.

17. **Judgment entered prematurely.**]—Levy thereunder. Measure of damages therefor. Recovery of payment thereon.

See DAMAGES, 12.

18. **Judgment by default—Where service accepted.**]—There must be an affidavit of service. O. 13, R. 13.

See PRACTICE, 62.

19. **Entered for too much—Ordered reduced—Costs.**]—Defendant's solicitor applied to set aside a judgment entered by default, on the grounds that it had been entered for too much, costs having been paid before entry, and on the ground that it was entered in violation of an agreement between solicitors, as to the settlement of the matter.

Held, that the Chambers Judge had power under O. 13, R. 10, to vary the record by deducting the amount paid, and was not bound to have set the judgment aside in toto.

Also, the application on defendant's part being a necessary one, it should car-

ry costs, though unopposed, but having failed of establishing his contentions on appeal, he should have no costs of appeal.

City of Halifax v. Bent, 33/546.

20. **Decree after judgment—Leave to defend—Costs — Laches — Irregular decree.**]—Action to set aside as fraudulent a deed made by one defendant to another. A defendant residing out of the jurisdiction was served, but did not appear, being advised that no decree could pass against her. A Judge at Chambers made a decree setting aside the deed. On an application three years later by the absentee defendant for leave to defend, on an affidavit of merits:—Held, per Townshend, J., at Chambers, that such a decree could not be made at Chambers, and that plaintiff should have proceeded as if defendant had appeared by filing statement of claim, giving notice of trial and proving his case in Court. On appeal:—Held, per McDonald, C.J., that the plaintiff's pleadings were defective, rendering the proceeding irregular, and that the matter should go to trial without costs to either party, neither being blameless.

Per Richie, J., that the proceeding was irregular because no statement of claim was delivered to defendant or a copy filed for her, and because the decree was not warranted by the pleading. That she should have a right to appear and plead upon paying costs of plaintiff's appeal, defendant's costs of motion to be costs in the cause.

Per Graham, E.J., dissenting, that defendant had not made out merits sufficient to excuse her laches.

Per curiam, that it is not necessary to set down an action for trial where no defence is made.

Thomson v. Barrett, 24/143.

21. **Setting aside—Interlocutory judgment — Irregularly entered — Amendment.**]—On 20th April, defendant was served with a writ indorsed "for seizing and levying on personal property on an execution issued on a judgment which was set aside, and for money collected on said execution." On the 30th an appearance and demand for a statement of claim was tendered him, which he declined to receive, and which were then put under his office door. Before this, on the same day, the Clerk of the Court had marked default as follows:—"Default for want of appearance and pleas marked the 30th day of April, 1889, 9 a.m., J.M., C.C.C." Nothing further was done until 13th June, when plaintiff filed the following statement of claim:—"The plaintiff's claim is for $30 cash and interest from December, 1887, paid to the defendant under the following agreement. The undersigned having been indemnified on proceedings under execution herein, undertakes to return any money he may get under said execution without sale of property, if the appeal herein is sustained, provided that my returning said money is according to law, and will not stand as a bar, or in any manner operate against my recovering on the bond of indemnity if necessary to resort thereto. Hugh McDonald, Sheriff." The said appeal was sustained with costs, but the defendant did not pay the $30 or any part thereof.

On the same day plaintiff entered judgment for $30 debt, $2.50 interest and $2.50 costs. The defendant having succeeded in having the judgment set aside at Chambers, plaintiff appealed:—Held, (1) the inclusion of interest was under the circumstances an irregularity; (2) the alleged default was not the interlocutory judgment contemplated by the rules. (Appendix F., No. 2), (3) the appearance was entered in time, (4) even were the appearance not in time, the judgment was irregular, being entered on a statement of claim going beyond the indorsement of the writ, and not served on defendant, a contingency not covered by O. 20 R. 2.

Quære, whether the statement of claim should not have been verified by affidavit?

Gillies v. McDonald, 23/411.

22. **Satisfaction of judgment not filed — Note given therefor dishonored — Whether return of note revives judgment.**]—H., as agent of the plaintiff, delivered to the defendant a satisfaction

piece signed by plaintiff, of a judgment recovered by him, taking therefor notes signed by the defendant, which were afterwards dishonored. The defendant, instead of taking the satisfaction piece to the Clerk of the Court, to be filed, and receiving from him a certificate to be recorded in the Registry of Deeds, took it to the Registrar of Deeds, who recorded it. H., who was the real party interested, afterwards sought by returning the notes to the defendant, to treat the judgment so standing on the records of the Court as undischarged, and to issue execution thereon.

Held, that the judgment was discharged by the acceptance of the notes. And that the failure to file the satisfaction piece could not have the effect of keeping the judgment alive, except in favor of a holder who had no notice of the settlement.

Semble, the judgment could not be revived in favor of H., except by the return and cancellation of the unfiled satisfaction piece.

Maguire v. Carr, 28/431.

23. **Setting aside—Question of satisfaction.**]—The question as to whether a judgment has not been satisfied by payment may not be raised in a summary way on a motion to set aside an execution for irregularity caused by a slip of the Clerk of the Court in entering on the docket of judgments.

Armstrong v. Dunlap, 24/334.

24. **Equitable action—Default of appearance—Time.**]—Plaintiff as an heir at law of L., brought action against defendants for a declaration of rights and for partition. One month later she marked default. Seven months later, defendants entered an appearance and afterwards a defence. They then gave notice of trial under O. 34 R. 11.

On the first day of the trial term, plaintiff moved to set aside this notice of trial, which motion was dismissed.

When the action was called for trial, plaintiff not being present, defendants moved under O. 34 R. 23, and obtained an order dismissing plaintiff's action unless plaintiff should pay the costs of the motion to set aside the notice of trial, and furnish security for costs of action.

On plaintiff's appeal from both orders:—Held, plaintiff should have moved to set aside the appearance and defence, even if irregular, not the notice of trial.

Also, the action not being merely for partition, but also an equitable action for a declaration of rights, not specifically provided for by O. 13 R. 11, defendants might appear and plead at any time before the judgment rendered in accordance with O. 13 R. 13.

Also, the terms of the order dismissing plaintiff's action, though unusual, were within the province of the trial Judge.

Duyon v. LeBlanc, 34/215.

25. **Court equally divided.**] — There does not appear to be any "decision" where the Court is equally divided. Effect on agreement as to cognate cases.

See DECISION.

JUDICATURE ACT AND RULES.

(R.S. 5th Series, Cap. 104. R.S., 1900, Cap. 155.)

Construed, noticed, applied, etc.]—

JUDICATURE ACT.

Sec. 12 (5), (1900, s. 18 (5)), Attachment 4, Injunction 1.
(7), (1900, s. 18 (7)), Mandamus 3.

Sec. 18 (1900, s. 25) Judgment 4.

Sec. 20 (1), (1900, s. 42 (1)), Jury 24.
(8), (1900, s. 42 (6)), Jury 15, 19, 35, 40.

ORDERS AND RULES.

I., 1, Attorney-General 1.

III., 5, Practice 5.

IX., 6, Partnership 17.
8, Practice 61.

XI., 1, 2, Practice 64, 65.

XII., 18, Practice 4.

XIII., 9, 10, Account 3, 4, 5; Judgment 19.
11, Practice 6.
13, Practice 4, 62.

XIV., 1, Pleading 6, 41; Practice 1, 2.
2, Practice 1.

XVI., 1, Parties 21.
2, Parties 7, 19.
8, Parties 13, 14.
9, Oddfellows.
10, Parties 7, 19; Specific Performance 1.
14, Parties 6.
49, Parties 27.

XVII., 4, 5, Executors 10.

XVIII., 2, Mortgage 2.

XIX., 3, Pleading 27.
4, Pleading 58.
5, 6, Pleading 66.
15, Trespass 1; Pleading 9.
19, Pleading 46.
27, Pleading 36, 47; Damages 1.

XX., 2, Judgment 21.

XXI., 4, Damages 1.
5, Pleading 32.
15, Pleading 27.
20, Pleading 32.

XXII., 1, Payment 14, 20.
2, Payment 18.
6, Payment 17.

XXIII., 2, Pleading 7.

XXV., 1, 2, 3, Pleading 51.
4, Pleading 39, 45, 48, 50, 60.
5, Charge 3.

XXVI., 1, Practice 8, 9.

XXVII., 1, Practice 18.
14, Judgment 14, 15, 16; Practice 61.

XXX., 5, Examination.

XXXII., 2, Account 3.

XXXIV., 1, Jury 1, 2.
11, Judgment 24.
22, Executors 10.
23, Judgment 24; Practice 34.
24, Practice 12.
42, Referee 2.
46, Trespass 1.

XXXV., 4, Practice 43, 44.
21, Affidavit 4.
38, Judgment 6, 7.

XXXVI., 1, Affidavit 3, 4.
5, Commissioner 2.
6, Affidavit 5.
14, Affidavit 2.
28, Affidavit 4.

XXXVII., 6, Jury 12, 15, 35, 40; Negligence 26.
8, Practice 51, 52.

XXXVIII., 6, Referee 2.
10, Insurance 10; Jury 15, 22, 23; Negligence 19.

XL., 10, Partnership 17.
15, Sheriff 3.
17, Probate Court 7, 8, 9.
23, Execution 27.
30, Probate Court 7.
31, Execution 24, 25.
32, Absconding debtor 7.
41, Absconding debtor 7.
44, Examination.

XLIII., 1, Absconding debtor 1; Chose in action 2.
2, 4, 5, Attachment 5.

XLIV., 1, Capias.
14, Capias 14.

XLV., 1, Execution 24; Replevin 2.
5, Replevin 6.
8, Replevin 6.

XLVI., 5, Absconding debtor 9.
6, 7, Attachment. 4.
15, Absconding debtor 10.
18, Absconding debtor 3, 4.

XLVII., 1, Company 33; Parties 4.

XLVIII., 1, Possession 17.

L., 3, Practice 46.

LI., 11, Mortgage 9.

LII., 3, Practice 52.
4, Practice 27.
6, Costs 68.

LIV., 4, Practice 26.

LV., 9, Practice 28.

LVI., 11, Practice 25.

LVII., 4, Appeal 1.
5, Appeal 41, 45; Pleading 41; Practice 30.
13, Appeal 50; Costs 58.
17, Appeal 1.

LIX., 17, Commissioner 1.

LX., 5, Pleading 34.
8, Time 5.
9, Practice 10, 11.

LXI., Chose in action.

LXIII., 1, Costs 13, 40.
5, Costs 62.
7, Costs 60.
11, Costs 68.
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LXV., 4, Practice 49.

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2, Practice 4.

APPENDICES.

C., Sec. 3, No. 6, Bills and Notes 22.

D., Sec. 5, Pleading 46.

F., No. 2, Judgment 21.

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JUDICIAL FUNCTIONS.

See JUDGE, 8.

JUNK DEALER.

See HALIFAX, CITY OF, 5.

JURAT.

See AFFIDAVIT, BILL OF SALE, COMMISSIONER OF THE SUPREME COURT.

JURISDICTION.

See also COMMISSIONER, COUNTY COURT, JUDGE, MAGISTRATE, PROBATE COURT, ETC.

1. **Place of contract—Breach of contract for sole agency.**]—Action for breach of contract, under which plaintiffs were to have the exclusive right to sell goods manufactured by defendant company within the Province of Nova Scotia, in that defendant company had sold through other agents. On the part of the defendant company it was objected that it being a foreign company doing business in Ontario, where the contract was made, the Court was without jurisdiction:—Held, that as the breach complained of had taken place within Nova Scotia, action might be brought there.

W. H. Johnson Co. v. Bell Piano & Organ Co., 29/84.

2. **Bill of lading—Claims to be settled in England.**]—Plaintiffs obtained leave to serve the defendants, who were shipowners out of the jurisdiction, in an action for non-delivery of goods. A clause of the bill of lading read, "That claims, if any, for loss or damages, short delivery or any other cause, shall at the option of the shipowner, be settled direct with the agents of the line in Liverpool, according to British law, with references to which this contract is made, to the exclusion of proceedings in any other country." The defendants moved the Judge in Chambers, who set aside the action. Plaintiffs appealed.

Held, that though agreements to oust the jurisdiction of Courts and to refer the settlement of differences to a private forum, and to arbitration, are on grounds of public policy held to be void, yet it is different with an agreement as to which of two jurisdictions shall determine the dispute. But as the wording of the clause of the bill of lading made it doubtful whether the jurisdiction of our Court administering "British law," if that term meant the mercantile law of England, was excluded, the matter could be best settled in the action, for which reason it

should be restored. And after further argument, Graham, E.J., dissenting, with costs against the respondent.

Stairs v. Allan, 28/410.

3. **Claim reduced by set off—Jurisdiction.**]—Where a claim is reduced by set off allowed, and not by proof of a money payment, to an amount below the jurisdiction of the Supreme Court, it remains within the jurisdiction. The supplying of necessaries to an infant, pleaded by way of set off, is not to be regarded in the light of a money payment.

Weatherbe and McDonald, JJ., dissenting.

Rutherford v. Purdy, 21/43.

4. **Jurisdiction — Reduction of claim below.**] — Appeal allowed from a judgment in favor of plaintiff for $80, balance of an account stated, where part of the amount was shown to represent compound interest wrongly charged, deduction of which would reduce the claim to an amount below the jurisdiction of the trial Court.

Hart v. Condon, 22/334.

5. **Inferior Courts.**]—The rule that the orders, etc., of inferior Courts must show jurisdiction of their face, extends to the County Court.

See COUNTY COURT, 5.

6. **Statutory Courts**—Their jurisdiction is strictly limited to the spheres described in the Acts creating them—Generally.

See COUNTY COURT, PROBATE COURT.

7. **Service out of jurisdiction.**]

See PRACTICE, 64.

8. **Action against foreign company**—O. 41, R. 1—Doing business in Province—Scope of the order.

See COMPANY, 33.

JURY.

See also CRIMINAL LAW, 1. NEW TRIAL.

Practice, 1.
Charge, 7.
Verdict, 15.
New trial, 32.

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1. **Right to jury—Legal and equitable issues.**]—A party cannot by serving a demand for a jury prevent trial by a Judge in term or at Chambers, of issues deemed to be of an equitable nature, and thereby defeat O. 34, R. 2.

But as the right to a jury as to legal issues, seems absolute under s. 20, Judicature Act, a Judge must either order all issues to be so tried, or separate those of an equitable nature for determination otherwise.

Clairmont v. Prince, 30/258.

2. **Equitable issue—Withdrawing from jury.**]—Semble, a Judge may not in the face of the order of another Judge, directing an equitable issue to be tried by a jury, at the conclusion of the trial withdraw the issue from the jury, and thereupon determine it himself.

But quaere, does an order for a change of venue, directing that action "be entered for trial with a jury at Sydney, etc.," amount to an adjudication under O. 34, R. 2, that it be tried with a jury?

McKenzie v. Ross, 33/252.

3. **Application for jury—Act repealed.**]—On April 10th plaintiff applied for and obtained an order for a jury under R.S. 5th Series, c. 105, which was then in force. On April 16th an Act was passed repealing this Act and providing a different mode of summoning a jury. On the day following notice of trial was given:—Held, that the jury had been lawfully summoned.

Brown v. Black, 21/349.

4. **Notice for jury—When to be given.**]—Chapter 6, Acts of 1889, amending s. 20 of the Judicature Act, provides that notice of demand for a jury is to be given "at least twenty days before the first term or sittings of the said Court, at which said issue is to be tried, or damages are to be assessed or enquired of." This meant to extend the practice theretofore

confined to notice given at the date of delivery of the statement of claim or defence, and is to be read as referring to any sittings at which the matter is eligible for trial, not merely to the first at which such is the case.

Clairmont v. Prince, 30/258.

5. **Action set down for trial—Effect of subsequent jury notice.**]—This action was set down for trial before a Judge at Chambers, when defendant gave notice of a demand for a jury. When called for trial defendant's counsel was present, and though objecting to the jurisdiction of the Judge without a jury, took part in the trial. Not being successful, he appealed:—

Held, that having taken his chances of trial he could not afterwards urge the giving of the jury notice to destroy proceedings in which he had acquiesced.

Alexander v. Baker, 30/443.

6. **Justices' Court—Jury failing to agree.**]—Plaintiff sued in the County Court, as indorsee of a promissory note. He had theretofore sought to recover before justices of the peace and a jury, when, the jury failing to agree on a verdict, the justices had discharged them, and made an order as to payment of costs, but rendered no decision in the action:—Held, that under c. 102, R.S., the justices had no authority to dismiss the jury without their having rendered some verdict, nor to summon another. Having done so the trial was abortive, and plaintiff might bring a fresh action, if he chose, before other justices. That the matter was not to be considered res adjudicata because of the judgment the justices had thought proper to sign, as it did not finally settle the matter at issue.

Creelman v. Stewart, 28/185.

7. **Judge charging jury—Going outside record.**]—Per Ritchie, C.J.: The Supreme Court of Canada should not approve such strong observations as to facts, to the jury, on the part of the trial Judge as in effect charge fraud on a party before the Court, which was not raised by the pleadings, nor properly in issue.

Putnam v. Hardman, 18 S.C.C. 714.

8. **Charge by Judge—Suggesting verdict.**]—Following the English doctrine, which is different from that followed in many of the United States, a Judge in charging a jury, has a right, if in his discretion he thinks fit, to advise the jury as to their verdict, at the same time instructing them that they are not bound to follow his opinion, but that the responsibility of finding the facts is theirs. In English Courts where a Judge has not only advised the jury, but has expressed himself in strong terms as to the facts, he has been held not to have exceeded his discretion.

Hawkins v. Snow, 29/444.

9. **Refusal to submit question.**]—The Judge's refusal to submit a question to the jury, specifically, is not ground for a new trial where it appears that the matter covered by the question was put to the jury in other ways.

Davis v. Commercial Bank of Windsor, 32/366.

10. **Unsupported claim against deceased person.**]—A jury should be warned to take the unsupported evidence of a claimant against a deceased person with caution, and here, having found against such claimant, their verdict would not be interfered with unless it was such as reasonable men could not have arrived at.

McDonald v. McDonald, 24/241.

11. **Misdirection—Likely to mislead.**]—In an action of ejectment brought by a son against his father who had remained in possession after executing a deed to the son, in which a valuable consideration was expressed, the Judge instructed the jury that as the deed expressed a consideration, the burden was on the defendant to show that none had passed:—Held, that as the passing of a valuable consideration was on the face of the evidence out of the question, the direction was likely to have misled the jury, for which reason there must be a new trial.

Harvey v. Harvey, 21/172.

12. **Misdirection—Causing substantial wrong.**]—In an action for damage caused

by negligent operation of a steam engine used for pressing hay, whereby plaintiff's barn was destroyed by fire, the learned Judge instructed the jury that the defendant's failure to use a spark arrester amounted to negligence in law. The answers to all questions were in favor of plaintiff:—

Held, that there was misdirection, and that the jury's conception of the law was necessarily so influenced thereby, that there must be a new trial; Graham, E.J., dissenting.

Peers v. Elliott, 23/276, 21 S.C.C. 19.

13. **Malicious prosecution** — Misdirection—Finding of implied malice.

See MALICIOUS PROSECUTION, 3.

14. **Misdirection—No substantial wrong.**]—The Judge erroneously directed the jury to award punitive damages. On an application by defendant for a new trial:—Held, that as the jury in the face of the direction had only awarded $10 damages they could not have been misled, and that the matter could be disposed of under O. 37, R. 6, without being sent back. Weatherbe, J., dissenting.

Henderson v. Scott, 24/232.

15. **Failing to answer questions.**]—The jury answered one of four questions submitted, and stated that they could not agree as to the rest. No judgment was entered and no application was made for a new trial. Plaintiff entered the action for trial at the next term, but the Judge refused to proceed until the finding of the jury was disposed of, but extended the time for applying for a new trial. On appeal:—Held, he was right in refusing to proceed, and had properly exercised his discretion as to extending time.

McBeath v. Sinclair, 23/342.

16. **Jury failing to answer** ten out of twenty questions, there should be a new trial.

See NEGLIGENCE, 19.

17. **Not answering all questions.**]—Though a jury do not answer all questions submitted, yet if they answer enough to settle all material issues, their verdict will be sustained.

Joyce v. Halifax Street Ry. Co., 24/113, 22 S.C.C. 258.

Harvey v. Harvey, 24/492.

McKay v. Huggan, 24/514.

18. **Returning answer "don't know."**]—Where the jury returns the answer "don't know" to a question material to the adjudication of the case there must be a new trial, and a direction of judgment for the defendant is wrong.

But the Supreme Court of Canada held that a definite answer to this particular question was not necessary to final determination, as there was material from which the Court might direct a verdict for plaintiff.

Halifax Banking Co. v. Creighton, 22/321, 18 S.C.C. 140.

19. **Answers equivalent to verdict—Malicious arrest.**]—In an action for malicious arrest, the Judge directed the jury to answer certain questions and directed them as to what their verdict would be in the event of their returning certain answers. They returned answers which the Judge then told them were equivalent to a verdict for the defendant:—

Held, that the result was a general verdict, not contrary to Judicature Act, s. 20 (8), which permits the Judge, instead of directing a verdict, to require answers to questions except in certain actions, of which this is one.

Manley v. Gillespie, 27/301.

20. **Failing to answer—Where answers could not help applicant for new trial.**]—The question was whether plaintiff had furnished as full a statement of goods destroyed by fire as was in his power, to satisfy a condition of the policy sued on. His clerk testified that immediately after the fire, if given time, she could have prepared a fuller statement. The jury found generally for plaintiff, but failed to answer questions as to whether plaintiff with the assistance of his clerk might not have rendered a fuller statement.

Their verdict having been set aside:—Held, in the Supreme Court of Canada, that there was no occasion for a new

trial, as on the evidence the jury could not return answers which would be favorable to plaintiff.

Nixon v. Queen Insurance Co., 25/317, 23 S.C.C. 26.

21. **Incompetent finding—Court may not disregard.**]—Held, distinguishing the opinion of the Supreme Court of Canada in the last case, that where the jury has found on a question material to the issue, and raised by the pleadings, but on insufficient evidence (the question also being one which in law ought not to have been put to them), there should be a new trial, but the Court cannot disregard the finding and exercise its right of rendering final judgment.

Per Ritchie, J., the better course would have been for the trial Judge to have withdrawn the issue from the jury.

McDonald v. Mahoney, 31/523.

22. **Court may draw inferences of fact.**]—Under O. 38, R. 10, the Court may take the decision of a case which has been passed on by a jury into its own hands, if all the materials necessary to coming to a correct conclusion not inconsistent with the findings of the jury, are before it, but not unless.

Putnam v. Hardman, 18 S.C.C. 456.

Pudsey v. Manufacturers Accident Ins. Co., 29/124, 27 S.C.C. 374.

23. **Supplying answers to questions.**]—Or, similarly, may from such materials before it, supply answers to questions to which a jury has unreasonably returned the answer, "don't know."

Creighton v. Halifax Banking Co., 18 S.C.C. 140.

24. **Court drawing inferences of fact.**]—The Court setting aside the third verdict of a jury ordered the issues for retrial, considering that it could not itself dispose of them (under O. 38, R. 10, and O. 57, R. 5), after notice for a jury had been given under c. 104, R.S. s. 20, s.-s. 1.

Holmes v. Bonnett, 24/279.

25. **Inconsistent findings.**]—In answer to one question the jury found that plaintiff was not entitled to recover at all. To another; that assuming his right to recover, he would be entitled to $1,000. On the second finding an order for judgment for that amount was made:—Held, the findings should be set aside. But as the Judge had not submitted an alternative claim as to which the jury might have found differently there should be a new trial.

Snow v. Fraser, 30/80.

26. **Findings of jury—Judgment must accord with.**]—The jury returned answers to a number of questions submitted, and the Judge remarking that he should have found otherwise, made a decree inconsistent with some of the findings:—

Held, per Ritchie and Townshend, JJ., that though the decree of the trial Judge was fully sustained by the evidence, yet there being a jury, he should have decided in accordance with their findings, in consequence of which there should be a new trial.

Per Weatherbe and Smith, JJ., that the findings of the jury were justified by the evidence.

Holmes v. Bonnett, 21/497.

27. **Findings set aside a second time.**]—The new trial ordered above having resulted in similar findings against evidence, upon which the trial Judge dismissed the action, on an application for a new trial:—Held, that though it was very undesirable to disturb the findings of a second jury, yet in this case, to prevent an obvious perversion of the rights of parties, a third trial was imperatively demanded.

Holmes v. Bonnett, 23/475.

28. **Third verdict set aside.**]—On a third trial the jury returned a similar verdict which was set aside as against law and evidence. Per Meagher, J.: "The rule against setting aside a third verdict applies only where the case is largely one of fact, and where no question of reception or rejection of evidence, or of misdirection is involved. The history of this case shows that some or one of these objections arose every time the case was before the Court, and therefore the rule referred to does not govern."

Holmes v. Bonnett, 24/279.

29. **Third verdict.**]—The Court refused to disturb the verdict of a jury on a question relating solely to the credibility of witnesses, being the third verdict to the same effect.

O'Donnell v. Confederation Life Assn., 21/169, 17 S.C.C. 420.

30. **Setting aside verdict — Single Judge.**]—A single Judge has no power to set aside the verdict or finding of a jury. Every motion to that end must be made to the Court in banc.

McPhee v. McDonald, 26/519.

31. **Verdict set aside** as unreasonable.

Moore v. Dickie, 33/375.

Bourgue v. Logan, 26/1.

32. **Setting aside verdict — County Court.**]—Notwithstanding Acts of 1891, c. 15, s. 2, a Judge of the County Court, in setting aside the verdict of a jury, is to be governed by the same rules which apply in a like case in the Supreme Court.

Grant v. Booth, 26/171.

33. **Setting aside findings—Opinion of trial Judge.**]—Per Townshend, J. In passing on the question of the reasonableness of the findings of a jury, the opinion of the trial Judge is, of course, not conclusive, but should be taken into serious consideration.

MacNutt v. Shaffner, 34/415.

34. **Verdict in cognate case—Not binding.**]—The trial Judge found for plaintiff, considering himself bound by the finding of a jury on the same evidence in another case. The Court having set aside the finding of this jury as against the weight of evidence:—Held, there must also be a new trial in this case.

Bourgue v. Logan, 26/1.

35. **Immaterial question not put.**]—An application for a new trial on the ground that the trial Judge had not put a question to the jury, refused, the Court considering the question immaterial. The party applying had not proposed such question under Judicature Act, s. 20, s.-s. 8.

Eisenhaeur v. Nova Scotia Marine Ins. Co., 26/391.

36. **Grounds not taken.**]—On an application for a new trial, the verdict of a jury will not be set aside on a ground not taken in the notice, nor by motion to amend the notice, even though that ground be a valid one.

Milner v. Sanford, 25/227.

37. **Ground not taken.**]—In excess of the necessity of the case for enforcing a by-law of an incorporated town relating to pedlers, a policeman seized plaintiff's horse and waggon and arrested him. The mayor of the town had instructed a policeman to seize the horse and waggon.

On trial of an action of false arrest, the jury found in answer to the question, "Did the defendant town authorize the arrest?" that "constable was authorized to seize the horse and waggon." On this a verdict was entered for defendant.

On an application for a new trial:—Held, the finding not having been moved against, nor complaint made in the notice that the jury was not properly instructed; there was not such a miscarriage of justice as would warrant the Court of its own motion to order a new trial.

Gresham v. Town of Sydney Mines, 27/320.

38. **Grounds not taken—Withdrawing from jury.**]—The trial Judge at the close of a trial, having announced that he would not submit the case to the jury, it was the duty of the party now applying for a new trial, to have indicated what issues he wished submitted. Not having done so, it is too late to object to the course pursued.

McKenzie v. Ross, 33/252.

39. **Point not raised.**]—The Court will not order a new trial because of error in regard to a material matter which the applicant did not see fit to raise on trial, preferring to rely on other issues. The principle of estoppel applies.

Davis v. Commercial Bank of Windsor, 32/366.

40. **Party cannot complain of questions he proposes.**]—On trial of an action for negligence, plaintiff proposed certain questions which were put to the jury. On the resulting verdict, judgment was entered for defendant. Plaintiff did not move to set aside the verdict, but appealed from the judgment:—

Held, per Weatherbe and Ritchie, JJ., that plaintiff, having proposed such questions, could not afterwards complain of them as immaterial or irrelevant, and demand a new trial in consequence.

Per Townshend, J., dissenting (McDonald, C.J., concurring), that that fact would not justify the Court in upholding an improper verdict, even though counsel should designedly submit improper questions.

Holmes v. Robbins, 21/434.

41. **Ignorant jury.**]—A new trial will not be ordered solely because of the alleged ignorance or stupidity of the jury as shown by its (or some of its members) confusing the terms "plaintiff" and "defendant," where it appears that the main fact on which they were directed to pass, that of fraud, has been adequately understood by them. This though the trial Judge reported that he should have been better satisfied with an opposite verdict. Townshend, J., dissenting.

Fraser v. Drew, 32/385, 30 S.C.C. 241.

JUSTICE OF THE PEACE.

See MAGISTRATE.

JUVENILE OFFENDER.

See CRIMINAL LAW, 28.

LACHES.

1. **Certiorari** quashed for laches.
See CERTIORARI, 15.

2. **Of an infant,** not to be considered.
See PROBATE COURT, 12.

3. **Ignorance of facts.**]—Delay in bringing action caused by improper concealment of facts by defendant. Recovery of payment made.

See PRINCIPAL AND SURETY, 6.

4. **Sale of mine—Fraud of agent** or partner of purchasers—Collusion with vendor—Action for rescission—Laches.

See FRAUD AND MISREPRESENTATION, 7.

5. **Alleged warranty as to boiler—Evidence for and against—**Delay of five months in making claim.

See SALES, 24.

6. **Setting aside writ of summons.**]—A defendant is not guilty of laches who delays issuing a summons to set aside a writ of summons issued against him, for a patent defect, until the last day for appearance.

Morrison v. Corbett, 21/369.

7. **Setting aside award.**]—In 1889 plaintiff and defendant agreed to submit a matter of disputed boundary to arbitration. An award was made August 28th of that year. In May, 1894, plaintiff brought action for possession of the land awarded him, for trespass, etc. Defendant counterclaimed to set aside the award on the grounds that the arbitrators exceeded their jurisdiction, that defendant was not heard, that the award was made ex parte, etc.:—

Held, that though he might otherwise have succeeded, the defendant had, by his delay in moving, lost his right to question the award.

Clish v. Fraser, 28/163.

8. **Re-opening foreclosure—After three years.**]—The Court granted leave to defend an action for foreclosure on terms, after the lapse of three years, on a showing of merits and the belief of the applicant that a decree could not pass against him during absence from the jurisdiction, but refused to consider the ground that the decree itself was irregular in form.

Thomson v. Barrett, 24/136.

9. **Acquiescence in order of Court.**]—Under ordinary circumstances the plaintiff has a right to conduct a sale ordered by the Court. But where an order, consented to by plaintiff, does not set out who is to conduct the sale thereunder, and the plaintiff suffers the defendant to do so, and does not set up his right until after the sale has taken place, his laches defeat his right to object thereto.

Wallace v. Gray, 25/279.

10. **Opening up rule—Acquiescence.**]—Per curiam, "We should require authority to show that a party can come here at all to open up a rule, after seven years acquiescence."

Re Estate Greenwood, 23/262.

11. **Default judgment — Leave to defend.**]—While a summons on an application for security for costs was outstanding, plaintiff entered judgment by default, which the County Court Judge set aside, holding that the summons was in terms a stay of proceedings. On appeal:—Held, that a summons is not in terms, or in effect, a stay, and that the default judgment being regular, should stand. But that the defendant should be at liberty to defend on an affidavit of merits, without prejudice, by reason of the lapse of time, four months.

Creelman v. Ronnan, 28/50.

12. **Motion to vary judgment.**]—Plaintiff moved to vary an order for judgment as to costs of certain issues raised by counterclaim in which he succeeded on trial herein some years before, on the ground of omission by a mere slip:—Held, that if mention had been made of costs in the judgment on which the order was based, the matter might be considered on the ground suggested, but not in any case after so long a delay.

Palgrave Mining Co. v. McMillan, 31/196.

13. **Neglecting to collect draft.**]—Defendant being indebted to plaintiff in the sum of $117, sent him a draft on R. for $100 as part payment. Plaintiff forwarded the draft to R., who did not return it, but took no further steps, and did not notify defendant of its dishonor, until R. had left the country:—Held, that plaintiff by his laches had made the draft his own, and that it operated as payment to the amount of its face.

Hart v. McDougall, 25/38.

14. **Acquiescence in nuisance.**]—Two years endurance of a nuisance caused by the escape of vapors from a gas works, by a party who has continually protested thereat, should not disentitle him to have the same abated.

See NUISANCE, 5.

15. **Setting aside conveyance.**]—A delay of a year in beginning proceedings to set aside a conveyance on the ground that it was procured by fraud and undue influence, is not enough to justify the Court in refusing relief, where the defendant's position has not thereby been prejudiced.

Lockhart v. Lockhart, 22/233.

16. **Rectification of deed—Acquiescence for eighteen years.**]—A dispute having arisen between plaintiff and defendant over the boundary line between their lots, plaintiff brought trespass, and also claimed rectification of his deed to make it cover a strip of land which the defendant and his predecessor in title had enclosed for eighteen years with the plaintiff's knowledge:—

Held, that the plaintiff's right (if on another view of the case he had any), was barred by his laches.

McFatridge v. Griffin, 27/421.

17. **Claim seventeen years old — as against trustee.**]—Action for an accounting in reference to a partnership which had subsisted many years previously, between the plaintiff's husband and the defendant's testator. Defendant's testator had also been the brother and administrator of plaintiff's husband. The defence was a release of the partnership property by plaintiff to defendant's testator for a consideration (which was grossly inadequate), and acquiescence in the state of affairs for seventeen years. There was evidence also that the defendant's testator had held out delusive prospects from time to time of further

payments conditionally, of remembering her in his will, etc.:—

Held, that the defendant's testator as administrator having been in the position of a trustee, the delay of seventeen years was no bar to the action. The Statute of Limitations was not pleaded.

Mack v. Mack, 26/24, 23 S.C.C. 146.

18. **Partnership dealings twenty years old.**]—Plaintiff sought a declaration as to the rights of several persons, growing out of a partnership alleged to have subsisted more than twenty years previously between plaintiff, defendant and others, in relation to the taking up of Crown lands. Some of the partners were dead, and it appeared impossible at that late day to properly elucidate the facts:—Held, that the plaintiff's laches had barred his rights, if any had existed.

McIlreith v. Payzant, 25/377.

19. **Taxing Act—Laches in enforcing.**]—The Provincial Acts of 1883, c. 28, ss. 23 and 24, authorized the city of Halifax to collect an annual license fee of $100 from every company doing business within its limits. The city sought to collect several years' arrearages of this license fee from the defendant. It had rendered an account for the same from year to year, and had from time to time sent letters claiming payment, etc.:—

Held, in the absence of any statutory bar, the city was not by reason of any laches, prevented from collecting the arrears—less than six years'—claimed.

City of Halifax v. Jones, 28/452.

20. **Crown**—The Crown is not to be prejudiced in the assertion of any of its rights or remedies by the laches of its servants.

See CROWN.

LAND.

See also CHARGE, DEED, FRAUDS, STATUTE OF, 3, GRANT, TRESPASS, WILL.

1. **Actions for recovery—Pleading.**]—In actions for the recovery of land, no forms of pleading in use before the passing of the Judicature Act afford any guide to present requirements.

See PLEADING, 58.

2. **Auction sale—Encumbrances must be disclosed.**]—Plaintiff purchased at public auction a house and premises belonging to the defendant S. and paid thereon a deposit of 10 per cent. of the purchase money. At the time of the sale the property was subject to two liens, an overdue mortgage and one year's city taxes, the existence of which was not disclosed at the time of the sale, nor afterwards until discovered by plaintiff's solicitor. He thereupon gave notice that unless a deed in fee simple clear of all encumbrances was at once prepared and delivered, plaintiff would consider the sale off. Defendants then tendered unconditionally a deed in fee simple, but subject to the liens, which plaintiff declined to accept, and brought this action against the auctioneer to recover the deposit paid. The owner was added as a third party:—

Held, as the unpaid balance of the purchase money was more than sufficient for the discharge of the liens, to which purpose plaintiff might have applied it, and as he was aware that negotiations were pending for their discharge, the whole matter was one of conveyancing and plaintiff ought to have been satisfied.

On appeal to the Supreme Court of Canada:—Held, reversing the above, that plaintiff was entitled to a conveyance clear of all encumbrances, and not only of the equity of redemption, and might recover his deposit.

Wrayton v. Naylor, 26/472, 24 S.C.C. 295.

3. **Sale of land—Misrepresentation or mistake of agent—Whether binding on principal.**]—Defendant was owner of certain lots of land which she had placed in the hands of N., a real estate agent, for sale. She resided abroad with her son-in-law, F., who at her request conducted a correspondence with N. in relation to the sale of the lots. N. communicated an offer by plaintiff of $1,000 for the

lots, which F. accepted. Defendant refusing to carry out the sale on the ground that she had been misled by F., and thought that the offer applied only to part of the lots, known as the "swamp lots":—Held, that having authorized F. as her agent, she was bound by his negligence or misrepresentation, the terms of the contract being clear, and the plaintiff's conduct unimpeachable. But in the Supreme Court of Canada:—Held, that on account of the error or misrepresentation of the agent the parties were not ad idem as to the subject matter of the contract, and there was no actual consent by the defendant to the sale.

Jenkins v. Murray, 31/172, 28 S.C.C. 565.

4. **Agreement for sale—Action for purchase money.**]—Until the title (to lands or mining areas) has passed, no action may be maintained for the purchase price agreed on, as the vendor may not have the estate and the money both. His action is either in damages for breach of the contract, or for specific performance.

Semble, and even though an equitable interest has passed.

Weatherbe v. Whitney, 30/447.

5. **Sealed agreement for sale—Parol arrangement substituted — Estoppel.**]—Defendant agreed in writing under seal to sell certain land then in possession of D., to plaintiff, and received a part payment of the purchase price. Both thereupon joined in bringing an action of ejectment against D., who counterclaimed against plaintiff for trespass to the land, and against defendant for specific performance of a prior agreement for the sale of the land to him. On trial of these issues it was mutually agreed in Court, that the present plaintiff should receive back his payment and that defendant should convey the land to D.

The present action was for non-performance of the contract of sale first above mentioned, by defendant, by reason of his conveyance of the land to D.:—

Held, that plaintiff having been a party to the arrangement under which defendant had made the conveyance to D., was estopped from asserting his former rights.

Also, that the parol arrangement in Court might supersede the contract under seal which had not gone into effect.

Wentzell v. Ross, 30/136.

6. **Executory agreement for sale—Covenant to pay taxes.**]—Plaintiff and defendant entered into an executory agreement for the sale and purchase of land, a covenant of which was as follows:—"And it is hereby agreed that until such purchase is completed the said vendee shall have possession and use of the said land and shall pay all rates and taxes of every kind levied or assessed thereon." Taxes were assessed to the vendor:—

Held, that the above covenant was not one of indemnity, but that the vendor might as soon as the taxes became due, and without paying them, proceed to collect their amount from the vendee, as in the case of a mortgage.

Barrowman v. Fader, 31/20.

7. **Agreement for sale—Mutual and dependent undertakings — Jurisdiction County Court.**]—Plaintiff brought action on a promissory note given by defendant in pursuance of an agreement in writing, by which he undertook to purchase lands, and complete payment of the price within four years, or sooner. The plaintiff on his part undertook on the completion of payment to convey and assure the lands to defendant. The defence was that plaintiff could not make title because his wife would not relinquish her dower right:—

Held, that the obligations were mutual and dependent. But the defendant being willing to take title, subject to the dower right, at a reduced price, the value of the dower right was ordered ascertained and deducted, and the balance paid into Court. No costs.

Quaere, is such a matter within the jurisdiction of the County Court, or should it be transferred to the Supreme Court under s. 43 of the Judicature Act?

Arenburg v. Wagner, 33/396.

8. **Sale of land—Memorandum** in writing—Terms left to be arranged at a future date—Specific performance refused.

See FRAUDS, STATUTE OF, 3.

9. **Contract for sale.**]—Specific performance will not be decreed a vendee in default as to his part—He waives objections as to title by entering into possession.

See SPECIFIC PERFORMANCE, 5.

10. **Owner not seized—Judicial sale.**]—Though an owner not seized may not convey his title, because the policy of the common law prohibits the transfer of causes of action, and the statute, 32 Henry VIII., c. 9, makes such transfers a crime, yet sales under execution and judicial sales are not within the inhibition, the transference being involuntary.

Doull v. Keefe, 34/15.

11. **Sale by order of Court—Right to conduct.**]—Plaintiff brought action for a declaration as to his interest in certain mining properties which the defendant was proceeding to sell. He consented to a sale, and an order was drawn up by the defendant's solicitor directing sale by the sheriff. After the sale, at which he had been present and a bidder, plaintiff moved to set the same aside on the ground that he had been, as plaintiff, entitled to conduct it, that the advertising had been insufficient, and the price realized too small. The order did not specify who was to conduct the sale, and it had been done by the defendant:—

Held, on such an order the plaintiff was entitled, but in not applying before the sale had taken place, he had by his laches lost his right to object. Per Graham, E.J. Plaintiff should have seen that the order contained this provision, or should have made a special application in reference thereto.

Wallace v. Gray, 25/279.

12. **Sale of land** by license of Probate Court.

See PROBATE COURT, 15.

13. **Adjoining owners—Dispute as to boundary.**]—Plan of subdivision into lots, referred to in deed may be introduced to show what was meant to be conveyed by deed, etc.

See DEED, 9.

14. **Rectification of deed—Strip omitted in description.**]—Represented by vendor as included—He is thereafter estopped from asserting property—Court should make amendment.

See DEED, 5.

15. **Conventional line.**]—In an action for trespass by defendant on lands of plaintiff, the jury found that before the date of the lease, plaintiff's lessor and defendant had met and agreed on a wire fence as the northern boundary of the demised property:—Held, that neither in law or fact did this establish a conventional line.

McDonald v. Mahoney, 31/523.

16. **Mesne profits—Rule for estimating.**]—In an action for the recovery of land, the Court being of opinion that the plaintiff was entitled, directed a referee to take an account of the mesne profits. The referee reported that he found the land to be worth $3,500, and for twenty years occupation he had allowed 10 per cent. per year.

On motion to confirm this report:—Held, that the principle on which the referee had proceeded in estimating the mesne profits was erroneous, and the report could not stand. The general rule is that the annual value may be recovered, which in this case was far less than 10 per cent. of the value of the land.

Fraser v. Kaye, 25/102.

17. **Mesne profits—Misjoinder.**]—In an action to recover possession of land, and for mesne profits, the plaintiff C. F. claimed as grantee in 1889 of the plaintiff L. F., who had acquired title in 1870:—Held, that in this action the plaintiffs could only recover as to mesne profits for the period of joint occupation, i.e., since 1889. Award reduced accordingly.

Per Graham, E.J., dissenting, that notwithstanding misjoinder, L. F. should be allowed to amend and seek to recover for the term between 1870 and 1889,

under O. 16, R. 1, and that defendant should be allowed a countervailing privilege of amendment to enable him to set up the Statute of Limitations.

Fraser v. Kaye, 26/111.

18. **Accounting may be ordered after final judgment.**]—An order for an accounting as to mesne profits may be ordered at any stage of the proceedings. And after final judgment, such an order being considered as setting aside or varying such judgment on such terms as may be just. O. 13, R. 10. Cf. also, O. 32, R. 2, and O. 13, R. 9.

Hesslein v. Wallace, 29/431.

19. **Overflow—Injury to land—Measure of damages.**]—In an action for damages for injury to land caused by the overflow of water through the negligence of defendant:—Held, that the proper measure of damages is the reduction in selling value caused by the injury, without considering loss of profits or the amount it would take to restore the land to its former condition, or damage to growing crops, based on the assumption that they would have matured.

Lloy v. Town of Dartmouth, 30/208.

20. **Tenant for life—Insurance by.**]—S. being tenant for life of a certain house, insured it against fire. The house having burned, the insurers paid her the amount of the policy. Immediately afterwards she died, and the remainderman laid claim to the insurance:—

Held, S. not having been under any legal obligation to insure, nor to restore in case of fire, yet had an insurable interest, and having insured out of her own monies for her own benefit, the resulting fund belonged to her estate.

Re Estate Susan Curry, 33/392.

21. **Writ of possession—When to issue.**]—The order of a Judge at Chambers directing the issue of a writ of possession for lands sold under execution, under R.S. 5th Series, c. 124, did not specify the number of days after which the writ was to issue:—

Held, that the order was in this irregular, and an appeal therefrom should be allowed. Meagher, J., dubitante as to whether such an appeal lies.

But, an appeal from the action of another Judge at Chambers refusing to set aside the order of his associate, should be dismissed with costs.

Re Broad Cove Coal Co., 29/1.

See also POSSESSION, 17.

22. **Transfer of interest—Oral trust.**]—Ascertainment and construction of agreement between parties.

See TRUST, 11.

23. **Land formed by accretion.**]—Dispute as to ownership.

See ACCRETION.

LANDLORD AND TENANT.

See also LEASE.

1. **Distress—Attachment.**]—A landlord who distrains loses his right of action for rent and cannot hold an attachment therefor under Absent or Absconding Debtor process.

Gray v. Curry, 22/262.

2. **Note for rent—Distress.**]—Where a landlord accepts a note in payment of rent, his right to distrain is suspended during its currency.

Colpitts v. McColough, 32/502.

3. **Distress for rent — Outer door — Breaking in.**]—F. rented several rooms as a dwelling place in a building owned by S. F. absconded, and S. proceeded to distrain for rent. The constable, in order to levy, took down a key from a nail in the hall and unlocked the door of F.'s apartment:—Held, that the door was an outer door, and the entry a breaking in, and that the distress was void and the sale following passed no title to the purchasers of the goods.

Miller v. Curry, 25/537.

4. **Distress—Impounding goods—Misuse.**]—A piano hired by defendant to A. was distrained on by plaintiff, A.'s landlord, for rent, and by him placed in the custody of A.'s wife, with instructions not to allow it to be removed. During

her custody A.'s family continued to use the piano.

Held, that the impounding was valid under the statute, and that the misuse, if any, was not by or on behalf of plaintiff (or of his agent, within the scope of her authority), but was referable to the hiring by defendant to A., which could not be set up against the landlord.

Dimock v. Miller, 30/74.

5. **Excessive distress—Recovery back of excess—Appropriation of payments.**]—The defendant distrained on plaintiff's goods for a larger sum than was due, which plaintiff paid, and now sought to recover back:—Held, that where the distress is legal, only the excess may be recovered back, where illegal the whole amount, regardless of any rent due, and that the plaintiff in this case was entitled to recover back the excess and damages. But the defendant having, in a cross action, established a claim for goods sold, no costs were awarded either party, and the two judgments were ordered set off against each other, the holder of the larger to have execution for the difference between them.

Where payments are made in respect of an account, and there is no agreement as to the appropriation thereof, they are considered as applied to the items of account from first to last, in the order of date.

Netting v. Hubley, 26/497.
Hubley v. Netting, 26/497.

6. **Action for rent—Eviction by landlord.**]—To an action for rent, the defendant pleaded as to the last month claimed for, a resumption of possession and eviction by the landlord, disentitling him to recover. It appeared that the defendant had allowed the landlord's tenant, who was to succeed him, to enter into possession about ten days before the expiration of his term:—Held, that this was not resumption of possesion by the landlord.

Corse v. Moon, 22/191.

7. **Tenant at will—Sub-letting by—Trespass by sub-lessee.**]—B. made a verbal agreement to sell a farm to his nephew F. F. entered into possession, but no part of the price was ever paid, though interest thereon was paid for a time. In December, 1888, B. agreed with F. to rescind the contract of sale, and re-entered upon the farm and leased the same to W., January 1st, 1889. F. rented the same to the defendant, not, however, concealing from him the fact that he had no possession to give and would not defend him from the owner. In an action by B., the owner, and W., his tenant, for entry and performing acts of possession:—Held, that both were entitled to recover.

Semble, admitting F. at the time of the sub-letting to have been still a tenant at will, the sub-letting did not terminate the will, unless made with the consent of the owner.

Woodworth v. Thomas, 25/42.

8. **Denying landlord's title.**]—The defendant, as guardian of two infants, was part owner with N., their uncle, of premises occupied by D., the plaintiff, as tenant. In 1889, N. agreed with the defendant that D. should in the future be tenant solely to defendant, who was to collect rents, etc. D. was not a party to the document, but recognized the arrangement and paid rent under it. One of the infants having died, N. set up a claim of ownership as his sole heir, maintaining that the survivor of them was illegitimate. D. having refused to pay rent to defendant, a distress was levied, and D. began this action for damages, contending that as the agreement between N. and defendant was at an end, by reason of the death of one of the infants, his tenancy to defendant had ceased, and N.'s right as landlord had revived:—Held, that the relationship of landlord and tenant having been once established between defendant and plaintiff, it could not be terminated at the option of the tenant without the landlord's assent, and that the original agreement stood as valid as ever, and plaintiff being in the same position as though put into possession by defendant, could not now dispute his landlord's title, and for the same reason could not question the legitimacy of the surviving infant.

Downey v. Crowell, 24/318.

9. **Surrender of lease—Whether acquiesced in by landlord—Burden of proof—House unsanitary—Eviction.**]—The defendant was tenant to plaintiff of a house and premises, for the term of one year from May 1st, 1892, to May 1st, 1893. On 26th October, 1892, he vacated the house and sent the keys to plaintiff. This action was for the balance of rent from October 26th, 1892, to May 1st, 1893. The defences were that there was a surrender assented to by plaintiff, that the house was condemned by the Board of Health and defendant ordered to move out, and as evidence of acquiescence in the surrender, that the landlord had permitted another tenant to move in five days prior to May 1st, 1893.

Held, that the burden of proof of these matters was on defendant, and he had failed to establish them. That the giving of a receipt by plaintiff to defendant for the rent to October 26th, 1892, expressed as "on account," was opposed to the view that he accepted the surrender, and that his allowing another to enter did not refer to the matter, as no rent was to be charged until the expiration of defendant's term.

Quære, if pleaded, would such entry, permitted by the landlord, have amounted to an eviction, or only to a trespass on defendant? Corse v. Moon, ante, 6, noted and approved.

Hart v. Jost, 27/243.

10. **Notice to quit — Overholding—Waiver.**]—Action for one quarter's rent against the tenant of a house alleged to have overheld. He had given notice of his intention to quit on May 1st, which notice was accepted by the landlord. That day falling on Sunday, he proceeded to move out on the 2nd, but had not finished when a new tenant arrived. He retained the key for a few days, when it was returned to the plaintiff:—

Held, that the overholding, if any, did not amount to a renewal of the tenancy or to a waiver of the notice to quit on the part of the tenant, unless mutual agreement to that effect was shown. And that the only period for which he could be held liable to pay rent was that during which he had retained the key, upon proof by plaintiff that he had thereby been prevented from recovering possession. In that case the action should be for use and occupation.

Nisbet v. Hall, 28/80.

11. **Overholding proceeding.**]—There is no appeal from the decision of the County Court in an application for a warrant of possession against a tenant for overholding, under section 62 of the County Court Consolidation Act, c. 9, Acts of 1889, that proceeding not being an "action" within the meaning of the interpretation clause of the Judicature Act, which is the proper guide to the meaning of the word, when used in the County Court Act.

Hill v. Hearn, 29/25.

(Note.—But now see interpretation clause County Court Act, R.S., 1900.)

12. **No documentary title—Possession—Ejectment.**]—Defendant had no documentary title to land of which he was in possession. Plaintiff recovered judgment against him and sold, and afterwards executed a lease under which defendant continued in possession. This proceeding was for overholding:—Held, that whatever the defendant's original title was, it was extinguished by the sale under plaintiff's judgment, and his subsequent taking under the lease, thereby recognizing plaintiff's title as landlord.

McDonald v. Arbuckles, 22/67.

LARCENY.

See CRIMINAL LAW, 9.

LAW STUDENT.

See BARRISTER AND SOLICITOR, 5.

LEASE.

1. **When tenancy begins.**]—Where a writing creating a tenancy reads "from

the 30th day of April," the tenancy begins on the first day of May, and if the first be Sunday, then on the second.

Gray v. Shields, 26/363.

2. **Yearly letting — Construction of contract—When beginning.**]—Defendant contracted to let plaintiff a house then in course of construction for the term of one year, at $20 per month, payable in advance, tenancy to begin June 1st, 1900, with a proviso that if the house was not ready for occupancy on that date there should be an abatement of rent corresponding to the delay.

Occupancy did not begin until June 24th, and no rent was charged for that month. Rent was paid in advance for the months of July, August, September and October, and occupation continued until May 1st, 1901, when plaintiff moved out. In an action for damages against the landlord, for illegal distress, on the ground that there was no definite agreement in existence, therefore no rent ascertained to be due.

Held, that there was yearly letting from June 1st, 1900.

Acorn v. Hill, 34/508.

3. **Fixture—Right of removal—Statute of Frauds.**]—A lease of land for five years gave the tenant a right to remove a certain building at its expiration, unless the landlord elected to purchase it at its value. The building stood upon piers and earth had been dumped in around to the level of the sill.

Held, that the building was a fixture attached to the freehold, but that the right of removal enabled the lessee to sell the building to the defendant, and that his contract in so doing did not come within the Statute of Frauds.

Oswald v. Whitman, 22/13.

4. **Ownership of lime excavated.**]—The defendant wrote to plaintiff proposing an arrangement for quarrying and burning lime on plaintiff's land. Receiving no reply, he entered and burned lime. The plaintiff afterwards came to the spot, ratified defendant's action, and agreed to buy all the lime he burned, and to supply the barrels. Plaintiff having refused to accept a lot of lime on the ground that it was not delivered within the time agreed on, the defendant shipped it to another party. Plaintiff then brought action for the conversion of his property.

Held, the action could not be maintained. Per Weatherbe, J., a lease was consummated, and plaintiff assented to defendant's dealing with the lime, when he visited the property.

Per McDonald, C.J., Ritchie, and Townshend, JJ., because the defendant's lien on the lime was undischarged.

McLachlan v. Kennedy, 21/271.

5. **Covenant running with the land—Personal covenant.**]—Plaintiff in 1883 demised a brewery containing a number of casks, hogsheads, etc., to G. By covenants in the lease, G. undertook to return these casks, etc., or to pay a fixed price therefor, also to pay all taxes assessed on the demised property. He afterwards entered into partnership with M., shortly afterwards removing all the casks, etc. In 1885 the partnership was dissolved by order of the Court and M. continued to carry on the business until the expiration of the lease. None of the casks ever came into his possession. The rent was fully paid, but there remained a claim for the return or value of the casks and for $76 taxes, for which plaintiff brought action against both G. and M. The defendant G. made no defence, but sought to assist plaintiff to fix liability on M. It was contended that M. by becoming sole occupant and paying rent had virtually attorned to the lessor, and was liable under all covenants:—Held, that the covenants relating to the casks, etc., and the payment of taxes were purely personal, under which G. alone could be held.

McDuff and McDougall, 21/250.

6. **Lease to third person—Possession sufficient to found liability for negligent maintenance.**]—In an action against defendant steamship company for damages for an injury caused by the negligent maintenance of its wharf, it appeared that the demise of the wharf was to C., the agent of the defendant company, but

merely because the lessor preferred to deal with him:—Held, that the demised premises were sufficiently in the possession of defendant company to render it liable.

York v. Canada Atlantic S.S. Co., 24/436, 22 S.C.C. 167.

7. **Demise for three lives renewable forever—Fine and substitution—Indorsement of counterpart—Evidence.**]—By lease dated in 1805, F., under whom defendants claimed, demised certain lands to P.C. for his own life and for the lives of his wife E.C. and one X.C. The lease contained a covenant to the effect that it should be renewable forever, as each life should fall, by the substitution of a new name on the payment of a consideration, or fine.

Plaintiffs had been in possession as grantees of P.C. until 1884, when, one year's rent reserved being a month overdue, defendants re-entered under the lease.

This action was to recover possession. It was not contended that the default as to rent was sufficient to work a forfeiture, but the only evidence as to whether substitution of a new life for one that had fallen had been made, was an indorsement on the counterpart of the lease, dated 1852, by which for a consideration mentioned, the devisee of F. substituted S. for E.C., who had died. This counterpart was in the hands of said devisee's agent. There was no evidence of substitution at all for the life of P.C., whom the Court held must (1890) have died, having been a married man in 1805, or for the life of X.C., whose death was proved.

Held, McDonald, C.J., dissenting (and affirmed in the Supreme Court of Canada, Gwynne, J., dissenting), that the indorsement on the counterpart in the hands of F.'s devisee's agent, must be regarded as renewal and substitution of a life and consequently of payment of the consideration or fine therein mentioned. The indorsement being on the counterpart retained by the lessor, the presumption arises that the lease itself was similarly indorsed and delivered to plaintiffs' predecessors, whereas had the document so found been the lease itself, there might have been a countervailing presumption that it was held back for cause, such as the non-payment of the consideration; but on account of the laches of plaintiffs or their predecessors in the matter of renewals on the deaths of P.C. and XC., the right to further renewal, legal and equitable, was gone on the death of S.

Held, also, in the Supreme Court of Canada, that the indorsement of renewal did not require registration, not being a "deed" within section 18 of the Registry Act, or a "lease" within section 25. Semble, Section 25 only applies to a demise for years.

Pernette v. Clinch, 26/410, 24 S.C.C. 385.

8. **Option to purchase—Lost agreement.**]—Plaintiff being unable to pay for a lot of land, induced defendant to do so for him. Defendant did so, causing the conveyance to be made by the seller to him, and gave plaintiff a lease for twelve years at a rent equal to 7 per cent. on the price paid, $800, and containing an option to purchase. Plaintiff made payments on account, but before the expiration of the term, an agreement was entered into by which plaintiff agreed to pay a higher price in consideration of more time. This agreement was lost, but established by secondary evidence. Plaintiff having brought an action for a conveyance under a clause of the lease under which he might purchase at any time on payment of $800, alleging that the lost agreement was obtained by fraud, which the evidence did not substantiate:—Held, that the relationship was not that of mortgagor and mortgagee, but that the lost agreement, as proved by secondary evidence, might be specifically enforced. Per Graham, E.J., This not being the relief asked for, the practice in equity before the Judicature Act would have been to dismiss the bill with leave to file another, since the passing of the Act, however, the Court may make the necessary amendment of the pleadings and dispose of the matter. McDonald, C.J., dissenting.

Doyle v. Dulhanty, 23/78.

9. **Dam—Right to maintain—Lease of "proprietors."**]—Plaintiff brought action against riparian owners for breaking a dam which he asserted a right to maintain under license of the "proprietors committee" of the Township of Liverpool, dated in 1895. There was no evidence as to what this committee was, but there was evidence that some such committee had assumed control of the water rights in question as early as 1760.

The grant of the Township of Liverpool, under which both parties claimed, showed division into 200 shares, of which 157 shares were granted, but it could not be said whether the water rights in question had been granted or not. There was no transmission of title shown from the committee of 1760 to that of 1895. The question of title by user not arising:—

Held, plaintiff lessees had not shown title sufficient.

Moore v. Ritchie, 33/216.

10. **Foreclosure of mortgage.**]—Right of lessee to redeem. And to claim protection of rights in settling order for sale. Rights of other encumbrancers, etc.

See MORTGAGE, 9.

LEGISLATURE.

See ASSEMBLY, HOUSE OF.

LEVY.

See CONSTABLE, EXECUTION.

LIBEL.

See SLANDER AND LIBEL.

LIBERTY OF THE SUBJECT.

County Court—Appeal.]—The County Court, concurrently with the Supreme Court, has jurisdiction under the Liberty of the Subject Act to hear a prisoner applying for discharge.

But that Act provides for no appeal from the County to the Supreme Court, and a proceeding thereunder does not fall within the meaning of "action" to give an appeal under the County Court Act.

Re Edwin G. Harris, 26/508.

(Note.—But see County Court Act, R. S., 1900.)

LICENSE.

Business license.]—See COMPANY, 18.

Junk dealer.]—See HALIFAX, CITY OF, 5.

Liquor license.]—See LIQUOR LICENSE ACT.

Mining.]—See MINES AND MINERALS.

Pedlar's.]—See FALSE ARREST AND IMPRISONMENT, 3.

To sell land.]—See PROBATE COURT, 16.

LIEN.

1. **Equitable lien.**]—"There can be no appropriation by way of lien of chattels susceptible of delivery which will prevail against third persons, without a delivery good at common law."

Malcolm v. Harnish, 27/262.

2. **Of a judgment.**]—
See JUDGMENT, 1.

3. **As a defence to conversion.**]—
See CONVERSION, 4.

4. **Of a solicitor for costs.**]—
See COSTS, 66.

5. **Statutory lien for taxes.**]—
See HALIFAX, CITY OF, 7.

LIFE INSURANCE.

See INSURANCE, 12.

LIMITATION OF ACTIONS.

1. **Arrears of annuity.**] — Only six years of an annuity charged upon land may be sued for, and no interest should be allowed thereon.

Roche v. Roche, 22/211.

See also INTEREST, 2.

2. **When beginning to run—Forged will.**]—Where a proceeding has not been taken within the time fixed by the statute, because of a misapprehension caused by a certain will being a forgery, limitation is considered as beginning to run from the date of the discovery of the forgery.

McDonnell v. McIsaac, 23/407.

See also PRINCIPAL AND SURETY, 6.

3. **Disability of infancy—Laches.**]—In an action of ejectment the defendant showed possession for twenty-four years. During the first ten of these years, plaintiff had been under the disability of infancy (section 19), but action was not brought until fourteen years after infancy had ceased:—Held, the defendant's possession had ripened into title good against all the world.

Shea v. Burchell, 27/235.

4. **Costs on settlement—When limitation begins to run.**]—Plaintiff, a barrister, was retained to defend an action brought against the defendant. Subsequently, defendant settled the action without consulting plaintiff, who now sought to recover his costs as between solicitor and client.

Held, that the Statute of Limitations was to be considered as beginning to run from the date of settlement, not from the date of retainer.

Gourley v. McAloney, 29/319.

5. **Mortgage—Covenant to repay.**]—The limitation of c. 107, s. 21, applies equally to an action on the covenant of a mortgage to repay as to an action against the land.

Cogswell v. Grant, 34/340.

6. **Mortgage — No payment for 20 years.** Payment of insurance premium by plaintiff's agent. Repayment by mortgagor amounts to a payment on account of principal.

See MORTGAGE, 21.

7. **Payments indorsed on note.**]—Indorsements of payments of interest on a note, in the handwriting of a deceased payee, are prima facie sufficient evidence of payment on account of the note, to take the debt out of the Statute of Limitations.

Watson v. Harrington, 21/218.

8. **Payment by wife without authority.**]—To an action for a balance due of the price of a sewing machine, the defence was that the claim was barred by the lapse of six years. There had been a payment of $5 on account by the wife of defendant about two years previously. This payment was made not only without the authority, but against the express command of the defendant:—Held, that the Statute of Limitations applied.

Robertson v. McKeigan, 29/315.

9. **Order on third party.**]—To an action of debt, the defendant pleaded the Statute of Limitations. The plaintiff relied on a written order given by defendant on L., but never accepted or paid by him:—Held, that the debt was barred. The evidence showing that the order was not taken as payment, it was not a sufficient acknowledgment of the debt.

Faulkner v. Archibald, 21/294.

10. **Towns Incorporation Act, 1895—Limitation—Nuisance.**]—An action in reference to a continuing nuisance is not barred by the Towns Incorporation Act, 1895, s. 295, which provides that "no action ex delictu shall be brought against any town incorporated under this Act . . . unless within twelve months next after the cause of action shall have accrued," except as to damage suffered more than one year before action brought.

Archibald v. Town of Truro, 33/401, 31 S.C.C. 380.

11. **Acknowledgment after debt barred.**]—To an action for money had and received, brought by the assignee of the chose in action against an administrator, the defendant set up the Statute of Limitations. The following letters written by the defendant's intestate to plaintiff's assignor, were held, Graham, E.J., dissenting, to be a sufficient acknowledgment to take the debt out of the statute, though written after the debt was overdue six years:—

"Hopewell, June 19h, 1875.

"Dear Uncle,—I am in receipt of yours of 31st May, about your money, and must say that I am not astonished at you for wanting it. You ought to have had it long ago, and you would have had it, only I was unfortunate in a railway contract I took. . . . Do not think, Finlay, that I intend to do you or any other body out of one shilling, so rest assured that I have your money secured in a manner that you will get it, although I cannot send it now. You had good patience, so I hope you will have a little more and I will put you all right . . . Now, Finlay, rest assured that I have your money secured so that you will get it whatever becomes of me.

Very truly yours,

Alex. McDonald.

Mr. F. Thompson, Port Ludlow, B.C.

"Hopewell, August 9th, 1876.

"Dear Uncle Finlay,—I received a letter from you some time ago about your money. I delayed writing because I did not know what to write. I did not know but something would turn up which would enable me to pay you. . . Be not afraid, as I have but a small family and no boys, and I will have plenty to pay my debts. . . . I regret very much keeping it from you so long, but I hope the time will soon come when I will be able to pay you.

"Yours very truly,

"Alex. McDonald."

Cameron v. Grant, 23/50, 18 S.C.C. 716.

12. **Sufficiency of letter of acknowledgment.**]—In an action of debt the following letters written by defendant to plaintiff were held to be sufficient to take the debt out of the statute:—

"Pugwash, Feb. 2nd, 1885.

"Dear Sirs,—In reply to your letter of January 26th, will say that I am not in a position to accept draft at present. Owing to failure in business I have asked an extension of time from all my creditors, which they have granted me except you, and if you will wait about three months I think I will have my business settled about that time and will pay you. If you will wait that long it will be a great obligation to me by so doing."

Pugwash, March 2nd, 1885.

"Dear Sirs,—Received yours of the 28th. It mentioned an enclosed note to sign, but there was no note in the letter. It must have been forgotten. I am thinking of going with another business, and will be able to attend to you about 1st of April."

Carsley v. McFarlane, 26/48.

13. **Execution against lands—After 20 years—Acknowledgment.**]—In 1868, defendant recovered and registered a judgment against N. In 1874, while this judgment was outstanding, N. conveyed lands to plaintiff. Defendant acted as conveyancer, and was present at the delivery of the deed. Plaintiff was aware of the judgment against N.

Within 20 years of its recovery, N. acknowledged the obligation of the judgment in writing. After the lapse of 20 years, defendant obtained permission, and under the judgment levied on and sold the lands which had been conveyed to plaintiff.

Held, that R.S. 5th Series c. 112, s. 11 (Limitation of Actions), did not apply to levy and sale by the Sheriff, such not being an "entry and distress' or an "action to recover land."

Also that the case was governed by s. 21 of the same chapter and was within its exception by reason of the undisputed acknowledgment.

Also, that defendant was not estopped from asserting his rights under the judgment as against plaintiff, by reason of his part in the conveyance.

Naugler v. Jenkins, 32/333.

14. **Trespass — Adverse possession — Section 11—Need not be pleaded in defence of title—New trial.**]—Plaintiff brought trespass to lands, to which defendant pleaded (1) denying the acts; (2) setting up ownership. On trial defendant, who had entered originally as tenant to plaintiff, produced evidence to show that he had been in adverse possession upwards of twenty years, thereby acquiring title under R.S. 5th Series c. 112, s. 11. Plaintiff objected that the statute not having been pleaded (O. 19 R. 15), the evidence was not admissible.

The jury returned answers to the questions:—1. "Did defendant continuously occupy the lot after plaintiff refused to rent it to him in 1867?" "Yes."

2. Did he pay plaintiff rent within 20 years?" "No."

Held, that where, as in this case, the Statute of Limitations not merely bars the action, but divests the title to the land, or vests it in another person, that person need not plead the statute as a defence.

But the defendant must negative the payment of rent for a period of 20 years next before the trespass alleged, and the first question above could only refer to the 20 years next before either trial or action brought, neither of which would be sufficient. And the second question does not cover every possibility of plaintiff, though disseized, having still possession enough to maintain trespass. For which reasons a new trial was ordered.

Miller v. Wolfe, 30/277.

15. **Adverse possession—Against tenant in common—Must be uninterrupted.**]—Under R.S. 5th Series, c. 112, possession of the land, in order to ripen into title and oust the real owner, must be uninterrupted during the whole statutory period. If abandoned at any time the law will attribute it to the person having the title.

Possession by a series of persons during the period, will bar the title, unless some of such persons were not in privity with their predecessors.

Where one of two tenants in common had possession of the land as against his co-tenant, the bringing of an action in their joint names and the entry of judgment therein, gives a fresh right of entry to both, and interrupts the prescription accruing in favor of the tenant in possession.

Handley v. Archibald, 32/1, 30 S.C.C. 130.

16. **Adverse possession—Judgment.**]—As against the lien of a judgment, where there is no proof of eviction of the owner (judgment debtor), by one claiming by adverse possession, the Statute of Limitations runs only from the recovery of the judgment.

Doull v. Keefe, 34/15.

17. **Title by adverse possession.**]—Requirements of Act. As against deed of disseisee.

See TRESPASS, 5.

18. **Adverse possession.**]—Tenants in common. Possession of one not that of the other. Section 17.

See WILL, 9.

19. **Right of way—Action barred because of cessation** of user for more than a year before action brought.

See RIGHT OF WAY, 3.

20. **Amendment to plead statute refused.**]—Plaintiff brought action in 1892 against her father's estate for an accounting in respect of a legacy received by him on her behalf in 1877. On trial defendants moved for leave to amend their defence, setting up the Statute of Limitations and the plaintiff's laches. This the trial Judge refused.

Held, that as defendant was aware of all the facts at the time the action was brought, the allowing or refusing of such an amendment was peculiarly within the discretion of the trial Judge, and the appeal must be dismissed with costs.

Roberts v. Ward, 26/463.

21. **Suggested,** where a countervailing amendment as to parties was asked by the other side.

See LAND, 17.

LIQUIDATION.

See COMPANY, 33; PARTNERSHIP, 10.

LIQUOR LICENSE ACT.

Cf. CANADA TEMPERANCE ACT, CERTIORARI, CONVICTION, ETC.

CONSTITUTIONALITY.

1. **Constitutionality — In the Privy Council.**]—1902, in the Supreme Court of Canada, per Strong, C.J., the constitutional aspects of the Nova Scotia Liquor License Act are now settled by the decision of the Privy Council in Attorney-General, Manitoba v. Manitoba License Holders' Association (1902, A.C. 73).

Brown v. Moore, 32 S.C.C. 93.

2. **Earlier cases—Wholesale trade.**]—The provisions of the Act of 1886 relating to the licensing of wholesale dealers, brewers, distillers, etc., are beyond the powers of the Province to pass.

Queen v. McDougall, 22/442.

3. **Retail trade.**]—But not the provisions relating to retail licensing. (Weatherbe and Ritchie, JJ., dissenting.)

Queen v. Ronnan, 23/421.

Queen v. McKenzie, 23/6.

4. **Conviction not specifying offence.**]—Accordingly a conviction not specifying whether the offence of selling without a license, was a sale by wholesale or retail, is bad.

Queen v. King, 25/488.

5. **Forfeiture clause.**]—The clause of the Act relating to the confiscation and forfeiture of liquor, is within the powers of the Province.

King v. Gardner, 25/48.

PROCEDURE.

6. **Appeal to County Court.**]—The effect of an appeal to the County Court under the Liquor License Act is to vacate the judgment appealed from, and to require trial de novo, the Judge to come to such conclusion as he thinks just, whether he takes fresh evidence or not.

Queen v. McNutt, 33/14.

7. **Provisions regarding appeal mandatory.**]—Section 104 (2) of the Act of 1886, which forbids a summons to the inspector, to show cause, etc., to be granted unless within 30 days after conviction, except for reasons occasioned by the default of the magistrate, must be strictly construed, and applies even to the case of delay caused by the magistrate, if the appellant could by greater diligence have obviated it.

Queen v. A. McDonald, 24/35.

8. **Affidavit on appeal.**]—The Act of 1889, c. 17, s. 7, amending the Act of 1886, requires that an applicant for appeal shall make an affidavit to the effect that he did not personally or by his servant sell liquor as charged, before he shall be entitled thereto.

Held, Ritchie, J., dissenting, that this applies even where the convicting magistrate was without jurisdiction.

(Note.—Cf. remarks of Ritchie, J., on argument Queen v. Murphy, 24/21, also Queen v. McDonald, 26/ at p. 408.)

Queen v. McKenzie, 23/6.

9. **Certiorari—Affidavit.**]—The Court is absolutely prohibited from granting certiorari where the affidavit is not made.

Queen v. Power, 28/373.

10. **Constitutionality.**]—The necessity for an affidavit is the same where the defendant wishes to raise the question of the constitutionality of the Act. Appeal to Supreme Court of Canada dismissed, Gwynne, J., dissenting.

Queen v. Bigelow, 31/436, 31 S.C.C. 128.

11. **Affidavit—Bond.**]—Acts of 1889, c. 17, s. 4, does not require the affidavit on appeal to state that defendant "will not sell liquor during the pending of appeal," but merely that such an under-

taking shall be inserted in the bond.

Section 7 of that Act does not require a defendant to negative a charge of which he was acquitted.

Queen v. Johnston, 27/298.

12. **Affidavit—Laches.**]—It is too late to object to the affidavit after certiorari has issued.

Queen v. Major, 29/373.

13. **Appeal—Summons must be sealed.**]—A summons to the inspector to show cause, etc., granted by the Judge of the County Court, must conform to the ordinary practice of that Court in being sealed, and signed by the Clerk.

And an appeal in reference to this matter lies under the Act of 1889, c. 17, s. 15, amending the Act of 1886.

Queen v. Adams, 24/32.

14. **Amending conviction.**]—Where a summons for an offence against the Liquor License Act, 1886, was left at the defendant's place of business an hour or two before it was returnable, and defendant swore he never received it, and the trial was adjourned, but no notice thereof given defendant, other than a verbal message through a constable to the effect that he was instructed by someone, not shown to be connected with the prosecution, to inform him that his case "would come up on Monday at 10 o'clock," a magistrate who convicts is without jurisdiction.

Where a bad conviction has been made and filed, a good conviction cannot be made out and returned to a writ of certiorari which has issued.

Queen v. McKenzie, 23/6.

15. **Form of conviction—Varying to meet case.**]—Two separate penalties having been adjudged, no form of conviction laid down in the schedules to the Act exactly suited the circumstances of the case. To meet the difficulty the magistrate used one of the forms provided, but introduced words taken from another.

Held, his jurisdiction not being questioned and the penalty imposed not excessive, the conviction was not for that reason bad. (Cf. sections 74 and 83, and schedules 7 and 8.)

Semble, it is not necessary to follow a form set by a statute, if the form used is consistent with its tenor.

Queen v. Grant, 30/368.

16. **Conviction—Setting out date of offence.**]—Motion to quash a conviction as not showing that the offence was committed within ninety days of information laid. The conviction read, ". . . did within ninety days before 28th of August (the date of information), to wit, between the 29th day of May and the 28th of August, unlawfully sell, etc."

Per Meagher, J., that the conviction was good as the time referred to began 30th May, a time within ninety days.

Per Graham, E.J., McDonald, C.J., concurring, that the ground against the conviction was not sufficiently taken in the notice of motion, it setting out merely ". . . the time said offence was committed is not stated in said conviction."

Queen v. Murphy, 24/21.

17. **Date of offence.**]—Conviction quashed on certiorari, with costs against the informer, not an inspector under the Act, for not showing that the information was for an offence committed within ninety days.

Queen v. Ida Adams, 24/559.

18. **Date of offence—Information.**]—If the information on which the conviction is based sets out the date of the offence, the conviction itself need not do so.

Queen v. King, 25/488.

19. **Second offence—Minute of conviction—Amendment.**]—The following minute of conviction as for a second offence, is sufficient: "I adjudge the offence of the said A.M. to be his second offence against the Liquor License Act, 1886, and Acts in amendment thereof, and I adjudge, etc."

The certificate of the first conviction signed by the Stipendiary Magistrate of Truro, omitted to state the place of conviction:—Held, it should be suitably amended under section 96, Act of 1886.

Queen v. Murphy, 27/161.

20. **Third offence—Warrant of commitment.**]—On motion for habeas corpus as to a defendant detained in jail on conviction for a third offence, it appeared that the warrant recited the conviction under which defendant was committed, the first conviction and a subsequent one:—

Held, that the use of the words "again duly convicted" in connection with the last-mentioned conviction were sufficient to show that it was a second conviction. Also, the warrant may direct both fine and imprisonment, and costs of conveying to jail.

Queen v. McLean, 25/449.

21. **Adjournment—Amendment without notice—Altering summons.**]—After hearing a charge for violation of the Liquor License Act, the magistrate adjourned to a day named for the purpose of determining the sufficiency of the proof of a previous conviction alleged. At the adjourned hearing, neither the accused nor his counsel being present, he heard and granted a motion to amend the summons in the case by changing the date of the previous conviction:—Held, a conviction made thereafter was bad.

Queen v. Grant, 30/368.

22. **Crown Rules—Commissioner—Certiorari.**]—On argument coming on after the coming into effect of the Crown Rules:—Held, that before the passing of those rules a Commissioner of the Supreme Court had express power to grant writs of certiorari, under Acts of 1874, c. 1, amending c. 89, R.S. 4th Series, and the practice was regulated by sections 57 and 58 of the "Practice Act."

Queen v. Conrod, 24/58.

Queen v. King, 24/62.

23. **Certiorari—Reviewing facts.**]—If the Court below had jurisdiction at all, its conclusions as to matters of fact cannot be reviewed by certiorari. Queen v. E. McDonald, 19/336, overruled.

Semble, under the Act, the Court below has jurisdiction unless there be no evidence at all against the defendant.

Queen v. Walsh, 29/521.

Queen v. Stevens, 31/124.

(Note.—In Queen v. Stevens, the only evidence on which the conviction was based was that of the informer, sharing in fine, who the defendant contended was incompetent under the Act.)

24. **Jurisdiction of Magistrate.**]—Per Ritchie, J., under section 87, Act of 1886, as amended, both justices should be present when the information is laid and the summons granted, but only one need sign the information, and the conviction should show on its face the facts necessary to give jurisdiction to the one not signing.

Where the conviction is for a second offence, it must appear from the evidence that the offences were committed on different days, and also, where the first information covered the whole period of ninety days before the information, that the second offence was committed after information laid for the first.

Queen v. McKenzie, 23/6.

25. **Witness failing to attend.**]—Application by habeas corpus for the discharge of a person convicted of a breach of the Liquor License Act, on the ground that the Stipendiary Magistrate had refused to issue a warrant for the apprehension of an absent witness, who it appeared had not been tendered his fees, though they were tendered in Court on the application for the warrant.

Held, non-tender of fees does not afford a witness in a criminal proceeding, an excuse for non-attendance, as it does in other matters, and the Act is mandatory on the magistrate to issue a warrant. But his failure to do so did not cause him to lose jurisdiction, so that the case could not be reviewed by habeas corpus.

The King v. Clements, 34/443.

MISCELLANEOUS PROVISIONS, OFFENCES, ETC.

26. **Club—Sale of liquor by employee.**] (Note.—For a discussion of the status of clubs in relation to the sale of liquors without license under the Act, see decision of Russell, Q.C., Stipendiary Ma-

gistrate, in convicting the "caretaker" of an incorporated club, for a sale to a member.)

Queen v. Walsh, 29/521.

27. **Costs—Municipal charge.**]—Plaintiff had acted and was acting as license inspector for the Town of Truro. Doubts having arisen as to whether the Act of 1886 was during part of the time in force in that town, the Act of 1890, c. 18 was passed, s. 9 providing that "all expenses heretofore incurred by any chief inspector . . . and all expenses hereafter incurred, including all sums paid by such inspector for costs taxed against such inspector . . . shall be a charge on the city, municipality or town . . . and may be sued for and recovered . . ."

Held, that plaintiff might recover all costs for which he had become liable whether paid or not, and without seeking by mandamus to compel the town to assess the sum on the corporation.

Laurence v. Town of Truro, 25/369.

28. **Forcible entry—Police officer.**]—1889, c. 17, s. 2, amending the Act of 1886, empowers any policeman, etc., to enter, at any time, any place where liquors are reputed to be sold, or where he believes that liquors are kept for sale or disposal contrary to the provisions of the Act or any amending Act, and to make searches in every part thereof . . . as he may think necessary.

In an action against a policeman for breaking, entering and trespassing:—Held, the section does not warrant a policeman in forcibly entering at a late hour of the night, on merely seeing a light burning and hearing voices inside, there being no evidence of disorder, and when he had no other reason for suspicion but information from one person some days previously that liquors were being sold.

White v. Beckham, 26/50.

29. **Illegal contract—To violate Act.**]—Contracts entered into in the face of a statutory provision are void, and the prohibition of sales by wholesale of liquor, to persons who hold no licenses under the Nova Scotia Liquor License Act, 1895, has the effect of rendering the contract of no effect, and of discharging a surety for the payment of the price by the purchaser.

Brown v. Moore, 33/381, 32 S.C.C. 93.

30. **Scheme to defeat Act—Alleged lease of bar.**]—Conviction of defendant, a hotelkeeper, affirmed, though he alleged that the portion of his premises in which the selling had taken place was leased to H., who was not a resident of the Province. There being no evidence of payment of rent by H., nor of participation by him in profits or management:—Held, the arrangement was mere collusion to defeat the Act.

Queen v. Learment, 31/387.

31. **Decision of like tenor**, under similar circumstances in.

Queen v. McNutt, 33/14.

31a. **To evade distress.**]—Fraudulent transfer of stock in trade—Married woman doing business in her own name—May not dispose of property where husband's consent is not filed.

See FRAUD, 13.

32. **Internal communication.**]—Acts of 1890, c. 18, s. 12, provides that no licensed premises shall have any door not opening on a public street. A conviction mentioning an interior door as leading "from" the licensed premises, is sufficient, the use of that word precluding the idea that the door referred to may have been a closet door.

Defects in the minute of conviction should not invalidate, or should be amended.

Queen v. McDonald, 26/402.

33. **Proximity to church.**]—The Act of 1890, c. 18, s. 11, forbids the licensing of premises within 100 yards of a church, school, etc., the prohibition not to "apply to premises on which licenses have already been granted."

Held, an applicant as to premises which had continuously been licensed to the date of the application, but to another person, was within the exception. Mandamus accordingly to the Mayor and inspector for the City of Halifax to issue a license.

But (probably) exception does not apply to an applicant as to premises licensed some years previously, but unlicensed at the passing of the Act.

Queen v. McPherson, 24/378.

34. **Proximity to railway.**]—The Act of 1896, c. 25, s. 6, in amendment of the Consolidated Liquor License Act, 1895, extended the provision as to proximity to railways other than street railways.

Acts of 1897, c. 10, s. 3, also in amendment of the Act of 1895, excepted from the prohibition, premises which had been "continuously licensed up to the passing of the Act of 1896, but provided that that Act should not be in any way affected.

Held, a license could not be continued as to premises within 100 yards of a railway.

In re Felix J. Quinn, 32/542.

35. **Meaning of railway.**]—The tracks of the Intercolonial Railway extended along a street of the City of Halifax between the main terminus and wharves on the harbor front, intended to increase terminal facilities, fall within the meaning of the word "railway," occurring in the Liquor License Act, and amendments, referring to the refusal of a license to premises within a certain radius.

In re Felix J. Quinn, 32/542.

36. **Refusing to sign license—Mayor of Halifax.**]—The Mayor of Halifax, knowing that the City Council has illegally granted a liquor license to premises within the prohibited distance of a railway, is warranted in refusing to sign the license, though his function in that behalf is (probably) merely ministerial.

In re Felix J. Quinn, 32/542.

37. **Screen clause.**]—Acts of 1895, c. 2, s. 39, providing that there shall be no obstruction of view of any part of the licensed premises from the street, does not so increase the burden of the law on the sale of liquors as to make it prohibitory, and so beyond the powers of the Legislature.

Queen v. Power, 28/373.

38. **"Table beer."**]—A pint of which a witness swore had a slightly intoxicating effect, comes within the purview of the Act,

Queen v. A. McDonald, 24/35.

LIS PENDENS.

1. **Limits of doctrine.**]—The doctrine of lis pendens operating as notice, cannot affect or control the liabilities of third parties to a greater extent than would the final adjudication of the action or matter itself. The action was to foreclose a mortgage which had been assigned to plaintiff. The defence was that proceedings were pending to set aside the assignment as fraudulent, but before trial, those proceedings had resulted in a decree that the assignment of the mortgage was valid. See also MORTGAGE, 11.

McLean v. Chisholm, 27/492.

2. **Restraining proceedings.**] — The Court will not entertain proceedings to restrain action in another proceeding pending. Application for this purpose should be made in the other proceeding. And an action which has proceeded to execution and levy on a judgment rendered, is a matter pending.

Rogers v. Burnham, 24/535.

3. **Stay of proceedings in County Court —Removal of inquiry.**]—Plaintiff in another action had succeeded in obtaining a decree for the reconveyance by defendant M. of certain lands held in trust. Before the reconveyance was made, defendant L., colluding with defendant M., purchased at a small cost a judgment against plaintiff, and applied to the County Court for leave to issue execution thereon against the lands in question.

This action was, amongst other things, for a declaration that L. held such judgment in trust for plaintiff, and pending trial to stay his application to the County Court. On motion for injunction:—

Held, as there was some doubt as to the jurisdiction of the County Court to entertain such an enquiry as the present, or to grant full relief, and as all the parties were not before that Court, and as

the balance of convenience was in favor of the Supreme Court as a forum, L. should be enjoined from proceeding with his application to the County Court.

Clattenburg v. Morine, 30/221.

4. **Issue not appealed — Is before Court.**]—Semble, where two distinct issues have been passed on on trial, and there is an appeal only in respect to one of them, the Court of Appeal may notwithstanding vary the decision of the lower Court as to the matter not appealed from. If the doctrine of res adjudicata applies because of the non-appeal, it is to be met with that of lis pendens.

Fisher v. McPhee, 31/523.

LOAN COMPANY.

See BUILDING SOCIETY.

LOBSTERS.

Contract to supply tinned.]—Warranted to be free from "smut," and to keep in Europe for one year. Inspection. Damages.

See SALES, 26.

LORD CAMPBELL'S ACT.

Particulars of damage.]—

See NEGLIGENCE, 34.

LORD'S DAY.

Lord's Day observance.]—Powers of Province to regulate. Unrepealed legislation.

See CONSTITUTIONAL LAW, 5.

MACHINERY.

Machinery, defective, or worked on a dangerous system, causing injury to employee. Master and servant.

See NEGLIGENCE, 14.

MAGISTRATE.

See also CANADA TEMPERANCE ACT, CERTIORARI, CONVICTION, LIQUOR LICENSE ACT.

1. **Description of office.**]—It is not ground for quashing a conviction that therein the magistrate has described himself as "police magistrate" and elsewhere as "stipendiary magistrate." In this Province there is no distinction.

Queen v. McDonald, 26/94.

Queen v. Hoare, 26/101.

2. **One justice—Jurisdiction.**]—There is no jurisdiction in one magistrate under the "Summary Conviction Act," R.S. c. 103, as amended by the Acts of 1889, c. 36, to convict for using abusive language on a highway contrary to R.S. c. 162, s. 12. On quashing such a conviction the Court required that no action should be brought by defendant.

Queen v. McLeod, 30/191.

3. **Jurisdiction—Both magistrates present.**]—As to a matter within the jurisdiction of two justices, both should be present when the information is laid and the summons granted, but only one need sign the information, and the conviction should show on its face the facts necessary to give jurisdiction to the one not signing.

Queen v. McKenzie, 23/6.

Queen v. Brown, 23/21.

Queen v. Ettinger, 32/176.

4. **Must show jurisdiction.**]—Where a warrant to levy for school rates stated the issuing justice to be a justice for the County of H., but did not show on its face that the rates had been assessed for that county, or that the warrant had been issued therein:—Held, that the warrant was bad and the defendant, who directed the levy by a constable, was liable for a wrongful taking.

McDonald, C.J., and Townshend, J., dissenting.

McDonald v. Miller, 23/393.

5. **Jurisdiction — Deed.**] — Quære, per Graham, E.J., is the name of the county for which he acts, standing at the head

of a certificate of the attestation of a witness to a deed and necessary to its being registered, sufficient to show jurisdiction in the Justice of the Peace who signs the certificate?

Phinney v. Morse, 25/509.

6. **Jurisdiction—Money obtained by fraud.**]—The plaintiff sued before a Justice of the Peace to recover back money paid under a fraudulent statement of facts by the defendant:—Held, that the matter might be entertained by the justice under the jurisdiction conferred by R.S. 5th Series, c. 102, as a "debt."

Fraser v. McLanders, 25/542.

7. **Jurisdiction—Seaman's wages.**]—R. S. Canada, c. 74, s. 52, enables seamen to sue for wages in a summary manner "before any stipendiary magistrate, police magistrate or any two justices of the peace acting in or near the place where the service terminated." Proceedings were had before G. by seamen under the section, which resulted in the seizure of the vessel, and this action was in replevin by the owner. G. was stipendiary magistrate for the County (but not for the City) of Halifax, but by a special Act was allowed to sit within the City of Halifax without adding to his jurisdiction.

On trial of this action the Judge found that the services sued for terminated at the City of Halifax, and that G., having jurisdiction as to the county, was sitting "in or near the place" under the section, and consequently had jurisdiction.

On appeal:—Held, that the expression "in or near" referred to places near the place of sitting, but themselves within the jurisdiction of the stipendiary magistrate, etc.

McDonald, C.J., and Weatherbe, J., contra, dismissing the appeal. Ritchie, J., expressing no opinion.

Grant v. Webber, 25/193.

8. **County stipendiary—Jurisdiction.**]—R.S., 1900, c. 33, regulating the appointment of stipendiary magistrates makes the whole county for which he is appointed the jurisdiction of a County Stipendiary. There being no legislation to the contrary, he may therefore convict for an offence committed within an incorporated town.

The King v. Giovannetti, 34/505.

9. **Jurisdiction of magistrate—Police district—Judicial notice.**]—An applicant by habeas corpus had been committed by the Stipendiary Magistrate for the Municipality of Pictou, for an offence described as having been committed at "Hopewell, in the County of Pictou."

By Acts of 1895, c. 89, s. 1, the municipality of the County of Pictou is made a police division. By Acts of 1895, c. 3, ss. 1, 2, the municipality is defined to be the County of Pictou, except such portions of it as are comprised within the limits of incorporated towns. The question being whether Hopewell might not be one of these, so that the warrant would not show jurisdiction on its face, as being within the limits presided over by the municipal stipendiary;—

Held, the Court will judicially recognize limits and bounds of towns, districts, etc., as far as they may be laid down in public statutes, and it appearing from the Act last referred to that Hopewell is described as a municipal polling section, and that a municipal polling section is part of the municipality, jurisdiction was sufficiently shown.

Queen v. W. McDonald, 29/160.

Ex parte James W. Macdonald, 27 S.C.C. 683.

10. **Jurisdiction — Stipendiary Magistrate, City of Halifax.**]—Per curiam, the Stipendiary Magistrate of the City of Halifax has jurisdiction to inquire of, and commit a prisoner for, an offence committed at McNab's Island, in Halifax Harbor, being a place beyond the city limits (but within the county).

Queen v. Brown, 31/401.

11. **Legality of imprisonment—Territorial limits.**]—Imprisonment in default of payment of a fine having been ordered as to a defendant, charged with a violation of the Canada Temperance Act, by the Stipendiary Magistrate of the incorporated Town of Springhill, and there being no place for the confinement of prisoners describable as a common goal

within that town:—Held, the defendant was lawfully conveyed to and confined in the common goal at Amherst, the county seat of the county in which Springhill is situated, though that place is outside the jurisdiction of the convicting magistrate.

In re Burke, 27/286.

12. **Justices' Court—Jury failing to agree.**]—Plaintiff sued in the County Court, as indorsee of a promissory note. He had theretofore sought to recover before Justices of the Peace and a jury, when, the jury failing to agree on a verdict, the Justices had discharged them, and made an order as to payment of costs, but rendered no decision in the action:—Held, that under c. 102, R.S., the justices had no authority to dismiss the jury without their having rendered some verdict, nor to summon another. Having done so the trial was abortive, and plaintiff might bring a fresh action, if he chose, before other justices. That the matter was not to be considered res adjudicata because of the judgment the justices had thought proper to sign, as it did not finally settle the matter at issue.

Creelman v. Stewart, 28/185.

13. **Disqualification from sitting—Relationship.**]—Without deciding what degree of relationship, if any, disqualifies a Judge from sitting on a case, the affinity arising from the fact that the presiding stipendiary magistrate and the prosecutor, an inspector under the Liquor License Act, married sisters, does not.

Quaere, will anything but interest in the mater at issue disqualify?

Queen v. Major, 29/373.

14. **Adjournment sine die.**]—A magistrate who adjourns a hearing after all the evidence is in, without naming a day cannot afterwards convict.

Queen v. Morse, 22/298.

Queen v. Gough, 22/516.

15. **Adjournment of hearing.**]—At the hour fixed for the return of a summons for a violation of the Canada Temperance Act no one appeared for the defendant. The justices having mislaid the information, they adjourned until 12 o'clock the same day, after which they convicted the defendant:—Held, they had not lost jurisdiction by failing to prove service until the adjourned hearing.

The King v. Wipper, 34/202.

16. **General warrant.**]—A search warrant issued by a magistrate, authorizing the search of "any other house" and the arrest of "any other person," is bad as a general warrant, and as delegating the jurisdiction of the magistrate to act on suspicion.

See WARRANT, 1.

17. **Certiorari—Making false return.**]—If the convicting magistrate make a false return to a writ of certiorari directed to him, the truth or falsity of the return cannot be inquired of on motion to quash it. The recourse of the injured party is by action against the magistrate or by information at the instance of the attorney-general.

Queen v. Nichols, 24/151.

18. **False arrest—Liability therefor.**]—The judicial character of the act of a magistrate in issuing a capias, regular in form, but based on an affidavit impeached as insufficient under R.S. 5th Series, c. 102, s. 5, will protect all who have acted under it in securing the arrest—even one who after issue, has interfered to describe and point out the person to be arrested. It is not so if the capias be irregular in form, and not merely voidable, but void.

Orwitz v. McKay, 31/243.

19. **Whether directing illegal act.**]—Defendant constable had illegally levied on plaintiff's waggon, in the possession of a judgment debtor, but had not removed it. The judgment debtor desiring that it should be removed, the defendant constable consulted the defendant magistrate, who had issued the execution, who said, "Well, if he wants the waggon, go and bring it in":—

Held, that the words did not amount to a direction to the constable sufficient to render the magistrate liable, but were mere friendly advice.

Per Meagher, J., unless the magistrate knew that there was doubt as to the ownership of the waggon.

O'Handley v. Dooley, 31/121.

20. **Action against magistrate—Notice—R.S. c. 101, s. 19.**]—An action against a magistrate for false arrest, was dismissed for want of notice given, as required by R.S. 5th Series, c. 101, s. 19. On appeal the Court was equally divided as to the necessity for notice:—

Held, per Henry, J. (Graham, E.J., concurring), dismissing appeal, that a magistrate is entitled to notice of action under the section, wherever he has acted in good faith, and not merely colorably in the execution of his office, no matter how great the error of law into which he may have fallen.

Per Ritchie, J. (McDonald, C.J., concurring), that though such was the sense of the older cases, now, if a magistrate acts entirely without jurisdiction, he is not entitled to notice.

Semble, also, the fact that he was misled by a barrister is not a mitigation of his error.

Mott v. Milne, 31/372.

21. **Causing wrongful arrest—Jurisdiction—Malice.**]—R.S. 5th Series, c. 101, s. 11, requires, in actions against magistrates for official acts coming within their jurisdiction, allegation and proof of malice and want of reasonable and probable cause. By s. 12, where a magistrate has acted without jurisdiction, such need not be shown.

Plaintiff brought action against a magistrate for illegally causing his arrest on a distress for non-payment of rates assessed under the Public Instruction Act, 1895. The jury found that there was no malice:—

Held, as the magistrate had general jurisdiction in relation to the matter malice must be shown, and that departure by him from the forms of procedure laid down by the Act did not constitute an excess of jurisdiction, to bring the matter within the operation of s. 12 above. Also, before proceeding to enforce payment of rates, a magistrate is not bound to inquire into the validity of the assessment, in order to have jurisdiction.

Parker v. Etter, 33/52.

MALICIOUS PROSECUTION.

See also FALSE ARREST AND IMPRISONMENT.

1. **Reasonable and probable cause—Proof of want of.**]—Defendant laid an information against plaintiff for a common assault, which on trial before the County Court was dismissed. The assault had occurred in a set-to among a number of persons, and there did not appear to be any doubt of the fact of the assault, though there was a question as to the amount of provocation and justification. The County Court Judge in an action for malicious prosecution found for the plaintiff. On appeal the Court was of opinion he had made erroneous deductions from the evidence and set aside his judgment with costs.

Per Graham, E.J., that the burden of proof of all facts necessary to show the want of reasonable and probable cause is on plaintiff, and if the defendant honestly believes the charge made, the plaintiff must furnish evidence to prove malice.

Per Ritchie, J., that the defendant had a right to have the matter inquired into judicially, "and the mere fact that the complaint was dismissed, was no evidence of want of reasonable and probable cause, even if the ground of dismissal was that the complainant had commenced the disturbance, and by his conduct provoked the assault."

Raymond v. Biden, 24/363.

2. **Reasonable and probable cause—Directions to jury—Admissability of deposition.**]—Action for malicious prosecution in causing the arrest of plaintiff on a charge of breaking into defendant's house and stealing therefrom a pitcher and some money. Plaintiff was acquitted of the charge. Evidence was given to show that defendant was moved to prefer the charge by the fact that the plain-

tiff had testified against him in a prosecution for arson before a stipendiary magistrate, the odium of which he wished to remove, and that he did not himself believe in plaintiff's guilt, and had stated as much to other persons. The jury having found for plaintiff, and assessed damages (on a direction for severe damages) at $75, the defendant moved against the findings on the grounds of misdirection, and of the wrongful admission of evidence:—

Held, that there was no misdirection in the Judge's having left the question of want of reasonable and probable cause to the jury instead of determining it himself, inasmuch as he had submitted a set of disputed facts upon which they were to find one way or the other, and which being found in a certain way, he instructed them, would constitute a want of reasonable and probable cause.

On the objection that evidence had been wrongly admitted to show that plaintiff was not guilty of the charge:—Held, whether a mistake or not, it was corrected by the instruction to the jury that they were not to try the question of guilt or innocence of the plaintiff.

On the objection that a deposition taken during the prosecution complained of, was wrongly admitted to show want of reasonable and probable cause, because anything that had transpired should have been shown by oral testimony:—

Held, that a deposition taken down by the magistrate is presumed to contain everything material in the testimony of the witness, and is the best evidence of the testimony, on which ground it was admissable.

Millner v. Sanford, 25/227.

Cf. CRIMINAL LAW, 42.

3. **Malice express and implied — Misdirection.**]—In an action for malicious prosecution the jury found in answer to questions (1) That the defendant honestly believed in the guilt of plaintiff. (2) That such belief was not based upon reasonable grounds. (3) That he had not taken all such reasonable pains to inform himself, as a reasonable man would have taken. (4) That there was implied not actual malice.

On application for a new trial and appeal:—Held (McDonald, C.J., dissenting), that, in contradistinction to the action of slander where malice from the illegal act of publication may be presumed, in actions for malicious prosecution the presence of actual or real malice must be found as a fact by the jury, and that a finding of implied malice, negativing the existence of express malice, was not sufficient to sustain a judgment for the plaintiff. New trial ordered.

Per Townshend, J., that as the third finding was based on a misdirection, the defendant was on that ground alone entitled to a new trial.

Grant v. Booth, 25/266.

4. **Malicious arrest—Questions to jury—Judicature Act, s. 12.**]—In an action for malicious arrest it appeared that defendant had caused the plaintiff's arrest by capias, for a claim which did not technically amount to a debt.

The trial Judge charged the jury that a person having a claim against another had a right to pursue it to the fullest extent of the law, if he did so bona fide, and without malice, that in this instance the defendant had probably merely mistaken his remedy, but that of itself formed no ground for this action. He then directed them to answer the following questions, and told them if they answered the first two in the affirmative and the third in the negative, the verdict should be for defendant, but if they found the first two in the negative or the third in the affirmative the verdict should be for the plaintiff.

"(1) Were the circumstances such that a reasonably fair person, acting with an unprejudiced mind, would have acted on them and considered them sufficient cause for action?

"(2) Did the defendant act in the matter, bona fide, with a belief that the circumstances which justified his acting were true?

"(3) Was there malice?"

The jury answered the two first questions in the affirmative, the last in the negative. The Judge told them that such answers were equivalent to a verdict for

the defendant, which was found and entered accordingly.

On an application for a new trial:—Held, dismissing application, that from the questions and summing up, both of which were usual and proper, it appeared that the Judge had decided as a matter of law, that there was not a want of reasonable and probable cause.

To the objection that the Judge should not have submitted questions to the jury, but should have directed them to find a verdict, in an action for malicious arrest, under Judicature Act, s. 12:—Held, that while the Judge submitted questions he had directed what the verdict should be, according to the answers. The finding was a general verdict, and the provision of the Judicature Act was complied with.

Manley v. Gillespie, 27/301.

5. **Misdirection as to "malice" and "reasonable and probable cause."**]—The defendant had caused plaintiff to be arrested for the theft of a coffin. The plaintiff, who was a coroner, had forcibly entered defendant's undertaking establishment during his absence, and removed the coffin and a corpse it contained, on which he wished to hold an inquest, believing he had a right, by virtue of his office, to do so. Defendant failed to appear at the hearing of the information, and plaintiff was discharged.

On trial of an action for malicious prosecution, the learned Judge in the course of his charge said: "You must believe that defendant had Dr. H. arrested out of malicious motives. You can judge by the facts as to whether in causing the arrest he was actuated by spite. If you can infer that from the facts in evidence, that would be malice in point of law, sufficient to establish the second point (that he was actuated by malice . . .). Even though defendant was actuated by malicious motives, if he had reasonable and probable cause it is of no consequence how malicious he may have been; if he had reasonable grounds for having the plaintiff arrested the plaintiff cannot succeed in this action. . . . If you find an absence of reasonable and probable cause, you can infer malice . . . Then you must be satisfied that he was actuated by malice which led him without reasonable and probable cause to make the charge."

The jury found for the defendant, and added (1) Defendant had just cause for action against plaintiff. (2) There was no malicious intent on the part of defendant.

On an application for a new trial:—Held (McDonald, C.J., dissenting), that the finding (1) did not dispose of the question of want of reasonable and probable cause, which was one for the Judge. That the jury should have had a proper definition of malice, more extensive than the idea of spite, and that the one sentence "if you find want of reasonable and probable cause you can infer malice" was not a sufficient exposition of the doctrine that malice in fact may be inferred from all the circumstances which led up to the institution of the prosecution. New trial ordered. Also held, if the case was to go to a jury again, an important consideration in connection with reasonable and probable cause for defendant's belief, was that the stipendiary magistrate before whom he laid his case was a member of the bar.

Per Meagher, J., dubitante, that the Court before ordering a new trial should see that the jury has in fact been misled, not that such might have been the case.

Hawkins v. Snow, 27/408.

6. **Malice though defendant believed charge — Non-direction.**] — In an action for malicious prosecution the Judge not having been asked to do so, did not instruct the jury that even though defendant believed the charge he was making, he might still have acted maliciously:—

Held, that there was non-direction on a material point, for which reason there should be a new trial.

Hawkins v. Snow, 28/259.

7. **Motive amounting to malice.**]—It is not misdirection for the Judge to tell the jury that if the motive of the defendant in causing the arrest complained of was resentment at conduct of plaintiff, it would amount to malice though de-

fendant honestly believed in the truth of the charge he was making.

Or that if his object in causing such arrest was to get the best of a controversy, malice might be inferred.

Hawkins v. Snow, 29/444.

8. **Prosecution counselled by solicitor—Action against solicitor.**]—Plaintiff, a constable, armed with civil process for the arrest of K., pursued him into the house of his employer, the defendant, and proceeding up stairs, made a search. Returning below, he after a time ascended again and made a second search. No special objection seems to have been made by defendant, but he afterwards consulted a solicitor, and on his advice preferred a criminal charge against the plaintiff, that of breaking and entering and misconducting himself in the execution of process, on which charge he was tried and acquitted by the County Court. On his acquittal he brought this action against defendant, joining also the solicitor.

On trial the Judge withdrew the case against the solicitor, on the ground that there was no evidence against him, and the jury found that the defendant had reasonable and probable cause for his belief in plaintiff's guilt, and that there was an absence of malice.

On motion to set aside the findings:—Held (Ritchie, J., dissenting), that the question of want of reasonable cause being one for the Judge alone, the finding was not warranted unless there was in the mind of the defendant, who was present and an eye witness to the plaintiff's whole course of conduct, evidence sufficient to constitute a prima facie case as to the crime alleged, and that the actual happenings bore no resemblance thereto. Also, that there was evidence of indirect motives both on the part of both defendants to render a new trial necessary.

Also, that though the consulting of a solicitor has not the same effect as taking the opinion of counsel in England, yet the fact of having done so was evidence of belief and of absence of malice on the part of the defendant. (Cf. 5 ante.)

Seary v. Saxton, 28/278.

9. **Prosecution by law and order league—Malice.**]—Plaintiff was convicted of a violation of the Liquor License Act, 1886, at the instance of the defendant, who was president of a "Law and Order League." The defendant had proceeded not of his own knowledge, but on information furnished by two persons employed for the purpose of obtaining evidence of violations by liquor dealers. In an action for malicious prosecution, the County Court Judge held, that defendant had proceeded without reasonable or probable cause and found for plaintiff for $110 and costs. Defendant appealed:—Held, that there was proof of reasonable and probable cause, and a total absence of malice. Respondent not called on.

Anderson v. Bell, 24/100.

10. **False arrest—Liability of person directing.**]—A person having been arrested on a capias granted by a magistrate on what, it was contended, was an insufficient affidavit under R.S. c. 102, s. 5, brought an action for false arrest against the person who applied to the magistrate:—Held, the capias not being void, but voidable, the magistrate, in granting it, exercised a judicial discretion within his jurisdiction, which fact is sufficient to protect all who act under it, even though the defendant in this case, after the issue of the capias, interfered to describe and point out the person who was to be arrested. It is different where the capias is void ab initio.

Orwitz v. McKay, 31/243.

MANDAMUS.

1. **Mandamus not applicable—Office sought filled—Quo warranto.**]—Motion for mandamus to compel the warden and clerk of the municipality of C., to swear in the prosecutor as county councillor. Before notice of the application was served on C., who as rival contestant for the office, was chiefly, if not solely concerned in opposing it, C. had been sworn in as councillor:—Held, that as the office was de facto filled, mandamus was

no longer the proper mode of procedure; and that the prosecutor should have moved for quo warranto.

Queen v. Burke, 29/227.

2. **Quaere is mandamus** the proper mode of proceeding in an application to compel a company to produce its books for inspection?

Queen v. Clements, 24/64.

3. **Compelling production of books, etc.**]—Under the Judicature Act, R.S. 1900, s. 39 (9), the Court may grant an interlocutory order for a mandamus to compel a company to produce its books for the inspection of a shareholder, and to furnish a list of stock, and stockholders, and to comply with provincial statutes regarding the filing of certain statements with the Provincial Secretary, the registrar of deeds, etc., but under that section, such an order would not be "just and convenient," where the effect would be to determine the whole matter by affidavit, leaving nothing to be considered on trial.

Merritt v. Copper Crown Mining Co., 34/416.

MARINE INSURANCE.

See INSURANCE, 15.

MARRIED WOMAN'S PROPERTY ACT.

(R.S. 5th Series, c. 94—R.S. 1900, c. 112.)

1. **Action by wife—Non-joinder of husband.**]—In an action against a municipality for negligence, whereby plaintiff, a married woman, was injured, it was objected that her husband was not joined as a party. Per Townshend and Meagher, JJ., whether the absence of her husband for above seven years without being heard of, raised such a presumption of his death as to enable her to maitain action as a feme sole, or not, she was entitled to do so under s. 82 of the Act (R.S. 5th Series, c. 94), as the evidence showed that she had never lived in this Province with her husband. (Decided in 1890.)

Gilbert v. Municipality of Yarmouth, 23/93.

2. **Capacity to contract.**]—H. gave a note to plaintiff, who indorsed it to defendant, who was the wife of H., without recourse. She re-indorsed it to plaintiff, who finally brought action thereon against her. The note was in payment for damages to a certain house conveyed to her, and held as her separate property under the Married Woman's Property Act, 1884:—Held, she was not liable.

Per Townshend, J., "the separate property which a married woman may now (1894) enjoy under the statute, c. 94, R.S., does not partake of the nature, incidents and liabilities of property settled upon a married woman for her separate use, which, under equitable proceedings, can be made chargeable with her debts and obligations. It is a property created by the statute for the benefit of a married woman, and can only be chargeable so far as the statute confers the right. . . . The Act, ss. 3, 4 and 5, conferred upon a married woman the right to have, hold and enjoy all her real estate and all her personal property whether belonging to her before her marriage or acquired after marriage otherwise than from her husband, free from his debts and obligations in as full and ample a manner as if she were sole and unmarried. . . . No power is given to a married woman to enter into contracts or obligations in respect to the property so freed from the debts and contracts of the husband. No change has been made in the law in this regard."

Per Meagher, J., that there was sufficient proof in the record to warrant judgment against defendant, if the property could be regarded as free property for her separate use, and her status and power under the Married Woman's Property Act are the same in relation thereto as they were held to be by Courts of Equity, prior to the enactment of the chapter.

Foster v. Hartlen, 27/357.

(NOTE.—Decided in 1894. Cf. the present Married Woman's Property Act, R.S. 1900, c. 112.)

3. **Separate property — Burden of proof.**]—Where goods apparently in the possession of the husband, or in joint possession of husband and wife, are taken in execution against the husband, and the wife claims them as her separate property, the burden of proving property is on the wife.

Adams v. Crowe, 21 S.C.C. 342.

Cormier v. Mattinson, 27/354.

4. **Filing certificate—R.S., c. 94, s. 53.**]—A married woman doing business in her own name being sued, offered as a defence that no certificate in relation to her separate business had been filed with the city clerk as required by the above section:—Held, that the defence was not open, not having been pleaded, also that non-compliance with the section did not release her from liability for her own debts, but might render her liable for those of her husband.

Cook v. Hartlen, 23/170.

5. **Separate business — Consent not filed.**]—The stock in trade of a married woman doing business in her own name, but who has not filed her husband's consent to such course as required by s. 53 of the Married Woman's Property Act, 1884, belongs to her husband, and may not be taken in distress against her for a violation of the Liquor License Act, 1886. Also, she, having attempted to do so to evade the warrant, had no authority to transfer property in the goods as a whole, but only by retail in the ordinary course of business.

Rodenhiser v. Cragg, 27/273.

6. **Separate business—Construction of "wages and earnings"—Suing in her own name.**]—Section 52 of the Married Woman's Property Act, 1884, enacts: "The wages and earnings of any married woman, acquired . . . in any employment, occupation or trade in which she is engaged, or which she carries on separately from her husband . . . shall be free from the debts, disposition or control of her husband . . ."

The plaintiff, who was carrying on a business of farming, lumbering and general trading, with her husband's consent, purchased certain wood working machinery, for which she gave her promissory note in payment. The same having been levied on by defendant sheriff, under an execution against her husband, she brought action in her own name:—

Held, allowing appeal (Ritchie, J., dissenting), that the provisions of the Act which would protect her in the enjoyment of the property if acquired with her separate "wages and earnings," also extend to that acquired on her separate credit. Also, that in relation thereto she might sue in her own name.

Slaughenwhite v. Archibald, 28/359.

7. **Separate business—Execution against husband.**]—Plaintiff, a married woman, carried on a separate business with the consent of her husband, in premises leased by herself. Defendant sheriff, under an execution against the husband, levied on a machine, and on a number of saws purchased for use in connection with the machine. The trial Judge found that the machine was the property of the husband, but there was uncontradicted evidence that the saws were the property of the wife, having been purchased by her personally:—Held, that the plaintiff might recover the price of the saws with costs of the issues in relation thereto, defendant to have all other costs, and costs to be set off.

Slauenwhite v. Archibald, 30/240.

8. **Certificate separate business — Omitting street and number.**]—A married woman proposing to do business in her own name, filed a certificate required by R.S. 5th Series, c. 94, s. 53, but in lieu of designating the street and number of her place of business, it set out:—"I say that it is not practicable to give the street and number of the street in Halifax at which I propose to carry on said business, as the premises have not yet

been selected by me":—Held, such a certificate was insufficient to protect her property from her husband's debts.

Pearce v. Archibald, 34/543.

9. **Wife's ante-nuptial debts.**]—In an action against a husband for boarding the wife before her marriage:—Held, that the use in his household, of furniture belonging to the wife, married since 1884, is not a reception of personal property of the wife, in connection with, or as the result of the marriage, within the terms of s. 9 of the Married Woman's Property Act, 1884, which makes the husband liable to the extent of the property he shall have received.

Bennett v. Lawrence, 31/289.

10. **Note of husband indorsed to wife—No contractual relationship—Action.**]—By R.S. 5th Series, c. 94, s. 3, passed 1884, a married woman might hold and enjoy to her own use, all property acquired "otherwise than from her husband." Section 81 of that Act forbade her to contract with her husband.

In 1892 plaintiff became possessed of a promissory note made by her husband to L. The Acts of 1898, c. 22, s. 12, permitted a married woman for the protection of her separate estate, to maintain action against all persons, including her husband, as if she were a feme sole. After the passing of this Act plaintiff, as indorsee of the above note, brought action thereon against her husband, the present defendant:—

Held, per Townshend and Meagher, JJ. (sustaining the trial Judge), that the indorsement of the note to plaintiff put her in a conractual relationship to her husband, thereby extinguishing his liability.

Per McDonald, C.J., and Weatherbe, J., that the note was acquired "otherwise than from her husband," hence might be held by her as her separate property, and on the passing of the Act of 1898, she might maintain action thereon.

In the Supreme Court of Canada:—Held, reversing the result reached, that the relationship of maker and indorsee is not contractual. Though the action of indorsee against maker is ex contractu, yet the indorsee's right of action is not derived from the contract between maker and payee, but from the Statute of 3 & 4 Anne, c. 9, and subsequent legislation, bringing negotiable instruments within the law merchant, and creating an exception to the common law rule, that no one can sue ex contractu except a party to the contract.

Also, s. 12 of the Act of 1898, relating to procedure, it might be given a retrospective effect, entitling plaintiff to sue in relation to a contract made before its passing.

Michaels v. Michaels, 33/1, 30 S.C.C. 547.

11. **Domiciled abroad.**]—The property within this Province of a married woman, married before the passing of the Married Woman's Property Act, who is domiciled in England, does not come within its provisions.

Dwyer v. Mapother, 26/294.

12. **Estover—Firewood and fencing.**]—The rights secured in dowry to a widow under Married Woman's Property Act, 1884 (R.S. 5th Series, c. 94, s. 66), extend to her tenant.

The question as to whether cutting trees constitutes waste to the injury of the reversion, is one of fact in each particular case.

Wilkie v. Richards, 32/295.

MASTER.

See also REFEREE.

1. **Report confirmed.**]—The report of a Master settling an account was upheld where the evidence was conflicting, and it was not shown that he had acted on an erroneous principle or made some manifest error.

King v. Drysdale, 24/308.

2. **Master deciding point of law.**]—On a reference to him to take an account, a Master may not decide the chargeability of certain lands under a will, the question being one for the Court.

Smith v. Beaton, 25/60.

3. **Judge County Court.**]—Quaere, has a Judge of the County Court, as a Master of the Supreme Court, jurisdiction to hear an application by habeas corpus, for the discharge of a prisoner tried summarily by a stipendiary magistrate, the ground of the application being that the prisoner had not consented to be tried summarily?

Queen v. Bowers, 34/550.

MASTER AND SERVANT.

See also PRINCIPAL AND AGENT, WRONGFUL DISMISSAL.

1. **Agreement amounting to partnership—Action for salary.**]—Plaintiff and defendants entered into an agreement by which defendants were to become purchasers of a mine, plaintiff to be owner absolutely of one-fifth interest therein, and to be manager of future operations at a salary of $150 per month.

A further term was proved to the effect that if defendants should furnish $10,000 towards developing the property, plaintiff would rely on the profits of working to pay his salary. Defendants had not furnished the money. The defences were, partnership, and a different statement of the terms of the agreement entered into:—

Held, plaintiff might recover in respect of the salary agreed on.

In the Supreme Court of Canada, defendants' appeal was allowed, but without prejudice to plaintiff's right to raise the same questions in a different form of action, instituted to take partnership accounts.

Townhsend v. Adams, 26/78.

2. **Town clerk** of incorporated town—Question of remuneration—Right to retain monies of town against salary claimed.

See INCORPORATED TOWN, 3.

3. **Injury to servant**—Defective system—Negligent management of machinery, etc.

See NEGLIGENCE, 14.

4. **Respondeat superior.**]—The relationship of master and servant does not exist, in such a way as to make the principal liable in cases of negligence, between:—

City of Halifax and contractors for street lighting.

See NEGLIGENCE, 28.

City of Halifax and firewards, constituted by statute.

See HALIFAX, CITY OF, 3.

Municipality and commissioners of streets.

See MUNICIPALITY, 1.

5. **Reckless driving by servant** rendering master liable—Injury to children.

See NEGLIGENCE, 7.

6. **False arrest by policeman**—In excess of by-law of town and of instructions—Whether the town is liable?

See FALSE ARREST, 3.

MEDICAL BOARD, MEDICAL PRACTITIONER.

See PHYSICIAN.

MERCHANT SHIPPING ACT.

See SHIPPING.

MESNE PROFITS.

See LAND, 16.

MINES AND MINERALS.

1. **Contract to purchase mining areas—Meaning of term "good title."**]—Defendants made a contract in writing with plaintiff to sell him certain areas for a price to be paid in three instalments. Plaintiff paid two of the three instalments, and then gave defendant notice to rescind the contract on the ground that he had given an undertaking to give a good title to the lands in question, whereas they were owned by a third

party, thus making the agreement for sale void. In an action for the instalments paid:—

Held, that the agreement having been made in contemplation of the business of mining, in which ownership of the fee is not customary, and an agreement having been come to by the defendant with the surface owner under s. 18 of the Mines Act, the defendant was in a position to make a sufficient conveyance under the Act, which was all the parties could have been supposed to have intended, a view strengthened by the fact that in a different part of the agreement, an arrangement to purchase the fee in other lands was differently dealt with. Defendant's counterclaim for third payment allowed.

VanMeter v. Matheson, 21/56.

2. **Agreement for sale — Action for purchase money.**]—Until the title (to lands or mining areas) has passed, no action may be maintained for the purchase price agreed on, as the vendor may not have the estate and the money both. His action is either for damages for breach of the contract, or for specific performance.

Semble, and even though an equitable interest has passed.

Weatherbe v. Whitney, 30/447.

3. **Powers of commissioner—License.**]—After a prospecting license is once issued, the commissioner has no authority to pass on its validity. His function is simply to decide whether or not he will grant the license, when under s. 133, he may call witnesses. Once granted, he may not review his decision, which must be done by the Court on the appeal of an aggrieved party.

In re Malaga Barrens, 21/391.

4. **Validity of lease.**] — The commissioner refused an application for a license to search on the ground that the areas were already covered by lease. The applicant admitted this, but claimed that the lease was irregular and should be cancelled:—Held, that the matter could not be passed on by the commissioner.

In re Jeffrey McColl, 22/17.

5. **Appeal from commissioner—Validity of bond.**]—Appeal from the decision of the commissioner of mines granting the application of F. for a prospecting license, in preference to C.'s application for a lease. The bond on appeal was in favor of H.M. the Queen (c. 7, form G), instead of the respondent. The Court being moved to dismiss the appeal on this ground:—Held, per McDonald, C.J., Ritchie, Townshend and Meagher, JJ., that the bond was good. Per Weatherbe, J., and Graham, E.J., dubitantibus, that the appeal should be heard, and the whole matter then determined. Costs reserved.

Re Ovens, 23/168.

6. **Forfeiture of areas—Certiorari to commissioner.**] — The commissioner of mines, without notice to the lessee, declared forfeiture of areas under ss. 107-113:—Held, that he could not do so without notice, and that the matter might be brought up by certiorari, his functions under the Act being judicial.

Weatherbe and Graham, JJ., dubitantibus, as to whether the commissioner was acting as a Judge or as a landlord.

Queen v. Church, 23/347.

7. **License to search—Second rights—Lands already covered—Construction of Act.**]—On the 13th October, 1891, W. applied for and obtained a license to search for eighteen months, over an area of one square mile. While it was outstanding plaintiff applied for a license to search over an area of five square miles, including the mile covered by the above. By R.S. 5th Series, c. 7, s. 84, the commissioner was forbidden to receive applications for rights over areas already covered, but by an amendment (1892, c. 1, s. 98), passed a few days after the plaintiff's application was made, he was authorized to receive applications for licenses to search (called second rights), over lands already covered, in the case of minerals other than gold and silver.

After the passing of this amendment, and two days after the expiring of W.'s rights, defendant applied for and ob-

tained a license to search over that square mile:—

Held, that the commissioner acting under the statute then in force had rightly refused the plaintiff's application, and for the same reason had rightly granted the application of the defendant. And that it was immaterial that the plaintiff's application covered other land than that covered by W.'s license.

McColl v. Ross, 28/1.

8. **Second application — Must not be received—Description of areas—Shape.**]—The commissioner of mines being merely the creature of the statute, has no jurisdiction to receive and pass on other applications for areas than the first. The provisions of the Act in this regard are imperative, not merely directory.

A description in an application for license to search is sufficiently definite if it merely refers to numbers on a plan on file in the department.

Though the Mines Act requires that each area shall be rectangular, yet the whole block applied for need not be so.

In re Ovens, 23/376.

9. **Amendments to Act—Payments in lieu of work.**]—On 27th November, 1886, the Crown granted to W. and others a lease of certain gold mining areas to commence 25th of same month, which lease was by various assignments transferred to the relators. By the Act then in force the lessee of areas was required to perform a certain number of days' work each year, otherwise to forfeit. By the Acts of 1889, c. 23, this provision was amended, allowing an agreement to be made between the commissioner and the lessee, substituting a payment of 50 cents per area in advance, for the work theretofore required, such payment to begin from the "nearest recurring anniversary from the date of the lease."

The relators entered into such an agreement 17th December, 1889, making their first annual payment 31st December, the receipt therefor reading, "for amount of fee accompanying application for rental lease No. 354 one year from 15th November, 1889." One year later the relators attended at the mines department for the purpose of making their next annual payment, but learned that their lease had been forfeited on the preceding 25th of November for non-payment of rental in advance:—

Held, the lease commenced to run from the 27th of November, the day on which it was made, not from the 25th, the day on which it purported to commence. Also, setting aside the forfeiture, that the rental was not in arrears, the words "nearest recurring anniversary" meaning "next ensuing anniversary" after the date of the lease.

Also, as to the form of the receipt, the statute must govern, the department having no power to grant a receipt except as thereby contemplated.

And the relators having as a matter of precaution taken out a new license to search:—Held, that this was not a waiver of their rights by recognizing and assenting to the legality of the forfeiture.

Attorney-General v. Sheraton, 28/492.

10. **Amendments to Act—Renewals—Time for applying.**]—By R.S. 5th Series, c. 7, the lessee of areas was compelled each year to perform a certain amount of work thereon, on pain of forfeiture. By an amendment passed in 1889 (c. 23), the lessee was permitted to pay an annual rental of 50 cents per area in lieu of work, and by s.-s. (c) he might, by duplicate agreement in writing with the commissioner of mines, avail himself of the provisions regarding such annual payment, and "such advance payments shall be construed to commence from the nearest recurring anniversary of the date of the lease." By s. 7 all leases are to contain the provisions of the Act, respecting payment of rental and its refund in certain cases, and by s. 8, said s. 7 was to come into force two months after the passing of the Act.

Before the Act of 1889 was passed a lease was issued to E., dated June 10th, 1889, for twenty-one years from May 21st, 1889. On June 1st, a rental agreement under the amending Act was executed, under which E. paid the rent for his areas for three years, the last pay-

ment being made in May, 1893. On May 22nd, 1894, the commissioner declared the lease forfeited for non-payment of rent for the following year, and issued a prospecting license to the defendant for the same areas. E. tendered the rent for the year to follow on June 9th, 1894, and this action was on the relation of E., to set aside the prospecting license granted to the defendant, as illegally and improvidently issued.

In the Supreme Court of Canada:—Held, affirming the decision of the Supreme Court of Nova Scotia, that the phrase "nearest recurring anniversary of the date of the lease" is equivalent to "next or next ensuing anniversary," and the lease being dated June 10th, no rent for 1894 was due on May 22nd of that year, at which date the lease was declared forfeited, and that E.'s tender on June 9th was in season.

Also, that though the amending Act provided for forfeiture of the lease without prior formalities, in case of non-payment of rent, such a provision did not apply to leases existing when the Act was passed, in cases where the holders executed agreements to pay rent in lieu of work. The forfeiture of E.'s lease was therefore void for want of the formalities required by the main Act, R.S. 5th Series, c. 7.

Attorney-General v. Temple, 29/279, 27 S.C.C. 355.

11. **Coal mining area—License to search—Section abolishing—Construction of.**]—By c. 7, R.S. 5th Series, s. 91, the holder of a license to search for minerals other than gold and silver is enabled at any time before the expiration thereof, to select from the lands covered an area of one mile square for the working of coal. By s. 95 "every license to work shall be for the term of two years from the date of application, and shall be extended for three years upon the additional payment of one half of the amount originally paid for such license."

By the Acts of 1889, c. 23, s. 5, passed 17th of April, 1889, the latter section was repealed and one substituted abolishing licenses to search and enabling applicants to obtain a license to work in the first instance.

On August 23rd, 1887, the defendants applied for and obtained a license to work an area over which they had previously held a license to search. On the 21st August, 1889, they applied for and obtained a renewal of the license to work for the further period of one year, on payment of the additional amount required by s. 95, and on the 20th August, 1890, they applied for and obtained a lease of the area.

On the 14th April, 1890, prior to the latter application, the relators made application to the commissioner for a lease of part of the lands in question, which was rejected on the ground that the area was covered by the defendants' lease:—

Held, that the effect of the repeal of s. 95 was to take away the power of the commissioner to receive the defendants' application for an extension of the license to work. The defendants' right was executory (on certain steps being taken, application and payment), and when these steps were taken, the statute which would have authorized the granting of the extension, had been repealed and was no longer available.

Per Townshend, J., dissenting, that under the original lease the defendants had obtained a vested right to an extension which was not necessarily taken away by the repealing Act.

On further appeal to the Privy Council:—

Held, that at the date of the application to renew, the power of the commissioner to grant a renewal was gone, and even if the amending Act were so construed as not to interfere with vested rights, the defendants possessed only a privilege and not an accrued right in reference to the matter of renewal.

Attorney-General v. Reynolds, 27/184, 1896, A.C. 240.

12. **License to search—When beginning to run.**]—The Mines Act of 1892, s. 91, authorized the commissioner to grant licenses to search, to be in force for 18 months from date of application therefor. Section 92 enacted that no applica-

tion should be valid without a payment of $30. By s. 98, when a license to search was applied for or granted, the commissioner might receive other applications, called "second rights," over the same tract. Section 99 was as follows: "On the expiration of the license to search, granted upon the first application, or, on the selection of an area for lease by the holder thereof, a license to search over such tract, or the remainder thereof, as the case may be, granted to the first of the applicants for license to search (called second rights). Upon the expiration of this license, or selection of an area by the holder, the second of such applicants may be granted a license over such tract, or the remainder thereof, as such applicants for areas in the tracts the case may be, and so on until all have been exhausted":—

Held, that a license granted in pursuance of such second rights, began to run from the date of expiry of the preceding right.

Re application of Caldwell, 28/240.

13. **Lease issued without warrant of law — Amendments to Act — Lease not void but voidable—Parties.**]—15th Oct., 1896, W. made application for a lease of certain gold areas, which the commissioner refused on the ground that they were already leased. By Acts of 1889, c. 23, s. 7, all leases of gold, etc., were required to contain the provisions respecting the payment of a rental, in lieu of working, contained in s. 6, but by s. 8, the Act was not to come into force until two months after its passage, April 17th, 1889.

On appeal by W. from the decision of the commissioner, it appeared that the lease referred to by the latter had been issued nearly a year after the passing of the above Act, that it was in the old form, not containing the provisions substituting payment of rental in lieu of working, that there was no evidence as to the date it was applied for, nor as to whether its provisions respecting working had been complied with. Further, the lessee was not before the Court.

By Acts of 1897, c. 4, s. 4, it was enacted that no lease then outstanding should be called into question except within a year from the date of issue, or except for non-payment of rent or royalty, or non-working, as the case might be. By c. 5, s. 1, of the same year, it was enacted that leases applied for within two months of 17th April, 1889, and which were issued under the provisions of c. 23, s. 7, without containing the provision as to payment of rent, were to be read as if containing such provision:—

Held, that the lease attacked, was valid and outstanding. Per Ritchie, J., and forfeitable only for non-working. And that it could not be set aside by the commissioner in any case without hearing the lessee.

Per Townshend, J., that it could only be called in question by the Crown.

In re Wier, 31/97.

14. **Rival applications for rights — 1892, c. 1, s. 103.**]—An application for a mining lease made by appellants November 10th, 1893, was refused by the commissioner of mines on the ground that, at the date of the application, the area applied for was covered by a license to search issued to W. It appeared that on July 16th, 1890, appellants applied for a license to search which would come into force May 13th, 1892, and expire November 13th, 1893. When the application was originally made it covered other areas, but subsequently, on the application of appellants, assented to by the deputy commissioner, and indorsed on the application, it was amended to cover the area in dispute.

The application subsequently made by W. contained no description except one incorporated by reference to the application made by appellants:—

Held, that if the application made by appellants was defective, that made by W. was equally so, and that the parties relying on it in attacking the application made by appellants, had no locus standi. And assuming the license applied for by W. to be invalid, it was competent for appellants, under the provisions of the Act of 1892, c. 1, s. 103, to apply for a

lease without a previous license to search. And that the application of appellants being a valid one, must be granted.

In re Greener, 33/406.

15. **Surface rights—Arbitration—Section 19—Appointment by warden—Definiteness of award.**]—Appeal from an order of Ritchie, J., at Chambers, granting certiorari to remove the proceedings of an arbitration as to damages to the owners of lands entered under a mining lease. The owner having failed to appoint an arbitrator, the warden of the municipality did so for him (s. 19):—

Held, that this was a judicial act which could only be performed on notice to the party to be affected, and that such notice had not been served, or left at the defendant's place of abode, in consequence of which, the award was invalid. Also, generally where a proceeding necessarily interferes with rights of private property, the utmost strictness of form and action must be observed. Also, that the award in this case was also bad because of indefiniteness as to the extent of land intended to be set off to the plaintiff.

Per Wetherbe, J., upholding the award, the statute itself is notice to the owner, who may be evading service, and it does not contemplate any further notice. Though the act of the warden may be judicial, yet, like many other judicial acts, it may be done ex parte.

Palgrave Mining Co. v. McDonald (or McMillan), 24/70.

On further appeal to the Privy Council:—

Held, that the act of the warden was not a judicial one, therefore special notice was not necessary, nor a condition precedent to the validity of the award.

Nor was such award indefinite where it gave the defendant a sum estimated as damages "for all works and occupations necessary to or acquired under, the mining lease."

Palgrave v. McMillan, 1892, A.C. 460.

16. **Rights of lessee and of surface owner—Injunction—Litigation pending.**]—On an application for an interim injunction by the lessee against the owner of the fee, to restrain him from interfering with operations connected with the opening of an old shaft and tunnelling, the lessee based his rights on, (1) An award by arbitrators of damages to the defendant as surface owner; (2) a lease from the Crown of "all and singular the beds and veins and seams of gold and silver, gold bearing and silver bearing quartz, and all other gold bearing and silver bearing rocks and minerals, and gold bearing and silver bearing earth, and all gold and silver whether in quartz, grain or otherwise, in, situate or being, within the limits of the said tract, and within, under or upon the same."

Meagher, J., having refused an injunction on defendant's undertaking to abstain ad interim, from the acts complained of, plaintiff appealed:—

Held, (1) that the Judge seeming to consider the award of the arbitrators invalid, a question at that time being litigated, was justified in refusing an injunction on that ground; (2) that the lease independently of the award did not give a right to open the shaft and tunnel, distinguishing the case of Hamilton v. Graham (L.R. 2 H.L. 168), where the question was the right of the mine owner to tunnel, where he was also the owner of the fee.

Palgrave Mining Co. v. McMillan, 25/56.

17. **Absolute transfer — Oral trust — Construction.**]—Plaintiff transferred his interest in an option to purchase mining areas to defendant. Attached to the transfer was a verbal understanding, the nature of which was disputed, but which was found to be (1) that defendant should re-imburse himself certain advances out of the proceeds when the areas were disposed of; (2) pay the balance to the M. Co., to which plaintiff was indebted, and in respect of which indebtedness he was then being sued, defendant being the M. Co.'s solicitor in the action.

Defendant, against plaintiff's protest, disposed of the rights to W., also made a defendant:—

Held, in the Supreme Court of Canada, revising to some extent the decree of the Supreme Court of Nova Scotia, that in any view the transfer to W. was legitimate.

As to the amount received therefor from W., it should be applied, (1) to re-imbursing defendant M.'s advances; (2) the balance to belong either to the M. Co. or to plaintiff. It being doubtful whether the M. Co. had not forfeited its rights by repudiating all connection with the transaction and refusing to advance money, it should be allowed a hearing before a special referee on thirty days notice, as to its right to participate.

Oland v. McNeil, 34/453, 32 S.C.C. 23.

18. **Coal mine—Cave in.**]—At common law a coal mining company is not liable for damage caused by subsidence of the surface occurring during its occupation, but the result of excavations made by a previous occupier. And the Act, 1892, c. 1, has made no change in this regard.

Town of Stellarton v. Acadia Coal Co., 31/261.

19. **Fixture.**]—An engine installed in a power house at a mine is a fixture which will pass as part of the realty under a mortgage filed under the Mines Act.

See FIXTURE, 2.

20. **Manager of gold mine—Scope of authority to bind principals**—He may bind principals in authorizing the purchase of material for the construction of a boarding house for men employed—The Court equally divided.

See PRINCIPAL AND AGENT, 13.

21. **Sale by order of the Court**—Mining properties—The right to conduct the sale ordinarily belongs to the plaintiff, but he may lose the right by laches.

See LAND, 11.

22. **Registration of transfers.**]—V. being the registered lessee of certain mining areas, transferred an interest therein to G., which transfer was not registered. Subsequently G. transferred an interest to plaintiff, but this transfer was not presented for registry until after the passing of the Act, 1885, c. 3, s. 1, when one D. was the regularly registered lessee of the areas by transfer from V. The commissioner refusing to register the plaintiff's transfer from G., plaintiff brought this action against him:—

Held, that since the passage of the above section, the commissioner might only register transfers from lessees standing as such on the books of the department; and G. not being a registered lessee, no title could be derived from him.

Fielding v. Church, 28/136.

23. **Prospecting license—Fraudulent transfer to avoid mortgage.**]—G. loaned K., one of the defendants, money on what amounted to a mortgage of privileges held under a prospecting license, entitling K. to a lease for twenty-one years. The document was registered.

K. allowed his privilege of leasing to expire, and connived with D., so that D. took up a lease in his own name, with money furnished by K., which lease was transferred to K.'s son.

In an action by G. against all parties for a declaration of rights:—Held, that the transfer was fraudulent and without consideration, and that G.'s mortgage followed the new rights.

Griffin v. Kent, 31/528.

24. **Fraudulent sales of mines**—Rescission—Misconduct of agents.

See FRAUD, 7, 8.

MINOR.

See INFANT.

MISDIRECTION.

See JURY, 7.

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION.

MISTAKE.

Contract.]—The mistake must be mutual to avoid a contract.

See SALES, 16.

Payment.]—Made under misapprehension of facts, etc.

See PAYMENT, 3.

MORTGAGE.

1. **Foreclosure—Pleading.**]—After default by non-appearance of the defendant, the plaintiff may, upon filing a statement of claim, forthwith obtain an order for foreclosure and sale, without waiting ten days for the defendant to answer.

Boardman v. Laidlaw, 22/220.

2. **Foreclosure—Interest.**]—The order should allow interest to date of sale by the sheriff.

Wallace v. Harrington, 34/1.

3. **Foreclosure—Joinder of action on covenant to pay.**]—In foreclosure, a claim for any deficiency resulting on sale, under the covenant to repay, may be included. Foreclosure is not an action for the recovery of land, within the meaning of O. 18, R. 2.

The order for foreclosure and sale may contain a clause allowing plaintiff to move for judgment for such deficiency, if any, and the Judge at Chambers may grant an order for judgment.

Thomson v. Pitts, 26/108.

4. **Foreclosure—Non-joinder of mortgagor—Action on covenant.**]—In an action to foreclose a mortgage the mortgagor, who had transferred the equity of redemption, was not joined as a defendant. On sale by the sheriff the mortgagee purchased at less than the amount due under the mortgage, and sold to a third person. Subsequently he brought this action on the covenant to repay contained in the mortgage, against the mortgagor, for the deficiency:—

Held, he could not recover without giving the mortgagor an opportunity to redeem, which he was not in a position to do.

Ryan v. Caldwell, 32/458.

5. **Substituted service—Action on covenant.**]—The mortgaged property on foreclosure and sale failing to pay the claim, plaintiff sought an order for judgment for the deficiency. The defendant being a seafaring man and absent:—Held, plaintiff might serve his notice of motion by filing with the prothonotary under O. 65, R. 4.

Reliance Savings & Loan Co. v. Curry, 34/565.

6. **Foreclosure — Joining defendant's wife.**]—The wife of the owner of the equity of redemption is not a proper person to be made a defendant in an action of foreclosure. The estate of the husband proceeded against is of an equitable nature, in which no right of dower exists. The "Married Woman's Property Act, 1884," makes no change in this regard.

Parker v. Willett, 22/83.

7. **Foreclosure — Purchaser at sale — Specific performance** decreed against defendant to whom property was knocked down on sale by the sheriff on foreclosure, and whose agent paid the deposit required, and signed a memorandum agreeing to be purchaser, notwithstanding the defence that an unincumbered title could not be conveyed.

The transferrence of title depends on statutory provisions (1890, c. 14, ss. 5, 6, 10), as otherwise, the defendant's title having been barred by the order for foreclosure, nothing remains to be transferred, and the advertisement and deed refer only to "all the estate, right, title, interest and equity of redemption of the defendant, at the time of giving of the mortgage," no other reference to title being made, nor any specific estate offered.

Power v. Foster, 34/479.

8. **Foreclosure — Purchase and ejectment by mortgagee—Rights of persons not joined—Charge.**]—J. T. devised cer-

tain lands to the firm of T. & Co. (in which McK. was sole partner), subject to a payment of an annuity for life to his three daughters, and appointed McK. executor of the will. In his lifetime J. T. had mortgaged the lands (1) to a building society, (2) to B., which mortgages were outstanding at the time of his death.

With the concurrence of the holders of the mortgage (1) B. foreclosed the mortgage, (2) and McK. became purchaser at the sale by the sheriff, and mortgaged the property (3) to the plaintiff.

This mortgage (3) having been foreclosed, the plaintiff purchased the property, and now sought to eject the executor and others claiming under the will of J.T. Plaintiff also held by assignment from the building society, the mortgage (1). The defence set up was that McK., being executor of the will of J.T., and trustee for the chargees thereunder, his purchase of the land on foreclosure of the mortgage (2), was subject to the trusts of the will.

Held, that such purchase by McK. was not void, but voidable, and that the chargees under the will, not having counterclaimed in their pleadings as to the annuity, the Court could not consider the question of reopening the foreclosure proceedings under which the plaintiff acquired the title of McK., the maker of the mortgage (3).

To the objection that the legatees under the will of J.T. had not been made parties to such foreclosure proceedings: Held, that the provisions of our procedure make the joinder of cestuis que trust unnecessary.

To the objection that J.M., who had become purchaser of the equity of redemption in a portion of the lands mortgaged, after the making of the mortgage (3):—Held, he not having asked to redeem, the legal title of the plaintiffs must prevail.

Held, also, that plaintiff having lent money to McK., who was at least a trustee with power to sell and mortgage, took a valid title, and were not bound to see to the application of the money lent.

Quaere, might the chargees under the will, and J.M., the holder of the equity of redemption of a portion of the land, successfully assert their claims by a different form of action? (Cf. Collins v. Cunningham, in the Supreme Court of Canada, post.)

Parker v. Thomas, 25/398.

See also CHARGE.

9. **Right of lessee of equity to redeem —And to require assignment of mortgage —Adding parties—Protecting lessee in order for sale.**]—Plaintiff began action to foreclose a mortgage made by O., of whom defendants were severally administrator and heirs at law. None of the defendants appeared and plaintiff on 31st July, 1888, obtained an ex parte order for sale with the usual condition for redemption by defendants at any time before sale.

On the 9th of August, McG., claiming to hold a subsequent mortgage on some of the property sought to be foreclosed, applied to be made a defendant and for leave to appear. He appeared but entered no defence. On August 16th an order was made at the instance of McG., and by consent of the other parties, that the Queen Hotel, one of the properties, should be sold first and separately, and the remaining properties afterwards, en bloc, and that the order for sale be amended accordingly, the sale to take place September 15th.

On the day set for the sale, S., who claimed as lessee of the Queen Hotel for a term of years unexpired, obtained an order that upon payment into Court of the sum of $30,000 due, all proceedings on the part of plaintiff should be stayed, and that he should assign to K., within 20 days, the mortgage sought to be foreclosed, and all benefit and advantage of the proceedings taken, and that upon compliance, plaintiffs should be entitled to receive the money out of Court.

On the 26th December, an order was made amending the above order by making S. a defendant, and K. a plaintiff in the suit, and also removing the stay of proceedings.

On 31st December, S. appeared and filed a defence, setting out that she had

taken the Queen Hotel for a term of years under lease from defendants, had made large outlay in repairs, and that to secure herself, after foreclosure proceedings had been begun, the plaintiff not having assented to her tenancy, she had procured K. to pay the amount due and to take an assignment of the mortgage with the understanding that he would assent to the lease, and that the sale of the Queen Hotel should be made subject thereto.

After notice of motion to defendants an order was made to this effect on 4th June, 1890, varying the order for sale of 31st July.

The defendants other than S. and McG. now appealed (1) from the order of 26th December, making K. a plaintiff and S. a defendant; (2) from the order of 4th January, 1890, directing that the Queen Hotel should be sold subject to S.'s lease:—Held, per Townshend, J. (Ritchie, J., concurring, Weatherbe, J., dubitante), that under O. 51 R. 11, the lessee of a property sought to be foreclosed might designate a person to receive an assignment of the mortgage, upon payment of the amount due, provided she had a right to redeem which right is unequivocal. That defendants could not object to the order adding a plaintiff being made ex parte, as they had not appeared and were not injuriously affected by the order. Appeal (1) dismissed with costs. Affirmed in Supreme Court of Canada.

Per Ritchie, J. (Weatherbe, J., concurring in the conclusion arrived at, Townshend, J., dissenting), that the appeal (2) should be allowed with costs and the order of 4th January, 1890, set aside and cancelled, because it purports to amend and authorize a sale under an order which was a conditional one, and the condition being met by payment of the amount due, the order was at an end, and because the order ex parte directs a sale subject to the lease which might prejudice the interests of incumbrancers prior to the lessee, and heirs of O., who had not executed the lease. That the default of these persons in pleading should not prevent them from doing so now, as since the time for pleading the complexion of the matter had materially altered.

Per Townshend, J., dissenting, that the order for sale was not defunct because the payment of the amount on which it was conditioned, was not made by the owners of the equity of redemption, to whom the order referred.

On appeal to the Supreme Court of Canada:—Held, that the appeal (2), should have also been dismissed, the Court having a right to endeavor to protect the rights of the lessee. That the rights of subsequent incumbrancers and creditors could not be considered as they were not before the Court, but that such rights were preserved and might still be asserted.

Collins v. Cunningham, 23/350, 21 S.C.C. 139.

10. **Foreclosure—Stay of proceedings.**]—Plaintiff having obtained an order for foreclosure, an agreement in writing was entered into for the settlement of the action, extending the time for payment and dividing the amount payable into two instalments. Defendant paid the first instalment, but failed to pay the second within the time agreed on when plaintiff proceeded to sell.

Shortly before the day fixed for the sale the defendant offered to pay the balance agreed on, but claimed the right to include as part thereof, a cheque signed by F. for an amount which F., under the agreement would be immediately entitled to receive from plaintiff. Plaintiff having declined the proposition, defendant applied for and obtained a stay of proceedings for 90 days:—Held, Henry, J., dissenting, that the granting of the stay was a matter within the Judge's discretion, which, in the circumstances, appeared to have been wisely exercised.

Ouchterloney v. Palgrave Gold Mining Co., 29/414.

11. **Foreclosure—Defence, fraudulent conveyance and lis pendens—Notice.**]—F. conveyed certain lands to P., who executed a mortgage to F. for $1,200. F. assigned this mortgage to plaintiff, taking in payment a promissory note for the amount of the consideration. Plaintiff paid the sum of $500 on the note at

the time it was given, and afterwards paid the balance to a person to whom F. had indorsed it, who thereupon delivered it up as satisfied.

Subsequently to the assignment of the mortgage to plaintiff, but prior to the payment of the balance due on the note, an action was commenced by creditors of F. to set aside several conveyances affecting the mortgaged lands, including the above-mentioned deed, mortgage and assignment. In that action all conveyances were set aside except the mortgage, which, it was decreed should remain as a valid and effectual lien on the property.

In an action to foreclose this mortgage, the defence was that any money not paid at the time the mortgage was assigned, was paid, if at all, while the action to set aside the mortgage was pending, of which plaintiff had notice, and that the plaintiff also knew that the indorsee of the note was not a bona fide holder for value. It was found by a Master of the Court that the payment by plaintiff on note was made, and that he was a bona fide holder for value.

Held, there was no ground for disturbing the report of the Master, and the assignment of the mortgage not having been set aside, the plaintiff was entitled to enforce his rights under it, and that the doctrine of lis pendens pleaded could not affect or control the liabilities of third parties more than the final adjudication of the action itself.

The assignment having been held valid there was only one way in which creditors could get at the money paid thereunder, that is by instituting an action to follow it, as fraudulently disposed of, under the Statute of Elizabeth.

McLean v. Chisholm, 27/492.

12. **Railway company—Pledging bonds for loan—First and second incumbrancers—Right of second to purchase at sale by first — Trusteeship for railway.**] — The plaintiff company, needing money for purposes of constructing its line, E. and W. agreed to advance a large sum for a commission. This sum they obtained by discounting their personal notes with defendant bank. Plaintiff company then entered into a written agreement with the bank whereby the bank was appointed its attorney irrevocable to receive mortgage bonds to the amount of $1,000,000 out of the hands of the issuing trustee, to be held as collateral security for the debt of E. and W. This agreement also contained a general power of substitution, and of sale "to the best advantage," upon default of payment. Default having been made, the bank proceeded against defendants E. and W., whereupon plaintiff company, by its general manager, at the instance of defendant W., wrote to the bank, asking further time, and proposing that the bonds should be turned over, under the power of substitution, to E. and W., to be sold by them. This being done, E. and W. adjusted their indebtedness to the bank by a part payment and a renewal note, and redelivered the bonds to the bank as collateral security. On a second default of payment the bank notified plaintiff company of their intention to sell the bonds to a syndicate in which a large interest was held by defendants, E. and W. Plaintiff company thereupon asked for an interlocutory injunction to restrain the sale, chiefly on the ground that E. and W., being in the relationship to plaintiff company of trustees for the sale of the bonds, could not become purchasers of the same, free of trusts. Argument coming on before Graham, E.J., was by him adjourned into Court, where the injunction was dissolved, and the sale permitted to take place. On trial of the action before Ritchie, J.:—Held, that judgment must be for defendants on the ground that he was bound by the action of the Court on the argument of the injunction. On appeal:—Held (and affirmed by the Supreme Court of Canada), that the relationship of the plaintiff company and the bank was that of mortgagor and mortgagee, and that E. and W. were in the position of second mortgagees, with a right to protect themselves by purchasing at the sale by the first mortgagee, and that they were not in the position of trustees for the company. Also

that were permission to purchase necessary, it would in the circumstances be given.

N.S. Central Ry. v. Halifax Banking Co. et al., 23/172, 21 S.C.C. 536.

13. **Default of interest on bonds.**]—Street railway company. Foreclosure of mortgage. Appointment of receiver.

See COMPANY, 37.

14. **Trespass—Conversion—Right of mortgagees to maintain—And of holder of the equity—Estoppel.**]—In an action of trespass to a hotel property and conversion by the removal of the bar counter, mirrors, fixtures, etc., the plaintiffs were B., the first mortgagee; H., the third mortgagee; R., the owner of the equity of redemption; and X., who had purchased the property at sheriff's sale on foreclosure of the first mortgage, and who subsequently acquired the third mortgage and the rights of R., the holder of the equity of redemption. The defendants were the second mortgagee, and several strangers, privy with him.

Before action brought, the first and second mortgages had been satisfied by the proceeds of the foreclosure and sale.

The defendants claimed the converted property under a bill of sale as personalty. It having been decided that they were attached to the freehold, the question was who could maintain action in regard thereto.

Held, that mortgagees out of possession could not maintain action for trespass after their rights as mortgagees were discharged, nor recover the value of the converted property.

Per Ritchie, J., that X., as assignee of the third mortgage, which was still outstanding, could maintain action for conversion, but not for the trespass, he having had no possession at the time.

Per Ritchie and Townshend, JJ., that R., the owner of the equity, could maintain action for the trespass, though before action brought he had deeded his interest to X.

Also, the defendants having set up that the plaintiff H., the third mortgagee, was estopped from asserting this action by the fact of having represented to the holder of the bill of sale, to whose rights defendants succeeded, that he regarded the fixtures as personalty subject to removal:—Held, that he was not so estopped, as there was no evidence that he authorized the communication of this to defendants.

Brown v. Brookfield, 24/476, 22 S.C.C. 398.

15. **Indemnity bond—Mortgage—Description covering lands after acquired—Foreclosure—Estoppel.**]—C.D.A., in 1853, retired from partnership with B.A. and T.D.A., and agreed to allow certain property to which he held title subject to a mortgage, to remain in the use and occupation of his former partners, they undertaking to satisfy the mortgage. This they failed to do, and the property being put up for sale under foreclosure, B.A. and T.D.A. purchased and remortgaged the same to X.

They then reconveyed the equity to C.D.A., and gave him a bond of indemnity, undertaking to pay off the mortgage to X. C.D.A. subsequently conveyed his equity to C.W.A., who conveyed it to B. B.A. and T.D.A. effected a compromise with B., by which, for the sum of $8,000, B. released and surrendered the bond of indemnity given to C.D.A.

Thereafter B. conveyed the equity of redemption to the defendant.

X., having required payment of the mortgage from B.A. and T.D.A., under the collateral bond given therewith, they made an arrangement with the plaintiff's testator, by which he took over the mortgage, by assignment from X., in trust for B.A. and T.D.A.

Plaintiff having brought foreclosure proceedings in trust for B.A. and T.D.A., the defendant set up that certain properties of B.A. and T.D.A., acquired after their making of the mortgage, were attached by the following words in the description therein, and were liable to the payment of the amount due thereon. "Also, all and singular the water lots and docks in front of said lots (i.e., the mortgaged lots), and also all the right and title of the said B.A. and T.D.A., therein and thereto, with the wharves, stores and erections thereon."

The Court was of opinion that the property afterwards acquired by B.A. and T.D.A. was meant to be included in the mortgage, but that the plea could only be raised against them as an estoppel, which was open to the original mortgagee and his assignees, but not to the defendant, who did not derive his title from the mortgage, nor pretend that he took anything by virtue of the words quoted. Also that the plaintiff was entitled to an order for foreclosure, and that B.A. and T.D.A. were warranted in taking the only course open to them to avoid paying the mortgage debt twice.

In the Supreme Court of Canada:—Held, that the liability of B.A. and T. D.A. was fully discharged by the compromise, and as they were afterwards compelled to pay the outstanding encumbrance, they were justified in acquiring and enforcing the mortgage, and that even if the evidence (which was admissible to show what was meant to be included), showed that the after-acquired property was included in the mortgage, it was not liable to contribute to its payment.

Breffit v. Campbell, 24/389.

Imrie v. Archibald, 25 S.C.C. 368.

16. **Action for interest—Transfer of equity—Right of mortgagor to indemnity by transferee—Adding parties.**]—F. entered into a written agreement with B. and two others, X. and Y., by which he undertook, for a consideration paid, to convey to B. certain lands and privileges subject to the mortgages and incumbrances thereon (one of which was a mortgage made by F. to plaintiff), to be sold by B., and the proceeds applied, first, to the discharge of the incumbrances, and as to any balance, one-half to F., and one-half in equal shares to B., X. and Y.

F. made an absolute conveyance to B., who sold the lands, etc., to the Halifax Land Co. for $25,000 in money and $15,000 in stock, and accounted to F. to his satisfaction for his share under the agreement.

Plaintiff thereafter brought action against F. for interest on his mortgage, and F., under third party procedure, claimed indemnity against B., X. and Y., and caused them to be added as defendants. Their contention was that B. had parted with the equity of redemption to the Halifax Land Co., which alone was bound to indemnify F.

Held, however, that as the arrangement made contemplated the discharge by B. of encumbrances, of which plaintiff's mortgage was one, before division of the proceeds of a sale, he was liable to indemnify F. Also, dubitante, and depriving them of costs, that this did not extend to X. and Y.

But, in the Supreme Court of Canada: Held, that as it appeared that the transfer by F. to B was not for his own benefit, but on behalf of a company to be formed, and to which he had transferred the lands, that company, not B., was liable to indemnify F. Taschereau and King, JJ., dissenting.

Coombs v. Fairbanks, 25/525.

Fraser v. Fairbanks, 23 S.C.C. 79.

17. **Deed declared a mortgage—Term "within one year"—Interest.**]—Plaintiff deeded lands to defendant's testator and at the same time entered into an agreement in writing for the redemption thereof, defendant's testator agreeing to re-convey on payment of a sum of money with interest "from the above date hereof, within one year."

Plaintiff having paid a part, desired within the year to pay the balance with interest to date, which defendant declined, setting up an oral agreement by which he was to be entitled to demand one year's interest on the whole sum for disturbing his investment.

Held, that such an agreement must be in writing under the Statute of Frauds. That the deed and agreement in writing were entitled to be declared a mortgage, and that the use of the term "within one year" entitled plaintiff to pay the sum agreed on at any time within the first year with interest to such time only, a construction strengthened by the use further on in the agreement of the term "in one year" in fixing the limit for payment.

Angevine v. Smith, 26/44.

18. **Mortgage or conditional sale.**]—In ejectment, the plaintiff's right depended upon the title of A., who, on entering into possession of the lands, had procured them to be conveyed to Z. Both A. and Z. were dead, and it became necessary to decide whether a mortgage or a conditional sale was intended. There was evidence of a debt outstanding between Z. and A., also of payment of interest, also of a sale by A. of a portion of the lands with the knowledge of the heirs of Z.:—Held, that "where it is doubtful on the evidence whether the parties intend a mortgage or a conditional sale, the Courts as a general rule treat the transactions as a mortgage, that being the more just and equitable construction, and one which tends to prevent oppression."

Robinson v. Chisholm, 27/74, 24 S.C.C. 704.

19. **Rectification.**] — Mistake in description by which an undivided interest was omitted. The interest bound by an after recorded judgment, which takes priority of the mortgage and of the right to rectification.

See REGISTRATION, 2.

20. **Trustee—Mortgage registered** in his name individually. The rights of the cestui que trust, to whom the mortgage really belongs, are senior to those of the judgment creditors of the trustee.

See REGISTRATION, 3.

21. **Statute of Limitations—No payment in 20 years—Insurance premium.**] To an action to foreclose a mortgage, the defence was the Statute of Limitations (R.S. 5th Series, c. 107, s. 21), no payment on account of principal or interest having been made within 20 years. Plaintiff contended that as his agent, a solicitor, had during that period advanced or paid an insurance premium due on the mortgaged premises, which was afterwards repaid by the mortgagor, a payment had been made on account of the principal sufficient to take action out of the statute.

Held, that as the mortgage provided that the mortgagee might "as required effect, renew and continue such insurance, and charge all payments made for or in respect thereof, with interest . . upon the said mortgaged premises," defendant had made a sufficient payment on account of principal to take the case out of the operation of the statute.

Per Ritchie, J., dissenting, inasmuch as the mortgage did not in terms make payments on account of insurance chargeable and collectible as principal, the onus was on plaintiff to show that the payment by the agent (since deceased), was made on his behalf, and was intended to be so charged, of which there was no evidence, an entry in the office books of the agent, debiting the mortgagor with the amount of the premium paid, being quite consistent with the idea that he had advanced the same personally on the credit of the mortgagor.

Also the limitation of section 21 applies as well to an action on the covenant of the mortgage to repay, as to an action against the mortgaged land.

Cogswell v. Grant, 34/340.

22. **Building society mortgage — Repayment by instalments—By-laws.**] — Defendant subscribed for 20 shares of stock in plaintiff association, and obtained an advance, on mortgage of real estate, to the amount of $2,000, to be repaid in monthly instalments extending over a term of years, according to the by-laws and rules of the association. The mortgage was to become void on payment of all instalments, subscriptions, dues, etc., but contained no provision making the whole debt due on failure as to single payments. By a by-law of the company, however, such was provided for.

In an action for foreclosure:—Held, setting aside the report of a Master which fixed the amount due at the sum of the instalments, etc., to date of sale, that plaintiff was entitled to an order for the whole amount unpaid.

Dominion Building & Loan Association v. Gordon, 26/551.

23. **Loan company—Special plan of lending money—Rate of interest.**]—Defendant having applied for and obtained certain shares in plaintiff company, applied for and obtained a loan of $600.

The shares were allotted and the loan granted on certain conditions which included the payment of a membership fee and certain monthly dues, and the execution, as collateral security, of a mortgage, which was to continue until the maturity of the shares, or until repayment of the loan was made.

Under the by-laws of the company the rate of interest on loans was declared to be six per cent., but under the provisions of the mortgage executed by defendant, in case of delays in payment of dues and instalments, the rate of interest was in effect about fifteen per cent.

Held, the defendant having made default in payment, the company was entitled to enforce the rate of interest fixed by the terms of the mortgage. That the contract of membership in the company was distinct from the mortgage, and its nature was not to be considered in the foreclosure suit, and if defendant's shares were wrongly forfeited, her recourse was by separate action.

Canadian Mutual Loan, etc., Co. v. Burns, 34/303.

24. **Railway company foreclosure—Cumulative provision relating to power of sale—Not to affect right of foreclosure—Principal, when due.**]—Appeal from an order of foreclosure and sale granted by McDonald, C.J., against the defendant company at the suit of the trustees for bondholders, default having been made in payment of interest on the bonds. The defendant company relied on the following clause in the mortgage as limiting the right of the plaintiffs to begin foreclosure until after notice. "And further the said N. S. C. Railway hereby covenants and agrees that in case it shall for the space of six months after demand made therefor, make default in the payment of the semi-annual interest, due or to become due upon any or either of the said 1,000 bonds, then, after the lapse of six months, the whole principal sum mentioned, in each and all of said 1,000 bonds, shall forthwith be and become due and payable, and the lien or encumbrance hereby created for the security and payment thereof, may at once be enforced, anything in the said bonds or in this indenture to the contrary notwithstanding."—Held, that this related to the cumulative and additional right of sale without foreclosure, conferred on the plaintiffs by the mortgage and was not designed to limit their ordinary right to foreclosure immediately upon breach of the covenant to pay interest, which would enable the company to be always six months in arrears with its interest, a possibility certainly not intended.

Also, upon default of payment of interest, the right of foreclosure accrues, and the principal sum is due, though the time set for payment of principal has not yet arrived.

Farmer's Loan and Trust Co. v. N. S. Central Ry., 24/542.

25. **Mortgage by license of Probate Court—Whether entitled to rank as a debtor of testator.**]—R. died in 1874, largely indebted to a number of persons and by his last will devised his real estate to his wife for life, with remainder to his son and daughters. The executors obtained leave of the Probate Court to mortgage this real estate, and with the sum thereby realized, paid the debts. The mortgage coming to be foreclosed, the real estate having fallen in value, upon sale, failed to realize the amount due.

Afterwards, on the death of the widow, the estate came up for final settlement in the Probate Court, and the mortgagees having presented their account, were admitted to share in the settlement, as creditors of the testator. On appeal:—

Held, per Graham, E.J. (Weatherbe, J., concurring, McDonald, C.J., dubitante), allowing appeal, that the Court of Probate had no power under its act of constitution to sustain or adjudicate on the claim, not being a debt contracted before the death of the testator.

Per Ritchie, J. (considering that the question of jurisdiction had not been raised), that the amount realized from the mortgage having been applied to the payment of the creditors of the testator, the mortgagees were entitled to take the place of those creditors, unless the outcome should be to impose an addi-

tional burden on the estate, which being the case here, the appeal should be allowed.

Re Estate Richardson, 22/416.

26. **The mortgagees** having brought action in the Supreme Court, against the surviving executor for the amount of the deficiency:—Held, on trial per Townshend, J., that the making of a mortgage is an implied promise to pay, whether there is a covenant to that effect or not, and that inasmuch as the money loaned was applied to the payment of the creditors of the testator, the plaintiffs were entitled to be subrogated to the rights of those creditors. That as the Court had decided that the Court of Probate had no jurisdiction to entertain the claim, the plaintiffs were now seeking their proper remedy. On appeal:—

Held, per Weatherbe, J. (McDonald, C. J., concurring in dismissing appeal), that the principle of subrogation or an analogous one, does not apply to the matter of a mortgage by leave of the Probate Court for the purpose of paying debts unless authority therefor can be drawn from the Probate Act. But that section 35 provided that such a mortgage should have "the same effect as if made by the deceased," which made the amount due the plaintiffs a debt of the deceased in express terms.

Per Graham, E.J., Meagher, J., concurring, that the mortgage, though containing a covenant to repay, could not bind assets of the estate not mentioned in the mortgage and not covered by the license. And further that the executors had no right to make such a covenant. That section 35 of the Act only referred to the passing of the title, which not being in the executors, they could give none unless by virtue of a special provision.

Boardman v. Dennaford, 23/529.

27. **Prospecting license — Fraudulent transfer to avoid mortgage.**]—G. loaned K., one of the defendants, money on what amounted to a mortgage of privileges held under a prospecting license, entitling K. to a lease for 21 years. The document was registered.

K. allowed his privilege of leasing to expire, and connived with D., so that D. took up a lease in his own name, with money furnished by K., which lease was transferred to K.'s son.

In an action by G. against all parties for a declaration of rights:—Held, that the transfer was fraudulent, and without consideration, and that G.'s mortgage followed the new rights.

Griffin v. Kent, 31/528.

28. **Whether released — Question of agency—Fraud of agent.**]—Defendant arranged to purchase a property through M., who was solicitor and agent for the owner, and paid him $1,600, part of which was intended to be applied to the discharge of a mortgage for $1,000 held by F. F. executed a release of the mortgage and delivered it to her niece, E.C., who delivered it to M. M. then absconded from the Province, and the release was finally returned into the hands of F. On her application to foreclose the mortgage as against the defendant:—

Held, on the findings of fact, (1) that F. never employed or trusted M. in any capacity, and was not aware that he held the release, (2) that she had expressly forbidden E.C. to part with the release except on receipt of the money, (3) that M. did not assume or pretend to act as her agent, (4) that E.C. had no general authority as agent of F.; that the mortgage was valid and outstanding, and that F. was not debarred, by estoppel or otherwise, from obtaining an order for foreclosure.

Ross v. Sutherland, 32/243.

29. **Payment—Estoppel — Inconsistent finding.**]—In an action for the foreclosure of a mortgage, one of the chief grounds of defence was that the amount claimed had been placed by defendant in the hands of M., a solicitor, to be paid over to plaintiff, and plaintiff, after notice of such payment, had induced defendant to believe that he accepted such payment as a payment to himself, and that plaintiff, by failing to press for payment, had prevented defendant from recovering the amount from M., who had become insolvent. The jury found

in answer to questions:—(2), that plaintiff, by his conduct after the payment to M., had left defendant to reasonably believe that he regarded the payment as if made to himself; (5), but that the position of defendant in consequence of such belief, was not changed for the worse. The trial Judge, notwithstanding this last finding, entered judgment for defendant.

Held, the finding could not be supported. That the evidence was insufficient to complete an estoppel. That to show detriment to defendant, it would be necessary to prove that, but for the plaintiff's acknowledgment, defendant would have taken steps against M. likely to have resulted in recovery of the money.

Cameron v. McDonald, 33/469.

MOTIONS.

See PRACTICE, 26.

MUNICIPAL ELECTION.

See ELECTION, 7.

MUNICIPALITY.

1. **Liability for acts of commissioners of streets—Negligence.**]—The plaintiff was injured at night, by falling over a pile of street sweepings alleged to have been negligently left in the gutter of a street of the unincorporated Town of Yarmouth, by the defendant municipality. Chapter 50 R.S. 5th Series incorporates districts to be under the control of commissioners of streets, to be appointed by the municipal councils of the several counties, and further provides that such councils may remodel and make new districts. The Town of Yarmouth was within one of these new districts.

In an action for damages, judgment was for defendant, and on an application for a new trial:—Held, per Weatherbe and Ritchie, JJ., that the control of the municipal council over the acts of the commissioners of streets and the responsibility of the latter to the council were of too limited a character to sustain the idea of master and servant. That under c. 50, R.S., such commissioners had an independent corporate existence and responsibility.

Per Townshend and Meagher, JJ., comparing c. 50, "Commissioners of Streets," and c. 56, "County Corporations," and testing the question of the relationship existing between the municipality and the commissioners by the duty of the former to appoint, to provide with means, to control in the discharge of their duties, and to dismiss commissioners of streets, that they were the servants of the municipality, which was therefore liable for their negligence.

Gilbert v. Municipality of Yarmouth, 23/93.

2. **Negligence—Non-repair of bridge—Municipal liability—Effect of Bridge Act—Bridge over great road.**]—Plaintiff was injured by driving into a hole in the approach to a bridge known as the River John Bridge in the County of Pictou. The evidence showed that the hole was an old one, caused by water and consequently increasing in size, and that the injury was of such a character as to wholly and permanently incapacitate plaintiff from earning a living. The principal defences were that the bridge, being upon a "great road," was a matter of Provincial, not municipal, concern, and that, further, as the municipal council had some years before passed a resolution placing the bridge under the "Bridge Act," 1883, c. 20, and as the same had been accepted by the Provincial Government, responsibility for its condition had ceased. This resolution was passed in 1885. In 1889 the Provincial Engineer made a report upon which the Province accepted the bridge for reconstruction under the Act, and authorized the Department of Public Works to enter into a contract for the work, but nothing further had been done at the date of the injury complained of. The learned Judge having found a verdict for plaintiff, and assessed damages, the municipality appealed:—Held, that the fact that the bridge was upon a so-called great road of the Province, enumerated with others in R.S. 5th Series,

c. 44, did not take it from under the municipal control (on authority of McQuarrie v. St. Mary's, 5 R. v. G. 493). Also, that the purpose of the Bridges Act was to provide a means of spending an extraordinary Provincial grant upon certain bridges under Provincial direction, to ascertain what bridges it should apply to, etc., etc., but contained no provision changing the liability of a municipality for accidents on its bridges through want of repairs. Had the accident been due to the negligence of Provincial servants or contractors during the reconstruction contemplated under the Act, it might be held that the municipality should not be held liable for persons over whom they had no control, but not where work had not been commenced. Appeal dismissed, Weatherbe, J., dissenting.

But on further appeal to the Privy Council, the respondent not appearing: —Held, that by the common law, public bodies charged with the maintenance of public roads and bridges, though liable to indictment, are not liable to private persons for mere non-feasance. Similarly, that a municipal corporation to which such an obligation has been transferred by statute, is not liable for non-feasance unless the intention of the Legislature to create such liability should clearly appear.

(Note.—Followed in Thomas v. Town of Annapolis, see NEGLIGENCE, 21.)

Geldert v. Municipality of Pictou, 23/483, 1893, A.C. 524.

3. **Board of Health—Employing physician—Municipality liable.**]—Plaintiff was employed by resolution of the municipal council as attending physician during an epidemic of smallpox, to be remunerated at the rate of $6.50 per day. The council afterwards employed another physician as consultant, and the plaintiff refusing to consult with him, was dismissed:—

Held, that under R.S. 4th Series, c. 29, s. 12, and Acts of 1874, c. 6, s. 1, the municipality was liable to plaintiff ex contractu at the rate of $6.50 per day for each day during which the epidemic continued, but not in damages for wrongful dismissal. The employment of a physician falls within the meaning of the words of the above statutes, "reasonable expenses to be incurred," and the word "municipality" must be substituted for "district."

Affirmed in the Supreme Court of Canada, Ritchie, C.J., and Strong, J., dissenting on the ground that the plaintiff's claim being in effect one for wrongful dismissal, such a liability does not fall within the meaning of the words "reasonable expenses."

McKay v Municipality of Cape Breton, 21/492, 18 S.C.C. 639.

4. **Liquor License Act**—Costs of enforcing, a municipal charge.

See LIQUOR LICENSE ACT, 27.

5. **Jurisdiction of magistrate—Police district—Judicial notice.**]—An applicant by habeas corpus had been committed by the Stipendiary Magistrate for the Municipality of Pictou, for an offence described as having been committed at "Hopewell, in the County of Pictou."

By Acts of 1895, c. 89, s. 1, the Municipality of the County of Pictou is made a police division. By Acts of 1895, c. 3, ss. 1, 2, the municipality is defined to be the County of Pictou, except such portions of it as are comprised within the limits of incorporated towns. The question being whether Hopewell might not be one of these, so that the warrant would not show jurisdiction on its face, as being within the limits presided over by the municipal stipendiary.

Held, the Court will judicially recognize limits and bounds of towns, districts, etc., so far as they may be laid down in public statutes, and it appearing from the Act last referred to that Hopewell is described as a municipal polling section, and that a municipal polling section is part of the municipality, jurisdiction was sufficiently shown.

Queen v. W. McDonald, 29/160.

Ex parte James W. Macdonald, 27 S.C.C. 683.

NAME.

1. **Arrest by wrong name.**]—Plaintiff H. O., was arrested on a capias issued

by a magistrate at the instance of defendant, describing him as C. O. The proceedings being dismissed by the magistrate for this reason, he brought action for malicious arrest. The defendant had rendered him a bill for the goods sued for, as C. O., and plaintiff while objecting to some items thereof, had not called plaintiff's attention to the matter of the name:—Held, the defendant was warranted in supposing plaintiff's name to be C. O., and the latter had only his own conduct to blame for the result.

Orwitz v. McKay, 31/243.

2. **Wrongly stated in execution.**]—The name of the defendant in an execution as "Donald A.," whereas his proper name was "Daniel A." The jury found that he was well known by both names:—Held, that this met the objection.

Adams v. Crowe, 26/510, 21 S.C.C. 342.

NE EXEAT REGNO.

See CAPIAS.

NEGLIGENCE.

See also DAMAGES, NUISANCE.

CARRIERS, VEHICLES.
Electric Car, Elevator, Reckless Driving, Sleeping Car, etc., 1.

DANGEROUS ELEMENTS.
Dynamite, Overflow, Escaping Steam, 9.

DANGEROUS OPERATIONS.
"*Flying Shunt*," "*Spark Arrester*," 12.

DEFECTIVE SYSTEM, MASTER AND SERVANT.
Machinery, Management of Mine, Snow Plow, etc., 14.

NEGLIGENT, MAINTENANCE.
Streets, Excavations, Obstructions, Lighting, 20; *Wharf-Construction, Lighting, Volunteers*, 29; *Coal Mine, Cave in*, 31.

MISCELLANEOUS, 32.

1. **Drowning from steamer—Insecure gangway.**]—Plaintiff's daughter fell overboard from defendant's steam ferry and was drowned in consequence of a gangway against which she leaned being left unfastened. The defence was contributory negligence, also that plaintiff suffered no pecuniary loss. It was shown that there was a cabin provided for passengers, also that at the time, a heavy sea was running and the vessel was very unsteady. The trial judge (without a jury), having found a verdict for plaintiff, with $300 damages, the defendant's appeal therefrom was dismissed with costs.

McAdam v. Ross, 22/265.

2. **Steam ferry—Injury to passenger in landing.**]—The defendant town owned and operated a steam ferry plying between that town and Halifax. The plaintiff returning home by the boat after dark, in attempting to land fell off the end of the boat into the water at a point where the boat was not hauled close into the landing float, and was severely injured. Plaintiff was near sighted and mistook the gap between the end of the boat and the landing float for a difference in level similar to that which she had observed at the opposite terminus. There was a bar to prevent passengers from landing until the boat was secured. This had been removed and other passengers had landed before the plaintiff attempted to do so.

On trial without a jury, Weatherbe, J., found that there was negligence on the part of the defendant town, also as plaintiff was short sighted and was going about after dark unaccompanied, and as she had not made any enquiries prior to attempting to land as to the safety of the place, and had not tested the spot with her foot or a stick usually employed by such persons, there was contributory negligence on her part, on which he entered a verdict for the defendant town, but fixed $600 as the amount plaintiff should be entitled to recover, if at all.

On appeal:—Held, reversing the finding of the trial judge as to contributory negligence, and entering judgment for

plaintiff for the amount of damages fixed, that where contributory negligence is relied on to defeat the right of a plaintiff, he must have been guilty of at least ordinary negligence, or have failed to use ordinary care. Mere failure to take unusual care is not enough. Also plaintiff had used a proper amount of care considering her short sightedness, in waiting until other passengers had landed, whereupon she was warranted in concluding that the way was safe.

Drake v. Town of Dartmouth, 25/177.

3. **Electric railway collision—Rate of speed—Injury to vehicle—Contributory negligence.**]—A cab belonging to plaintiff, and driven by his servant, was injured by being run into by an electric street car proceeding rapidly on a down grade, and plaintiff brought action for damages. The jury found that the car was proceeding at too high a rate of speed, that the motorman in charge had endeavored to avert the accident by applying brakes and reversing the current, that there was contributory negligence, but that the accident might have been avoided by a greater degree of care on the part of the motorman.

Held (also in the Supreme Court of Canada), that the last finding neutralized the finding of contributory negligence, and entitled plaintiff to recover.

Inglis v. Halifax Electric Tram Co., 32/117, 30 S.C.C. 256.

4. **Sleeping car—Injury to passenger—Speed—Curves.**]—Plaintiff was a sleeping car passenger by defendant company's night train between Montreal and Toronto. After retiring to her berth—an upper one—she endeavored to make some change in the way in which the berth was made up. She next tried to change her position end for end in the berth, but while doing so there was a violent lurch, and plaintiff was thrown from the berth to the floor, sustaining serious injuries. Plaintiff was elderly, and wholly unaccustomed to travelling.

The trial judge having withdrawn the case from the jury, on the ground that there was no evidence of negligence on the part of the defendant company:—

Held, ordering a new trial, that defendant's duty of carrying safely involved a proper regulation of speed in going around curves, etc., evidence of which should have gone to the jury.

In the Supreme Court of Canada:—

Held, allowing appeal, that the trial judge was right in withdrawing the case. That neither the existence of curves, nor the maintaining of a high rate of speed necessarily indicate negligence, and the car appearing to have been constructed with due regard to the safety and comfort of passengers, the accident must be attributed to plaintiff's own inexperience and negligence.

Smith v. Canadian Pacific Railway Co., 34/22, 31 S.C.C. 369.

5. **Elevator — Injury to passenger — Trespasser or "Loiterer"—Usage.**]—H. entered an elevator in an office building after inquiring of the boy in charge whether a certain tenant was in his office, and being told that he was not. He remained in the elevator while it made several trips in response to calls, and had been in it ten minutes or more when a call came from the fifth floor. The elevator went up and another passenger entered. The boy in charge simultaneously shoved the door to close it, and turned the wheel to move the elevator in its descent. At that moment H., without warning, or signifying his intention of doing so, attempted to alight on the fifth floor, and was caught between it and the top of the elevator, sustaining injuries of which he died. In an action by his administrator against the owner of the building:—

Held, in accordance with answers returned by the jury, Weatherbe, J., dissenting, that the accident was due solely to the negligence of the deceased.

Affirmed in the Supreme Court of Canada. Also, the question as to whether or not the deceased was a mere trespasser, or "loiterer," as found by the jury, was unimportant, inasmuch as the deceased being in the cage with the assent of the operator, there was a duty on the latter's part to be as careful in regard to him as any other passenger. Also, convenience has established a rule in

regard to the mode of ingress and egress from elevators, just as it has in reference to the passing of teams on the highway. One who violates either, cannot complain of consequences.

Hawley v. Wright, 34/365, 32 S.C.C. 40.

6. **Rule of the road—Injury to waggon—Proximate cause.**]—A line of teams was drawn up, awaiting the ferry boat, on a street in the town of Dartmouth running straight from the ferry landing. The plaintiff with his team arrived and took up his position at the end of this line. The defendant with his team was already waiting on a cross street, and on the arrival of the boat, insisted on crowding the plaintiff out and taking his place. The plaintiff insisted on resuming his position and in the struggle which ensued the plaintiff's team being the lighter of the two was overturned and injured.

In an action for damages:—Held (whether or not there was a rule of law or custom, regulating the approach of waggons to the ferry, in Dartmouth), that the plaintiff had a right to his original position of which the defendant had deprived him, also a right to recover it, also that his action in doing so was not such contributory negligence as should disentitle him to recover, also that the series of happenings related back to defendant's original misconduct in taking plaintiff's place, so that it was the proximate cause of the damage. Weatherbe, J., dissented.

Bundy v. Carter, 21/296.

7. **Reckless driving—Injury of children—Negligence of parents.**]—The plaintiffs, two children aged respectively ten and two years, sued by their next friends for injuries received by being run over by a team of the defendant's driven by his employee rapidly down hill on the road from Dartmouth to Eastern Passage. The horse was a spirited one, which would resist being checked, and was hard in the mouth and difficult to control. The driver saw the children playing in the road some distance ahead, but made no effort to slacken his speed until too late to do so, supposing that there was space to pass between the children:—

Held, per Townsend, J., finding for plaintiffs and awarding $100 damages each, that the doctrine of contributory negligence does not apply to a child of tender years. To disentitle him to recover, the injury must be due solely to his own negligence. Also that the negligence of the parents, if any, in allowing the children to play in the road should not prejudice their right to recover.

On appeal:—Held, that the negligence of the driver was so extreme as to render it unnecessary to consider the question of contributory negligence either of parent or child.

Turner v. Isnor, 25/428.

Brett v. Isnor, 25/430.

8. **Injury to children.**]—Loss of services—Insufficiently set out in pleading.

See PLEADING, 63.

9. **Explosion of dynamite—Negligence of fellow servant.**]—Plaintiff, who was employed as a blacksmith in connection with the defendant company's business of gold mining, was seriously injured by the explosion of dynamite kept in the shaft house of the mine near the blacksmith shop. The proximate cause of the explosion was the negligent handling of the dynamite by a fellow employee, and there was a question as to whether the same was kept in a proper place:—

Held, that as the employee took all ordinary risks of his master's business including the negligence of fellow employees, and as there was no evidence of negligence on the part of the defendant company, or of knowledge of negligent or improper practices on the part of employees, the plaintiff could not recover.

McInnes v. Malaga Mining Co., 25/345.

10. **Overflow—Injury to land—Measure of damages.**]—In an action for damages for injury to land caused by the overflow of water through the negligence of defendant:—Held, that the proper measure of damages is the reduction in selling value caused by the injury, without considering loss of profits, or the amount it would take to restore the land

to its former condition, or damage to growing crops, based on the assumption that they would have matured.

Lacy v. Town of Dartmouth, 30/208.

11. **Nuisance from steam or vapor.**]—The defendant operated a steam engine in connection with an electric system, on premises adjoining those used by plaintiff as a warehouse for the storage of hardware very liable to deterioration by rust. The condenser of the engine discharged hot water into the cold water of Halifax harbor at a point on defendant's premises 20 feet distant from this warehouse, which was built for a distance of 30 feet over the harbor. The plaintiff's stock was injured by steam or vapor arising through the floor, the result of the operations of defendant's condenser. The evidence went to show that the damage could have been avoided by defendant's lengthening the pipe of the condenser 20 feet. The trial judge having found for plaintiff, on appeal the Court was equally divided:—Held, per Townshend, J. (McDonald, C.J., concurring), the plaintiff was entitled to recover, as defendant was not conducting his business with due regard to the welfare of his neighbors, as shown by his not lengthening the pipe after notice, and that the trial Judge had found no contributory negligence. (Affirmed by Supreme Court of Canada).

Per Weatherbe, J. (Graham, E.J., concurring.) The defendant was not liable, because the result could not have been foreseen; because the evidence did not show that by extending the pipe greater damage might not have been occasioned to some one else; and because the plaintiff was guilty of contributory negligence in not having the floor of his warehouse properly constructed to prevent the ingress of vapor from the harbor.

Fuller v. Pearson, 23/263.

Chandler v. Fuller, 21 S.C.C. 337.

12. **Accident caused "by flying shunt."**]—Action by the widow and sole administratrix of J.M., under R.S. c. 116 (Lord Campbell's Act), against the W. and A. Railway for the killing of J. M. while attempting to cross the defendant's tracks by a public thoroughfare in the Village of Lawrencetown. The accident took place during what is known as a "flying shunt," that is, breaking a train into three sections and using the brakes, so that the middle section might be side-tracked, and the first and third rejoined on the main track. J. M. was run over and killed in attempting to cross between the first and second sections. The deceased was old and partly deaf and had poor sight. The jury having found a verdict for plaintiff for $1,000, on appeal:—Held, that the "flying shunt" being admittedly a dangerous operation, particularly where the track crossed a public thoroughfare, the defendant company was guilty of absolute negligence, or at all events the question was one for the jury. Also the deceased's contributary negligence, if any, in attempting to cross between the sections before the smoke had cleared away, was not such as to disentitle plaintiff to recover, if the exercise of reasonable care on the part of defendant company would have averted the accident.

McLeod v. Windsor & Annapolis Ry., 23/69.

13. **Steam engine—Absence of spark arrester.**]—The absence of a spark arrester or contrivance for catching sparks in operating a steam engine in connection with pressing hay, is not negligence in law, but is a question for the jury.

Peers v. Elliott, 23/276, 21 S.C.C. 19.

14. **Machinery — Dangerous employment.**]—Action under Lord Campbell's Act, by the father of an employee of the defendant company, who had been killed by machinery which he was tending on a night shift. The learned Judge on trial withdrew the case from the jury, on the ground that there was no evidence of negligence to be considered.

On appeal:—Held, Graham, E.J., dissenting, ordering a new trial, that inasmuch as there was evidence that defendant company had set the deceased at work at a machine for washing ore, and had probably instructed him that it was necessary to keep the spout clear of lumps with his hands and without stop-

ping the running, the question as to whether the defendant company had taken due precautions for the safety of an employee, in and about work of a dangerous character, ought to have gone to the jury.

Affirmed in the Supreme Court of Canada.

Tobin v. New Glasgow Iron, Coal & Ry. Co., 26/268, Cout. Dig. 100.

15. **On the re-trial** ordered above, the trial Judge instructed the jury that, "when a workman knows that the employment is a dangerous or risky one, he has nothing to complain of, and even, admitting, as the plaintiff contends, that the work T. was engaged to do was dangerous, and that the danger was known to the defendant company, it was likewise known to T., and in that case the plaintiff would be disentitled to recover. In short, as a matter of law, knowledge of the danger of his employment on the part of the deceased T., in itself, would operate as a bar to the plaintiff's claim":

Held, that this was a misdirection for which there should be a new trial, inasmuch as it tended to make deceased's knowledge a matter of law, whereas it should always be left open as a matter of fact.

Also, per McDonald, C.J., following the doctrine of Smith v. Baker, 1891, A. C. 325, that the question whether the machinery at which deceased was employed, was defective or operated on a defective system, should have gone to the jury.

Tobin v. New Glasgow Coal, Iron & Ry. Co., 29/70.

16. **Injury by steam—Employing unskilful engineer.**]—Plaintiff, a machinist, was inside one of four boilers of defendant company's machinery engaged in repairing it, when some one blew off steam from another boiler. The steam entered the boiler in which plaintiff was, scalding him severely.

In an action for damages, the only negligence attributed to defendant company was that of employing an unskilful engineer. The evidence fully establishing his competency:—Held, the trial Judge was right in withdrawing the case from the jury, and entering judgment for defendant company.

White v. Sydney & Louisburg Coal and Ry. Co., 25/384.

17. **Coal mine—Gas explosion—Defective system.**]—Plaintiff's intestate, a laborer employed in defendant company's coal mine, was ordered by an "overman" to go to work in a portion of the mine which had been disused for about six months. He did so, when an explosion of accumulated gas took place, killing him instantly.

In an action for damages by his administrator, the learned Judge withdrew the case from the jury on the ground that there was no evidence against defendant company, the accident being the result of the negligence of a fellow employee, which course was sustained by the Court, Graham, E.J., dissenting.

In the Supreme Court of Canada:—Held, Taschereau and Sedgewick, JJ., dissenting, that under the Mines Act (R. S. 5th series, c. 7), which is probably declaratory of the common law, the company was bound to fence and inspect unused places and to ventilate to prevent the accumulation of gas: also to employ competent men to carry out these regulations. Not having done so there was evidence of the existence of a defective system, for which it should be liable, though the immediate cause of the accident was the negligence of an employee.

Grant v. Acadia Coal Co., 34/319, 32 S.C.C. 427.

18. **Master and servant—Risk of employment.**]—Plaintiff sued for damages for an injury caused by loose stones and excavated earth falling on him while working at the bottom of a trench excavated for a sewer on one of the streets of the City of Halifax. The system of dealing with this excavated material was to construct a retaining wall of loose stone at a distance of about eighteen inches from the edge of the trench, behind which earth, etc., was thrown. The injury was caused by the giving way of a portion of this wall.

Held, that it had not been shown that there was anything defective in this system of itself or that it involved a hidden danger, or that the work on which plaintiff was engaged was of a specially hazardous nature. That the negligence, if any, was that of a fellow workman, and that the trial Judge had rightly withdrawn the case from the jury.

Taylor v. City of Halifax, 26/490.

19. **Railway—Derailing of snow plow—Killing engine driver—Jury failing to answer—Questions.**]—Action for negligence by the administratrix of P., an engine driver in the employ of defendant company, who was killed in an accident caused by the derailing of a snow plow and its consequent destruction of a bridge, through which the engine fell. In answer to questions submitted the jury found that the derailment of the snow plow was the proximate cause of the accident, that it was unfit for the service on account of not being properly ballasted, that the bridge was not at the time of the accident reasonably fit to carry trains, or for the general operations of the road, being defective in the flooring, that the number of men employed on the train was not reasonably sufficient to conduct it, that deceased was not guilty of contributory negligence, and that the damage sustained by the widow and child of deceased was $4,500.

They returned the answer "We do not know," to questions as to whether defendants knew of the unfit condition of the snow plow and bridge, whether the defects of the plow and bridge, other than those of construction, could have been discovered by a reasonably careful inspection of the plow and bridge; whether deceased or defendants knew when the train was sent out the number of men on board; whether the accident might have been averted if the bridge had been differently constructed in a manner described; whether deceased knew that the snow plow was derailed before arriving at the bridge; whether he could have averted the accident by using reasonable care, or whether the men on the train or any of them by using reasonable care could have done so.

On these findings the trial Judge entered a verdict for the defendants, and this was an application by plaintiff for a new trial, and a cross-appeal by defendants. The Court was equally divided.

Per McDonald, C.J., that the application should be dismissed.

Per Meagher, J., that the jury had found that the derailing of the snow plow was the proximate cause of the accident, but had not found to whose negligence the derailing was due. The evidence showed that unaccountable derailing of snow plows sometimes happened, which being known to the deceased, as an experienced engine driver, might be taken as a risk incident to his business for which his employer should not be held liable. Though an employer is bound to provide proper machinery, he is not responsible for defective management thereof by employees, and though there was ample evidence that ballasting a snow plow is not the most advisable method of operation yet if there was negligence in relation thereto it was that of deceased's fellow employees only. The bridge in question having been safely operated for years, there was no duty on defendants to replace it with one of more modern design, and the fact that they did do so after the accident was not to be taken as evidence of previous negligence. The jury had only found that the derailing of the snow plow was the proximate cause of the accident, therefore no right of action in regard to the bridge had been established, nor on the evidence could the jury have reasonably found negligence in connection therewith. The Judge's directions were sufficiently full, and were not attacked on grounds appearing on the record, but for the omission of matters not suggested by the plaintiff. No substantial injustice having been done, and as the findings in favor of the plaintiff were not warranted by the evidence, and as the jury were evidently willing to have found for plaintiff if possible, there should be no new trial to enable her to show what should have been shown before.

Per Graham, E.J., Henry, J., concurring, that the jury having failed to ans-

wer ten out of twenty answers could not be considered satisfactory, as suggesting the ideas that they might have wished to avoid what seemed to be cross-examination, or that they were so instructed that they considered themselves invited to answer as they did, or that they were not fully instructed at all; for which reason there should be a new trial.

On further appeal to the Supreme Court of Canada a new trial was ordered because of the failure of the jury to answer necessary questions. Otherwise the judgment of the Court below was affirmed.

Pudsey v. Dominion Atlantic Ry., 27/498, 26 S.C.C. 641.

20. **Municipality not liable** for mere non-repair of bridge, causing accident. Effect of Bridge Act, 1883, ch. 20. Excessive damages.

See MUNICIPALITY, 2.

21. **Incorporated town—Defective sidewalk—Faulty construction and non-feasance in maintaining—Liability of town.**]—The "Towns Incorporation Act" transferred the duty of maintaining streets, etc., to the defendant town. The town caused to be constructed a catch basin for water, covered by a movable grating in the sidewalk. Plaintiff stepping on this grating, it tilted and caused injury. He brought action and recovered $300 damages.

On an application for a new trial:—Held, following Geldert v. Municipality of Pictou (see MUNICIPALITY, 2), that the liability of the municipal corporation depended on whether the injury was caused by negligence in original construction, or in maintenance, which material issue having been left undetermined, there should be a new trial.

Per Townshend and Weatherbe, JJ., concurring, that the plaintiff was entitled to retain his verdict, it appearing sufficiently that it was the intention of the trial Judge to hold that the accident was due to a defect in the original construction.

Thomas v. Town of Annapolis, 28/551.

22. **Excavation of street.**]—The town of New Glasgow was engaged in introducing a water system and for some time had been making excavations for the purpose of laying pipe, etc. Plaintiff on a dark and rainy night while going home by G. street, which was an unusual route for her, fell into an excavation and was severely injured. It appeared that the town had placed a fence or barrier across the street designed to prevent the passage of vehicles, but the sidewalk was unobstructed, and the plaintiff was injured crossing the street by a path other than that provided. The evidence showed that she knew in a general way that excavations were in progress, but none that she knew of this one in particular. Her evidence was "They were excavating so often that I did not remember."

The jury found all the issues in favor of the plaintiff except as to whether she had used ordinary care, etc., which they found for the defendant on instructions assuming knowledge on her part of the existence of this particular excavation, a ground not raised by the pleadings. On an application for a new trial by the plaintiff:—Held, per Meagher, J., Ritchie, J., concurring, that there was ample evidence on which the jury might find as they did, and that plaintiff in passing the barrier and encountering rough ground, as shown by the evidence, had such warning as to put her on her guard, and that it was too late now to object to the pleading, which should have been on trial.

Per McDonald, C.J., and Townshend, J., that there was a misdirection such as to make a new trial necessary. And that the ground of knowledge on the part of the plaintiff of the excavation, not having been taken, the defendant should be held strictly to the pleadings.

Fraser v. Town of New Glasgow, 24/422.

23. **Maintaining street—Falling in cellar—Notice of action.**]—Plaintiff's intestate while passing along Water Street in the City of Halifax, 3rd October, 1890, stumbled over a raised hatchway on the sidewalk and was precipitated into an excavation which was beside and under

the sidewalk, and behind a ruinous fence, receiving injuries of which he died two days later. In an action for damages under Lord Campbell's Act, the jury found among its answers to questions, that the deceased was aware of the dangerous condition of the spot, and did not use ordinary caution. On these findings, Graham, E.J., dubitante, as to whether the deceased, with full knowledge of the risk, had voluntarily agreed to incur it, entered a verdict for the defendant city.

On appeal:—Held, per Townshend, J., sustaining verdict, that the finding of contributory negligence obviated the necessity for the defendant pleading and proving that plaintiff voluntarily assumed the risk.

Per Meagher, J., that the accident was largely due to the condition of the fence, which it was not the defendant city's duty to maintain.

The defendant relied on the Statute of Nova Scotia, 1890, c. 60, s. 35, as follows:—"The City of Halifax shall keep in repair the streets, sewers and other public works of said city, and on neglecting to do so, upon ten days' notice in writing being given by any person interested therein, or who is or has been injuriously affected by such neglect or refusal, may be compelled by mandamus issued out of the Supreme Court, to make from time to time the necessary repairs to preserve the same, and shall be liable to pecuniary damages to any person, who, or whose property, is injuriously affected by reason of such neglect or refusal."

Held, per Townshend and Meagher, JJ. (Ritchie and Weatherbe, JJ., concurring, McDonald, C.J., dissenting), that in the absence of ten days' notice to repair, the city could not be held guilty of negligence. (Following Crysler v. Township of Sarnia, 15 O.R. 180, a decision based on an identical enactment.) (Note—The Privy Council in construing this Ontario Act held, 1891, that it did not apply to such an action as the present. Corporation of Raleigh v. Williams, 1891, A. C. 540.)

Per McDonald, C.J., dissenting, that the section required ten days' notice before application for mandamus, and did not refer to the liability of the city for negligence in cases of accident.

Bedford v. City of Halifax, 25/90.

24. **Unfenced excavation — Whether negligent—Question not put—Point not taken at trial.**]—In a general conflagration which had taken place one month previous to the date of the injury complained of, defendant's building was destroyed, leaving a cellar excavation abutting the street, which remained unfenced. A train passing near by frightened plaintiff's horse, and plaintiff endeavoring to control him by the head, was carried from the street, across the sidewalk, into the excavation and sustained permanent injuries. In an action for damages:—

Held, that the questions as to whether it was the duty of the defendant to have fenced the excavation; and as to whether such fence should have been constructed only with reference to foot passengers using the sidewalk, or should have anticipated the liability of horses to leave the roadway, when frightened, were for the jury. And the jury having found for the plaintiff, with $2,500 damages, there was no reason for disturbing the verdict. Damages considered not excessive.

Quaere, was the presence of the excavation or the noise of the train, the proximate cause of the injury? But the point, though material, not having been raised on trial, by the present applicant for a new trial, and consequently not submitted to the jury, could not be taken into consideration.

Davis v. Commercial Bank of Windsor, 32/366.

25. **Municipality — Obstruction in street.**]—Plaintiff, after nightfall, in hurrying to take a steamer to Boston, fell over a pile of dirt or street sweepings left in the street of the unincorporated town of Yarmouth, and was injured. In an action to make the municipality liable for negligence, the evidence was not clear as to the care with which the plaintiff was proceeding, but showed that she had met with the accident while crossing the street diagonally and not

availing herself of the foot path and bridge over the gutter provided by the commissioners of streets.

In answer to a question as to whether the defendant had been guilty of negligence, the jury returned, "Yes, in a measure," and as to contributory negligence on the part of plaintiff, "Yes, undue caretaking on the part of plaintiff." On these findings judgment was directed for the defendant. On application for a new trial the Court was equally divided.

Per Weatherbe and Ritchie, JJ. (but on other grounds (see MUNICIPALITY, 2) that the application should be refused.

Per Townshend and Meagher, JJ., that the finding as to contributory negligence should be set aside and a new trial ordered. Also that there was no contributory negligence in plaintiff crossing the street after dark off the foot-path and bridge provided.

Per Weatherbe, J., that the jury having found as they did with regard to contributory negligence there was no reason for disturbing the verdict. Also that the finding of negligence should be set aside.

Gilbert v. Municipality of Yarmouth, 23/93.

26. **Obstruction in street—Driving accident—Contributory negligence—Character for veracity.**]—An excavation had been made on a street of the town of Bridgetown for laying a pipe, and the refilled earth stood from four to eight inches above the general level. Plaintiff driving across it by night, at the rate of seven miles an hour, in a two-wheeled vehicle, his horse stumbled and fell, breaking the spring of the vehicle and throwing plaintiff out and injuring him.

The evidence showed that he had passed the spot a few hours before by daylight, that his horse was 17 years old, ringboned, and sometimes lame, was then without shoes, had been known before to stumble, that the spring had been repaired at least twice before and was then worthless:—

Held, that the obstruction was not negligently constructed, and was not more serious than was usual on such streets, and that plaintiff's negligence in not approaching the place with more care, was the cause of the accident.

On trial, defendant produced witnesses against plaintiff's general reputation for veracity. On cross-examination his counsel proposed to ask one of these witnesses, "What do individual neighbors think of his character? Whose opinion do you know?" which was not permitted:—Held, there was error, but not such as to cause "substantial wrong or miscarriage."

Messenger v. Town of Bridgetown, 33/291, 31 S.C.C. 379.

27. **Street railway.**]—Non-compliance with charter—Allowing rails to stand above street level—Injury to horse in crossing.

See STREET RAILWAY.

28. **Duty of city to light streets—Hydrant improperly placed.**]—The plaintiff was injured by falling over a hydrant or "fire plug" situated on the sidewalk of a street in the City of Halifax, at a moment when the electric street light was extinguished. The sidewalk had been widened some years after the hydrant had been put there, in consequence of which it was somewhat farther from the gutter than is usual, but the evidence showed that there was ample room for foot-passengers, and that the position of the hydrant was well-known to plaintiff. The light in question was supplied and maintained by the C. Electric Co., under a yearly contract with the city, and there was evidence that the service was unreliable and unsatisfactory; matters known to the city. Graham, E.J., without a jury having found for plaintiff, on appeal:—Held,

Per Ritchie and Townshend, JJ., that the duty of the city to light its streets efficiently was mandatory under its charter (sec. 439), in consequence of which failure to do so amounted to negligence, and though there was room for plaintiff to pass, there was no negligence on the part of plaintiff.

Per Wetherbe, J., that the lighting of its streets was an optional matter with

the city, and that the burden of lighting in such a way that the accident complained of would have been impossible, would be intolerable, also that the plaintiff in a measure contributed to her own misfortune.

Per Meagher, J. (not deciding whether the duty of the city to light its streets was imperative or not), that the plaintiff had not shown that the accident was due solely to the light being out, and that it was not under the management of the city or its servants, and that the evidence went to show that failure of electric lights at times could not be prevented or guarded against.

The defendant having appealed to the Supreme Court of Canada:—Held, Strong and Taschereau, JJ., dissenting, that the city was not liable. That its relationship to the Electric Light Co. was not that of master and servant, nor of principal and agent, but that of employer and independent contractor, for whose negligence the city was not responsible. Also that there was evidence of contributory negligence.

Lordly v. City of Halifax, 24 i, 20 S.C.C. 505.

29. **Wharf—Disease founded by accident.**]—The defendant company were owners of a steamship plying regularly between Boston and Halifax, and docking in Halifax at the N. Wharf, used and occupied by the defendant company, under lease to its agent by the owners. The general public had been admitted and excluded from the wharf at the pleasure of the defendant company, at the landing of steamers. Y. and his wife on the night of November 30th, 1890, in proceeding down the wharf to meet a person who was to arrive by the steamer, were induced to leave the ordinary path provided, by the press of vehicles. At a point where the wharf narrowed and there was a "jog," and which was insufficiently lighted and unprotected by a railing, the wife unknowingly came to the edge of the wharf and fell into the water, where she remained some minutes before rescued. Next morning she was found to suffer with bronchial irritation and a cough. Seventeen days later she visited a physician who discovered premonitory symptoms of consumption which developed with such rapidity that within 43 days of the accident she died. She belonged to a family hereditarily predisposed to consumption. The husband and parents having brought action against the company for negligence, the jury found that the accident was due to the insufficient lighting of the wharf and the failure to provide protection at the place of danger.

Also, in answer to the 16th question, that the accident was the proximate cause of death. In answer to the 17th as to whether she would have recovered notwithstanding the accident if she had had regular and continuous medical attendance and treatment they returned "Very doubtful."

On motion to set aside the findings and verdict for plaintiff, assessing damages at $1,500:—

Held, per Weatherbe, J., and Graham, E.J., that the finding on the question as to the proximate cause of death was not one on which judgment could be entered.

Per Weatherbe and Townshend, JJ., that there was no invitation to the deceased to use the wharf, in consequence of which the defendant company was not liable for negligence.

Per Weatherbe, J., that there was no duty on the company to light or rail the dangerous place, which if required of all similar places on wharves of the port, would be intolerable.

Per McDonald, C.J., that the answer to the 17th question was all that could be required of inexpert men such as compose a jury, and that as the evidence amply established that immersion in the water was the proximate cause of death, judgment should be for plaintiffs for the damages fixed by the jury. Also that the deceased was on the wharf by invitation and it was the duty of defendants to render the place safe.

On appeal to the Supreme Court of Canada:—Held, that the deceased was lawfully on the wharf, and in view of the established practice had a right to consider herself there by the invitation of defendant company, which was bound

to see that the place was safe for persons using ordinary care.

That the finding of the jury as to the proximate cause left the matter in doubt and showed they had not been properly instructed as to the defendant's liability and that there should be a new trial. And that under the circumstances the damages were excessive.

Also that it having been shown that the wharf was rented to the agent of defendant company merely because the lessors preferred to deal with him, the company was in possession at the time of the accident.

York v. Canada Atlantic Steamship Co., 24/436, 22 S.C.C. 167.

30. **Coaling pier—Invitation to use—Duty of lighting.**]—The defendants were owners of a coaling pier. The Government steamer "Newfield," on which plaintiff was employed, drew up at the pier for the purpose of coaling, but without, as customary, asking permission to do so. Plaintiff going ashore on private business after dark fell over the side of the pier and was seriously injured. The trial Judge directed a general verdict for defendants, on the ground that there was no evidence enabling plaintiff to recover. On an application for a new trial:—Held, the appeal must be dismissed. Per Weatherbe, J., there was nothing to show that defendants held out an invitation to anyone to use the pier, and there was no duty on defendants to light or provide a watchman.

McMullin v. Archibald, 22/146.

(Note.—See also 5 ante.)

31. **Coal mine—Cave in.**]—At common law a coal mining company is not liable for damage caused by subsidence of the surface occurring during its occupancy, but the result of excavations made by a previous occupier. And the Act, 1892, ch. 1, has made no change in this regard.

Town of Stellarton v. Acadia Coal Co., 31/261.

32. **Injury on vessel—Rigger—Duty of master to take care.**]—W. was working on a vessel in port when a boom had to be taken out of the crutch in which it rested, and he pointed out to the master that this could not be done until the rigging supporting it, which had been removed, was replaced, which the master undertook to do. When the boom was taken out it fell to the deck, and W. was injured. In an action against the owners for damages, the jury found that the fall of the boom was owing to the said rigging not being secured, but that this was not occasioned by the negligence of the owners or their servants.

In the Supreme Court of Canada:—Held, that though the contract between the employer and employed required on the part of the former the duty of taking reasonable care and of providing proper appliances so that the employed be not exposed to unnecessary risk, the first part of the finding did not mean that the rigging had never been secured, or that if secured originally it had become insecure by the negligence of the defendants, and the jury having negatived negligence, their finding should not be ignored.

Williams v. Bartling, 30/548, 29 S.C.C. 548.

33. **Ice bridge—Loss of livery horse—Contributory negligence of owner—Duty of warning hirer.**]—Plaintiff, a livery stable keeper at Sydney, hired a horse and sleigh to defendant, a stranger, for the purpose of driving from Sydney to North Sydney and back, and recommended him to take the road across the ice, the harbor being at the time frozen over and generally travelled. In returning after dark by the same road by which defendant had gone, the horse went through a crack in the ice and was drowned.

In an action for damages for the loss of the horse:—Held, the defendant having exercised ordinary care and diligence, the plaintiff, from his residence and occupation, was necessarily more familiar with the ice road than a stranger, and was bound to have warned defendant of any probable circumstance which might render his journey dan-

gerous. Not having done so he was not entitled to recover.

McKenzie v. Lewis, 31/408.

34. **Lord Campbell's Act—Particulars of claim.**]—R.S. 5th Series c. 116, s. 4, requires full particulars of the nature of the claim in respect of which damages are asked, to be served with the writ of summons. The Judge on trial allowed an amendment, not materially varying the particulars furnished. On objection to this course:—Held, that the defendant had had ample notice of the nature of the matter introduced, by the first particulars, and that if they were insufficient, objection should have been raised by the pleadings.

McLeod v. Windsor & Annapolis Ry., 23/69.

35. **Contributory negligence—Crossing street.**]—In actions of negligence against a town for injuries caused by the condition of the street, and received when crossing, it does not appear to be contributory negligence to cross at a point other than the regular one where foot paths are provided.

Gilbert v. Municipality of Yarmouth, 23/93.

Fraser v. Town of New Glasgow, 24/422.

36. **Negligence or unskilfulness of surgeon.**]—Degree of skill required. Surrounding circumstances.

See PHYSICIAN AND SURGEON.

37. **Liability of solicitor to client.**]—Failing to collect or return promissory note—Measure of damages.

See BARRISTER AND SOLICITOR, 18.

NEGOTIABLE INSTRUMENT.

See BILLS AND NOTES.

NEW TRIAL.

See also APPEAL, JURY.

1. **First day of sittings—Absence and neglect of counsel—Surprise.**]—Defendant's counsel in a libel suit was not present to represent the interests of his client on the first day of the sittings when causes were being set down for special days. In consequence the action was set down and afterwards tried without defendant and his witnesses being present, and a verdict rendered against him:—Held, there should be a new trial on payment of costs by defendant.

Kirkpatrick v. Mills, 30/426.

2. **Form of action—Incorrectly tried on pleadings.**]—The trial of an action which appeared on the face of the pleadings to be one for false imprisonment, having been treated as though it were one for malicious prosecution, as to the consideration of malice, want of reasonable cause, etc.:—Held, defendant's appeal must be allowed with costs, and a new trial had.

McKenzie v. Jackson, 31/70.

3. **Incompetent evidence—Equally affecting both parties.**]—A new trial will not be ordered on the ground that the defendant succeeded owing to the reception of the evidence of persons not shown to be experts, where the plaintiff on trial relied on the same sort of evidence in order to establish his case.

Rice v. Ditmars, 21/140.

4. **No substantial injury occasioned.**]—New trial refused where the Court was of opinion that evidence improperly admitted was not of a character to work a substantial injury to the party applying.

Black v. Brown, 21/349.

5. **Evidence wrongly rejected.**]—The Court refused to order a new trial on the ground that evidence had been improperly rejected, where it was of opining that the evidence if given would not have helped the applicant's case.

Almon v. Law, 26/340.

6. **Witness not called.**]—In an action for specific performance there was a conflict of evidence but the trial Judge found for plaintiff, decreeing performance. On an application for a new trial:—Held, that the fact that defendant's son, who might have corroborated his father, was present and not called, was not sufficient ground.

McDonald v. McDonald, 27/103.

7. **Main issue not decided.**]—Plaintiff in his reply set up what amounted to a new case. Defendants failed to move to strike out the reply and proceeded to trial on immaterial issues:—Held, there must be a new trial without costs to either party.

Cogswell v. Holland, 21/155.

8. **Issue not decided.**]—In an action for wrongful distress for rent, judgment had been for the defendant, but as it appeared that the question of whether any rent was due had not been made clear, the Court ordered a new trial.

Taylor v. Forbes, 26/267.

9. **Material issue not determined.**]—Defective construction or negligent maintenance of sidewalk causing injury —Liability of incorporated town.

See NEGLIGENCE, 21.

10. **Point not determined.**]—In an action for trespass, the main point, as to whether a fence complained of had been placed by defendant on the line of a former fence, admitted to be the correct boundary, having been left undetermined by the trial Judge without a jury, a new trial was ordered.

Dixon v. Dauphinee, 34/239.

11. **Ground not taken.**]—On an application for a new trial, the verdict of a jury will not be set aside on grounds not stated in the notice of motion, even if those grounds be valid.

Milner v. Sanford, 25/227.

See also JURY, 37.

12. **Grounds not pleaded.**]—New trial ordered, where the decision of the Judge without a jury, proceeded on grounds not raised by the pleadings. (O. 19 R. 6.)

See PLEADING, 66.

13. **To award nominal damages.**]—The Court refused to disturb the decision below, and to order a new trial to enable the applicant to recover nominal damages as to a single issue on which he was entitled to succeed.

Wood v. Gibson, 30/15.

Wilkie v. Richards, 32/295.

NON-COMPLIANCE.

See AMENDMENT, PRACTICE, 32.

NOTICE.

Of action.]—See ACTION, 2.

Of assignment.]—See CHOSE IN ACTION.

Of impounding.]—See IMPOUNDING OF CATTLE.

Of motion.]—See PRACTICE, 27.

Of trial.]—See PRACTICE, 34.

NOVATION.

See CONTRACT, 20.

NUISANCE.

1. **Company — Non-compliance with charter—Accident caused thereby.**]—The charter of the defendant street railway company required it to keep the roadway between, and for two feet on each side of its rails, constantly in repair and on a level with the rails.

Plaintiff's horse in crossing the rails, caught the caulk of its shoe in a grooved rail standing above the level, tore off its hoof, etc.:—Held (affirmed in Supreme Court of Canada), that the rail not being in compliance with the charter, was a nuisance, for the maintenance of which defendant company was liable.

Joyce v. Halifax Street Ry. Co., 24/113, 22 S.C.C. 258.

2. **Continuer of nuisance—Notice.**]—The purchaser of lands who continues the nuisance of the former possessor, cannot be held liable without notice. Per Graham, E.J., reviewing Moir v. O'Connor (unreported).

Corbitt v. Digby Water Co., 24/25.

3. **Continuing nuisance—Towns incorporation Act, 1895—Limitation—Damages.**]—An action in reference to a continuing nuisance is not barred by Towns'

Incorporation Act, 1895, c. 4, s. 295, which provides that "no action ex delictu shall be brought against any town incorporated under this Act . . . unless within 12 months next after the cause of action shall have accrued," except as to damage suffered more than one year before action brought.

Archibald v. Town of Truro, 33/401, 31 S.C.C. 380.

4. **Escape of steam from exhaust pipe—Injury to neighbor's goods.**]—Contributory negligence—

See NEGLIGENCE, 11.

5. **Gas works—Noxious vapors—Injunction—Laches—Construction of charter.**]—Defendant company was incorporated by the Legislature, with power, by the terms of its Act of incorporation to manufacture and supply illuminating gas, and to do "any matter or thing necessary to carry out the above objects." Plaintiff was an adjoining property owner, whose enjoyment of his property was materially interfered with, by the escape of gases and vapors incidental to defendant company's operations. He had protested to defendant company before its works were erected, and afterwards at various times until action brought, a period of about two years.

On his application an interim injunction was ordered to issue with costs, restraining defendant company's operations in so far as they involved a continuance of the nuisance.

On appeal:—Held, that the main facts as to the nuisance not being in dispute, costs were properly awarded against the defendant company, though otherwise the usual rule would have been to make them costs to abide the event.

That the Act of the Legislature granting the defendant company powers, was not to be construed so as to make its right to proceed with its operations, outweigh plaintiff's right to the enjoyment of his property, nor likewise was the matter of public convenience, connected with the supply and use of gas, sufficient to this end.

That a delay of two years under the above circumstances should not prejudice the plaintiff's right to relief.

That the nuisance being a continuing one, no compensation in damages could be adequate, consequently an injunction had properly issued, and should be made perpetual.

(Meagher, J., dubitante, as to the extent of the injury.)

Francklyn v. People's Heat & Light Co., 32/44.

ODDFELLOWS.

Incorporated society—Maintaining action.]—Plaintiffs were trustees of "Halifax Branch, Independent Order of Oddfellows (Manchester Unity) Friendly Society," which was unincorporated. The action was against an officer of the organization who had fraudulently misappropriated funds:—Held, that under O. 16, R. 9, the plaintiffs might maintain action for the money. The fact that the "Halifax Branch" had been suspended by the supreme authority of the order after action brought did not deprive it of control of its funds.

Burford v. Sinfield, 25/387.

ORDER.

See PRACTICE, 37.

OVERHOLDING.

See LANDLORD AND TENANT, 10.

PARENTAL RIGHTS.

See HABEAS CORPUS, 9. INFANT, 8

PARTIES.

1. **Charge in favor of widow.**]—Testator devised his farm in equal moieties to his son and son-in-law. The moiety of his son-in-law had come into the hands of the defendant, when the widow brought action for a declaration as to a charge for her maintenance provided by the will, and for contribution thereto by defendant's lands. On motion for a new trial after judgment for plaintiff:—Held, that the son should have been made a party defendant to the proceeding.

Smith v. Beaton, 25/60.

2. **Company — Action by stockholder against promoter.**]—On behalf of himself and all others. Should be brought in name of the company except under special circumstances.

See COMPANY, 32.

3. **Setting aside judgment against company.**]—Motion by one not a party. Trustee for bondholders.

See COMPANY, 13.

4. **Suing foreign Company.**]—O. 47 R. 1, which authorizes actions to be brought in our Courts against foreign companies doing business by an agent within the Province, refers to such companies as do a regular and continuous business here, and not to such as may occasionally have a few isolated business transactions.

Salter v. St. Lawrence Lumber Co., 28/335.

5. **Foreign company in liquidation—Property must not be attached after liquidator appointed.**]—Plaintiff attached a cargo of laths belonging to the defendant company an English company doing business in New Brunswick, which happened to be at Port Hawksbury, in transit to Boston. The company at the time was being wound up in the Supreme Court of New Brunswick and a liquidator had been appointed, who now sought to set aside the plaintiff's process:—

Held, that after the company had been put into liquidation in Court in the interests of creditors, no attachment by an individual creditor should be allowed to issue.

Also, that the liquidator had sufficient status as a party either under the Winding Up Act (R.S.C. c. 129, s. 30), or under sec. 12 (5) of the Judicature Act, to enable him to appear to set aside such an attachment. And that the fact of the liquidation and of the appointment of the liquidator was sufficiently proved by his affidavit to that effect.

Slater v. St. Lawrence Lumber Co., 28/335.

6. **Foreign firm may sue—Or be sued.**]—O. 16, R. 14 extends to allow a foreign firm to sue in our Courts in its firm name where it appears that it has that right in its domiciliary Courts, though:

Semble, such a firm may not be sued in its firm name where there is a possibility of infringing a rule of international law by subjecting foreigners to our jurisdiction.

Knauth Nachod v. Stern, 30/251.

7. **Suing as a company—Unincorporated—Amendment—Waiver of irregularity by pleading.**]—S. brought action against the defendant as the "B. Advertising Co." which was unincorporated as a company, and was merely a business style used by S. After the discovery of this the defendant delivered his defence, and moved for a stay of proceedings on the ground of the irregularity. The Judge of the County Court, held that the defendant by pleading had waived the irregularity, and of his own motion made an amendment substituting "S. doing business as the B. Advertising Co." as plaintiff.

Held, that defendant had waived the irregularity; and that under O. 16, R. 2, 10, the Judge had power to make the amendment.

Per Graham, E.J., dissenting, that the Judge had no power to make the amendment as the rules only apply to real parties. Here there was no plaintiff, the B. Advertising Co. not being a company could not bring an action.

(Note—As to waiver, Cf. ARBITRATION, 7.)

Bijou Advertising Co. v. Dickenson, 27/443.

8. **Unincorporated association—Church meeting.**]—An action will lie against persons who have attended a meeting and supported a resolution favoring the building of a church and awarding the contract therefor to plaintiff at an agreed price. This though there is no corporate body to be made defendant, and though there is no contract in writing.

McQuarrie v. Calnek, 27/483.

9. **Oddfellows, Manchester Unity—Unincorporated mutual benefit society.**]—Right of Trustees to bring action against a former officeholder for funds misappropriated.—O. 16, R. 9.

See ODDFELLOWS.

10. **Death of plaintiff—Trespass—R.S. 5th Series, c. 113—Dismissing action.**]—M. brought action for trespass to lands, alleging that the trespass was continuing, but died before trial. Defendant applied and obtained an order dismissing the action, on notice, under O. 17, R. 8, for want of prosecution.

Plaintiff's executor applied to the Chambers Judge for an order rescinding the above order, on the ground that the action had abated with the death of the plaintiff, and for a stay of proceedings. This motion the Judge denied, on the ground that he had no jurisdiction to rescind, but granted a stay pending appeal.

Held, that R.S. 5th Series, c. 113, s. 1 not only gives an executor the right to begin an action for trespass during the period of 6 months next before the death of the testator, but also continues an action begun by the deceased in so far as it relates to that period, so that defendant's application to dismiss, for want of prosecution, under O. 17, R. 8, was in order, and the order appealed from, well made.

Miller v. Corkum, 32/358.

11. **Executor substituted—O. 17 R. 4.**]—Semble, an executor who has been substituted for a deceased defendant who has raised a counterclaim in an action, should apply to revive that counterclaim. Nevertheless in the County Court, his default of appearance does not appear to dispose of the original pleadings, and he probably, in case of his appearance, has a right to raise any further defences peculiar to his position.

See COUNTY COURT, 5.

12. **Foreclosure — Joining defendant's wife.**]—The wife of the owner of the equity of redemption is not a proper person to be made a party defendant to an action for foreclosure. The estate of the husband proceeded against is of an equitable nature in which no right of dower exists. The "Married Woman's Property Act, 1884," makes no change in this regard.

Parker v. Willett, 22/83.

13. **Foreclosure—Owner of equity—Cestui que trust.**]—Plaintiff, who was purchaser of lands on foreclosure and sale, brought ejectment against the mortgagor and others who remained in possession.

In reference to objections raised by way of defence that certain interests had not been made defendant in the foreclosure proceedings:—Held, that these claims not having been set up by counterclaim, the Court could not consider the question of re-opening the foreclosure proceedings:—

Semble, the owner of the equity of redemption in part of the lands not having been joined, and not asking to redeem, his estate must give way to the legal estate of the plaintiff, in ejectment:—

Semble, it is not necessary to join persons in the position of cestuis que trust, who appear to have a vested interest in the lands under a charge by will antecedent to the mortgage.

Parker v. Thomas, 25/398.

14. **Trustee.**]—In actions by trustees, it is not necessary to join the cestui que trust. O. 16, R. 8.

Eastern Trust Co. v. Forrest, 30/173.

15. **Fraudulent conveyance—Creditors—Amendment by Court.**]—The plaintiff having begun an action to set aside a conveyance as fraudulent under the statute of Elizabeth, and having prosecuted his case to argument on appeal, on his own behalf only, instead of on behalf of himself and all other creditors, the Court made the amendment necessary to enable him to succeed, he being otherwise entitled.

Shortell v. Sullivan, 21/267.

16. **Infant—Action against guardian—Next friend.**]—Any person who suspects an infant's estate has been or is being

mismanaged may, in the character of next friend of the infant, with or without his consent, or even against his strongest remonstrances, institute proceedings on his behalf.

In an action by the surety of a guardian and another, against the guardian for indemnity for past waste and to prevent proposed misconduct, the question whether the infant shall be a party plaintiff or defendant is a matter within the discretion of the judge.

Pope v. Carroll, 27/467.

17. **Interpleader proceedings.**] — See PRACTICE, 22.

18. **Judgment—Reviving—Heirs of defendant.**]—In proceedings had in 1884, to revive a judgment recovered against A. in 1871:—Held, it was not necessary to join the heirs of A. as parties. Burrows v. Isenor (1 Old. 687), followed.

Robinson v. Chisholm, 27/74, 24 S.C. C. 704.

19. **Adding party after judgment.**]—The power of the Court of a Judge to add parties or to amend, under O. 16, R. 2, 10, continues after final judgment.

Plaintiff in her personal capacity recovered judgment setting aside a release as obtained by fraud. On appeal the Court (also the Supreme Court of Canada) in delivering its opinion suggested that it was desirable that a representative of her late husband, in respect to whose estate the litigation was begun, should be a party to the record. Thereupon she applied and was appointed his administratrix de bonis non. The Judge at Chambers then added a paragraph to the statement of claim in the action setting out her appointment.

Mack v. Mack, 27/458.

20. **Married woman.**]—Actions by and against married women.

See MARRIED WOMAN'S PROPERTY ACT.

21. **Mesne profits—Misjoinder.**]—In an action to recover possession of land and for mesne profits, the plaintiff, C. F., claimed as grantee in 1889 of the plaintiff, L.F., who had acquired title in 1870:—Held, that in this action the plaintiffs could only recover as to mesne profits for the period of joint occupation, i.e., since 1889. Award reduced accordingly.

Per Graham, E.J., dissenting, that, notwithstanding misjoinder L. F. should be allowed to amend and seek to recover for the term between 1870 and 1889, under O. 16, R. 1, and that defendant should be allowed a countervailing privilege of amendment to enable him to set up the Statute of Limitations.

Fraser v. Kaye, 26/111.

22. **Negligence—Unwilling to be co-plaintiff made co-defendant.**]—Per Meagher, J. (the rest of the Court expressing no opinion), in an action for damages under Lord Campbell's Act one of the administrators of the deceased being unwilling to join as a plaintiff in bringing the action, was properly made a defendant.

Pudsey v. Dominion Atlantic Ry., 27/498.

23. **Substituting plaintiff.**]—After argument on appeal, it appearing that plaintiff in law had not any right of action, but that such a right in relation to the subject matter might appertain to another person, the Court did not amend by adding or substituting that other person, where it could only be done on such terms as to costs, etc., as would practically amount to a refusal of the application.

See PAYMENT, 9.

24. **Rectification of deed.**]—Plaintiff and defendant were owners of adjoining lots of land derived through different chains of title from A., who owned both lots in 1875. A dispute having arisen as to the dividing line between them, plaintiff brought trespass and added a claim for the rectification of the description in his deed to make it conform to the agreement alleged to have been entered into on the sale in 1875, between A. and K., plaintiff's predecessor in title. K., in conveying to the plaintiff had made use of the description in the deed he had received from A.:—

Held, that though the Court might have reformed the deed in an action by K. against A. to make it conform to the agreement arranged between them, there was no theory upon which the plaintiff, K.'s successor in title, could maintain an action against anyone at all in respect to this contract to which he was not a party, or at all events he could not maintain such an action against the defendant, who was a bona fide purchaser for value from A., without notice.

McFatridge v. Griffin, 27/421.

25. **Replevin—Person directing seizure.**]—In the action of replevin, the person who directed the seizure, is properly joined as a party defendant with the person who effected the seizure and is in possession of the goods.

Wilson v. Reid, 21/318.

26. **Specific performance.**]—Oral trust respecting land.—Right of judgment creditor to take the place of the debtor as beneficiary under the trust.—Parties to be joined.

See SPECIFIC PERFORMANCE, 1.

27. **Third party procedure—Action on note—Adding party on agreement to accommodate.**]—The defendant was sued on a note in favor of B. & Co., discounted with plaintiff bank. He applied at Chambers to have B. & Co. added as third parties, under O. 16, R. 49, swearing to a good defence, and to a right to indemnity over against them, by reason of an agreement to renew the note at maturity. It appeared by answering affidavits that this agreement only extended to a portion of the amount at issue, and was conditional on the payment of the difference by the defendant, which he had not done:—Held, that there was no contract entitling the defendant to any indemnity, and that the course of the defendant was not only not sustained by the affidavits, but was also "frivolous, and trifling with the common sense of the Court."

Merchants' Bank v. Moseley, 24/301.

28. **Third party procedure.**]—Foreclosure.—Right of mortgagor to be indemnified by the holder of the equity of redemption.

See MORTGAGE, 16.

PARTITION.

See TENANT IN COMMON, 7.

PARTNERSHIP.

1. **Partner suing partner—Co-owners of mine—Form of action.**]—Plaintiff and defendant agreed verbally that in consideration of plaintiff transferring to defendant one-quarter interest in a gold mine, defendant should contribute, to an amount not exceeding $150, one-fourth of the expenses then incurred, or to be incurred for working, etc.

The transfer was made. Subsequently plaintiff brought action under the agreement for work done, money paid, materials provided, etc., the amount of which he had been compelled to advance. The defence was partnership subsisting, during which no action could be brought but for an account. The County Court having found for plaintiff, defendant appealed:—

Held, partnership was neither pleaded nor proved, and that plaintiff was entitled to recover his advances, such advancing being no part of the arrangement made.

Per Graham, E.J., if there be an agreement by each partner, and one is compelled to advance on behalf of the other, action may be maintained for such advances.

Per Townshend, J., co-owners of mining areas are not partners.

Westhaver v. Broussard, 25/323.

2. **Agreement amounting to partnership—Action for salary.**]—Plaintiff and defendants entered into an agreement by which defendants were to become purchasers of a mine, plaintiff to be owner absolutely of one-fifth interest therein, and to be manager of future operations at a salary of $150 per month.

A further term was proved to the effect that if defendants, should furnish $10,000 towards developing the property, plaintiff would rely on the profits

of working to pay his salary. Defendants had not furnished the money. The defences were, partnership, and a different statement of the terms of the agreement entered into:—

Held, plaintiff might recover in respect of the salary agreed on.

In the Supreme Court of Canada, defendants' appeal was allowed but without prejudice to plaintiff's right to raise the same questions in a different form of action, instituted to take partnership accounts. (Not reported.)

Townshend v. Adams, 26/78.

3. **Test of partnership—Mining venture.**]—Defendants R. and M., and one S. entered into an agreement in writing for the working of a mine belonging to S., under which R. and M. were to employ two workmen and S. one (R. also to contribute his own services), for a certain time. The ore mined was to belong one-fourth to S., three-fourths to R. and M. The plaintiff, a workman employed by R., sued both R. and M. for wages:—

Held, he was entitled to recover against both there being partnership between them under the above agreement, further evidenced by the fact that M. had paid for certain supplies used, in proportion to his interest.

Hallett v. Robinson, 31/303.

4. **Interest in mine—Verbal agreement as to—Statute of Frauds—Specific performance.**]—Plaintiff claimed specific performance of an alleged verbal agreement for the transfer of a share of defendant's one-quarter interest in a mining property, in consideration of services, etc., also for an accounting on the basis of partnership growing out of the same verbal agreement, in the proceeds of the working of the mine. On argument it was admitted that the first claim was barred by the Statute of Frauds:—Held, that plaintiff, on whom the burden of proof rested, should fail, as his evidence as to the conversations with defendant on which his second claim depended was directly contradicted by the defendant.

Stuart v. Mott, 23/524, 14 S.C.C. 734.

5. **Joint undertaking—Notice necessary to terminate interest.**]—Plaintiff furnished funds to enable defendant to proceed to Newfoundland and secure an option to purchase a mine from one C., to be resold by them, and profits divided in certain proportions. This option, after being once renewed, expired June 10th, 1885. In August, 1885, defendant associated himself with other persons and succeeded in purchasing mine and disposing of it at a profit. He seems to have been at some pains to conceal from plaintiff the fact that he had re-opened negotiations on his own behalf:—Held, that plaintiff and defendant having entered into an agreement to obtain the control and sale of the mine and to divide the profits on a re-sale and this agreement not having been terminated by notice, or otherwise, the profits subsequently obtained by one of them enured to the benefit of both. McDonald, C.J., dissenting.

Affirmed in the Supreme Court of Canada.

Annand v. Tupper, 21/11, 16 S.C.C. 718.

6. **Action for accounting—Dealings between surviving partner and widow of deceased partner—Undue influence.**]—Plaintiff's husband, who had been a partner of defendant's testator, died intestate in 1871. The partnership possessed a lumbering business, and very valuable timber lands. The surviving partner, who was a brother of deceased, took administration of his estate, but no further steps were taken therein. Shortly afterwards by representing the estate as in a precarious and peculiar position he obtained sole control, by illegally inducing plaintiff to relinquish her interest to him for $2,000. Almost immediately he disposed of timber lands for $80,000. The plaintiff was entirely unskilled, and ignorant of business matters, and reposed great confidence in defendant's testator, and relied on promises, of further payments if the business turned out better than expected, and of mentioning her in his will, set out in letters produced on trial.

This state of affairs continued until his death in 1888, when plaintiff brought action for an accounting of the partnership and to set aside her release.

The defences relied on were the release, and acquiescence, and delay in bringing action for 17 years:—

Held (and affirmed by the Supreme Court of Canada, Gwynne, J., dissenting), that the release given by the plaintiff to defendant's testator who was administrator of her deceased husband, in ignorance of the real state of the business involved, was improper and obtained by undue influence and abuse of confidence, and should be set aside; also that he as administrator, and as having admitted liability to plaintiff in relation to the partnership property was in the position of a trustee, and as such could not set up the laches of plaintiff. The Statute of Limitations was not pleaded.

Ritchie, J., dissented.

Mack v. Mack, 26/24, 23 S.C.C. 146.

7. **Fraud of partner—Firm name—Authority to sign—Notice to holder.**]—E. was a member of the firm of E. & Co., also of the firm of S. C. & Co. In order to raise money for the use of E. & Co., he made a note for $5,000 in the name of S. C. & Co. indorsing it with the name of E. & Co. and handing it over to plaintiff bank in payment of an overdraft of E. & Co. Shortly afterwards E. & Co. became bankrupt. In an action by the bank claiming as bona fide holder for value, against S. C. & Co., the defence set up was that the note was made by E. in fraud of his partners, and beyond the scope of his authority, and that the bank was not bona fide holder without notice. It was shown that plaintiff bank was familiar with the handwriting of E. The jury found that S. C. & Co. had not authorized the making of the note, but returned an answer "don't know" to a question as to the bank's knowledge of this want of authority:—Held, there was no verdict on a material point, hence there must be a new trial, but on appeal to Supreme Court of Canada:—Held, there was evidence enough of knowledge on the part of the bank to make it their duty to institute inquiries as to E.'s powers, in consequence of which they were not in the position of bona fide holders, and could not recover.

Halifax Banking Co. v. Creighton, 22/321, 18 S.C.C. 140.

8. **Tortious act of partner—Outside scope of business.**]—Appeal from County Court in an action of replevin for 108 bushels of roofing gravel worth $25, where judgment was for plaintiff. The defendant had bought the gravel from H. who claimed to be a partner of plaintiff in the roofing business. Plaintiff denied partnership and proved that the gravel had been bought by himself alone:—Held, that whether there was partnership or not the judgment for plaintiff was right. If partnership existed the sale by H. was outside of its scope, it being no part of the roofing business to sell gravel.

There being no proof of special damage, the damages awarded below were reduced to $25, the value of the gravel sold.

O'Regan v. Williams, 24/165.

9. **Warrant to confess.**]—W., who was a partner of the defendant O., gave the plaintiff a warrant to confess, signed by him for O., and on which judgment was entered against both. This was without the knowledge or consent of O.:—Held, that the judgment so entered must be set aside with costs.

Pitfield v. Oakes, 25/116.

10. **Insolvency—Winding-up—Receiver—Rights of judgment creditor—Appeal.**]—In an action pending to wind up a partnership, in which a receiver had been appointed, S., one of the judgment creditors, applied for and obtained an order for the payment of the amount of his debt out of the funds in the hands of the receiver. The receiver appealed in the interests of the other creditors, representing that the estate was hopelessly insolvent:—

Held, allowing appeal, that S. was not entitled to priority over other creditors by reason of his vigilence in applying in a proceeding aiming at securing equality of distribution, and that

the order should be varied to the extent of putting him in the same position as though he had seized and sold under execution, he undertaking to abide by any future order, etc.

Also, as to a preliminary objection that the receiver had appealed without leave; that the only effect was that he lost his right to reimbursement for costs in the event of failing.

O'Brien v. Christie, 30/145.

11. **Winding up business—Remuneration.**]—Where a partnership has been dissolved by death, the surviving partner, being in the position of a trustee as to the share of the deceased partner, is not to receive any remuneration for his services in winding up the business.

Butler v. Butler, 29/145.

12. **Dissolution—Continuing liability.**]—Defendant T., with the knowledge and consent of his partner, defendant F., accepted in the firm name, a bill of exchange drawn by plaintiff, against the personal debt of T. Afterwards T. arranged for a renewal of this bill, but before its acceptance, in the firm name, the partnership was dissolved, but not to the plaintiff's knowledge:—

Held, that F. having made himself liable as to the original bill was liable as to the renewal now sued on. That the liability being joint, and not joint and several, F. could not be regarded in the light of a surety for the obligation of T., discharged for want of notice of, and consent to, the renewal, and that he could have no discharge except by satisfaction of the debt.

Pitfield v. Trotter, 32/125.

13. **Partnership debt — Dissolution — Appropriation of payment — Counterclaim.**]—M. and C., while carrying on business as partners, gave a chattel mortgage to plaintiffs as security for goods supplied to them. Subsequently M. retired leaving the assets in the hands of C., who gave a further chattel mortgage to plaintiffs covering the goods described in the former mortgage as well as goods supplied to C. personally, after the dissolution.

Plaintiffs realized on the whole security, applied proceeds to the payment of C.'s personal indebtedness only, and then brought action against both M. and C. in respect of the joint debt. Defendants counterclaimed objecting to certain items of expense in connection with realizing on the security, and claiming that the proceeds had not been properly applied:—

Held, that the proceeds of the goods covered by the first chattel mortgage should have been applied to the payment of the partnership debt.

Also, as the circumstances would before the Judicature Act have rendered a suit in Equity proper, the present course in asking to have an account taken, was by counterclaim.

Fisher v. McPhee, 28/523.

14. **Wages after dissolution of partnership—Pleading — Amendment.**] — Plaintiff sued for wages and for an accounting under an alleged partnership. The trial Judge found that the partnership had been terminated, and that there had been no agreement to pay wages in addition to profits, of which there were none. It appeared on argument, however, that after the dissolution of the partnership, plaintiff did certain work for defendants in superintending operations, etc.:—

Held, that plaintiff should be entitled to recover for this work, but as the statement of claim had not been framed to meet that view, and as there was no evidence as to the amount and value of the work on which the Court might base its findings if an amendment were allowed, the appeal must be dismissed with costs.

McDonald v. McKeen, 28/329.

15. **Partnership dealings 20 years old.**]—Plaintiff sought a declaration as to the rights of several persons, growing out of a partnership alleged to have subsisted more than 20 years previously between plaintiff, defendant and others, in relation to the taking up of Crown Lands. Some of the partners were dead and it appeared impossible at that late

day to properly elucidate the facts:—Held, that the plaintiff's laches had barred his rights, if any had existed.

McIlreith v. Payzant, 25/377.

16. **Foreign firm may sue.**]—O. 16 R. 14 extends to allow a foreign firm to sue in our Courts in its firm name.

Semble, such a firm may not be sued in its firm name where there is a possibility of infringing a rule of international law by subjecting foreigners to our jurisdiction.

Knauth Nachod v. Stern, 30/251.

17. **Execution against partner—Service—Costs.**]—Plaintiffs having recovered judgment against defendant firm discovered that B. was a partner therein and applied for execution against him under O. 40, R. 10. Defendants had been served as a firm under O. 9, R. 6. B. opposed the application for execution, disputing his liability for costs of the judgment on the ground that as he had not been served, he had had no share in incurring them:—

Held, he was liable notwithstanding, and his recourse, if any, was against his partners who had contested plaintiffs' claim on, a winding up of the partnership.

Banque d'Hochelaga v. Maritime Ry. News Co., 31/9.

18. **Right of way.**]—Quære, may one partner maintain a right of way for his personal use over partnership porperty, or does his estate therein merge in the partnership?

See RIGHT OF WAY, 4.

PASSENGER.

Injury to passenger.]—Carriers.

See NEGLIGENCE, 1.

PATENT.

Contract in relation to an invention.]—The use of the term "Horton's Sash Patent" does not imply a representation that letters have actually been granted.

See SALES, 16.

PAYMENT.

1. **Appropriation of payments.**]—Where there have been payments in respect of an account, in the absence of an agreement between the parties, the payments are to be applied to the discharge of the items of account, from first to last, in the order of their date.

Netting v. Hubley, 26/497.

2. **Partnership debt—Dissolution—Appropriation of payment—Counterclaim.**]—M. & C. while carrying on business as partners, gave a chattel mortgage to plaintiffs as security for goods supplied to them. Subsequently M. retired leaving the assets in the hands of C., who gave a further chattel mortgage to plaintiffs covering the goods described in the former mortgage as well as goods supplied to C. personally, after the dissolution.

Plaintiffs realized on the whole security, applied the proceeds to the payment of C.'s personal indebtedness only, and then brought action against both M. and C. in respect of the joint debt. Defendants counterclaimed objecting to certain items of expense in connection with realizing on the security, and claiming that the proceeds had not been properly applied.

Held, that the proceeds of the goods covered by the first chattel mortgage should have been applied to the payment of the partnership debt.

Fisher v. McPhee, 28/523.

3. **Payment made in ignorance of facts, recovered.**]—Surety for debt. Appropriation of payments.

See PRINCIPAL AND SURETY, 6.

4. **Payment under doubt as to liability —Decision of Court.**]—The defendant M. brought actions against three insurance companies, on three policies of insurance, two being policies on the hull of defendant's vessel, and the third a policy on freight. Two of the actions were defended, by one solicitor, and the third by another. Before the trial, an agreement in writing, headed in the three causes, was entered into between the solicitors for the respective parties, by which it was agreed that the three causes, so far as the trial before the jury was concerned, should be tried together, but that evidence relative to the issues in either of said actions should be considered as taken in that action, etc. At the conclusion of the trial, a separate order was taken in each action for judgment for plaintiff, with costs. Notices of motion for a new trial, headed in each of the three causes, were given. The appeals were heard together, and M. having succeeded, a separate order was made in each case, dismissing the application, with costs. Three notices of appeal to the Supreme of Canada were then given—one in each action. No consolidation of the appeals was ordered in that Court, but all were heard together, and judgment was given allowing the appeals on payment by the plaintiff companies of costs of the former trial within thirty days after taxation, the appeals otherwise to stand dismissed with costs.

There being some uncertainty as to the exact terms of the judgment in the Supreme Court of Canada—as to what was decided as to costs and as to the time of payment,—plaintiff's solicitors paid to B. the amount claimed by M.'s solicitors as payable under the judgment, and did so under protest, and reserving the right to require re-payment of any part of the amount paid, on the ground that they had already paid more than they were required to do.

In an action brought on behalf of the three companies, jointly, to recover back the money paid, as having been paid by mistake where judgment was for plaintiffs:—

Held (Weatherbe, J., dissenting), that the claims made against the three companies, and their supposed liability, being several, and the money to pay the claims having been contributed severally, were paid on their account severally, in mistake as to part, the implied promise to pay back that part to the companies was several, and the title to the monies in possession of defendants was several, and they could not be joined as plaintiffs, and that, for these reasons, the judgment appealed from must be reversed.

And that if plaintiffs elected to have a new trial, and amend, by striking out all of the plaintiffs except one to be selected, and to retax the costs of the trial severally against each company, they ought to have leave to do so on payment of the cost of appeal and trial, and consequent on the amendment; otherwise the action to be dismissed with costs.

Insurance Company of North America v. Borden, 34/47.

5. **Voluntary payment—To cashier of bank—Presumption of payment to bank.**] —Though payment of the cashier of a bank, who has brought action in his own name, in respect of a negotiable instrument (held in fact by the bank), as indorsee, has the appearance of a voluntary payment to a stranger, yet there is a fair inference of payment to the bank. (Affirmed by Supreme Court of Canada.)

Seeley v. Cox, 28/210.

6. **Payment to agent.**]—Adoption and consequent estoppel of principal. Agent's default.

See MORTGAGE, 28, 29.

7. **Payment by negotiable instrument.**] —Is only conditional payment, unless the parties otherwise intended, which is a question of fact.

8. **Laches.**]—Or unless the payee by his laches, adopt the payment as absolute.

See BILLS AND NOTES, 14, 15.

9. **Payment under compulsion—Agency —Ratification — Amendment.**]—Plaintiff had been owner of a brewery in the

City of Halifax to which the city supplied water, and for this purpose had laid a two inch pipe from the main in the street to the line of the property. There was a dispute outstanding between the plaintiff and the city as to which should bear the cost of laying this two inch pipe, when plaintiff sold his property to O.

Thereafter, by threat of turning off the water, the city succeeded in collecting the amount from O., who demanded and received re-imbursement from plaintiff. This action was to recover from the city the amount paid to O.:—

Held, Graham, E.J., dissenting, the city was not in any case liable to plaintiff to return the amount paid by O. The trial Judge having found that plaintiff was not primarily liable to the city in respect of the cost of laying the pipe, his payment to O. was purely voluntary, and not one which he had a right to recover on the ground that he might have been liable in damages to O. under the covenant of his deed warranting the title to the brewery free of incumbrance, had the water been turned off.

Nor could the payment by O. be considered as an act of an agent, subsequently ratified and adopted by plaintiff, willing to be considered principal. In making the payment O. had acted solely to protect his own interests and had not professed to act on behalf of plaintiff. There being no agency, there could be no subsequent ratification.

An amendment having been asked for on argument, to add or substitute O. as plaintiff:—Semble, if granted at all it could only be on such terms as to costs as would practically amount to a refusal.

Lindberg v. City of Halifax, 31/154.

10. **Premature entry of judgment—Levy—Recovery of payment.**]—Defendant entered judgment by default against plaintiff, levied, but did not remove the property. Thereupon an arrangement was made under which plaintiff paid $100 on account of the judgment, and was to pay the balance by instalments. Immediately after the payment was made, plaintiff discovered that the judgment had been entered prematurely, and applied and had it set aside. He then brought this action to recover his payment and for damages. The jury awarded him the amount of the payment and $1,000 more for damages.

Held, that as the payment was not made under compulsion to prevent an illegal levy, or to relieve the property, but in discharge of a debt due, plaintiff could not recover it back.

And, the evidence not showing that plaintiff had suffered special damage by reason of the illegal levy, the award of the jury was reduced to $50.

Johnston v. Miller, 31/83.

11. **Illegal payment to constable—Recoverable.**]—Plaintiff having been arrested at S. Junction, charged with a violation of the Canada Temperance Act, paid defendant constable $30 to avoid being conveyed to S., and secured his release. Defendant testified that he received it "on and towards the fine.":—Held, the money might be recovered.

Richards v. Taylor, 28/311.

12. **Money paid on fraudulent misrepresentation.**]—The defendant obtained $50 from plaintiff by fraudulently representing to him that he had lost the benefit of an arrangement he had made with B., by which B. was to pay that amount for the privilege of using defendant's mare for breeding purposes during the season, because plaintiff's colt had broken defendant's close and got the mare with foal. Plaintiff paid $50, as in the nature of damages, and was to have the foal. The mare proving not to be with foal, and plaintiff discovering defendant's fraud, brought action to recover the payment:—Held, he might recover, and that the matter was within the jurisdiction of a Justice of the Peace under R.S. 5th Series, c. 102.

Fraser v. McLanders, 25/542.

13. **Compromise and settlement of litigation—Fine.**]—Defendant having been fined for a violation of the Canada Temperance Act, his goods were taken in distress. He replevied them in an action which resulted in an order against him

for the return of the goods and costs. Thereupon he arranged a compromise of all matters with the solicitor who had charge of the case against him and paid a sum of money, taking a receipt, "in full settlement of C.T.A. fine and costs."

Held the compromise must be referred solely to the matter of solicitor's costs, and could not touch the matter of the fine under the Canada Temperance Act.

McMillan v. Giovannetti, 29/91.

Cf. ACCORD AND SATISFACTION.

PAYMENT INTO COURT.

14. **Compromise of action—Payment into Court.**]—In an action and counterclaim pending, the parties agreed in writing that plaintiff should accept and defendant pay the sum of $240 as a settlement of all matters in dispute. Next day the defendant tendered the amount, but plaintiff repudiated the arrangement, considering it as an offer only on his part, which he had a right to withdraw:—Held, on trial of the action that the defendant should succeed, there being a valid contract of settlement, for good consideration, and with costs; also, Ritchie, J., dissenting, upon proof of tender before action brought, without payment into Court of the amount agreed on.

Forsyth v. Moulton, 25/359.

15. **Payment into Court — Tender — Costs.**]—To an action for commissions, etc., defendant pleaded payment of an amount sufficient into Court, and tender of the same amount before action brought. The trial Judge found the amount of the payment into Court sufficient but no evidence of the tender:—Held, "When the defendant pays money into Court, either in the alternative or as a sole defence to the action, and the plaintiff replies that the sum paid in is not sufficient; if the cause goes on to trial and the sum paid in is found sufficient to satisfy the plaintiff's claim, the defendant has succeeded upon an issue going to the root of the action, and is entitled to have judgment entered in his favor, and to recover the general costs of the action, as well as the costs of the other issues, if any, on which he has succeeded. The plaintiff is entitled to the costs of all the issues upon which he has succeeded."

Defendant to have the general costs of the action, and all issues on which he succeeded, plaintiff to have costs of the issue as to tender and all others, if any, on which he succeeded. Cost to be set off; no costs of argument; cost of printing to be equally divided.

Hart v. Davies, 28/303.

16. **Failure to pay into Court.**]—Action to set aside deed. Pleading. Offer to return consideration.

See DEED, 11.

17. **Amendment of payment—Agreement in Court—Admission.**]—In an action for damages caused by the negligent driving of defendant's servant, the sum of $50 was paid into Court as sufficient to satisfy plaintiff's claim. On trial, after plaintiff had been called and given evidence, it was agreed by counsel that, in event of defendant being held liable, the plea of payment into Court should be regarded as if it had named $65 instead of $50:—

Held, that this was in effect an admission of liability to the extent of $65, that plaintiff had then the right to accept that amount in settlement of the suit, and that it covered costs to the time of agreement by counsel.

Gray v. Nova Scotia Power Co., 26/455.

18. **Conditional payment into Court—Pleading.**]—Defendant paid a sum of money into Court to be taken out by plaintiff on his executing a good and sufficient deed with covenants, etc., which defendant had counterclaimed for:

Held, that such a payment should not affect plaintiff's right to costs of the action as there was no way in which he could obtain the money but by going to trial. Also because defendant had not pleaded the payment into Court in his defence, according to O. 22, R. 2.

In the Supreme Court of Canada:—Held, that as defendant had succeeded on his counterclaim, he should not have been ordered to pay the costs before re-

ceiving his deed, and the decree was varied by a direction that he was entitled to his deed at once, with the costs of the appeal to the Court below and to the Supreme Court of Canada. No costs to either party in the Court of first instance.

Per Gwynne, J., defendant should have all costs subsequent to the payment into Court.

Darrow v. Millard, 33/334, 37 S.C.C. 196.

19. **Extension of time—Accepting payment into Court.**]—Plaintiff brought action for $300 for detinue, to which defendant filed a defence, and paid into Court $1. The action being at issue without plaintiff's having delivered a reply, he concluded to abandon his action, and applied to the Judge at Chambers after the time for reply had expired, for further time in which to file a reply, accepting the payment into Court, which was refused:—

Held, rather than prolong admittedly needless litigation, the extension should have been granted, on such terms as the justice of the case required.

Per Meagher, J., dissenting, that as in effect the application related only to costs, the Chambers Judge was within his discretion in that behalf.

Miller v. Archibald, 33/189.

20. **No general admission.**]—"Payment of money into Court with other defences denying liability, is regulated by O. 22 of the Judicature Rules. In view of the decision of the Court of Appeal in Wheeler v. United Telephone Co. (13 Q.B.D., p. 612), there can be no doubt it is no admission of any other allegation in the statement of claim." Any admission contended for must be deduced exclusively from other paragraphs of the defence.

City of Halifax v. Farquhar, 33/209.

PENSION.

Pension liable to equitable execution.]—The pension of a retired official of the City of Halifax can be made available for the satisfaction of a judgment, by means of equitable execution and the appointment of a Receiver.

See EXECUTION, 22.

PHRASES.

See WORDS.

PHYSICIAN AND SURGEON.

1. **Illegal practising.**]—Prosecution for illegally practising medicine under R.S. 5th Series, c. 24, s. 26. Selling and directing the application of plasters for the cure of cancer is "practising," within the meaning of the Act.

Provincial Medical Board v. Bond, 22/153.

2. **Negligence—Degree of skill required.**]—Per Townshend, J. (McDonald, C.J., concurring, the majority expressing no opinion), "It surely cannot be that the skill of a physician attending a patient in a private house with few conveniences and no assistants is to be measured by the same standard as that of the city surgeon, provided with an operating room, assistants, nurses, and all the aids of a modern hospital. It is a simple matter after the event with better opportunities of examination for an expert to say what should have been done, but I think defendant must be judged by his surroundings at the time." (See PLEADING, 66.)

Zirkler v. Robertson, 30/61.

3. **Municipality liable** on contract employing a physician.

See MUNICIPALITY, 3.

PILOTAGE DUES.

See SHIPPING, 10.

PLAN.

1. **Mines department.**]—Reference to numbers of areas on a plan on file in

the Department of Mines, is a sufficient description in an application for a prospecting license.

See MINES AND MINERALS, 8.

2. **Division into lots—Referred to in deed.**]—The details of a plan produced in evidence will outweigh details of description where it appears that it was meant to convey certain lots as set out on plan.

See DEED, 9.

PLEADING.

AMENDMENT.

1. **Amendment improperly refused.**]—Plaintiff sued to recover land of which defendant was in possession as guardian of W.N. The action was brought on the assumption that plaintiff was entitled as uncle and heir of A.N., deceased, a brother of W.N., plaintiff alleging that W.N. was illegitimate. On trial defendant asked for leave to amend his defence to show that even if this was the case, plaintiff could not succeed, because others were nearer of kin to A. N.

Held, that the amendment being necessary to determine the matter at issue it was wrongly refused and that there must be a new trial.

Naylor v. Crowell, 24/181.

2. **Amendment and new trial.**]—Where it appeared that the defendant had a meritorious defence to an action of replevin, which had not been raised by the pleadings, so that extensive amendments would be necessary, leave to amend was granted and a new trial ordered on payment of costs of former trial and of appeal.

Hurlburt v. Sleeth, 25/511.

3. **Amendment of appeal.**]—Defendant failed of establishing his counterclaim, but on appeal, the Supreme Court of Nova Scotia, dismissing appeal, was of opinion that in a different form of action he might have recovered against plaintiff for fraud.

On further appeal, the Supreme Court of Canada:—Held, that under the Nova Scotia Judicature Act, it was the duty of the Court to have made any amendment necessary for determining the real question at issue. The Supreme Court of Canada enjoying like powers, the decision below was reversed and the amendment made. See DEED, 5.

Feindel v. Zwicker, 31/232, 29 S.C.C. 516.

4. **Amending defence on appeal.**]—Defendants having successfully resisted an action to set aside conveyances as fraudulent, applied on argument of plaintiff's appeal, to amend their defence in conformity with the evidence given, and not contradicted:—Held, they were entitled to do so, and the action having been tried as if the amendment asked for were then on record, the amendment should not affect the question of costs.

Also that it was too late for plaintiff to apply to amend in order to allege other fraud against defendants.

Bauld v. Challoner, 28/205.

5. **To arrive at merits.**]—In an action for trespass, tenancy in common was not raised by the pleadings, but was fully discussed on trial. On appeal:—Held, a proper determination of the question between the parties depending on it, the Court would consider that all necessary amendments in the pleadings had been made.

Zwicker v. Morash, 34/555.

6. **Pleading treated as amended—Presentment for payment.**]—On an application to set aside an appearance to a writ (specially indorsed), under O. 14, it was objected that plaintiff had not alleged that the note sued on had been presented for payment according to its face. The Judge allowed an affidavit to be read showing that presentation had in fact been made, and set aside the appearance:—Held, that by doing so he had treated the pleading as amended.

Crowell v. Longard, 28/257.

7. **Statute of Frauds not pleaded.**]—Defendant succeeded on trial because of the Statute of Frauds, which he had not pleaded (except in a replication, bad because pleaded without leave required by O. 23, R. 2), but no objection was taken on trial, which proceeded as if the pleadings were amply sufficient:—Held, that the omission in the defence should be treated as if amended.

Per Ritchie, J., the action being trover wherein the plaintiff had not set out the nature of his title to the goods in question (which he was not bound to do), the defendant could not tell what he had to meet, and should therefore be allowed the benefit of any defence the trial developed, whether pleaded or not. (Meagher, J., contra, the rest expressing no opinion.)

In the Supreme Court of Canada:—Held, further, that only in actions between the parties to the contract, is it necessary that the Statute of Frauds should be pleaded.

Kent v. Ellis, 32/549.

31 S.C.C. 110.

8. **Bill of Sale Act not pleaded.**]—Plaintiff who succeeded on other grounds not having pleaded the Bill of Sale Act in reference to a defective affidavit, a ground on which he was also entitled to succeed: Per Townshend, J., the trial Judge might on terms have amended the pleadings, or the Court on appeal might do so.

McCurdy v. Grant, 32/520.

9. **Illegality not pleaded—Special circumstances.**]—Plaintiff sued to recover $200 loaned to defendant on his note of hand. The trial developed that the loan was made to enable defendant to make fraudulent bets on a skating race, which both had arranged with L., one of the contestants, that L. should lose. The plan did not succeed owing to L.'s opponent having made a similar arrangement with others, so that L. could not lose. There was no plea of this illegality as a defence, and judgment was for plaintiff.

Held, that though a defendant should not generally be allowed to set up his own illegal act without the special plea required by O. 19 R. 15, the ends of justice would be best served by introducing an amendment, and allowing the appeal without costs.

Baker v. Wambolt, 27/345.

10. **Fraudulent conveyance.**]—Plaintiff having begun his action on behalf of himself only, instead of on behalf of himself and other creditors, and having prosecuted it successfully to argument on appeal, the Court made the necessary amendment to enable him to succeed.

Shortell v. Sullivan, 21/257.

11. **Summary matters — Pleadings should be amended, not struck out.**]—In summary matters in the County Court, where application is made to strike out pleas under O. 19 R. 27 and O. 25 R. 24, and it appears to the Judge that the pleas cannot stand in the form complained of, he should grant leave for all necessary amendments, without costs.

Mantly v. Griffin, 25/117.

Power v. Pringle, 31/78.

12. **Relief not asked for.**]—Action having been brought for a conveyance of land under an option to purchase contained in a lease, the defence was that the lease had been superseded by an agreement since lost, by which plaintiff, in consideration of further time had agreed to purchase the land at a considerably higher price. The Court, considering that the terms of the lost agreement had been sufficiently established on trial, decreed specific performance thereof. This form of relief not having been asked for, per Graham, E.J., where the practice in equity before the Judicature

Act would have been to dismiss the bill with leave to file another, now the Court may make the necessary amendments in the pleadings and dispose of the matter.

Doyle v. Dulhanty, 23/78.

13. **A similar course** as to granting an amendment to enable the Court to grant a form of relief not asked for, and where too the party claiming had failed of establishing his main contention, was pursued in.

McDonnell v. Smyth, 26/259.

14. **Application too late.**]—Per Ritchie, J., a Judge rightly refuses an application for leave to amend a defence to an action for slander to enable defendant to set up privilege, where it is not made until all the evidence is in, and the jury has retired, though such an amendment would have been proper if more seasonably applied for.

Shea v. O'Connor, 26/205.

15. **To plead Statute of Limitations.**]—The Court refused defendant's application to amend his defence to set up the Statute of Limitations and plaintiff's laches, where all the facts of the case were before him when drafting his defence. The matter is also peculiarly within the discretion of the trial Judge.

Roberts v. Ward, 26/463.

16. **But where** the other side applies for a countervailing amendment as to parties?

See LAND, 17.

See 55 et seq. post.

BETTER PARTICULARS.

17. **Better particulars of defence.**]—Plaintiff applied at Chambers for an order for better particulars of defence. In answer the affidavit of defendant's counsel was read, showing that at the time the defendants were not in a position to give the information sought with any more detail than was given in an affidavit of the president of defendant company, used in opposing a previous motion of plaintiff to strike out the defence.

Held, that this was sufficient answer, but that the Chambers Judge had erred in dismissing the application with costs, plaintiff being unaware of defendant's inability to furnish the required particulars.

Ouchterloney v. Palgrave Mining Co., 29/59.

18. **Matters peculiarly within knowledge.**]—Plaintiffs sued for money had and received to their use by defendant as school trustee. Defendant demanded better particulars:—Held, he was not entitled to such, all the matters involved being peculiarly within his knowledge.

Trustees of School Sec. 34 v. Thomas, 23/210.

19. **Better particulars of reply—Canada Temperance Act.**]—To an action for wrongful seizure, the defendant, an inspector under the Canada Temperance Act, pleaded that plaintiff had been convicted before "a magistrate for Police District No. 3." Plaintiff replied that that district was not legally constituted under R.S. c. 129., ss. 1, 2, 3, 4, at the time of the conviction:—Held, defendant was entitled to better particulars to avoid surprise, those sections suggesting a number of possibilities, any or all of which might be relied on.

Perkins v. Irvine, 23/250.

20. **Wrongful dismissal — Vague defence.**]—To an action for wrongful dismissal of plaintiff from the position of manager of defendant company's mill, the defence was incompetency, acting beyond authority, disrespect to superiors, injury to business, etc., but in general terms only. Plaintiff applied for better particulars to enable him to draw his reply. The Chambers Judge refused his application.

Held, in actions of this kind a party is entitled to full particulars to guard against being taken by surprise on trial, and though the matter is one discretional with the Chambers Judge, yet that discretion is subject to review on appeal.

Ashton v. Nova Scotia Cotton Co., 22/309.

COUNTERCLAIM.

21. **Counterclaim—Cannot be set aside summarily.**]—A counterclaim cannot be set aside summarily as false, frivolous

and vexatious and pleaded for delay." It seems to have been settled in McGowan v. Middleton, 11 Q.B.D. 464, that all proceedings on a counterclaim must be considered as if it were a cross action, and there is no authority for summarily dismissing an action on such a ground."

Whitford v. Zinc, 28/531.

22. **Action and counterclaim—Payment into Court—Costs.**]—To an action for $709, balance of goods sold, defendant pleaded damage suffered to the extent of $450, by reason of plaintiff's non-fulfilment of his contract within the agreed time, and paid into Court $269 as enough to satisfy what remained of plaintiff's claim. He likewise set up a counterclaim as to the same amount, $450, being the difference between the price of the goods at the time plaintiff ought to have made delivery, and the price defendant was afterwards compelled to pay other persons.

Held, the defence being no answer, plaintiff was entitled to recover his whole claim and costs. Defendant to recover and set off the amount of his counterclaim and costs.

Bauld v. Fraser, 34/178.

23. **Claim reduced by set-off—Jurisdiction.**]—Where a claim is reduced by set-off allowed, and not by proof of a money payment, to an amount below the jurisdiction of the Supreme Court, it remains within the jurisdiction. The supplying of necessaries to an infant, pleaded by way of set-off, is not to be regarded in the light of payment.

Weatherbe and McDonald, JJ., dissenting.

Rutherford v. Purdy, 21/43.

24. **Repeating counterclaim—Consolidation of actions.**]—Plaintiff brought two actions, one for "use and occupation," the other for "goods sold," to each of which defendant pleaded the same counterclaim. Plaintiff applied to strike out the counterclaim as to one of the actions, on the ground that should defendant succeed in both he would recover double his due:—Held, that the subject matter was equally available to defendant in both actions, and if his course tended to vex the plaintiff, he had brought it on himself by bringing two actions. Appeal dismissed, but the actions were ordered to be consolidated.

Ward v. Ward, 24/179.

25. **Equitable relief.**]—Where equitable relief, as by specific performance, accrues to defendant as an incident to an action, it may be raised as part of his defence, and need not be counterclaimed.

McKay v. O'Neil, 22/346.

26. **In lieu of bill in equity.**]—In an action against former partners, where before the Judicature Act a bill in equity would have been proper to test the liability of one of them as to a particular claim, the matter may now be raised by counterclaim.

Fisher v. McPhee, 28/523.

27. **Inconvenient counterclaim—Striking out—Costs.**]—To an action for goods sold, defendant pleaded, amongst other things, a paragraph setting up slander:—Held, that this plea was properly struck out by a Judge at Chambers, O. 21 R. 15, O. 19 R. 3. And the motion having been allowed with costs, the Court would not interfere with the discretion of the Judge.

Lindsay v. Crowe, 31/406.

DEFENCE.

28. **Time for filing.**]—Appeal dismissed from an order at Chambers, refusing to set aside a defence as filed too late, where it was filed before notice of the application to set aside was given. Costs of appeal, and below, to be costs in the cause.

Roberts v. Ward, 25/115.

29. **Equitable relief.**]—Where equitable relief, as by specific performance, accrues to defendant as an incident to an action, it may be raised as part of his defence, and need not be counterclaimed.

McKay v. O'Neil, 22/346.

30. **Setting aside defence—Cross-examining on affidavit—Notice required.**]—Plaintiff moved to set aside as false, frivolous and vexatious a defence and coun-

terclaim to an action on a promissory note. To this defendant opposed his affidavit to the effect that there was no consideration, that there was fraud and misrepresentation, that at the time of signing he was of unsound mind, etc. Plaintiff thereupon applied to cross-examine the defendant on his affidavit, which was granted, and a time set for his appearence, but no order therefor was made and no notice was given by plaintiff. Defendant not having appeared at the time set, his affidavit was rejected, and his defence and counterclaim set aside. Defendant appealed.

Held, that O. 36 R. 28 is by virtue of O. 35 R. 21, applicable to such an enquiry as the present, and notice of cross-examination not having been given in accordance with O. 36 R. 28, the affidavit was improperly rejected. And the affidavit being sufficient to prevent the defence from being set aside as false, etc., the action should have been permitted to go to trial.

Also, a counterclaim being in the nature of a cross action, there is no authority for summarily setting aside an action on such a ground.

Whitford v. Zinc, 28/531.

31. **Statutory defence — Sufficiently pleaded.**]—In an action against a sheriff for wrongful levy, plaintiff failed to plead a bill of sale on which he necessarily relied for title:—Held, that this omission excused the defendant from detailing his objections to the form of the bill of sale under the Act, he having pleaded the Act sufficiently to raise the question of ownership.

Levy v. Logan, 24/412.

32. **Executors plaintiff—Proof of status —Plea of possession.**]—In an action to recover land, defendant objected to the right of plaintiffs to recover as executors of D., deceased, on the ground that they had not proved his death:—Held, that the objection could not be raised in the absence of a special plea under O. 21 R. 5, a general plea of possession under O. 21 R. 20 not being sufficient. Also the death of D. was sufficiently proved by the reception of his will in evidence, without objection.

Doull v. Keefe, 34/15.

REPLY.

33. **Is a pleading.**]—The reply is a pleading, and is included where that term occurs in the Judicature Act.

Perkins v. Irvine, 23/250.

34. **Extension of time—Accepting payment into Court.**]—Plaintiff brought action for $300 damages for detinue, to which defendant filed a defence, and paid into Court $1. The action being at issue without plaintiffs having delivered a reply, he concluded to abandon his action, and applied to the Judge at Chambers after the time for reply had expired, for further time in which to file a reply, accepting the payment into Court, which was refused.

Held, rather than prolong admittedly needless litigation, the extension should have been granted on such terms as the justice of the case required.

Per Meagher, J., dissenting, that as in effect the application related only to costs, the Chambers Judge was within his discretion in that behalf.

Miller v. Archibald, 33/189.

SETTING ASIDE PLEAS.

35. **Defence.**]—The right to apply to strike out paragraphs of a defence is not lost by replying to other paragraphs thereof.

Mahon v. Lawrence, 21/284.

36. **Counterclaim.**]—Nor does a plaintiff lose his right to apply to strike out a counterclaim by replying thereto.

Bank of British North America v. Yetman, 26/481.

37. **Counterclaim.**]—Being in effect a cross action cannot be set aside summarily.

Whitford v. Zinc, 28/531.

38. **Inconvenient counterclaim.**]—Striking out. See 27 ante.

39. **Reply.**]—A reply is a pleading, therefore the orders of the Judicature Act in reference to striking out, apply to it. And single paragraphs thereof may be struck out without dealing with the pleading as a whole.

Perkins v. Irvine, 23/250.

40. **Applications under O. 14 R. 1.**]—An application to set aside an appearance under this order will not be entertained if the statement of claim indorsed on the writ does not set forth everything necessary to the due presentment of plaintiff's case on trial, as in the case of an action on a promissory note "payable at the B. Bank," where there is no allegation of presentment.

Clayton v. McDonald, 25/446.

See also PRACTICE, 1.

41. **Specially indorsed writ—Setting aside defence.**]—Plaintiff, who had sued as indorsee of a bill of exchange accepted by defendant, moved under O. 14 to set aside the defence. The only affidavit offered by the defendant in opposing the motion, was to the effect "that I have been informed by the agent of the H. Company (drawer) . . . and from such information I verily believe, that the plaintiff herein is not, and was not at the time this action was brought, the holder of the said bill of exchange." The Chambers Judge set aside the defence, and defendant appealed.

Held (citing authorities to the effect that hearsay evidence is not shut out, and it is not necessary to show a good defence on the merits, but that some facts must be shown by hearsay or otherwise, to suggest that the defendant may be able to substantiate his defence; and that where any doubt exists the defence ought not to be set aside), that where there is nothing but a statement not under oath to satisfy the Judge of the existence of a defence, the matter is clearly one within his discretion.

But the defendant having obtained leave and read on appeal, further affidavits in support of his defence:—Held, that he should be permitted to go to trial on paying into Court the amount at issue. Plaintiff to have costs of motion below, costs of appeal to be costs in the cause.

Banque d'Hochelaga v. Maritime Ry. News Co., 29/358.

42. **Specially indorsed writ—Setting aside defence — Evidence.**]—Plaintiff claimed as bona fide holder of a bill of exchange drawn by K. on defendant and accepted by him as "A.M., executor of J.P." The defences were, (1) denial of acceptance; (2) an agreement with K. that defendant should not be personally liable, but only as executor; (3) that plaintiff was not holder for value, but only assignee of K., and was aware of all the circumstances.

Held, that defendant having failed to rebut the evidence offered by plaintiff on an application under O. 14, his defence must be set aside. And that he might not on appeal introduce a letter written by K. long after the transfer of the bill to plaintiff, such letter not being evidence on the one hand, and not pleaded on the other.

Campbell v. McKay, 24/404.

43. **In summary matters.**]—Where application is made in summary matters in the County Court to strike out pleas under O. 19 R. 27, and O. 25 R. 24, the Judge should forthwith make all necessary amendments without costs and proceed to determine the matters at issue. Fine pleading technicalities are not to be considered in such matters.

Mantly v. Griffin, 25/117.

Power v. Pringle, 31/78.

44. **Striking out plea as to damages.**] Circumstances in mitigation of damages need not be pleaded (O. 21 R. 4), but if pleaded, may the plea be struck out under O. 19 R. 27. The point noticed but not decided.

Weatherbe v. Whitney, 30/57 at p. 60.

45. **Counterclaim.**] — Defendant repeated in his counterclaim a plea which had been struck out of his defence, and added a number of counts bad in law. The Chambers Judge set aside the counterclaim and defendant appealed.

Held, that the lateness of plaintiff's application to strike out might have warranted the Judge below in refusing the application, but constituted no ground for allowing an appeal.

Per Ritchie, J., the repeated portion of the counterclaim should have been struck out under O. 19 R. 27 as "embarrassing," the remainder under O. 25 R. 4 as "false, frivolous, etc."

Bank of British North America v. Yetman, 26/481.

46. **Evasive plea—Omitting "or any part thereof."**]—Held, striking out pleas of a defence merely denying categorically conversion of a number of articles, without adding the words, "or any part thereof," that under O. 19 R. 19, there is as great a necessity for adding these words, where the ownership of a particular number of chattels is denied, as there is when a certain sum of money is alleged to have been received. It is a negative pregnant, and is evasive.

Unless the pleader has followed a form given in the Rules. See Appendix D., section 5.

McDonald v. Lowe, 34/531.

47. **Striking out pleas of reply—Tending to embarrass.**]—Plaintiff sought to recover in specie goods disposed of by him to F. under an arrangement by which property was to remain in plaintiff, and which had been attached by defendant sheriff. Defendant set up the attachment against F. as an absent or absconding debtor, and the judgment under which he acted. On an application under O. 19 R. 27, to strike out parts of plaintiff's reply as tending "to embarrass and delay."

Held, that the Chambers Judge had improperly struck out: (1) an allegation that F. was not an absent or absconding debtor; (2) that there was no personal service; that F. did not owe the whole judgment; that there was collusion in its recovery; (3) that it had been discharged; as such pleas if substantial would afford an answer. And had properly struck out (4) a plea to the effect that plaintiff had received and not credited payments by F., and the proceeds of collateral security, etc.

Per Ritchie, J., dissenting, that the whole of (4) and parts of the other pleas were "merely demurrable," affording no ground for an application under O. 19 R. 27, and that they were not "embarrassing," but easily disposed of by the Judge on trial.

Leonard v. Sweet, 33/197.

48. **Defence — Summons must state grounds — Principles governing.**] — The Court will not consider the striking out of a plea, on ground not stated in the summons.

Following Chipman v. Ritchie (2 Old. 232), decided under provisions of earlier series of the Revised Statutes, corresponding to O. 25 R. 4, the truth or falsity of a pleading is always the main inquiry. Pleas which are only demurrable, or inconsistent, multifarious or embarrassing, cannot be set aside under this order. (Cf. O. 19 R. 27.)

A defence will not be struck out as "disclosing no reasonable cause of action or answer" if it admits of argument at all, because it is not likely to prevail on trial. The Court must be satisfied that it is groundless. And generally it seems that the Court should exercise its powers under this rule with extreme caution.

O'Connell v. Scallion, 24/345.

49. **Approved and followed**—the Court adding, "It must not be forgotten that . . . the defendant is not called upon to prove his defence by affidavit, but merely to satisfy the Judge that he has a defence, which should be investigated by trial in the ordinary way."

Holmes v. Taylor, 32/191.

50. **Defence merely demurrable.**]—The refusal of a Judge to strike out a paragraph of a defence as disclosing no reasonable grounds, etc., is not equivalent or analogous to the old judgment overruling a demurrer. It does not imply that a good defence has been established, but merely that the Judge is not satisfied of the frivolous nature of the plea.

To invoke the rule (O. 25 R. 4), the defence must be "demurrable and something more."

Campbell v. McLeod, 24/66.

Power v. Pringle, 31/78.

51. **Setting aside defence — Proceedings in lieu of demurrer.**]—Defendant pleaded as a defence to an action on certain promissory notes that a chattel mortgage had been given and accepted as collateral security for the debt represented by the said notes, but did not allege that in consequence further time was granted.

Held, that the plea being no defence to the action, was properly struck out under O. 25 R. 2 and 3 (proceedings in lieu of demurrer).

Arthur v. Yeadon, 29/379.

52. **Opposing affidavits—Preponderance of evidence not to govern.**]—Where an application to set aside pleas as false, frivolous and vexatious is opposed, and there is any conflict in the affidavits produced by the several parties, the Judge should disregard a preponderance of testimony in favor of the applicant, and starting with the assumption that the facts set out in the opposing affidavits are true, determine whether there is anything to be tried.

Banks v. Batton, 30/386.

53. **Statutory defence.**]—To a civil action for an assault, the defendant pleaded that he had been convicted and fined therefor before a magistrate, in consequence of which the plaintiff's action was barred by R.S.C., c. 178:—Held, that the plea was defective and should be struck out, as not setting up that the conviction was at the instance, or on behalf of, the plaintiff.

Ross v. McQuarrie, 26/504.

STATEMENT OF CLAIM.

54. **Assignment, chose in action.**]—Semble, where a chose in action has been assigned and action is begun in the name of the assignor, the pleadings should set forth that the benefits are to accrue to the assignee.

McCurdy v. McRae, 23/40

55. **Assignment of chose—Averment of assignment in writing—Amendment.**]—Plaintiff, who was assignee in insolvency of H., sued in his own name for a debt due by defendant to H., alleging in his statement of claim "that H. duly assigned the said debt to said plaintiff." The County Court Judge considered that on the merits plaintiff should succeed, but not having alleged that the assignment was in writing, the statute was not complied with, for which reason judgment was for defendant.

Held, that it was the duty of the Judge to have made the necessary amendment. Amendment ordered by the Court, plaintiff to have costs of trial, no costs of appeal.

Dempster v. Fairbanks, 29/456.

56. **Conversion—Damages for withholding.**]—In trover, to recover possession of property, damages for loss of use because of the withholding, may be recovered without a special plea.

Garden v. Neily, 31/89.

57. **Setting aside deed—Offer to refund consideration.**]—In an action to set aside a deed as procured by misrepresentation, plaintiff neglected to allege in his statement of claim that he was ready and willing to return the consideration paid:—Held, that this was sufficiently remedied by his reply, "That he is now and was always willing upon equitable terms to take a reconveyance of the said lands."

Lockhart v. Lockhart, 22/233.

58. **In actions claiming easements.**]—In actions for the recovery of lands, etc., no forms of pleading in use before the passing of the Judicature Act afford any guide to present requirements. Though before the passing of that Act in actions for obstructing a right of way, it was sufficient to state that the plaintiff was possessed of a messuage and land, and by reason thereof was entitled to the easement, yet since, under O. 19, R. 4, it is necessary to state the material facts on which the party relies, etc. Therefore a statement of claim which merely claims the right "(c) Under c. 112, Re-

vised Statutes, 5th Series, 'Of the Limitation of Actions,'" without reciting the facts which make that chapter applicable, is defective, though a fit subject for amendment on terms before trial. But the pleading being in substantial compliance with the Judicature Act, inasmuch as it indicated the grounds to be met, the defect should not after trial operate to the disadvantage of the plaintiff, otherwise entitled to succeed.

Corkum v. Feener, 29/115.

59. **Fraudulent conveyance.**]—In an action to set aside a conveyance as fraudulent, a statement of claim is defective which does not specifically allege fraud, but merely sets out a set of facts from which the Court may infer it; and which does not allege fraud against creditors generally.

Thomson v. Barrett, 24/136.

60. **Action on guarantee—Must allege consideration.**]—Plaintiff issued a specially indorsed writ, the statement of claim indorsed on which was as follows: —"The plaintiff's claim is against the defendant upon a guarantee in writing . . . by which defendant agreed to see that plaintiff was paid ten dollars per month on the following note. . . No instalments have been paid since . . . and defendant refuses to perform his guarantee. The plaintiff claims $30":—

Held, that a statement of claim indorsed on a specially indorsed writ, like every other statement of claim, must disclose a cause of action, and that the indorsement in this case was rightly stricken out by the County Court Judge, because it did not allege that the guarantee was given for consideration, without which defendant was not liable, nor were there words from which the existence of a consideration could be inferred.

Johnson v. Fitzgerald, 29/339.

61. **Money had and received.**] — The defendant, an inland revenue inspector, had received from the department the proportions of proceeds due the seizing officer, on a sale of confiscated goods He had made a personal agreement with plaintiff, an informer, to share this money with him. The department had no knowledge of plaintiff:—

Held, that a count for money had and received for the use of the plaintiff, was not correct in form, but in view of the merits, all necessary amendments should be made to enable plaintiff to recover.

Wright v. Curless, 21/232.

Carroll v. Curless, 23/32.

62. **Money had and received.**]—Plaintiff and defendant entered into an agreement whereby defendant was to secure an option to purchase a mine from one C. This option having expired, the defendant soon after purchased the mine on his own account, but gave plaintiff no notice of the termination of their relationship. Defendant afterwards sold the mine at a profit, and plaintiff brought an action "for money had and received," claiming a share:—

Held (Ritchie, J., dubitante), that this form of action might be maintained, though one praying for a declaration of trust, and that plaintiff's share might be paid over, would be more advisable.

Annand v. Tupper, 21/17.

63. **Negligence—Injury to children—Loss of services.**]—Plaintiff brought action for the negligence of defendant's servant in driving recklessly, whereby two of plaintiff's children were injured. The only plea alleging special damage by loss of the children's services was ". . . in consequence of which they were for months, and one still is, ill and unable to move about and perform the acts and duties that children of their age are in the habit of doing, and are expected to do":—

Held, per Ritchie and Townshend, JJ., that in the absence of an allegation that the children were residing with, or in the service of their father, no inference of loss of service could be drawn.

Per Weatherbe and Graham, JJ., contra, that the plea was sufficient.

Cox v. McKenzie, 22/226.

64. **Presentment for payment—Amendment.**] — Action on a promissory note payable at the H. Bank. Plaintiff had neglected to allege presentment for pay-

ment. Defendant did not raise the point in his defence, but opposed plaintiff's motion to amend on trial, except on terms of a continuance, costs, etc. The County Court Judge considering on the merits that plaintiff's rights would be too much prejudiced by the delay, gave judgment in his favor without making the amendment:—

Held, that plaintiff had no right to succeed without alleging and proving presentment. That the amendment should have been made, and would now be made and a new trial ordered, but as defendant had not raised the point in his pleadings and so enabled the point to be disposed of inexpensively, costs of appeal should abide the event.

Pigeon v. Moore, 23/246.

65. **Alleging presentation for payment.**]—Plaintiff issued a specially indorsed writ for the collection of a promissory note, payable at the P. Bank. In his indorsement he alleged that the note was "duly presented for payment," but did not mention at what place. The defendant appeared, but did not plead. On an application under O. 14, R. 1, to set aside the appearance and for judgment, the defendant produced no answering affidavits of merits, but relied on the alleged defect in pleading. Plaintiff produced an affidavit to show that presentation was in fact made at the P. Bank, which the Chambers Judge received, and set aside the appearance. Defendant appealed:—

Held, that the Judge by admitting the affidavit had treated the pleading as if amended.

Quaere, was not the allegation of presentation sufficient? "The pleader in this case, had the authority of a form given in Chitty's Forms, 9th ed., p. 88."

Crowell v. Longard, 28/257.

66. **Vagueness and uncertainty.**]—In an action against a surgeon for damages the statement of claim was as follows:—

"5. The defendant negligently, improperly, ignorantly and unskilfully dressed and treated the plaintiff's said wounds and injuries.

"6. The defendant, while dressing and treating the said wounds and injuries, cut off a portion of one of the nerves of plaintiff's leg, viz., . . ."

The trial Judge, dubitante as to whether the point was sufficiently raised, found that the negligence of defendant was in not finding and suturing both ends of a nerve severed by the accident, and awarded $1,500 damages to plaintiff:—

Held, that paragraph 5 standing alone would be insufficient for vagueness and uncertainty (O. 19, R. 6), but that read with 6 it might be considered as setting out plaintiff's case. But as these issues had been found in defendant's favor, the decision against him had proceeded on grounds not set up, and which he was therefore not bound to answer, so that there must be a new trial, with costs.

And per Graham E.J. (Henry, J., concurring), an amendment necessary to raise the point properly.

Zirkler v. Robertson, 30/61.

Cf. FRAUD, 7.

PLENE ADMINISTRAVIT.

Defence raised by executor—Realty liable for debts.

See EXECUTORS AND ADMINISTRATORS, 8.

POLICEMAN.

See CONSTABLE, FALSE ARREST AND IMPRISONMENT, 4.

POSSESSION.

1. **Possession founding title.**]—Held, following Cunard v. Irvine (James Reports, 36), where a party claiming land in ejectment does not derive his title from the Crown, he is bound to start from someone in possession, possession being in such a case prima facie evidence of title.

And the evidence of such possession must be unequivocal.

McLeod v. Delaney, 29/133.

2. **Adverse possession — Statute of Limitations—Infancy.**]—During the first ten years of the possession set up as adverse by the defendants to an action of ejectment the plaintiffs were under the disability of infancy. The action was begun fourteen years after the removal of the disability:—Held, that under R.S. 5th Series, c. 112 s. 19, the possession of the defendants had ripened into a title good against all the world.

Shea v. Burchell, 27/235.

3. **Adverse — Statute of Limitations** need not be pleaded as a defence where a defendant in trespass relies on title acquired under that statute (R.S. 5th Series, c. 112, s. 11).

See TRESPASS, 6.

4. **Adverse possession—Tenant in common.**]—A tenant in common may resist an action for possession by a co-tenant never seized, by setting up adverse possession. The defendant's possession in such a case is not that of the plaintiff under R.S. 5th Series, c. 112, s. 17.

Laurence v. McQuarrie, 26/164.

5. **Possession as against written title.**]—In an action of ejectment the written titles of both parties were derived from J. In addition the defendant had title by possession for upwards of twenty years. After this title had matured, the plaintiffs had recovered in ejectment against J., and the sheriff, under a writ of habere facias, had put them into nominal possession:—Held, that though the possession given by the sheriff be valid, and the person found in occupation (who was defendant's tenant) had attorned to the plaintiffs, yet the title of the defendant was superior, and he might have maintained ejectment against the plaintiffs.

Shea v. Burchell, 27/235.

6. **Land**—Possession as against deed of owner not seized—Effect of deed, on joint occupier.

See TRESPASS, 5.

7. **Defendant not seized—Sale and deed by sheriff**—The ordinary doctrine does not apply.

See LAND, 12.

8. **Color of title — Title sufficient to maintain trespass.**] — J. V., sr., a squatter on land more than fifty years previously, mortgaged to plaintiff, then deeded to his son, J. V., jr., who went into possession, paid interest for several years, then abandoned the property, when plaintiff foreclosed against him:—Held, that the above acts constituting color of title, taken together with the foreclosure proceedings, and the statutes of the Province, gave plaintiff title quite sufficient to enable him to maintain action against a wrongdoer.

Payzant v. Hawbold, 29/66.

9. **Possession of street by abutting property owner—Sufficient to maintain trespass** against a wrongdoer—Cutting ornamental trees — Legislation — Telephone company.

See TRESPASS, 4.

10. **Color of title—As against grant—Notice to Crown—Registry Act.**]—Plaintiff, claiming by possession with color of title, brought trespass against defendant, who was the grantee of the Crown. The acts of possession relied on were frequent and long continued going on the land, which was wild, and unfenced, and cutting poles, removing stones, etc.:—Held, that these acts were insufficient evidence of completeness and continuity of possession to make it necessary for the Crown, before granting to take steps to re-vest the title in itself, and that the doctrine of Smyth v. McDonald (1 Old. 274), making such a course necessary after twenty years possession by the subject, is not to be extended.

Plaintiff also relied on a series of deeds made by different persons, registered, and some of them covering the area in dispute, as assisting his rights against the grant:—Held, that the Crown is not affected with notice by the registry of a deed of a stranger to the title. "There is nothing in the Registry Act which says that the Crown, or anyone else, is

bound to take notice of the registry of a deed made by a stranger conveying land which the owner has not granted, and there is nothing notorious in such a transaction without such a law."

McKay v. McDonald, 28/99.

11. **Presumption of grant**—Possession as against subsequent grant of Crown—Possession of predecessors.

See GRANT, 1.

12. **Possession sufficient to found liability for negligent maintenance.**]—In an action against defendant steamship company for damages for an injury caused by the negligent maintenance of its wharf, it appeared that the demise of the wharf was to C., the agent of the defendant company, but merely because the lessor preferred to deal with him:—Held, that the demised premises were sufficiently in the possession of defendant company to render it liable.

York v. Canada Atlantic S.S. Co., 24/436, 22 S.C.C. 167.

13. **Attachment of goods in possession of third person—Sheriff must justify.**]—Action against the sheriff for wrongful taking of goods out of the possession of plaintiff, under an attachment against J. J., an absent or absconding debtor, which plaintiff claimed as his own property by purchase from J. J.:—

Held, that the goods having been found in the possession of plaintiff, the onus was on the sheriff to prove the lawfulness of his action. The possession of plaintiff being sufficient to maintain trespass against a wrongdoer, he need not prove title.

And the sheriff was a wrongdoer because the affidavit on which the attachment was granted, did not prove that any debt was due by J. J., the absent or absconding debtor.

Johnson v. Buchanan, 29/27.

14. **Attachment—Does not bind until levy—Creditor in possession,** and who afterwards purchases from the debtor absconding, has a good title.

See ABSENT OR ABSCONDING DEBTOR, 7.

15. **Bill of sale**—Possession sufficient to constitute title apart from unrecorded or otherwise defective bill of sale.

See BILL OF SALE, 13.

16. **Donatio mortis causa**—Transferrence of possession necessary to effect.

See DONATIO MORTIS CAUSA.

17. **Foreclosure—Writ of possession.**]—After foreclosure and sale and purchase by plaintiffs, they applied under O. 48 for a writ of possession:—Held, they were entitled, but as no one opposed their motion, without costs.

Eastern Canada Savings and Loan Co. v. McKinnon, 26/523.

18. **Writ of possession—When to issue.**]—The order of a Judge at Chambers directing the issue of a writ of possession for lands sold under execution, under R.S. 5th Series, c. 124, did not specify the number of days after which the writ was to issue:—

Held, that the order was in this irregular, and an appeal therefrom should be allowed.

But, an appeal from the action of another Judge at Chambers refusing to set aside this order of his associate, was dismissed with costs.

Re Broad Cove Coal Co., 29/1.

19. **Where equities are equal,** better is the position of him who has possession.

See FRAUDULENT CONVEYANCE, 10, 11, 12.

20. **Plea of possession**—O. 21, R. 5, O. 20, R. 20.

See PLEADING, 32.

POUND.

See IMPOUNDING OF CATTLE.

POWER OF ATTORNEY.

Attorney exceeding powers—Acquiescence.

See ASSIGNMENT, 10.
PRINCIPAL AND AGENT, 14.

PRACTICE.

See also ABSENT OR ABSCONDING DEBTOR, ACTION, ADJOURNMENT, AFFIDAVIT, AMENDMENT, APPEAL, ATTACHMENT, CAPIAS, COSTS, COUNTY COURT, CROWN RULES, EXECUTION, JURY, NEW TRIAL, PARTIES, PLEADING, PRINTING, PROBATE COURT, REPLEVIN, TIME.

APPEARANCE.

1. **Setting aside — Specially indorsed writ.**]—O. 14, R. 2, provides that an application to set aside an appearance to a specially indorsed writ, shall be by summons. Plaintiff applied by notice of motion and an order for judgment was made from which defendant appealed:—

Held, the matter was an irregularity curable under O. 68, and defendant should have attended and pointed it out, in which case amendment would have been made on proper terms. Appeal dismissed with costs.

Sands v. Fisher, 30/185.

2. **Setting aside appearance—Pleading defective.**]—In an application to set aside an appearance to a specially indorsed writ (O. 14, R. 1), nothing material to the due presentment of the plaintiff's case will be overlooked. The appearance will not be set aside, if in an action on a promissory note "payable at the B. Bank," no allegation of presentation for payment is made.

Clayton v. McDonald, 25/446.

3. **Setting aside appearance—Pleading treated as if amended — Alleging presentation for payment.**]—Plaintiff issued a specially indorsed writ for the collection of a promissory note, payable at the P. Bank. In his indorsement he alleged that the note was "duly presented for payment," but did not mention at what place. The defendant appeared, but did not plead. On an application under O. 14, R. 1, to set aside the appearance and for judgment, the defendant produced no answering affidavits of merits, but relied on the alleged defect in pleading. Plaintiff produced an affidavit to show that presentation was in fact made at the P. Bank, which the Chambers Judge received, and set aside the appearance. Defendant appealed:—

Held, that the Judge by admitting the affidavit had treated the pleading as if amended.

Quaere, was not the allegation of presentation sufficient? "The pleader in this case, had the authority of a form given in Chitty's Forms, 9th ed., p. 88."

Crowell v. Longard, 28/257.

4. **Setting aside writ and attachment —Waiver by appearance and furnishing security.**]—Defendant company appeared to the writ of summons "without prejudice to the right to object to the jurisdiction," and now sought to set aside the writ and service, and an attachment (absconding debtor). It had procured an undertaking to be given plaintiff Com-

pany by the Bank of Montreal, on which the attached property—a vessel—had been allowed to proceed on her voyage:—

Held, the writ having been regularly issued, and in proper form, could not be set aside. Service thereof, though in itself probably defective, had been cured by appearance. Where a defendant appears, no service is necessary.

Also, appearance under protest is unknown to our practice, even had defendant company so sought to protect its right to object to the service. (Cf. O. 12, R. 18.)

Also, the attachment was vacated when security was furnished, leaving nothing to be acted on now.

Semble, had the defendant under the statute, put in special bail under protest, he might have succeeded on motion to set aside the attachment.

Dominion Coal Co. v. Kingswell S.S. Co., 30/397.

5. **Appearance by counsel—Quasi-criminal matter.**]—Defendant by his counsel having appeared under protest to a summons for violation of the Canada Temperance Act, intending to maintain that the serving constable was not authorized for the district. After cross-examining the constable, he left the Court and the case proceeded to conviction:—

Held, defendant had waived his right to object on the ground of defective service.

Queen v. Doherty, 32/235.

6. **Equitable action—Default of appearance—Time.**]—Plaintiff, as an heir at law of L., brought action against defendants for a declaration of rights, and for partition. One month later she marked default. Seven months later, defendants entered an appearance, and afterwards a defence. They then gave notice of trial under O. 34, R. 11.

On the first day of the trial term plaintiff moved to set aside this notice of trial, which motion was dismissed.

When the action was called for trial, plaintiff not being present, defendants moved under O. 34, R. 23, and obtained an order dismissing plaintiff's action unless plaintiff should pay the costs of the motion to set aside the notice of trial, and furnish security for costs of action.

On plaintiff's appeal from both orders:—Held, plaintiff should have moved to set aside the appearance and defence, even if irregular, not the notice of trial.

Also, the action not being merely for partition, but also an equitable action for a declaration of rights, not specifically provided for by O. 13, R. 11, defendants might appear and plead at any time before judgment rendered in accordance with O. 13, R. 13.

Also, the terms of the order dismissing plaintiff's action, though unusual, were within the province of the trial Judge.

Duyon v. LeBlanc, 34/215.

7. **Proceedings on default of appearance**—Interlocutory judgment—O. 20, R. 2—Practice generally.

See JUDGMENT, 20.

DISCONTINUANCE.

8. **After pleading—Agreement between solicitors.**]—Where defendants were added by order of the Court, and appeared and pleaded:—Held, that plaintiffs had not the right except by leave of the Court or a Judge, to discontinue as against such defendants, especially where such defendants claimed a specific right in the property in question, which right would be affected.

Where an agreement had been entered into, under which defendants' solicitor was permitted to withdraw the defence pleaded and to prepare a new one:—Held, that this was "another proceeding in the action," which, under O. 26, R. 1, precluded plaintiffs from discontinuing without leave.

Boak v. Higgins, 32/494.

9. **Appeal after discontinuance.**]—January 15th an order was made at Chambers dismissing with costs, an application to set aside a writ served out of the jurisdiction, on defendants, who were not British subjects. January 27th the plaintiff discontinued the action. February 3rd defendants appealed from the order of January 15th:—Held, they could not at that date assert their appeal.

Weatherbe v. Whitney, 29/97.

DISMISSING, NOTICE TO PROCEED, ETC.

10. **Dismissing action—Notice to proceed.**]—The plaintiff's action was dismissed for want of prosecution, October 7th, 1890, on an affidavit stating that issue had been joined January 18th, 1887, and that no notice of trial had been given. Plaintiff's appeal allowed on the ground that before moving to dismiss for want of prosecution, defendant was bound under O. 60, R. 9, to have given plaintiff one month's notice to proceed, which he had not done.

McLachlan v. Morrison, 23/193.

11. **Approved and followed,** the Court holding itself not bound by an Irish case to the contrary (Warnock v. Mann, 3 Q.B., 1896, Ir. 630.) Meagher, J., dissenting.

McIsaac v. Broad Cove Coal Co., 31/108.

12. **Dismissing action—O. 34, R. 23, 24—Rescinding.**]—Up to the day plaintiff's action was called for trial, his solicitor did not know that a certain fact was in issue, so refused to proceed, on defendant's solicitor declining to waive it. On the last day of the term defendant's solicitor, under O. 34, R. 23, obtained an order dismissing the action which plaintiff's solicitor opposed. On a motion by the latter to rescind this order under O. 34, R. 24:—

Held, that the case was not one for the indulgence of the Court. Though the motion to dismiss should probably have been made at the trial, and not on the last day, under O. 34, R. 23, yet plaintiff's solicitor had waived that point by attending and opposing the motion.

Nelson v. Studivan, 23/189.

13. **Dismissing action—Order to proceed—Waiver by solicitor.**]—An order was made at Chambers directing that plaintiff's action be dismissed for want of prosecution, unless he gave notice and proceeded to trial at the next sittings of the Court. The cause was set down for trial, but before the day the plaintiff's solicitor told defendant's solicitor that he would not be able to go to trial on that day, and asked him not to attend, to which he assented. Subsequently defendant's solicitor entered judgment under the order:—

Held, that this was irregular, the effect of the assent by defendant's solicitor being to relieve plaintiff from the terms imposed by the order to proceed, and if defendant's solicitor wished to go to trial that term, he should have qualified his assent.

Hechler v. Berrigan, 26/291.

14. **Agreement to continue.**]—Per Graham, E.J., an agreement to continue, made in writing between solicitors, is to be construed as a continuance to the next term only.

McLachlan v. Morrison, 23/193.

15. **Continuance refused—Absence of witness.**]—Appeal dismissed from the decision of the Judge on trial, refusing a continuance on the ground that a material witness who had been duly subpoenaed, etc., was absent, the action having been under order dismissing it before it came on for trial, which order had not been insisted on.

Duffy v. Adams, 30/197.

16. **Dismissing action—O. 34, R. 23—Appeal.**]—Plaintiff's action had been dismissed under O. 34, R. 23. He appealed. Defendant contended that from an order under that rule there was no appeal, but only recourse by way of motion to set aside the order within six days:—Held, that the wording of the rule not being imperative, it is only applicable to cases where the default is admitted and the judgment based thereon regular, and a party is seeking to have the cause restored on terms. Here, as it was disputed whether the action was ever at issue, an appeal might be asserted.

Cummings v. Pickles, 32/489.

17. **Dismissing action—Unusual order—Discretion of Judge.**

See ANTE, 6.

18. **In default of security for costs—** Action is not "dead" and indulgence

may be granted—To dismiss, further application must be made—O. 27, R. 1, and O. 63, R. 5, compared.

See COSTS, 62.

19. **Deciding points of law before trial.**]—Under Judicature Act, s. 18 (Cf. also s. 20 and O. 25, R. 1, 2, 3), a single Judge has the same power to consider and dispose of points of law before trial that he has on trial.

Knauth Nachod v. Stern, 30/251.

DOCKET.

20. **Change on docket.**]—Motion to remove a cause from the docket and reenter it so that it might be heard after another cause alleged to involve the same matters, refused on the ground that it had not been shown that the former cause would necessarily be disposed of by the latter.

Eaton v. Curry, 25/109.

21. **Right to be heard in order of entry.**]—When the appellant's case was reached on the docket, he refused to proceed on the grounds that he was not prepared, and that the case was reached prematurely because a sufficient number of qualified Judges had not attended to hear the case immediately preceding it, in which he was counsel. The respondent offered to attend later in the day or next day, and the Court expressed its assent to the arrangement, but the appellant declined, contending as a matter of right, that causes must be heard in the order of entry, that Judges were bound to attend, etc.:—

Held, quashing the appeal, that the Court had power to hear causes in any order it chose.

Fluck v. Wallace, 27/164.

INTERPLEADER.

22. **Setting aside execution—Rights of parties—Issue directed.**] — F. being indebted to R. in respect of an amount paid by him to defendant as a surety for F. on an appeal, purchased a judgment outstanding in this action against defendant, which he assigned to R., as part security for his debt.

Subsequently X. recovered judgment against F., and in connection with indigent debtor proceedings, F. assigned all his interest in the above mentioned judgment to X. X. thereupon applied to defendant, who settled the amount of the judgment.

An execution having been levied under this judgment by R., the legal holder, the defendant applied to the Judge at Chambers for relief on the ground that he had settled the amount due by payment to X. The Judge at Chambers set aside the levy and stayed proceedings. From this R. appealed:—

Held, that the matter involved an accounting between F. and R., and though prima facie the defendant must pay the legal holder, yet he was entitled to an enquiry as to any peculiar rights. Appeal allowed, but execution stayed on defendant paying into Court the amount thereof within fifteen days. Thereafter he might apply for an interpleader order to try the matters in dispute. Otherwise costs of appeal to be paid by defendant.

Per Graham, E.J., defendant had properly applied in the cause. Had he made application independently to restrain proceedings, his application would have been dismissed. Judicature Act, s. 12, ss. 5, 7.

Rogers v. Burnham, 24/535.

Cf. 54 post.

23. **Issue not directed cannot be tried.**]—On an interpleader application a judgment having been stayed and certain issues directed to be sent to trial:—Held, that the defendant on trial of the issues might not dispute his liability under the judgment, that matter not having been taken as a ground or directed to be tried as an issue.

Redden v. Burnham, 26/384.

24. **Notice of action—Railway Act.**]—Though an employee of the Intercolonial (Government) Railway may avail himself of the want of notice of action required by the Railway Act, as a ground of defence, it does not appear that the defence continues in favor of a party who has been substituted for him by interpleader proceedings.

McLachlan v. Kennedy, 21/271.

25. **Whether any appeal.**]—Point raised in preliminary objection, but no opinion expressed, the appeal being dismissed without costs on other grounds, as to whether a claimant may appeal from the decision of a Judge on an interpleader issue, without leave? See O. 56, R. 11.

Cormier v. Mattinson, 27/354.

MOTIONS AND OTHER APPLICATIONS.

26. **Short service—Initialing summons.**]—No separate order was made authorizing short service of a summons, but the Judge initialed the summons itself. On appeal the Court was equally divided as to whether this had the effect of an order.

Paint v. Gillies, 26/526.

27. **Remitting back award—By notice not summons—Voluntary reference.**]—The Judge at Chambers rightly refused to entertain an application to remit back an award, made by summons (affidavits not served therewith), inasmuch as O. 52, R. 4, prescribes notice of motion stating grounds, etc.

Per Graham, E.J., the Court has no power to deal with an award where the reference has been voluntary, not compulsory under R.S. 5th Series, c. 115.

Austen v. Bertram, 23/379.

28. **Setting aside award—Ground not stated.**]—The Court refused to consider the setting aside of an award for an irregularity not affecting the jurisdiction of the referee, such ground of irregularity not having been stated in the notice of motion.

Hogan v. Gates, 26/85.

29. **Death of Judge—Motion pending.**]—Notice of an application to set aside a judgment was given by defendant, which by consent was postponed for a week. Before the agreed return day the County Court Judge died. Some months later plaintiff gave notice of a motion before his successor to dismiss defendant's application. This Judge being interested, referred the matter to another Judge, who granted the application:—

Held, there was no jurisdiction, there being nothing pending. The application not having been heard on the return day, it expired without notice of abandonment by the mover, and that defendant was entitled to costs of opposing plaintiff's motion and of appeal.

Stewart v. Morrison, 24/406.

30. **Interlocutory application—O. 57, R. 5.**]—An application to a Judge to set aside a judgment entered against an infant, is an interlocutory application, entitling the applicant to produce further evidence on appeal from his refusal.

Leaman v. Murray, 23/298.

31. **Interlocutory decree—Action will not lie.**]—The Judge of probate on final settlement of the estate of G. found the sum of $500, due by the executor to the estate. On appeal to the Supreme Court the proper amount was found to be $300, and it was ordered that the matter be remitted back, and "that the said Court (of probate) do proceed therein as if the final decree on the accounting had been to that effect." On this decree, the plaintiff, who was solely interested in the estate, brought action against the executor:—

Held, the action would not lie. The order being an interlocutory order for the payment of money, the proper remedy was by attachment in some cases and by execution in others. In the Supreme Court always by execution.

Greenwood v. Chesley, 25/203.

NON-COMPLIANCE.

(See also AMENDMENT.)

32. **Rules and substantive law.**]—An affidavit for arrest merely setting forth an indebtedness with no particulars does not disclose "a good cause of action" nor may the word "fears" be substituted for "believes" the debt will be lost. Both of these matters of non-compliance with O. 44 are within the purview of O. 68. But an order for arrest signed "J. M. A., a commissioner of the Supreme Court for the County of C." is not to be so considered, as it transgresses the rule of substantive law, that orders of inferior Courts must show jurisdiction on their

face, in that there was nothing to show that the commissioner acted within the limits of his territorial jurisdiction.

Sydney & Louisburg Ry. Co. v. Kimber, 23/338.

33. **Within a reasonable time.**] — An application to set aside an order for arrest for irregularity is not made "within a reasonable time," as required by O. 68, R. 2, if made more than a year after issue of the order for arrest, and after the main matter in dispute has been tried.

Sydney & Louisburg Ry. Co. v. Kimber, 23/338.

NOTICE OF TRIAL.

34. **Notice of trial—Waiver.**]—Defendant, after giving notice of trial, accepted service of a reply:—Held, that by so doing he had waived his notice, by admitting that the cause was not at issue.

Cummings v. Pickles, 32/489.

35. **On default.**]—It is not necessary to set down an action for trial where no defence is filed.

Thomson v. Barrett, 24/143.

See also JUDGMENT, 24.

36. **Setting aside.**]—Plaintiff contending that an appearance and defence had been filed after the time limited had expired, should have moved to set such appearance and defence aside, not the notice of trial given by defendant under O. 34, R. 11.

See 6, ante.

ORDERS, INTERLOCUTORY, MISCELLANEOUS, ETC., RESCINDING, ETC.

37. **Acquiescence in order.**]—A party cannot take the benefit of one portion of an order and afterwards seek to set it aside as to another portion imposed as a condition.

McColl v. Tupper, 27/27.

38. **Irregular form—"By the Court."**] —An order made by a Judge at Chambers concluding with the form "By the Court," when no Court was sitting, is irregular, and should be set aside. But per McDonald, C.J., and Townshend, J., such an informality is a fit subject for amendment.

O'Gorman v. Westhaver, 22/314.

39. **Rescinding order.**] — The rule against a Judge rescinding his own order does not apply to orders made ex parte. Application may be made to rescind such on the ground that they have been irregularly or improperly obtained, or made without jurisdiction.

Hamilton v. Stewiacke Valley, etc., Co. and Dickie, 30/92.

40. **Reforming order—Ex parte application.**]—A Judge of the County Court having rendered his decision on December 18th, made two orders, one that plaintiff recover the sum of $50 against defendants T. and G., and that he have leave to enter judgment therefor with costs to be taxed; the other dismissing the action against defendant C. with costs to be taxed. Subsequently, on the same day defendant's solicitor ex parte obtained an order setting off the costs of an issue found in favor of defendants T. and G. against plaintiff's costs. On plaintiff's appeal:—Held, that the orders of December 18th having disposed of all matters outstanding, defendant's recourse was by appeal or by application to the Judge on notice to rectify the orders, on the ground that they were not in accordance with the decision.

McLellan v. Morrison, 23/235.

41. **Reforming order for judgment.**]— Under O. 57, R. 5, the Court reformed the order of a trial Judge to make it read in accordance with his decision, in lieu of remanding the matter back.

McLellan v. Morrison, 23/235.

42. **Re-opening rule — Laches.**] — The Court refused to re-open a rule, passed seven years before, on the ground of mistake, where there was evidence of acquiescence during the whole of that period.

Re Estate Greenwood, 23/262.

43. **Order for examination** — Plaintiff ordered to attend—O. 35, R. 4.]—In an action on a promissory note five grounds

of defence were pleaded. Plaintiff joined issue on the first three and admitted the last two. Those as to which he joined issue were struck out as false, etc. Apparently not appreciating that nothing remained at issue, defendant applied under O. 34, R. 4, and obtained an order compelling plaintiff to attend for examination under oath:—

Held, that the rule conferred no power to make such an order. Per Townshend, J.: "To postpone the trial, which this order in effect does, until the plaintiff attend before the Court for examination upon the trial of the action, is an excess of authority, and there is nothing in the language of the rule to justify it for one moment." The Court equally divided as to costs.

O'Gorman v. Westhaver, 23/232.

44. **Examination of plaintiff de bene esse — Mistake — Rescission.**] — Defendant's solicitor, in consenting to the passing of an order for the examination of witnesses abroad, was not aware that it was proposed in this way to obtain the evidence of one of the plaintiffs. On his application setting forth the misapprehension he was under, the Court set aside the order. Though both parties to an action are contemplated in the word "person" in O. 35, R. 4, yet the Court will only authorize the examination of a party in this way under special circumstances.

Also (McDonald, C.J., contra), the word "witness" appearing in R.S. 5th Series, c. 107, s. 30, is not meant to include a party to an action.

Seymour v. Doull, 23/364.

45. **Order for commission rescinded—Discretion reviewed on appeal.**] — The granting of a commission to take evidence is in the discretion of the Judge to whom the application is made, but where strong reasons are shown on appeal, why the commission should not have been granted, such as failure to exercise due diligence on the part of the party applying, or unreasonable delay occasioned to the opposite party, the discretion will be reviewed.

In a case which had been tried twice, and was coming on for a third trial, where it appeared that two commissions had already been obtained, and evidence taken under each; that the facts sought to be established had been previously known to, or their existence suspected by the party applying; where it was not alleged that the evidence sought to be obtained was material and necessary, and that the party could not safely proceed to trial without it, but only that the examination would be effectual; and where no defence based upon the facts sought to be established had been set up, and no application had been made to amend the pleadings so as to enable it to be set up; the Court set aside the commission with costs.

McLeod v. Insurance Companies, 32/481.

46. **Order for inspection.**]—On trial of an action for trespass to a mine below the surface, the Judge, on certain terms, made an order under O. 50, R. 3, for the inspection of defendant's mine, such inspection being necessary to enable plaintiff to prove his case:—

Held, that the making of the order was within the Judge's discretion, with which the Court would not interfere, though the plaintiff had not pleaded that such an inspection would be required.

Gray v. Hardman, 28/235.

47. **Quo warranto—Information—O. 1, R. 1.**]—The word "information," as used in O. 1, R. 1, refers only to informations in chancery, and quo warranto proceedings not having been cognizable in chancery, cannot now be instituted in the Supreme Court by information, nor otherwise except under the Crown Rules.

Proceedings having been instituted by the attorney-general on the information of P. to forfeit the charter claimed by the defendants as the South Shore Ry. Co.:—Held, that the Court could consider the matter only in so far as the Court of Chancery would have formerly had jurisdiction as to the matters set out in the statement of claim. And that

the attorney-general, acting in the interest of the public, may independently of the relator, maintain an action in the premises.

SERVICE. (See also 60 post).

Attorney-General v. Bergen, 29/135.

48. **Short service—Initialing summons.**]—No separate order was made authorizing short service of a summons, but the Judge initialed the summons itself. On appeal, the Court was equally divided as to whether this amounted to an order.

Paint v. Gillies, 27/526.

49. **Substituted service—Action on covenant.**]—The mortgaged property on foreclosure and sale failing to pay the claim, plaintiff sought an order for judgment for the deficiency. The defendant being a seafaring man and absent:—Held, plaintiff might serve his notice of motion by filing with the prothonotary under O. 65, R. 4.

Reliance Savings & Loan Co. v. Curry, 34/565.

50. **Service on solicitor.**]—The relationship of solicitor and client is not presumed to continue after final judgment.

Service of a summons for an order under O. 40, R. 44, directing the examination of an officer of a company, in aid of execution, cannot be made on one who has been defendant's solicitor in the cause.

Hamilton v. Stewiacke Valley, etc., Ry. and Dickie, 30/92.

STAY OF PROCEEDINGS.

51. **Notice of application.**]—A stay of proceedings must be applied for on notice of motion to the other party, not ex parte.

Perkins v. Irvine, 23/291.

Madden v. McInnes, 24/293.

52. **Application ex parte—Condition of bond.**]—Semble, application for a stay of proceedings pending an application for a new trial may be made ex parte, under O. 37, R. 8 (latter half . . . "The applicant, however, shall be entitled . . ."), not otherwise. But a bond filed, not conditioned "to respond the judgment to be finally given," cannot be said to comply with that provision, so the application should have been made on notice to the other party (following the ordinary course of O. 37, R. 8).

Madden v. McInnes, 24/293.

53. **Chambers summons not stay of proceedings.**]—Defendant, on the 17th January, obtained a summons returnable on the 24th, for the hearing of an application for security for costs, and for a stay of proceedings. Before the return day, plaintiff had entered judgment by default. This the County Court Judge set aside on the ground that the summons was in terms a stay of proceedings.

On appeal:—Held, that the summons was not a stay of proceedings in terms or in effect, and that the default judgment being regular, should stand. But that defendant should be at liberty to apply for leave to defend on an affidavit of merits, without prejudice on account of a delay of four months.

Creelman v. Ronnan, 28/50.

54. **In County Court—Removal of inquiry.**]—Plaintiff in another action had succeeded in obtaining a decree for the reconveyance by defendant M. of certain lands held in trust. Before the reconveyance was made, defendant L., colluding with defendant M., purchased at small cost a judgment against plaintiff, and applied to the County Court for leave to issue execution thereon against the lands in question.

This action was, amongst other things, for a declaration that L. held such judgment in trust for plaintiff, and pending trial to stay his application to the County Court. On motion for injunction:—Held, as there was some doubt as to the jurisdiction of the County Court to entertain such an enquiry as the present, or to grant full relief, and as all the parties were not before that Court, and as the balance of convenience was in favor of the Supreme Court as a forum, L. should be enjoined from proceeding with his application to the County Court.

Clattenburg v. Morine, 30/221.

Cf. 22, ante.

55. **Foreclosure—Stay of proceedings.**]—Plaintiff, having obtained an order for foreclosure, an agreement in writing was entered into for the settlement of the action, extending the time for payment, and dividing the amount payable into two instalments. Defendant paid the first instalment, but failed to pay the second within the time agreed on, when plaintiff proceeded to sell.

Shortly before the day fixed for the sale the defendant offered to pay the balance agreed on, but claimed the right to include as part thereof, a cheque signed by F., for an amount which F., under the agreement, would be immediately entitled to receive from plaintiff. Plaintiff having declined the proposition, defendant applied for and obtained a stay of proceedings for ninety days:—Held (Henry, J., dissenting), that the granting of the stay was a matter within the Judge's discretion, which in the circumstances, appeared to have been wisely exercised.

Ouchterloney v. Palgrave Gold Mining Co., 29/414.

56. **Stay of execution—Probate Act.**]—Application for a stay of proceedings under a judgment recovered against an estate which on the day of recovery had been declared insolvent and for leave to plead the order of the Probate Court in bar, etc. (Probate Act, s. 56):—Held, that apart from the Probate Act, the Court has power to order a stay under O. 40, R. 17, 30 (but Jud. Act, s. 12 (5), does not apply).

Cotterell v. Dunn, 27/533.

57. **Stay pending appeal.**]—Semble, because of a doubtful point as to the applicability of a statutory provision, the Chamber Judge granted a stay pending appeal.

See PARTIES, 10.

VENUE.

58. **Change of venue.**]—The Chambers Judge having decided that the balance of convenience was in favor of a change of venue, the Court, on appeal, refused to interfere with his discretion as exercised.

Munro v. McNeil, 29/79.

WARRANT TO CONFESS.

59. **Warrant to confess.**]—W., who was a partner of the defendant O., gave the plaintiff a warrant to confess, signed by him for O., and on which judgment was entered against both. This was without the knowledge or consent of O.:—Held, that the judgment so entered must be set aside with costs.

Pitfield v. Oakes, 25/116.

WRIT OF SUMMONS, SERVICE, ETC.

60. **Writ of service—Setting aside after appearing.**]—A writ of summons regularly issued and in proper form, may not be set aside.

Nor may service thereof, after the defendant has obviated the necessity for service by appearing.

Semble, even though he appears under protest, there being no such practice. (See 4, ante.)

Dominion Coal Co. v. Kingswell S.S. Co., 30/397.

61. **Irregular service—Judgment set aside—Abuse of process.**]—Plaintiff caused a writ to be issued against defendant company, which was insolvent, and to be served on himself as president. Thereafter he entered judgment by default:—

Held, at the instance of the trustees for the bondholders of defendant company (who had applied to the plaintiff-president-defendant, for leave to use the name of the company on an application to re-open and defend, and been refused), that the judgment entered should be set aside as an abuse of process, being founded on service which was bad, there being other modes of service appropriate to such a case, provided by the company's act of incorporation, and by O. 9, R. 8. And that the Chambers Judge in setting it aside had acted properly under O. 27, R. 14.

Per Weatherbe, J., dissenting, the applicants being strangers not prejudiced by the judgment, they had no status on which to move.

Holmes v. Stewiacke Railway Co., 32/395.

62. **Acceptance of service—Practice on judgment by default.**]—Defendant subscribed a memorandum indorsed on a writ of summons, "I accept service of the within writ and acknowledge receipt of a copy thereof, and waive service by sheriff, or any irregularities in reference to same not having been served by the sheriff." Later plaintiff entered judgment by default.

On an application to set this judgment aside:—Held, that the defendant's acceptance was binding on him, but before entering judgment by default, plaintiff should, under O. 13, R. 13, have filed an affidavit of service. (Cf. O. 13, R. 2, as to the case of service out of the jurisdiction.) Judgment set aside.

Per Meagher, J. (Ritchie, J., concurring), the clerk of the Court, in the absence of proof of defendant's signature, was not in a position to know whether the defendant had in fact accepted service, and was therefore not justified in entering judgment, apart from the question of the proper practice, etc.

Naylor v. Caldwell, 25/312.

63. **Constructive service — Order set aside.**] — Judgment by default, and an order for constructive service of the writ of summons on which it was based, set aside on the affidavit of the defendant that he had no intimation of the issue of the writ, that he had not evaded service, that he was all the time within nine miles of his place of abode, and that he had a good defence.

McCurdy v. McLeod, 22/267.

64. **Service out of jurisdiction.**]—Plaintiff, in his affidavit, had sworn to his belief that he had a good cause of action, and to satisfy the requirements of O. 11, R. 1 (e), had annexed thereto a number of letters tending to show that there was a contract in existence, and for breach of which action was brought, performable within the jurisdiction:—

Held, that the affidavit was sufficient, and that the merits should be determined on trial, not on an application for leave to serve out of the jurisdiction.

Also, leave to issue and leave to serve a writ out of the jurisdiction, may be embodied in one paragraph of a single order.

Also, where the place of service is within the British dominions, proof that the defendant is a British subject is not necessary.

Also, service of a writ will not be set aside for mere technical defects or omissions where no injury has been caused.

Sumner v. Cole, 32/112.

65. **Service on foreign company.**] — Plaintiffs obtained leave under O. 11, R. 1 (e), to serve the defendant company out of the jurisdiction. On an application to set aside the service, it appeared that the company was incorporated under the English Joint Stock Companies Act, and had an office in London, but the principal place of business, and real head office, was at Guelph, Ontario:—Held, that service was properly effected on the principal officers of the company in Guelph.

W. H. Johnson Co. v. Bell Piano & Organ Co., 29/84.

66. **County Court districts.**]—A writ issued out of the County Court for district No. 1, returnable in district No. 4, is bad, and should be set aside.

Morrison v. Corbett, 21/369.

Morrison v. Stewart, 22/1.

67. **Writ for liquidated demand—Indorsement must comply—Amendment.**] —A writ issued for the collection of a liquidated demand must comply with the requirements of O. 3, R. 5, by being indorsed with the amount claimed for costs, and the conditon on which further proceedings will be stayed. Such an omission renders it liable to be set aside, but for convenience, the Court should allow such a defect to be amended on payment of costs, and should extend the time within which the defendant may comply with the condition.

Murray v. Kaye, 32/206.

PRESENTMENT FOR PAYMENT.

See BILLS AND NOTES, 14.

PRINCIPAL AND AGENT.

1. **Solicitor and client** — Withholding cheque payable to client—Question of agency.

See BARRISTER AND SOLICITOR, 7.

2. **Solicitor and client—Authority to bind client.**]—The Court presumed that a solicitor who granted a debtor time in consideration of the giving of a promissory note, and thus bound his client to a suspension of his right of action, during the currency of the note, had authority from his client to do so.

And the solicitor's forbearance to sue is a valid consideration for the giving of the note to him personally, and he may maintain action thereon in his own name.

Lyons v. Donkin, 23/258.

3. **Father and infant son — Settling son's right of action.**]—Plaintiff sued on a promissory note given him by defendant in settlement of a right of action asserted against him by plaintiff's infant son, for assault. **The defence was** lack of consideration as between plaintiff and defendant:—

Held, that as the natural guardian of his son, and as his specially authorized agent, the father might bind him by such a settlement as long as the agency continued to be recognized by the son, and might maintain action in his own name. And that the voidability of the father's action by the son could not avail defendant as a defence.

Lyons v. Donkin, supra, approved and followed.

Hubley v. Morash, 27/281.

4. **Goods sold by captain—Presumption as to ownership.**]—A purchaser of goods ex vessel, from the captain, is not warranted in assuming that they are the property of the captain, and so appropriating the price to the payment of a debt of the captain. He must be on inquiry as to the ownership.

Hickman v. Baker, 31/208.

5. **The president of a company,** or one of the board of directors, is not the agent of the company to make engagements binding on it, except on proof by the party asserting the same, either that special authority has been conferred, or that there has been such a holding out of the agent as to bind the company by way of estoppel.

Almon v. Law, 26/340.

6. **The president of bank,** regarded in that behalf as acting beyond the scope of his duties, cannot in a letter on an indifferent topic make admissions of fact binding on the bank.

Black v. Bank of Nova Scotia, 21/448.

7. **Charter party—Renewal—Notice.**]—A charter party signed by M. K. & Co. as agents for and on behalf of the owners, contained a clause under which charterers should be entitled to an extension of the term, on notice:—

Held, M. K. & Co. not being generally authorized as agents of owners, notice to them requiring an extension was not sufficient. And that the question of agency was for the Judge not the jury.

Dominion Coal Co. v. Kingswell S.S. Co., 33/499.

8. **Implied agency—Course of dealing—Commission on sale made by principal.**]—The plant of the W. Electric Co. having been destroyed by fire, plaintiff telegraphed defendant company asking quotations on a new plant, and offering to represent its interests in effecting a sale. Defendant company replied quoting a price which included a commission to plaintiff, and sent a special representative to act in conjunction with him in connection with the matter. Together they proceeded to interview the officials of the W. Electric Co., who finally refused to purchase at all through plaintiff. Later in the day defendant company's representative, independently, succeeded in selling a much smaller and cheaper plant than any that had been in contemplation of plaintiff.

On this sale plaintiff now claimed a commission from a course of dealing alleged to have arisen from his having theretofore sold defendant company's goods and been allowed a commission:—

Held, that he was entitled to none, the sale having been effected by defendant

company independently, after the W. Electric Co. had refused to deal with him, and all the evidence of former dealing going to show that each contract respecting agency and commission was special, and that defendant company had declined to grant plaintiff a general agency. Graham, E.J., dissenting.

Affirmed in the Supreme Court of Canada (Gwynne, J., dissenting).

Starr v. Royal Electric Co., 33/156, 30 S.C.C. 384.

9. **Adoption of Agent's Act.**]—One S., claiming to be the authorized agent of the defendant company, purchased land from plaintiff and gave the company's note in payment of the price. In an action on the note, one of the defences was that S. was not the authorized agent of the company:—Held, that consideration of this question was obviated by the adoption by the company of what S. had done, by taking possession of the deed.

Ryan v. Terminal City Co., 25/131.

10. **Ratification.**] — There can be no ratification and adoption of an act by one willing to be considered principal, where the person acting did not at the time profess to act as an agent, but solely on his own behalf.

See PAYMENT, 9.

11. **Ratification—Evidence of similar Acts.**]—In an action by plaintiff against defendant company for the price of goods sold for use in connection with the construction of a line of railway, it was shown that the articles were supplied to H., who appeared to act as manager for defendant company as to the work of construction. It was also shown that H. had formerly employed plaintiff to do certain work in connection with the same construction, and that this act had been recognized and ratified by defendant company, and the work paid for:—Held, that this was sufficient evidence of agency to render the company liable.

McDonald v. Broad Cove Coal Co., 32/486.

12. **Acquiescence amounting to ratification.**]—Plaintiff authorized M. to sell two horses for him. Instead of selling, M. exchanged one of the horses with defendant for another horse and $20. The money was paid by M. to plaintiff's wife, and there was evidence to show that she informed him of the transaction by letter, he being absent from home at the time (December). Plaintiff returned home in March, but took no steps to rescind the contract till June:—Held, that though M. had exceeded his authority, there was acquiescence in his acts on the part of plaintiff which amounted to ratification.

McDonald v. Morrison, 27/347.

13. **Illegal act—Ratification.**]—B., the cashier of plaintiff bank was commissioned by the directors to proceed to S., where the agent of the bank had defaulted to a large amount, and make the best settlement he could. B., by threats of prosecuting the agent criminally, procured the defendant, his father-in-law, to execute a bond to the bank for a large sum of money. This bond being held uncollectible for illegality, as intended to stifle a prosecution:—Held, also, per Townshend, J., "Though the directors may not have directly authorized the terms made with the defendant, and the means he used to obtain his guarantee, yet plaintiff cannot be permitted to take advantage of the illegal act of their agent. The plaintiff bank must stand or fall by what he did in this transaction."

People's Bank v. Johnson, 23/302, 20 S.C.C. 541.

14. **Agent exceeding authority—Apparent scope—Power of attorney—Notice—Registry.**]—Defendant gave H. a power of attorney to carry on a general trading business for cash only or barter, and expressly withholding the right to accept or indorse any note or bill, or to pledge his credit in any way. He further instructed H. not to deal with the plaintiff. In violation of this instruction and in excess of his powers, H. purchased goods from plaintiff, and signed the note now sued on. H.'s business sign contained the style "agent," and in answer to plaintiff's inquiry he disclosed the fact that he did business as agent for the defendant. No different set of books were

kept for H.'s own business and there was no evidence that he conducted any business on his separate responsibility. On the question of the defendant's liability, the Court was equally divided:—

Held, per Graham, E.J., Henry, J., concurring, that the trial Judge was warranted in considering the transaction within the apparent scope of H.'s agency. That in the absence of a statutory provision, registration of the above power of attorney was not notice of its contents, and that the instruction to H. not to deal with the plaintiff was secret, and should have been communicated to plaintiff if he wished it to be effective.

Per Meagher, J., Ritchie, J., concurring, the evidence being contradictory, the preponderence was with the defendant.

Kenny v. Harrington, 31/290.

15. **Authority to bind principal—Manager of gold mine—Construction of boarding house.**]—Plaintiff brought action for material supplied a contractor for the construction of a boarding house for operatives at defendant company's gold mine, on the order of M., who was manager of the mine. The trial Judge having left the question as to the powers of the manager open to the jury, they found for the plaintiff, in which the Judge concurred. On an application for a new trial:—

Held, per Ritchie, J., Meagher, J., concurring, that inasmuch as in many cases mines were remote from settlements (a boarding house for men might be as necessary to the working of such mines as a pump or shaft house. And if, as found by the jury, the erection of such boarding house was necessary to the efficient working of the mine, and in accordance with the general practice in such cases, the authority of the mine managed to bind the company for the work was beyond doubt.

Per Graham, E.J., Henry, J., concurring, that it was for plaintiff to show that the authority of the manager extended so far, there being entire absence of evidence to show either an express conferring of authority on M. by defendant company or holding him out as their agent in such a behalf.

Miller v. Cochran Hill Gold Mining Co., 29/304.

16. **Agent exceeding authority—City engineer.**]—Plaintiff sued the City of Halifax for extra work done, under a written contract with the city, at the instance of the city engineer, a permanent official. The contract clothed the city engineer with certain authority, but not in relation to ordering extra work:—Held, that the city was not liable for his excess of authority.

Ellis v. City of Halifax, 29/90.

17. **Agency for sale of goods—Counterclaim.**]—Defendant was agent for the sale of plaintiff's goods and had given the promissory note now sued on, in payment for goods supplied. He counterclaimed damages on account of the failure of plaintiff to supply the goods in time to enable defendant to fill orders within the time agreed on, for commissions lost, etc. The extent of these losses was not shown:—Held, he was liable on the note and not entitled on the evidence (semble), even to nominal damages. Also, a surety for the defendant was also liable on an agreement to make good all debts due by him, though a note was accepted therefor.

Marshall v. Matheson, 31/238.

18. **Life insurance agent—Suing note for premium.**]—The agent personally, or his indorsee may sue on a note for a first premium of life insurance, payable to "S., agent of the O. Life Ins. Co." These words are mere descriptio personae, and do not touch the question of title to the note. Also, there is good consideration for the giving of the note to the agent.

McDonald v. Smaill, 25/440.

19. **Policy of insurance—Authority to waive condition.**]—A condition of a policy of fire insurance provided that the assured "is to deliver within 15 days after the fire, in writing, as particular an account of the loss as the nature of the case admits." Another condition pro-

vided that there should be no waiver of any condition, unless in writing, signed by the manager of the insurance company:—Held, that neither the local agent nor an outsider employed to adjust and report on the loss, had power to waive compliance with the condition regarding an account, nor after expiry of the time limit, to extend the time for compliance.

Brownell v. Atlas Assurance Co., 31/348, 29 S.C.C. 537.

Margeson v. Commercial Union Ass. Co., 31/337, 29 S.C.C. 601.

20. **Agent exceeding authority—Notice.**]—In an action to recover under a policy of accident insurance for the death of the insured by accident, it appeared that the agent of the defendant company had induced the deceased to renew his policy, taking as payment of the premium of $16, a promissory note for $15, and $1 in cash, and delivering to him the official receipt of the company. The company had in private instructions to agents forbidden them to take notes for premiums:—

Held, in the Supreme Court of Canada, Gwynne, J., dissenting, that as the agent had been employed to complete the contract, and had been entrusted with the renewal receipt, the deceased might fairly expect that he was authorized to take a premium note, having no knowledge of any limitation of his authority, and the policy not forbidding it.

Pudsey v. Manufacturers' Accident Ins. Co., 29/124, 27 S.C.C. 374.

21. **Conditional indorsement—Notice to agent—Principal, the holder, affected.**]—For the accommodation of S., M. indorsed a promissory note for $1,000, made by S., payable to the plaintiff bank. He did so on the express condition that the note should not be made use of unless the additional indorsement of H. was secured, a condition of which the bank's agent or local manager, was aware. Without securing H.'s indorsement, S. turned the note over to plaintiff bank, which now sought to enforce payment.

Held, M., the indorser, was not liable. Plaintiff bank's agent having notice of the condition attaching, it was affected with this notice, unless it could be shown that the agent was a party to a scheme to defraud. And it is not sufficient to show that the agent had an interest in not disclosing the facts of the matter to his principal.

Commercial Bank of Windsor v. Smith, 34/426.

Commercial Bank of Windsor v. Morrison, 32 S.C.C. 98.

22. **Exceeding authority.**] — Bank agent. Accommodation paper. Preference in assignment.

See ASSIGNMENT, 22.

23. **Conversion by agent—Damages for detinue—Pleading—Costs.**]—B., being in possession of a mare belonging to plaintiff, with authority to sell and meanwhile to use her, disposed of her to defendant in satisfaction of a personal debt due. There having been no holding out of B., by plaintiff, as an agent with larger authority:—

Held, he might recover in trover against defendant, and (Ritchie, J., dissenting), damages for the detinue, without a plea.

Also, the element of agency entering into the case does not affect the usual rule as to costs, or warrant a Judge in withholding them.

Garden v. Neily, 31/89.

24. **Mortgage — Whether released — Fraud of agent.**]—Defendant arranged to purchase a property through M., who was solicitor and agent for the owner, and paid him $1,600, part of which was intended to be applied to the discharge of a mortgage for $1,000 held by F. F. executed a release of the mortgage and delivered it to her niece E.C., who delivered it to M. M. then absconded from the Province, and the release was finally returned into the hands of F. On her application to foreclose the mortgage as against the defendant:—

Held, on the findings of fact (1) that F. never employed or trusted M. in any capacity, and was not aware that he held the release; (2) that she had expressly forbidden E.C. to part with the

release except on receipt of the money; (3) that M. did not assume or pretend to act as her agent; (4) that E.C. had no general authority as agent of F.; that the mortgage was valid and outstanding, and that F. was not debarred by estoppel or otherwise from obtaining an order for foreclosure.

Ross v. Sutherland, 32/243.

See also MORTGAGE, 29.

25. **Sale of mine.**]—Fraud of agent or partner of purchasers. Collusion with vendor. Action for rescission. Laches.

See FRAUD, 7.

26. **Sale of land—Misrepresentation or mistake of agent—Whether binding on principal.**]—Defendant was owner of certain lots of land which she had placed in the hands of N., a real estate agent, for sale. She resided abroad with her son-in-law, F., who at her request conducted a correspondence with N. in relation to the sale of the lots. N. communicated an offer by plaintiff of $1,000 for the lots, which F. accepted. Defendant refusing to carry out the sale on the ground that she had been misled by F., and thought that the offer referred only to part of the lots, known as the "swamp lots":—Held, that having authorized F. as her agent, she was bound by his negligence or misrepresentation, the terms of the contract being clear, and the plaintiff's conduct unimpeachable. But in the Supreme Court of Canada:—Held, that on account of the error or misrepresentation of the agent the parties were not ad idem as to the subject matter of the contract, and there was no actual consent by the defendant to the sale.

Jenkins v. Murray, 31/172, 28 S.C.C. 565.

27. **Company—Secretary exceeding authority—Accommodation indorsements.**]—Secretary of defendant company indorsed sundry drafts "Eureka Woollen Mfg. Co., J.P., Sec." for the accommodation of X., who discounted them with plaintiff bank. It appeared that the secretary's powers in relation to negotiable paper were limited by by-law of the directors to the acceptance of drafts on the company. Plaintiff bank having been aware that the indorsements were for accommodation:—Held, that this put an end to the question of the company's liability, though,

Semble, defendant company having power to deal with commercial paper, it would be otherwise in the case of a bona fide holder for value.

Union Bank v. Eureka Woollen Mfg. Co., 33/302.

28. **Exceeding authority—Rescission of contract made with purchaser—Notice of agency—Custom.**]—D. was in possession of, and agent for, the sale of certain carriages belonging to plaintiff, under a contract of agency by which "Notes of the purchaser only will be taken for goods in this contract; old machines, horses or trades of any kind are entirely at the risk of the agent, and he will be strictly responsible for all such notes."

D. disposed of two of the carriages to defendant, the first for credit on goods to be supplied from defendant's store, the second for an old carriage, and more credit in goods. Later on D. absconded, and plaintiff sought to rescind the transaction and to recover the goods or the price. All the issues stated were found by the jury for the defendant:—

Held, setting aside these findings as against the weight of evidence, that the jury had not properly considered defendant's knowledge of the character and extent of D.'s property in the goods, nor the fact that he had admitted that he knew that it was the custom of manufacturers outside the Province to sell through agents.

Per Townshend, J., the Factor's Act, 1895, c. 11, s. 2 (1), does not apply to protect the defendant under the circumstances. Also, the opinion expressed by the trial Judge is entitled to serious consideration in dealing with the findings.

MacNutt v. Shaffner, 34/402.

29. **Husband and wife.**]—Right of wife to pledge husband's credit for necessaries. And to dispose of his property.

See HUSBAND AND WIFE, 1, 2.

PRINCIPAL AND SURETY.

1. **Improper investment by trustee—Acquiescence by cestui and settlor—Liability of surety—Parties.**]—F. withdrew from deposit in a chartered bank and deposited with and loaned to the unchartered firm of F. & Co., of which he was a member, certain trust funds which were lost in that firm's insolvency. This action was by F.'s successor in the trusteeship against his sureties. The defence was acquiescence by the cestui que trust (a feme sole, who was also the settlor) in the course of F., without notifying the sureties.

Held, that such acquiescence was not shown as against a lady ignorant of business matters, by the fact that F. had communicated to her that some portion of the funds were held by F. & Co., until he could get good securities, as she might have supposed that this meant that it was simply placed in their vault as were the trust papers. Nor by the fact that she drew a cheque on F. & Co., as this might relate only to income.

Also, under O. 16 R. 8 (1888, c. 11, s. 67, to the same effect), the matter may be inquired of without joining the cestui que trust, but,

Semble, ought not to be found against her without adding her as a party.

Eastern Trust Co. v. Forrest, 30/173.

Eastern Trust Co. v. Bayne, 28 S.C.C. 606.

2. **Crown v. Surety.**]—The Crown not to be prejudiced in its rights by the nonfeasance of its officer.

See CROWN.

3. **Misapplication by guardian** of infant.]—Action by surety to restrain, and for indemnity. Removal of guardian. Receiver. Powers of Court. Parties.

See GUARDIAN, 1.

4. **Agent for sale of goods—Special agreement—Time granted—Surety liable.**]—Plaintiffs appointed O. agent for the sale of their goods under a special agreement in writing, under which O. was to indorse and become responsible for customer's notes. Defendant was surety for O. by bond conditioned, that O. should "well and truly abide by and perform all the terms and conditions of the said recited agreement, and on the expiry thereof . . . pay and satisfy all notes and other securities which remain outstanding on the termination of the said agreement . . . ."

O. being in default and in debt to plaintiffs, they dismissed him, and recourse was had to defendant as his surety.

Held, that the surety would have been discharged as to part of O.'s indebtedness, as to which plaintiffs, during the continuance of the agency, had granted O. time for settlement, except that under the terms of the bond, no liability accrued against the surety in any case, before the termination of the agreement.

Also, the surety was not discharged as to certain notes, by the fact that plaintiffs had received them from O. made out in a different form from that provided for in the agreement, the mere reception of such notes from O. not being a connivance at wrong doing on the part of plaintiffs, but for which the thing would not have happened.

McLaughlin Carriage Co. v. Oland, 34/193.

5. **Father and infant son—Mercantile agreement—Construction of contract of agency.**]—Plaintiffs doing business under the name of "Comet Cycle Co.," appointed the firm of "Bancroft & Bailey," agents for the sale of their goods within certain area, on terms set out in a written agreement signed by plaintiffs, but which in consequence of Bailey, one of the partners, being an infant, was not signed by the firm, but by the other partner and the father of the infant partner, as follows:—"I accept the terms of the above agreement, and acknowledge receipt of a copy of the same. E. M. Bancroft, H. M. Bailey,"

In an action to make the father of the infant partner liable in respect of this contract:—Held, reversing the decision of the trial Judge, to the effect that it was impossible to enforce the same because of indefiniteness as to the nature of the liability intended to be as-

sumed by H.M.B. McDonald, C.J., dissenting, that H.M.B. had made himself liable as surety for the firm of Bancroft & Bailey.

Fane v. Bancroft, 30/33.

6. **Money paid by mistake—Recovery by surety—Appropriation of payment—Laches.**]—Bank of L. being indebted to defendant bank, agreed to pay by instalments, plaintiff being surety for three instalments, amounting to $60,000. Acceptances belonging to the Bank of L. were deposited with defendant bank, as security for the payment of the last instalment. Defendant bank collected these acceptances, but applied proceeds to the payment of another indebtedness of the Bank of L., which was unsecured. Thereafter defendant bank demanded and received from plaintiff a balance of $9,000 due in respect of the secured debt.

A little less than six years afterwards plaintiff accidentally discovered these facts, and brought action to recover his payment to defendant bank, as made under a mistaken idea.

Held, that the acceptances above mentioned having been once appropriated to the payment of the debt for which plaintiff was surety, no different application could be made of the proceeds without consulting him.

Also, that plaintiff was not estopped by lapse of time, nor by having omitted when called on for payment to demand an account of the state of affairs, nor by having at that time asked further time of defendant bank, in which to endeavor to obtain indemnity for himself from the Bank of L., thus inducing defendant bank to prejudice its position with reference to the Bank of L., as all the facts were within the knowledge of defendant bank and beyond the knowledge of plaintiff.

Also plaintiff was not bound to tender back the bond of the Bank of L. on the ground that it would have been discharged by a proper appropriation of the acceptances above mentioned.

Black v. Bank of Nova Scotia, 21/448.

7. **Illegality of object—Contract void—Surety discharged.**]—Contracts entered into in the face of a statutory prohibition are void, and the prohibition of sales of liquor, by wholesale, to a person who holds no license under the Liquor License Act, 1895, has the result of rendering the contract of no effect, and one who has become surety for the payment of the price by the purchaser is discharged.

Brown v. Moore, 33/381, 32 S.C.C. 93.

8. **Appeal bond—Liability of surety.**]—Construction.

See APPEAL, 32.

9. **Replevin bond—Must be two sureties.**]—Otherwise on a failure to respond the judgment of the Court by a single surety, the Coroner (or Sheriff), is personally liable. Common law duty of Coroner. Construction of statutes.

See REPLEVIN, 6.

10. **Partnership—Continuing liability** after dissolution.]—The retiring partner is not in the position of a surety, as to a debt adopted by the firm, and settled by the firm's acceptance. He is therefore bound by a renewal acceptance after his retirement, of which he had no notice.

See PARTNERSHIP, 12.

PRINTING.

1. **Non-compliance with rules.**]—A case on appeal not having been printed in accordance with the rules, no costs allowed therefor.

Johnson v. Buchanan, 29/31.

2. **Careless printing.**]—Per Meagher, J., "The appellant should not be allowed any costs of printing on the appeal, nor of preparing the appeal book, because of the careless and inaccurate manner in which the case was prepared and printed. The argument was twice postponed because the printing was not completed, or not properly done. . . ."

Re Broad Cove Coal Co., 29/1.

3. **Unnecessary printing.**]—The Court refused the costs of unnecessary and vol-

uminous printing to a party succeeding on appeal, limiting him to recovery for that actually necessary to present the case. If counsel could not have agreed, an application should have been made to a Judge to settle the case.

Fraser v. Kaye, 25/102.

PRISONER.

Hiring out prisoners.]—Held an illegal contract.

See CONTRACT, 10.

PRIVILEGE.

See SLANDER AND LIBEL.

PROBATE COURT.

See also EXECUTORS AND ADMINISTRATORS, SUCCESSION DUTY, WILL.

1. **Action for administration,** may be brought against an executor, before the time limited for creditors to put in their claims has expired.

Townshend v. Brown, 22/423.

2. **Removal of administrator—Balance due him—Term "vouchers—Citation—Section 57.**]—B. was removed from the office of administrator and another appointed, at a time when he was absent from the Province, and there was a balance in his favor. He presented a petition to the Court, praying for a citation, and final settlement of the estate. The new administrator having appeared, the Judge proceeded to settle the estate.

Held, that a citation should have been issued under section 57, calling upon creditors, next of kin, etc., to attend the settlement. Also that B. was entitled to be indemnified out of the estate for outlays in the matter of costs of litigation. Also that he was not precluded, under section 61, from recovering amounts above $8, by the absence of receipts therefor, the term "vouchers" in that section not being limited to "receipts."

Re Estate of McRae, 26/214.

3. **Action by executor—Personal liability for costs—Citation.**]—An administratrix having brought action against O. for trespass to lands of the estate, and failing, the award of costs should be against her personally. If she has paid them personally, she may present them as a claim against the estate on final settlement, when the merits of the question may be passed on. But O. having presented his claim for these costs as a debt of the estate, which the Judge of Probate disallowed (unappealed from), the matter in res adjudicata in a subsequent action against the estate, though the personal liability of the administratrix is unquestionable.

Also, O., not being "a creditor, or other person interested," has no status under section 57 to apply for a citation.

Granger v. O'Neil, 31/462.

4. **Citation by legatee—Legacy having been separated he is not a creditor—Jurisdiction.**]—A testator bequeathed to certain of his children the income on certain sums named. The executors appropriated the principal sums to that purpose and separated them from the rest of the estate. The income having fallen into arrears, the beneficiaries cited the executors into the Probate Court, which found certain sums to be due and ordered them paid out of the body of the estate. The executors appealed.

Held, that after separation by the executors of the above sums from the body of the estate, it was not liable for any claims arising in connection with them, and the beneficiaries not being interested as creditors or otherwise in the estate had no right of citation, and the Judge of Probate in making the decree appealed from was without jurisdiction. The funds not having been dissipated, and being in the hands of persons liable for their administration, the proper recourse of the beneficiaries was against these persons in another Court.

In re Estate of David Morse, 31/416.

5. **Former administrator entitled to rank as a creditor—Citation—Claim for expenses, etc.**]—Held, that B., who had

been removed from the office of administrator and who had certain claims against the estate for monies expended, personal services, etc., was a "creditor" or "person interested," within the meaning of c. 100, s. 57, and as such was entitled to have the accounts taken. Also, Townshend, J., dissenting, that the filing of a petition by B., being the only step which a creditor can take to have his claim adjusted, has the effect of the bringing of an action in preventing the running of the Statute of Limitations against such claims.

After his appointment as administrator, B. had removed to Ontario, then to another County of this Province, and finally to Scotland, and now sought to make the estate liable for the expenses of travelling to and from these places:—Held, that these items were not "actual and necessary expenses," or "just and reasonable" within the meaning of section 69 of the Act.

Held, also, that in order to charge for interest paid by him for money advanced for the purposes of the estate B. must clearly show that such advances were necessary. Also that in support of a claim for witness fees paid, B. must furnish full and accurate particulars of the expenditure, in the absence of which the claims were properly disallowed.

Re Estate Alex. McRae, 28/20.

6. **Settling accounts—Persons not cited not prejudiced—Court may not adjudicate antecedent rights of property.**]—Notwithstanding its wide powers in settling disputes connected with estates of deceased persons (Vide, Acts of 1897, c. 2, ss. 74, 77, 85), the Court of Probate may not deal with the rights of persons not cited or heard. Therefore, when it decreed an administrator liable to account for a sum of $1,000, which he asserted had been the subject of a gift inter vivos, by the intestate to administrator's two sons (her nephews), two years before her death, the Judge erred in refusing to hear one of these donees, at any stage of the proceedings.

And in no case has the Court of Probate jurisdiction to determine property rights as between an estate and donees, depending on the validity of a gift or its acceptance, or subsequent application.

Per Graham, E.J., the consideration of the accounts should be adjourned, pending the determination of these rights in a proper action in the Supreme Court.

Re Estate Maria Wheelock, 33/357.

7. **Decree of insolvency—Probate Act, s. 56—Words "plead in bar"—Construction.**]—Sec. 56 of R.S. c. 100, provides that "any executor or administrator may make oath before the Judge of Probate, who has granted him administration of the estate, that he believes the same to be insolvent, and the Judge may, if he shall think fit, by an order for that purpose, declare the estate insolvent, and the executor or administrator may plead such an order in bar of any legal proceedings instituted against such executor or administrator for any cause of action accruing against the deceased."

Plaintiffs obtained a judgment by default against the estate of A., of which the defendant was executor, issued execution thereon and levied on property of the estate. On the day of the levy defendant obtained an order under the above section, declaring the estate insolvent.

On appeal from the refusal of the Judge at Chambers to order a stay of proceedings as to the judgment, or in the alternative for leave to plead the order in bar:—

Held, Graham, E.J., dissenting, that the intention of the Legislature being to relieve the estate of the deceased, in the interests of an equal distribution, and not to relieve the executor from personal liability, which seems no longer to enter into the question, (see Acts of 1892, c. 18), the defendant should have leave to set up the order notwithstanding that judgment had passed. Also, in construing section 56, the words "plead in bar" are not to be understood in their ordinary technical sense, but an order declaring an estate insolvent being brought into Court, is to be understood as operating as a stay of proceedings, subject to the right of the Court or a Judge to make such further order as the interests of justice may demand.

Per Townshend, J., independently of this section the Court has power under O. 40 R. 17, 30 (but not under Jud. Act, s. 12 (5)), to order a stay of proceedings.

Per Henry, J., the order declaring the estate insolvent must be taken as referring back to the date of the death of the testator, when the estate was actually insolvent.

Cotterell v. Dunn, 27/533.

8. **In this earlier case,** referred to in the above, the facts were, that plaintiff had sued the defendants as administrators, for money lent their intestate. Defendants set up in bar of the action an order of the Probate Court declaring the estate insolvent. Judgment on trial was against plaintiff on other grounds, but on appeal the nature of the plea in bar came under discussion.

Per Townshend, J., it could not have been the intention of the Legislature to have used the words in a strict and literal sense, as that would have been to defeat the succeeding portion of the section. What was intended was not to "bar," but to "suspend" the creditor's remedy until such time as the Court was satisfied that justice entitled them to proceed.

Per McDonald, C.J., "the plea in bar stops all proceedings, and the Judge is given a discretion to make such order for a stay of proceedings. I cannot say what that means, because the plea itself stays proceedings. The Judge can make such further order as justice requires."

Shortell v. Sullivan, 21/257.

9. **Devastavit against administrator—Decree of insolvency—Protects only the insolvent estate.**]—Plaintiff brought action in the County Court against S., who pleaded a defence and counterclaim. S. having died before trial, an order was made, on application ex parte of plaintiff, substituting his administrators as defendants. They did not appear or plead, and plaintiff (irregularly, see COUNTY COURT, 5), procured judgment against them as administrators. Execution having been returned unsatisfied, plaintiff brought this action on the judgment of the County Court against the administrators personally, alleging devastavit. To this action the defendants moved a stay of proceedings, on an order procured from the Court of Probate under section 56, declaring the estate of their inte-tate insolvent.

Held, removing stay, that the defendants by failing to appear to the action in the County Court had admitted assets in the estate, which (were the resulting judgment regular), would estop them from denying devastavit; and that the protection of section 56 of the Probate Act only applies to the estate of the deceased insolvent, not to administrators personally liable.

Stewart v. Taylor, 31/503.

10. **Surrogate Judge — Jurisdiction — Null decree—Appeal.**]—R.S. 5th Series c. 100, s. 4, provides for the appointment of a Surrogate or Deputy Judge of Probate during the illness or temporary absence of the Judge. A Surrogate appointed during the absence of the Judge heard a matter at issue and reserved his decision. Before he delivered it, the Judge returned, and, doubts arising as to the continuing of the Surrogate's jurisdiction, both Judge and Surrogate considered and determined the matter on the evidence taken, and both signed the decree.

Held, that the proceeding was null and void. And that there being for this reason no appeal, it might be inquired of by certiorari, and that a party was not prevented from applying by reason of the fact that the null decree read in his favor.

Queen v. Foster—Estate of Esson, 30/1.

11. **Jurisdiction—Words "last dwelt" —Costs.**]—The words "last dwelt," occurring in sec. 2 of c. 100, R.S. 5th Series, have the meaning "last resided," but not "last domiciled." Therefore application for probate should have been made to the Judge of Probate for the County of Colchester, where it appeared

that the deceased last resided in that County, and letters granted in Halifax County were properly set aside:—

And, the executor having appealed without reason, except that seeking probate in Colchester would be more expensive, a consideration outweighed by the expense he had gone to in appealing, costs were ordered to be paid by him personally, not out of the estate.

Re Estate Caroline Fraser, 30/272.

12. **Power to reopen and revise decree —Manifest error—Laches of infant.**]—Application was made to the Judge of Probate to reopen a decree of final distribution made by his predecessor, as manifestly bad in law. M., at his decease, left a widow and an infant daughter, M.G. A posthumous child only lived a few days. The widow subsequently married J.C., by whom she had one child, to whom, on her death, she bequeathed all her property. J.C. had in 1879 been appointed guardian of M.G. M.'s estate came up for final settlement and an order of distribution was made December 23rd, 1880, one-half to the widow and the remaining half to the daughter M.G., instead of two-third to the daughter M. G. Some days previously the guardian had applied to be removed, but the removal did not take place until January 3rd, 1881. M.G. was at that time 14 years old, and was now nearly of age. The guardian and administrators had been attended in Court by counsel, but no objection was made to the distribution. This application to set aside the distribution was made six years after the guardian's resignation. The Judge of Probate considered that he had no power to reopen the decree.

Held, the Judge had power, and should have opened the decree, also that by reason of her infancy, M.G. was not cut off from claiming what was rightfully hers, because of her laches, in not applying within a reasonable time.

Weatherbe, J., dissenting.

In re Estate of Murray, 22/125.

13. **Power to reopen decree of final settlement.**]—Appeal from the decree of a Judge of Probate reopening his former decree of final settlement on the ground of mistake.

Held, that the latter decree was bad and beyond the power of the Judge to make. The person prejudiced had on the passing of the first decree been represented by counsel and had not objected, and had allowed the time for appealing to pass with knowledge of the mistake, a fact he could not satisfactorily explain to the Court.

In re Murray, ante, distinguished.

Re Estate James W. Walton, 25/125.

Followed in,

Re Estate Caroline Fraser, 30/272.

14. **Residuary estate — Payment of share.**]—The Judge of Probate has no power to decree payment of monies of the residuary estate, until after the administrator's account has been passed, and the amount remaining for distribution ascertained.

Re Estate McWilliams, 22/367.

15. **Power to decree payment—Real estate.**]—The Probate Act, R.S. 5th Series, c. 100, confers no power on the Probate Court to order or decree payment of a debt passed by it for payment. Sections 57, 60, 65, 66, 68 and 70, bearing on the matter of payment of debts, use the words "adjust" and "adjustment," and confer no authority to "decree" payment. Section 26 authorizes the Court to grant a license for the sale of real estate, upon the application of the administrator or that of any other person interested, but it has no power to compel the administrator to proceed with the sale. It is very questionable whether the Court can take the administration out of the hands of the administrator without revoking his letters. A creditor whose claim has been passed, cannot enforce payment in the Probate Court.

Re Estate Henry Lake, 22/244.

16. **Jurisdiction — Selling land.**]—The Court of Probate has no jurisdiction conferred on it by statute to confirm or set aside sales of land made under its license.

Hirtle v. Kaulbach, 22/336.

17. **Debts payable out of real estate—License to sell—Rights of infants—Misappropriation of personalty.**]—J.C. died, leaving personal property appraised at $1,600, and real esate worth $6,000. An action was brought by a brother of the deceased which resulted in establishing his right as tenant in common as to the real estate. The personalty not being sufficient to enable the executrix to discharge the obligations incurred in connection with the suit, an order was obtained from the Judge of Probate, authorizing the sale of the real estate. On appeal from his decision, refusing to rescind this order:—

Held, that the order was authorized by section 26 of the Probate Act as amended by chapter 26 of the Acts of 1888, being for the payment of "costs incurred for the benefit of, or in relation to the estate."

Per Ritchie, J., that alleged misappropriation of the personalty by the executrix is no sufficient answer to the claim of a creditor to be paid out of the real estate.

Semble, per Meagher, J., where the question of misappropriation arises, and there are infant heirs, it is the duty of the Judge to delay ordering a sale of the real estate until such time as full inquiry can be made.

Re Estate Clarke, 24/289.

18. **License to sell—Lands sold not bound by judgment against devisees—Attacking decree.**]—The Judge of Probate granted a license to sell at auction "all the real estate of the deceased which he had at the time of his decease, or so much and such parts and portions . . . as may be found sufficient for the full and final discharge of his debts." Under this license the plaintiff became purchaser of lands, a portion of the lands of the deceased, which had been held by him as co-tenant with his brother, J. Previously to the granting of the license the devisees of J. had recovered judgment against the devisees of the deceased.

This action was for a declaration that such judgment did not bind the lands so purchased by plaintiff.

Held, that the judgment against the devisees did not bind, the sale being of the interest of the deceased at the time of his death, but that the sale did not affect the rights of the devisees of his co-tenant.

Also, although the license should have set out the parcels intended for sale, yet as above set out it did not amount to a delegation to the executor of his discretion to fix on portions, and that the fact that the license concluded with a provision that if the disposal of any lands should prove unnecessary, it should not be exercised, did not affect its validity.

Also that a license may not be attacked on the ground of irregularity in the proceedings of which it is the outcome.

Quære, but if on its face it is one which the Judge had no power to make?

In the Supreme Court of Canada:—

Held, that the judgment creditors by receiving payments out of the proceeds of the sale, had recognized the validity of the license, which they could not now dispute.

Phinney v. Clark, 27/384, 25 S.C.C. 633.

19. **Mortgage by license of Probate Court—Whether entitled to rank as a debt of testator.**]—R. died in 1874, largely indebted to a number of persons, and by his last will devised his real estate to his wife for life, with remainder to his son and daughters. The executors obtained leave of the Probate Court to mortgage this real estate, and with the sum thereby realized, paid the debts. The mortgage coming to be foreclosed, the real estate having fallen in value, upon sale failed to realize the amount due.

Afterwards on the death of the widow the estate came up for final settlement in the Probate Court, and the mortgagees having presented their account, were admitted to share in the settlement, as creditors of the testator. On appeal:—

Held, per Graham, E.J. (Weatherbe, J., concurring, McDonald, C.J., dubitante), allowing appeal, that the Court of Probate had no power under its act of constitution to sustain or adjudicate on the claim, not being a debt contracted before the death of the testator.

Per Ritchie, J. (considering that the question of jurisdiction had not been raised), that the amount realized from the mortgage having been applied to the payment of the creditors of the testator, the mortgagees were entitled to take the place of those creditors, unless the outcome should be to impose an additional burden on the estate, which being the case here, the appeal should be allowed.

Re Estate Richardson, 22/416.

20. **The mortgagees** having brought action in the Supreme Court, against the surviving executor for the amount of the deficiency:—Held, on trial, per Townshend, J., that the making of a mortgage is an implied promise to pay whether there is a covenant to that effect or not, and that inasmuch as the money loaned was applied to the payment of the creditors of the testator, the plaintiffs were entitled to be subrogated to the rights of those creditors. That as the Court had decided that the Court of Probate had no jurisdiction to entertain the claim, the plaintiffs were now seeking their proper remedy. On appeal:—

Held, per Weatherbe, J. (McDonald, C.J., concurring in dismissing appeal), that the principle of subrogation or an analogous one, does not apply to the matter of a mortgage by leave of the Probate Court for the purpose of paying debts unless authority therefor can be drawn from the Probate Act. But that section 35 provided that such a mortgage should have "the same effect as if made by the deceased," which made the amount due the plaintiffs a debt of the deceased in express terms.

Per Graham, E.J., Meagher, J., concurring, that the mortgage, though containing a covenant to repay, could not bind assets of the estate not mentioned in the mortgage and not covered by the license. And further that the executors had no right to make such a covenant. That section 35 of the Act only referred to the passing of the title, which, not being in the executors, they could not give unless by virtue of a special provision.

Boardman v. Dennaford, 23/529.

21. **Administration in Supreme Court.**] Administration of the real estate of a deceased person to pay debts, may be had in the Supreme Court, which will take cognizance of the English Act, 5 Geo. II, c. 7, relating to sales in equity for that purpose, which is still in force.

McDonnell v. McIsaac, 23/407.

(Note.—Contra, however, see per Thompson, J., in Murphy v. McKinnon, CONSTITUTIONAL LAW, 2.)

22. **Execution,** to enforce its decrees may not issue out of the Court of Probate, except under section 64, as to costs.

Re Estate Henry Lake, 22/244.

Re Estate McWilliams, 22/367.

23. **Changing guardian—Choice by infant—Suitable person.**]—The Court of Probate has power to revoke its appointment of a guardian on petition of an infant who has attained the age of 14, and thus has power to make a choice.

And the appointment of the infant's grandfather to succeed is a proper one, though he reside out of the jurisdiction.

Loasby v. Egan, 27/349.

24. **Proof in solemn form—Right to demand—Foreign will.**]—B.M., of Scotland, next of kin of A.M., presented a petition for proof of the latter's will in solemn form, and a citation was issued. B.M. then died, and J.M., his executor, prayed to be substituted, produced a certified copy of the will of B.M., and a certificate of death from the office of registration. An order was then made by the Surrogate Judge allowing J.M. to appear for all purposes, from which the executors of A.M. appealed on the ground, inter alia, that it was not shown that J. M. was a legatee or next of kin of A. M.:—Held, that the order was well made, and that proof might be proceeded with.

Re Estate of Alex. McLeod, 21/243.

25. **Court acting as quasi arbitrator.**]—In the settlement of the estate of a deceased person, the Judge of Probate, without objection being made, decided a matter of dispute between the administrator and M.S., one of the heirs, as to which he had no jurisdiction.

Held, that as he had no jurisdiction, he must be taken to have acted as a sort of quasi arbitrator, and while his action was not strictly correct in a legal aspect, yet a fair measure of justice to both having been attained, the Court would not vary the result.

Re Estate E. Scott, 29/92.

PROCEDURE.

See also PLEADING, PRACTICE, ETC.

Retroactive legislation.]—Acts relating to procedure, held retrospective in their action. Cf. STATUTES, 9.

See BARRISTER, 12, MARRIED WOMAN'S PROPERTY ACT, 10.

PROHIBITION.

See also INJUNCTION.

To County Court.]—Exceeding its jurisdiction as to certiorari. Cf. INJUNCTION, 2.

See COUNTY COURT, 12.

PROMISSORY NOTE.

See BILLS AND NOTES.

"PROPRIETORS."

See LEASE, 9.

PROTHONOTARY.

1. **Signature—Execution.**]—An execution, sealed, but not signed, by the prothonotary, is nevertheless valid. It is the seal, not the signature, which imparts validity.

(Overruling the decision of the Supreme Court of Nova Scotia in this case, and in Leary v. Mitchell, 21/367.)

Hubley v. Archibald, 18 S.C.R. 116.

2. **Certiorari.**]—But a writ of certiorari must be signed by the prothonotary.

Queen v. Ward, 21/19.

3. **Liquor License Act.**]—Summons to inspector on appeal must be signed and sealed by County Court.

See LIQUOR LICENSE ACT, 13.

4. **Ministerial officer.**]—The prothonotary has no discretion as to whether he will file an order as amended and settled by a Judge.

See JUDGE, 2.

PROVINCIAL EXHIBITION.

Regulations governing entries.]—

See RACE.

PROVINCIAL MEDICAL BOARD.

See PHYSICIAN AND SURGEON.

PUBLIC BODIES.

Amotion of officer.]—

See INCORPORATED TOWN, 5.

Non-feasance causing injury.]—Not liable therefor.

See NEGLIGENCE, 21.

PUBLIC INSTRUCTION.

1. **Public Instruction Act, 1895—Construction.**]—Held, construing the Act of 1895, c. 1, s. 44, that power is conferred on school trustees, with the sanction of the inspector, to choose the site for a school house. Quære, might the ratepayers defeat the choice by refusing to vote money to acquire it?

If the vote and assessment are legal, a ratepayer must seek to prevent illegal action by school trustees otherwise than by resisting payment of his rates.

Referring to secs. 63, 18, 21, 28 (8), the school trustees may give notice fixing the date of the annual meeting, without first filling a vacancy caused by the removal of one of their number, out of the district.

Though the party attacking the validity of the notice given, whose duty it was also to have posted bills under the Act, swears that he did not do so, yet the presumption is in favor of notice having been given, so that there must be other evidence, or corroboration.

Section 28 (8), prescribing the manner of obtaining valuations for assessment, is directory.

Under Section 57, the accidental omission of a name from the assessment roll does not vitiate the assessment.

Meisner v. Meisner, 32/320.

2. **Arrest for school rates—Application of Municipal Assessment Act.**]—The Public Instruction Act, 1895, c. 1, s. 44, provides that in default of payment of amounts assessed for school purposes, they "shall be collected under and by virtue of the provisions of the Municipal Assessment Act, 1895." That Act contains no provisions in reference to arrest for non-payment, but an amendment, c. 14 of the Acts of 1896, does.

Held, the amendment of 1896 cannot be construed as incorporated by the Public Instruction Act of 1895, to warrant the arrest of a defendant for non-payment of school rates.

But one acting as secretary of school trustees, who, in seeking to collect an amount due, makes an affidavit on which a warrant illegally issues, should not be held liable for false imprisonment with the magistrate and constable.

McKenzie v. Jackson, 31/70.

3. **Salary of school teacher attachable—Equitable Execution.**]—Under the terms of the Public Instruction Act, the contract of a teacher in the public schools, not being directly or indirectly with the Government, his salary is liable to attachment for debt.

And as such salary is not to be reached by ordinary modes, equitable execution by the appointment of a receiver may be had.

Semble, though the right to receive the salary has been assigned by defendant to plaintiff under the Collection Act, this is not an assignment of a chose on which the assignee may maintain action against the Inspector of Schools, after notice, etc. Fraser v. McArthur (12 N.S.R. p. 498), doubted in part.

Fisher v. Cook, 32/226.

4. **School trustees—Power to borrow—Ordinary expenditure.**]—Plaintiff, one of the trustees of a school section, at the instance of his co-trustees, loaned and now sought to recover, a sum of money to be applied to the payment of a teacher's salary. The defence was that the trustees had no power to borrow, except under 1895, c. 1, s. 21:—Held, that as the matter only affected the ordinary expenditure, the section did not apply.

McNeil v. School Trustees of Sec. 33, 34/546.

5. **Validity of assessment—School rates.**]—A magistrate before proceeding to enforce payment of rates under the Public Instruction Act, 1895, is not bound to inquire into the validity of the assessment, in order to have jurisdiction.

See MAGISTRATE, 21.

QUO WARRANTO.

1. **Quo warranto—Information—O. 1, R. 1.**]—The word "information," as used in O. 1, R. 1, refers only to informations in chancery, and quo warranto proceedings not having been cognizable in chancery, cannot now be instituted in the Supreme Court by information, nor otherwise except under the Crown Rules.

Proceedings having been instituted by the attorney-general on the information of P. to forfeit the charter claimed by the defendants as the South Shore Ry. Co.:—Held, that the Court could consider the matter only in so far as the Court of Chancery would have formerly had jurisdiction as to the matters set out in the statement of claim. And that the attorney-general, acting in the interest of the public, may independently of any relator maintain an action in the premises.

Attorney-General v. Bergen, 29/135.

2. **Quo warranto—Town councillor—Disqualified as a contractor.**]—Proceedings by quo warranto under the Crown

Rules to test the validity of the election and the right to sit, of a town councillor, who was surety for the town inspector of license:—Held, that the respondent was a contractor with the town within the meaning of 1888, c. 1, s. 50 (c), but as the affidavits in support of the application only touched the matter of election, which can only be inquired of under R.S. 5th Series, c. 57, the relator must fail. That the matter of illegal sitting could not be considered, because of Rule 49, it not having been set out in the notice, and because the Court would not infer an illegal act from an affidavit not specially setting it out.

Queen v. Kirk, 24/168.

RACE.

1. **Provincial exhibition—Conditions of entry—Classification—Costs.**]—The Provincial Exhibition Commission offered a prize for a race, open to all hack horses. Plaintiff entered a thoroughbred horse, which had occasionally been driven in a hack. A condition of all entries in connection with exhibits at this exhibition in the live stock classes, was that the animal must have been the bona fide property of the enterer for three months previously, which was not the case with plaintiff's horse:—

Held, on this ground the commission was warranted in withholding the prize from plaintiff when his horse ran first, though a "hack horse" is one which is usually driven in a hack, without reference to the matter of breeding.

The commission's regulation being obscure, thereby causing litigation, costs were withheld (Townshend, J., dissenting).

Robinson v. Provincial Exhibition Commission, 32/216.

2. **Fraudulent race**, agreement respecting—Setting up illegality without a plea—Amendment.

See GAMBLING, 3.

RAILWAY.

See also STREET RAILWAY, ELECTRIC STREET RAILWAY.

1. **Meaning of railway.**]—The tracks of the Intercolonial Railway extended along a street of the city of Halifax between the main terminus and wharves on the harbor front, intended to increase terminal facilities, fall within the meaning of the word "railway," occurring in the Liquor License Act and amendments, referring to the refusal of a license to premises within a certain radius.

In re Felix J. Quinn, 32/542.

2. **Negligence—Maintaining** high speed—Curves in track—Not necessarily evidence of negligence—Sleeping car.

See NEGLIGENCE, 4.

3. **Notice of action—Railway Act.**]—Though an employee of the Intercolonial (Government) Railway, may avail himself of the want of notice of action required by the Railway Act, as a ground of defence, it does not appear that the defence continues in favor of a party who has been substituted for him by interpleader proceedings.

McLachlan v. Kennedy, 21/271.

4. **Proceedings to forfeit charter—Quo warranto**—Status of attorney-general—Acting in interests of the public—Form of proceeding.

See COMPANY, 19.

5. **Railway Act — Liability of shareholders.**]—R.S. 5th Series, c. 53, s. 22, is confined in its operation to the rights of shareholders and transferees against the company, and does not profess to cover the status of shareholders in respect to creditors.

Hamilton v. Grant, 33/77.

6. **Railway Act—Coal company operating railway—Taxation.**]—The International Coal Co. was incorporated by Statutes of Nova Scotia, 1864, c. 42, and subsequently under the Dominion Companies Act, 1877, amended by 49 Vict., c. 29. They built and operated a line of railway about ten miles long from

their mines to a harbor of shipment, used chiefly for transporting their own product, but also for public freight and passenger business. Chapter 53, R.S. 5th Series, s. 9, s.-s. 30 (passed in 1880), exempts from taxation for local purposes "the road bed, tracks, wharves, station houses and buildings of all railway companies in the Province. The question was as to the right of the defendant municipality to tax this railway for school purposes. On a case stated:—Held (Ritchie, J., dissenting), that the plaintiff company was not a railway company within the meaning of the Act, but a coal mining company, with power acquired after incorporation to build and operate a line of railway.

In the Supreme Court of Canada:—Held (Gwynne, J., dissenting), that the portion of R.S. c. 53, ss. 5 to 33, includes all railways howsoever owned, constructed under the authority of Provincial Statutes, and that the plaintiff company was entitled to exemption from taxation under s. 9 (30).

International Coal Co. v. Municipality of Cape Breton, 24/496, 22 S.C.C. 305.

7. **Government railway employee—Not exempt from highway labor.**]—A section hand on the Intercolonial Railway, being an employee of the Dominion Government, is not exempt from the duty of labor on a highway under a Provincial Act, requiring snow to be removed, or from liability to pay the penalty for neglect when summoned, because he is such employee of the Dominion Government, or because his services are required at the same time for the same purpose on the line of railway.

Fillmore v. Colburn, 28/292.

8. **Stealing in or from railway station**—Construction of Criminal Code, 351.

See CRIMINAL LAW, 12.

9. **Warehousing goods at destination—Duty to safeguard.**]—Plaintiff shipped a barrel of wines by the Bay of Fundy S.S. Co. and defendant railway, marked "A. R. B., C⅋ K., Berwick." The goods having arrived at Berwick, K. called several times to take delivery, but was told by the agent of defendant company that the goods were not there. Thereafter the goods were stolen from the defendant's freight or warehouse:—Held (Meagher, J., dissenting), not deciding as to the contracts of carriage, or of agency between the transportation companies, that the goods having arrived at destination, and having been placed in defendant company's warehouse, it became bailee for the plaintiff, and liable for the reasonable care and custody of the same, the value of which plaintiff was entitled to recover.

Bell v. Windsor & Annapolis Ry., 24/521.

RECEIVER.

1. **Order revoked.**]—Where an order for the appointment of a receiver as to the rents and profits of certain properties was made, while a defence was outstanding, and without notice to the other party:—Held, it must be set aside.

Boak v. Higgins, 32/494.

2. **Leave to appeal.**]—A receiver appointed to wind up an insolvent partnership successfully appealed from an order directing him to pay over monies collected to a single creditor. To an objection that he had appealed without leave:—Held, by taking that course he merely ran the risk of not being entitled to reimbursement for his costs if he failed.

O'Brien v. Christie, 30/145.

3. **Equitable execution**—By way of appointment of a receiver.

See EXECUTION, 19.

RECEIVING FRAUDULENTLY.

See CRIMINAL LAW, 13.

RECORDER.

See INCORPORATED TOWN, 4, 5.

RECTIFICATION.

See DEED, 3, 5, 8, REGISTRATION, 2.

REFEREE.

See also MASTER.

1. **Hearing counsel.**]—The report of a referee will not be set aside on the ground that he ought to have heard counsel where one party wished to adduce further evidence, but made no application to the Court to that end; nor on the ground that the report was in fact prepared by another person acting as clerk, and doing merely the mechanical part of the work. Weatherbe, J., dissenting.

King v. Seeton, 21/20, 18 S.C.C. 712.

2. **Erroneous report—Setting aside.**]—A party may be heard as to setting aside the report of a referee as based on an erroneous principle, on the motion to confirm the report, and such party need not give notice of motion.

Fraser v. Kaye, 25/102.

3. **Setting aside report.**]—The report of a referee is not to be set aside only for reasons which would induce the Court to set aside the verdict of a jury. It will be done where the referee is shown to have proceeded on a wrong principle.

The reference was held at Digby in the County of Digby, not at Weymouth, in the same county as directed by the order. The defendant's counsel at first objected, but afterwards acquiesced, and the objection was not renewed in the notice of motion to set aside the report:—

Held, that there was irregularity, but not such as touched the jurisdiction of the referee, and the ground not having been taken in the notice of motion, could not be considered.

Hogan v. Gates, 26/85.

4. **Report confirmed—Re-opening.**]—A provision of a mortgage rendered the mortgaged lands chargeable with future advances. Such advances having been ascertained by a referee, his report was confirmed. Afterwards, on an application to the same Judge for an order for foreclosure and sale, the Judge re-opened the whole matter and reduced the amount awarded:—Held, he might so question the correctness of the report.

Wallace v. Harrington, 34/1.

REGISTRATION.

1. **Priority—Neglect of registrar.**]—A party who has taken every step incumbent on him to secure registry and consequent priority for a deed is not to be prejudiced if the registrar of deeds fails or neglects to enter such deed in his books.

It was shown that a deed duly executed was delivered to the registrar of deeds to be registered, and the fee paid, but was not entered in the books through neglect or oversight, and was found some time later at the registry unregistered. In the meantime judgments had been recovered against the grantor.

No evidence appearing on the deed that it had been attested to by the witness, to qualify it for registry:—Held, its reception by the registrar, a public officer, raised the presumption of regularity as to proof. Grindley v. Blaikie, 19/27, distinguished.

Jost v. McCuish, 25/519.

2. **Priority—Judgment and mortgage—Rectification of mistake.**]—By R.S. 5th Series, c. 84, s. 21, registry of a judgment binds the lands of the defendant as effectually as a mortgage. The defendant, intending to mortgage a property to plaintiff, a mistake was made in drafting the description by which only a one-sixth undivided interest was included in the mortgage.

Subsequently, C. having recovered and registered a judgment against the defendant, levied on and sold the remaining undivided five-sixths. In an action for the rectification of the mortgage:—Held, Weatherbe, J., dissenting, and affirmed in the Supreme Court of Canada, that under the Registry Act above, the lien of the judgment took priority of the mortgage and of the mortgagee's equitable right to rectification of the mis-

take, and that the title of a purchaser under execution on the judgment was superior to that of the mortgagee.

Miller v. Duggan, 23/140, 21 S.C.C. 33.

3. **Mortgage to trustee individually—Rights of cestui que trust—Judgment creditors.**]—D., who was trustee for his sister, invested trust funds in a mortgage, taking and registering it in his own name, with nothing to show the trust. Judgments having been recovered against him in his individual capacity, it was contended that the fund realized on foreclosure of the mortgage was bound thereby.

Held, that the rights of the cestui que trust had priority. Per Townshend and Graham, JJ., because equitable interests not being registerable, the Registry Act does not refer to them.

Oxley v. Culton, 32/256.

4. **Registration of a judgment** binds a beneficial interest in land not appearing on the face of the record of the title.

Ralston v. Goodwin, 21/177.

5. **And similarly** an equitable interest therein.

Robinson v. Chisholm, 27/24, 24 S.C.C. 704.

6. **Indorsement on lease not registered—Renewing lease—Rights of lessee and of person in possession.**]—Held, by the Supreme Court of Canada, that an indorsement on a lease, substituting a life during which the lease was to continue, in consideration of a fine paid, agreeably to a covenant in the lease, need not be registered, not being "a deed" within section 18 of the Registry of Deeds Act, nor "a lease" within section 25. Semble, section 25 applies only to leases for years.

Pernette v. Clinch, 26/410, 26 S.C.C. 385.

7. **Possession under color of title—As against grant—Notice to Crown—Registry Act.**]—Plaintiff claiming by possession under color of title, brought trespass against defendant, who was the grantee of the Crown. The acts of possession relied on were frequent and long-continued going on the land, which was wild and unfenced, and cutting poles, removing stones, etc.:—Held, that these acts were insufficient evidence of completeness and continuity of possession to make it necessary for the Crown, before granting to take steps to revest the title in itself, and that the doctrine of Smyth v. McDonald (1 Old. 274), making such a course necessary after twenty years' possession by the subject, is not to be extended.

Plaintiff also relied on a series of deeds made by different persons, registered, and some of them covering the area in dispute, as assisting his rights against the grant:—Held, that the Crown is not affected with notice by the registry of a deed of a stranger to the title. "There is nothing in the Registry Act which says that the Crown, or anyone else, is bound to take notice of the registry of a deed made by a stranger conveying land which the owner has not granted, and there is nothing notorious in such a transaction without such a law."

McKay v. McDonald, 28/99.

8. **Unrecorded deed—Effect of surrender by grantee—Reconveyance by grantor—Judgment.**]—M.R., for valuable consideration, conveyed a one-half interest in certain lands to P.R., who never recorded his deed. Subsequently P.R. returned the deed to M.R., who conveyed the whole to C.R. in consideration of $800 paid to him, and a promissory note for $700 given to P.R.

Thereafter plaintiff recovered judgment against M.R., and now sought to set aside the last mentioned deed as fraudulent, contending that, as the deed to P. R. was not registered, whereas his judgment was, no estate, not bound by the judgment, had passed out of M.R. to P.R., and the judgment bound the interest of M.R. (R.S. 5th Series, c. 84, s. 18.)

Held, that the Registry Act could not be construed so that a judgment would bind lands not at the date of its registry standing in the name of the judgment debtor, unless in case of fraud,

much less to affect a transaction bona fide and between strangers to the judgment, and with which the judgment debtor's connection was merely formal.

And although the mere cancellation by a grantee of an unrecorded deed does not divest his title, nor re-vest it in his grantor, yet if he sells to a third person and returns his deed unrecorded to his grantor, with a request to convey to such third person, that third person's title will be good against the grantor's creditor.

Bauld v. Ross, 31/33.

9. **Deed of disseizee—Registration not notice.**]—The deed of a disseizee during the continuance of disseizin, is inoperative to convey title as against the disseizor, and registration of such a deed in the county wherein the lands are situated and the disseizor resides, is not notice to him.

See TRESPASS, 5.

10. **Sale of land at auction—Registered encumbrances must be disclosed.**]—The purchaser has a right to expect a clear title in fee.

See LAND, 2.

11. **Agent exceeding authority**, but within apparent scope of business. In the absence of a statutory provision, registration of a power of attorney under which he acts is not notice of the extent of his powers.

See PRINCIPAL AND AGENT, 14.

RELEASE.

Under composition deeds.]—Bankruptcy. Creditors. Must be under seal, etc.

See ASSIGNMENT, 6, 7, 8.

RELIGION.

Church of England.]—Diocesan funds. Right to participate.

See TRUST, 12.

Juvenile offender.]—Place of confinement. Evidence of "faith."

See CRIMINAL LAW, 28.

Roman Catholic.]—Evidence of membership. Conditional devise.

See WILL, 9.

Infant.]—Questions of sectarian training.

See INFANT, 8.

RENT.

See LANDLORD AND TENANT, LEASE.

REPLEVIN.

1. **Notice of action—Constable.**]—It is well settled that the notice to the defendant before action brought, such as that of one month required by the Liquor License Act, 1886, s. 106, s.-s. 2, and other enactments similar to the English Act, 24 Geo. II. c. 44, s. 6, designed for the protection of constables, inspectors, etc., in the performance of their duty, does not apply to the action of replevin.

Wilson v. Reid, 21/318.

Johnston v. Smith, 22/93.

2. **Since Judicature Act.**]—The principles governing the action of replevin since the passing of the Judicature Act are the same as before. The only change made is one of form. Formerly a writ of replevin issued in the first instance. Now a writ of summons must first issue, then an order to replevy may be had.

Wilson v. Reid, 21/318.

Gates v. Bent, 31/544.

3. **Will lie against sheriff.**]—Per Townshend, J., that replevin will lie against the sheriff for goods seized under an execution, has long been settled in this Province by numerous cases.

Mulcahy v. Archibald, 30/136.

4. **Per Meagher, J.,** "It is not in my opinion competent for this Court at this late stage of the history of replevin . . . to hold that replevin will not lie against a sheriff. Such a conclusion must come from a higher Court."

Gates v. Bent, 31/549.

5. **Against sheriff — Possession.**]—Replevin being a process designed for the recovery of possession, it does not apply as against a sheriff who has in effect abandoned his levy, and where there has been no severance of the plaintiff's possession. See per Townshend, J.

See EXECUTION, 24.

6. **Bond—Must have two sureties—Otherwise coroner or sheriff liable—Construction of rules—Duties and privileges of coroner.**]—The bond on replevin ordered to be taken by O. 45, R. 5, must have two sureties, otherwise on a failure of the persons bounden to respond the final judgment of the Court, the sheriff (or coroner) is personally liable. Though that rule, taken from R.S. 4th Series, does not in words require two, and though R.S. 5th Series, c. 1, s. 7, (r), (The Interpretation Act), states that unless otherwise expressly required, one surety shall be sufficient, yet the form directed for use does and O. 45, R. 8, refers to more than one, and every revision of the Statutes prior to the 4th, requires two, legislation which has not been repealed.

There is no distinction between the liability of a coroner acting in a case where the sheriff is an interested party, and that of a sheriff. The coroner in such cases becomes by the common law, ex officio sheriff, so that not only all the common law, but all the statutory liabilities, as well as the rights of the office of sheriff attach to him while acting in that capacity. Am. & Eng. Enc. Law (1st Ed.), Vol. 4, 181.

Horsfall v. Sutherland, 31/471.

REPLY.

See PLEADING, 33.

RES ADJUDICATA.

1. **Same question in different form.**]—Plaintiff brought an action for specific performance of an oral agreement for the transfer to him of a share of the defendant's interest in a mining property, or for a declaration of partnership. On argument, he admitted that he could not succeed in enforcing performance, and it was held that the evidence did not warrant a finding of partnership.

The present action was for a share of the price received by the defendant on a sale of the property, and was supported by the same set of facts as the former one, with the addition that the defendant admitted on trial, that he had promised plaintiff the share claimed, on a sale of the property. On appeal to the Supreme Court of Canada:—Held, reversing the decision of the Supreme Court of Nova Scotia, Fournier and Taschereau, JJ., dissenting, that the matter was not res adjudicata, and that failure in the first action did not prevent the bringing of the second.

Stuart v. Mott, 24/526, 23 S.C.C. 153, 384.

2. **Restoring appeal.**]—The appellant having obtained a stay of proceedings pending appeal, the respondent later on applied to the Court after notice, and the appeal was struck off the docket for want of prosecution.

Held, the Court would not entertain a motion to restore it, on the same grounds that the appellant used in opposing the motion to strike it off, the only difference being an additional affidavit by himself.

Wiswell v. Wallace, 26/505.

3. **Matter not appealed from.**]—Semble, where there are two distinct issues decided on trial, and there is an appeal only in respect to one of them, the decision of the Court of Appeal may notwithstanding vary the decision of the lower Court, as to the matter not appealed from. If the doctrine of res adjudicata applies, it is to be met with that of lis pendens.

Fisher v. McPhee, 28/523.

4. **Justices' Court—Jury failing to agree.**]—Plaintiff sued in the County Court, as indorsee of a promissory note. He had theretofore sought to recover before Justices of the Peace and a jury, when, the jury failing to agree on a verdict, the justices had discharged them,

and made an order as to payment of costs, but rendered no decision in the action:—Held, that under c. 102, R.S., the justices had no authority to dismiss the jury without their having rendered some verdict, nor to summon another. Having done so, the trial was abortive, and plaintiff might bring a fresh action, if he chose, before other justices. That the matter was not to be considered res adjudicata because of the judgment the justices had thought proper to sign, as it did not finally settle the matter at issue.

Creelman v. Stewart, 28/185.

5. **Claim against estate disallowed.**]—The Judge of Probate, unappealed from, having disallowed a claim for a debt alleged to be due by an estate on final settlement, the matter is res adjudicata in a subsequent action against the estate, though the administratrix, joined as a defendant, be personally liable.

Granger v. O'Neil, 31/462.

6. **Party not heard.**]—In replevin and for damages, the defendant, a constable, sought to justify under a warrant which was afterwards set aside:—Held, defendant not having been a party to the proceeding in which the warrant was set aside, the matter was not res adjudicata as regarded him.

Hurlburt v. Sleeth, 27/375, 25 *S.C.C.* 620.

RES GESTAE.

See CRIMINAL LAW, 42.

RESPONDEAT SUPERIOR.

See MASTER AND SERVANT, 4.

RESTITUTION.

Judgment reversed.]—Goods sold under execution must be restored unless holder has further title. Second trial after sale. Applicant for restitution entitled to costs where the facts at the time warranted his application for restitution.

See EXECUTION, 11.

RESTRAINING ORDER.

See INJUNCTION.

REVIVOR.

See JUDGMENT, 10, 12.

RIGHT OF WAY.

1. **Notice of user.**]—In an action for obstructing a right of way over lands of the defendant, the plaintiff proved uninterrupted user for a period of 43 years. The defendant set up that there had been no notice of such user, and no proof that such had been given:—Held, that proof was unnecessary, as the owner of the servient tenement was bound to have had knowledge of an open and uninterrupted user.

Baker v. Acadia Coal Co., 25/364.

2. **User of predecessor in title.**]—In an action for obstruction of a right of way, the plaintiff may join his period of possession to that of his predecessor under whom he claims, to make up the twenty years user required by the Statute of Limitations.

Corkum v. Feener, 29/115.

3. **Appurtenant to grant—And by user—One year's obstruction before action.**] Plaintiff claimed a right of way over lands of defendant, the adjoining owner, by user for more than 20 years. It was the only practicable means of communication with plaintiff's wood lot, for the purpose of hauling wood in winter. Both parties claimed title from P.K., who, up to the time of his death in 1858 had made use of the way for that purpose, and since then and continuously down to 1892 the locus had been unobstructed. In 1892 the defendant built a fence across it. On having occasion to use the

way, plaintiff applied to defendant and obtained permission to remove the fence:—Held, (Meagher, J., dissenting), that such a right over unenclosed or barren lands might be acquired by prescription. Also that plaintiff's action in requesting permission to remove the fence was to be understood as mere neighborly comity, and not as a recognition of or acquiescence in defendant's course in obstructing, inasmuch as the way was only claimed in winter and the fence was only required in summer, and that it did not prejudice plaintiff's right to remove the fence forcibly, as he afterwards did.

In the Supreme Court of Canada:—Held, that plaintiff's right of action was barred by R.S. 5th Series, c. 112, s. 29, there having been a cessation of user for more than a year before action brought.

Also, reversing the decision of the Supreme Court of Nova Scotia, that the circumstances were not such that the right of way could be considered to have passed from P.K., the original owner of both tenements, and user of the way, as appurtenant to the plaintiff's tenement.

Knock v. Knock, 29/267, 27 S.C.C. 664.

4. **Over partnership property—May one partner maintain—Terminus ad quem—Merger.**]—On May 1st, 1873, T. conveyed a tract of land known as "the mill lot" to the firm of T.M. & Co., of which he and D.M. were members, "reserving a right of way at the nearest good crossing place below the mill dam from the said mill road, for the use of D.M. aforesaid, his heirs and assigns forever." At that time T. owned land on the opposite side of the river and immediately north of the latter land and of the mill lot was land which had been previously sold by T. to D.M., who had possessed and used it for some years, but the only legal title to which, so far as proved, was conveyed by two deeds from the heirs of T., made in 1880 and 1885, respectively. The way referred to was intended to be used in connection with this land. In July, 1883, D.M. acquired full right and title to the "mill lot," and from that time until October, 1885, he was the owner of both the dominant and servient tenements. There was evidence to show that D.M., prior to the conveyance to the defendants, had used the way continuously for a period of 29 years. In an action of trespass brought against defendants, who claimed under D.M., and sought to continue the use of the way:—

Held, assuming it to have been legally possible otherwise for the deed from T. to have vested the title to the right of way in D.M., that the description was void for want of a terminus ad quem.

That D.M. having become sole owner in fee of both tenements in 1883, the easement contended for, assuming it to have existed, was extinguished.

Quære, may one partner maintain a right of way to his individual tenement over partnership property, or does every interest vest in the partnership?

McDonald v. McDougall, 30/298.

Pleading—Obstructing right of way.]—What statement of claim should allege. Before and since Judicature Act. Statute of Limitations.

See PLEADING, 58.

RIPARIAN RIGHTS.

See ACCRETION, LEASE, 9.

ROMAN CATHOLIC.

Evidence of being.]—Condition of will.

See WILL, 9.

RULE OF THE ROAD.

See NEGLIGENCE, 5, 6.

RULES.

See JUDICATURE ACT.

SALES.

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1. **Nonfulfilment within agreed time—Loss of profits.**]—To an action for the price of a smoke-stack and boiler, defendant counterclaimed damages for non-delivery within the time agreed on, loss of profits which would have been earned, etc.

Held, that to recover as to profits, the onus was on defendant to show that but for plaintiff's default such would have been earned with reasonable certainty. But it appearing that even though the smoke-stack and boiler had been delivered, the vessel for which they were intended could not have been operated for want of an engine, the default of another person, this concluded the matter of profits against defendant.

Pictou Foundry & Mfg. Co. v. Archibald, 30/262.

2. **Condition precedent—Appropriation—Refusal to accept—Statute of Frauds.**]—Defendant agreed to purchase some puncheons of limejuice subject to inspection for comparison with samples, and regauging to determine the quantity to be paid for. He sent C. to inspect the goods, who approved of the quality of four out of five puncheons, and for identification marked the bungs with defendant's initials. Defendant then sent R., a public gauger, to gauge the contents, but plaintiff prevented him from doing so, in consequence of which defendant declined to proceed further with the matter. Plaintiff had caused the lime juice to be gauged by another gauger, and had certified the result to defendant. In an action for the price:—Held, per Townshend, J. (Ritchie, J., concurring), that the term as to regauging amounted to a condition precedent to the conclusion of the sale, which, having been prevented by the plaintiff, the defendant's contract was voided and that defendant was entitled to employ his own gauger. Also that the marking of the bungs by C., who was defendant's agent only for the purpose of inspecting the quality of the goods, amounted to an acceptance of the same.

Per Graham, E.J. (Weatherbe, J., dubitante), that there was no acceptance sufficient to take the case out of the Statute of Frauds.

The plaintiff also relied on an alleged re-sale of a portion of the goods to C., as showing acceptance and appropriation by defendant. The evidence of C. was to the effect that it was understood between defendant and himself that he was to have one or two puncheons, but no positive agreement was made:—Held, that there was no re-sale.

Hart v. Anderson, 24/157.

3. **Avoidance after appropriating a part.**]—Defendant, being indebted to plaintiffs, offered them wool on account. They wrote in reply. "If your wool is clean and free from burrs, we will allow you 27 cents, but it must be clean, or we will have to have an allowance." The defendant thereupon shipped a quantity of wool, which was not clean and free from burrs, and for which plaintiffs declined to allow more than 21 cents. Defendant declined to accede to this, and offered to take the wool back, but before it could be returned, the plaintiffs had used a portion of it, whereupon the defendant demanded full price for the whole. In an action by plaintiffs for their debt, the defendant counterclaimed for the wool at 27 cents, but the trial Judge found a balance due plaintiffs on the ground that the wool was not worth more than 21 cents, and should not be allowed for at a higher rate.

Defendant appealed, when the Court was equally divided:—Held, per McDon-

ald, C.J., that the price of 27 cents was conditional on the quality of the wool.

Per Weatherbe, J., that there was no evidence that a price was ever agreed on, wherefore the plaintiffs were only bound to allow its actual value.

Per Ritchie, J., Townshend, J., concurring, that the plaintiffs had no right to reduce the price of the wool without the defendant's assent, and if they kept any, they must keep all.

Eureka Woollen Mills v. Kirk, 21/335.

4. **Written contract—Verbal warranty—No rescission after acceptance.**]—Plaintiff telegraphed defendant at Sydney, "Can you handle 90,000 lbs. green cod. Answer price." Defendant replied: "If cod No. 1, large, no shrinkage, $1.35." Plaintiff brought the fish to Sydney, and while they were being landed, defendant signed the following: "We the undersigned, hereby agree to buy from A.L.H. & Co., the cargo of fish now unloading from the schooner "Pleroma," and to pay for the same by draft on the Union Bank of Halifax, at the rate of $1.46 per hundred pounds."

In an action for the price, $1.46 per hundred weight, defendant paid into Court a smaller sum, what he considered the fish worth, relying on an alleged verbal warranty as to quality.

Held, that the writing was meant to, and did, represent the contract between the parties, and could not be varied by parol. And defendant, having accepted the fish, thereby rendering it impossible to restore the parties to their original positions, equitable principles as to rescission could not be applied, to allow such evidence to be given.

Howard v. Christie, 33/367.

5. **Acceptance of goods—Rejection afterwards on account of quality—Inferring separate contract.**]—Plaintiff was under written contract with defendant to supply certain goods. He shipped the lot in question which were unsatisfactory because of quality. Instead of rejecting them and notifying plaintiff, defendant shipped them to England for sale on commission:—Held, plaintiff might recover the value of the goods under the written contract, in the face of which the Court would not imply a separate contract in relation to them, enabling defendant to sell on behalf of plaintiff on commission. Also, the plaintiff having authorized his agent to receive the goods from defendant, did not affect the case unless delivery were made.

Burke v. Roberts, 27/445.

6. **Objection to price and quality.**]—Defendant, when drawn on for the price of a railing designed for a church building, for which he was the contractor, refused acceptance on the ground that the price was not agreed on, but made no objection to the quality of goods till sued. The correspondence as to the price sustained plaintiff's contention, and there was evidence of defendant's having expressed satisfaction with the goods. Judgment for plaintiff.

Record Foundry & Machine Co. v. McKay, 21/541.

7. **Delivery to common carrier—At whose risk—Request to insure.**]—The defendant company ordered a safe of the plaintiffs in Toronto by letter as follows:—". . . Ship one of your No. 5 to V.C.S. Co., New Victoria Mines, C.B., to be landed at Victoria Pier, Sydney River. Ship from Montreal by first chance at your terms as stated by Mr. R. Please insure to Victoria Pier." The plaintiffs shipped the safe by railway to Montreal, thence by steamer "Thornholm" to North Sydney, where it was landed in a slightly damaged condition, the captain noting protest. Plaintiffs had not insured. The agents of the steamer notified defendant company that the safe was in their warehouse at North Sydney in a damaged condition, and defendant company thereupon notified plaintiffs that the safe would not be accepted except at a reduced price, and this action was brought.

Held, that the safe having been shipped according to directions, was upon delivery to a common carrier, at all events at Montreal, if not at Toronto, at defendant company's risk.

That defendant company could not set up non-delivery at destination, as it had itself interrupted the transit, also because such delivery did not amount to a condition precedent to the recovery of the price.

Nor could the defendant company complain of delay in delivery, because it had not notified plaintiffs of its election to rescind the contract because of same.

Per Meagher, J., concurring, the defendant company could not complain of plaintiff's neglect to insure on its behalf, and at the same time deny property in the goods.

Taylor v. Victoria Co-Operative Store Co., 26/223.

8. **Conditional sale—Delivery at express office—Refusal to accept—Rescission.**]—Defendant signed a written contract at the instance of plaintiff's agent, by which he undertook to purchase a physiological model for $35, payable $10 when delivered at the express office at D., balance in instalments, and upon default in any payment vendors to have a right of recovery of the property, and forfeiture of previous payments. Upon notification by the express agent at D. that the model had arrived, defendant refused to accept it, and by direction of plaintiff it was otherwise disposed of. There was no evidence of delivery at the express office except that of the agent, whose information was derived from the bill of lading.

In an action for goods sold and delivered, or in the alternative for goods bargained and sold:—Held, that the sale was a conditional one, and that the exercise by vendor of his reserved or special rights thereunder, amounted to a rescission of the contract.

Per McDonald, C.J., Ritchie, J., concurring, that there was no evidence of delivery at the express office.

Per Graham, E.J. (concurring in dismissing appeal), that the judgment below could not be set aside as against the weight of evidence.

White v. Smith, 28/5.

9. **Place of delivery—Custom as to railway charges—Act of one party adopted by the other.**]—Plaintiff wrote defendant as follows:—"I confirm sale to you by telephone of 10,000 bushels of oats at 24 1-2 cents per bushel f.o.b. cars at Pictou, or 28 cents delivered at Elmsdale whichever way you may choose to order them forward, the oats to be bagged in your bags. If you intend to have them go to different stations, kindly give me instructions as early as possible." To this defendant replied as follows:—

". . . we now complete purchase and will forward the bags to you at once, when we hope to be able to instruct you where to ship same." The oats were delivered in lots at various stations, some nearer to the point of shipment than Elmsdale, some more distant. Plaintiff having in his dealings treated Elmsdale as the place of delivery adopted by defendant, and it being admitted that the usage of trade was when delivery was agreed on at a certain place, and effected at other places, charges for freight should increase or diminish according to distance from that place:—

Held, that as defendant had adopted delivery at Elmsdale as the basis of contract, he could not object to settlement as to freight on that basis, even though in the meantime freight rates had fallen.

Sumner v. Thompson, 31/481.

10. **Delivery and appropriation—Contract to cut and supply logs—Conversion.**]—B. contracted in writing with W. to cut and supply 1,000 cords of pulpwood of specified dimensions, on board scows at the foot of the A. River, at the price of $2.50 per cord, to be paid $1 when delivered on lake, 50 cents when driven to the mouth of the river, and balance when on board scows. In consideration of the money advanced, the logs were to be the property of W. as soon as felled. By mutual agreement plaintiff was afterwards substituted for W. as to the whole agreement.

Plaintiff made advances to B. under the agreement, based on estimates of the quantities cut from time to time, on logs cut into pulp wood lengths and also on logs which he assumed would be so cut. There was evidence that he knew

that B. was cutting logs for other purposes, and that he was delivering the same to defendant, and that he recognized B.'s right to do so. Also that some of the logs cut were of fir and hemlock, whereas his contract called for spruce exclusively.

B. having failed to deliver sufficient pulp-wood to satisfy plaintiff's advances, the latter asserted property in a quantity of logs delivered by B. to defendant, and brought trover therefor. His contention was that all logs were his as soon as felled, under the terms of the agreement, or as he had, with the assistance of B., estimated on the spot, the quantity of logs felled and made advances thereon, there was then and there a sufficient appropriation to his use to pass the property.

Held, that there was no appropriation by B., and that the mere estimation of quantity and paying of advances were of no legal effect, under the circumstances. Also, because there was evidence that plaintiff had so regarded the matter himself, until he discovered that there would probably not be enough pulp-wood to cover his advances.

Also, as to plaintiff's contention that he had a property in the logs in the nature of an equitable lien for his advances, "there can be no appropriation by way of lien, of chattels susceptible of delivery, which will prevail against third persons, without a delivery good at common law."

Malcolm v. Harnish, 27/262.

11. **Delivery and appropriation.**]—Plaintiff agreed with P. to purchase all the deals he should cut, at a certain price, to be delivered at a certain railway station. P. delivered a quantity there which were taken possession of by plaintiff to P.'s knowledge, and from time to time loaded on cars and shipped to Halifax. Plaintiff had advanced P. about all that would be due him in any case.

On a certain day, when about 7,000 feet of deals were lying at the railway station, P. and plaintiff met and went over and measured them, while the loading and shipping was going on, P. meaning thereby to recognize the deals as part of the quantity appropriated to plaintiff's use.

The deals having been afterwards levied on by defendant sheriff under execution against P., at the suit of G., plaintiff brought conversion.

Held, he might recover. By the abovementioned acts, P. had irrevocably appropriated the property to the use of the plaintiff. And in any case, though the property vested thereby in plaintiff was not absolute, yet the circumstances were such that the Court would have restrained P. from diverting the deals to any other purpose than the fulfilment of his contract, and the sheriff on execution gets no more rights than the judgment debtor had.

Johnson v. Logan, 32/28.

12. **Ownership of timber cut—Appropriation—Varying written contract.**]—Plaintiff sold lands to S. by an executory agreement in writing containing a clause by which S. was not to cut thereon more than a certain quantity of timber in any one year. Certain logs and deals, having been taken by defendant sheriff under execution against S., plaintiff laid claim under an alleged oral and supplementary agreement, by which he was to receive the same and credit the value on the price of the land.

Held, he might not give evidence of such an agreement.

Blaikie v. McLennan, 33/558.

13. **Conditional sale — Instalments—Forfeiture.**]—Plaintiff brought action for the price of an organ sold to defendant by written contract, under which property was to remain in the vendor until completion of the payment of the price by instalments. On default of any instalment, plaintiff might resume possession, and all payments made were to be considered forfeited.

Defendant, who had never made any payments, set up his incapacity to contract by reason of drunkenness, which he failed of establishing, and judgment was for plaintiff.

Held, per Ritchie, J., Meagher, J., concurring, that under the terms of the agreement plaintiff's sole remedy was resumption of possession.

Per Graham, E.J., Weatherbe, J., concurring, plaintiff not having elected to resume possession, ordinary recourse was open to him.

Travis v. Way, 33/551.

14. **Delivery of possession—Contract separable from bill of sale—May be proved.**]—The plaintiff having a claim against M., called upon him at his farm to effect collection, and agreed to accept three head of cattle in full satisfaction. He received them one by one from M.'s hands and placed his own mark upon them (a letter K. cut in the hair), and thereupon made an arrangement with M. to pasture the cattle and delivered them to him. While thus in M.'s possession they were levied in execution against him, and this action was against the constable for a wrongful taking and carrying away.

There was no evidence of fraud or of attempt to delay creditors, but there was evidence that on the day of the above transaction M. had executed a bill of sale to plaintiff covering the same cattle, and defendant insisted that plaintiff's title, if any, was referable to this document, and that it should have been produced. Plaintiff asserted throughout that he did not rely on it for title.

Held, that there was a complete sale, delivery and appropriation of the property, not depending in any way on the bill of sale, of which parol evidence might be given. And that the bill of sale was not to be regarded as the best evidence of title, unless it was the intention of the parties that it should be operative to pass the property, and a necessary part of their contract.

Semble, the case is not affected by the question as to whether the parol contract or the bill of sale is first in time of making. (See also BILL OF SALE, 15.)

Kennedy v. Whittie, 27/460.

15. **Illegality of Object—Contract void—Surety discharged.**]—Contracts entered into in the face of a statutory prohibition are void, and the prohibition of sale of liquor, by wholesale, to a person who holds no license under the Liquor License Act, 1895, has the result of rendering the contract of no effect, and one who has become surety for the payment of the price by the purchaser is discharged.

Brown v. Moore, 33/381, 32 S.C.C. 93.

16. **Mistake — Recovery of price—Where mistake is not mutual.**]—Plaintiff sought to recover back the price paid for an interest in a supposed new invention on the ground that on application for a patent, it was refused for lack of novelty.

Held, reversing the decision of the trial Judge and ordering a new trial (Meagher, J., expressing no opinion), that the contract was not void for mistake unless the mistake was mutual, and it did not appear from the evidence that defendant professed to sell a patented right, though plaintiff thought he was buying such. (Pollock, 438.) Also, that the use by defendant of the term "Horton's Sash Patent" did not imply a representation that letters patent had been actually granted. Costs to abide the result.

Chisholm v. Peters, 31/16.

17. **Offer and acceptance—Mutuality.**] S., a grain merchant in Truro, telegraphed C., a grain merchant in Toronto, "Quote bottom prices 20 to 25 cars, thousand bu. each, white oats, delivered Truro bagged in our bags, even four bu. each." C. replied next day, "White oats 32 half, Truro, bags 2 cents bu. extra." S. wired same day, "How much less can you do mixed oats for. Might work white at 32, but not any more." C. answered, "White oats scarce, but odd cars obtainable half cent less. Exporters bidding 23 for white. Highest freight, Truro freight two half over Halifax. Offer white 32 bulk, 34 half in 4 bu. bags Truro." Next day S. wired, "I confirm purchase 20,000 bu. oats, white, at 32; mixed at 31 half, bagged even 4 bu. in my bags. Confirm. May yet order five cars more in bulk,"

and he confirmed it also by letter. C. answered telegram at once, "Cannot confirm bagged. Am asking half cent for bagging. Bags extra." S. replied, "All right; book order. Will have to pay for bagging." C. wired same day. "Too late to-day. Made too many sales already. will try and confirm to-morrow." On receipt of this S. wrote, urging action, and next day wired, "Will you confirm oats? Completed sale first telegram yesterday. Expect you to ship." C. answered next day, "Market advanced two cents here since yesterday noon. Had oats under offer expecting your order until noon yesterday. When you accepted bagged, parties demanded half cent for bagging. They sold before your second wire yesterday. This is why I could not confirm. Think advance too sudden to last." He wrote to S. to the same effect that day. The oats were never delivered, and S. brought an action for damages.

Held, reversing the decision of the Supreme Court of Nova Scotia, that there was never a completed contract between the parties, consequently S. could not recover damages for non-delivery.

Sumner v. Cole, 33/179, 30 S.C.C. 379.

18. **Mistake—Identity of party—Varying written contract.**]—An order in writing signed by defendants read: "Please furnish one 50 h.p. engine, for which we agree to pay you when delivered $350." In an action for this price the defendants set up that in giving the order they were under the impression that plaintiff concern was the same as one of similar name in Toronto, with which they had had dealings, and to whom they had delivered goods to the value of $700, to be credited against machinery to be ordered.

The trial Judge found that though the businesses were allied, they were distinct, but that there were surrounding circumstances to lead defendants to believe that they were one, particularly the letter heads of the Toronto concern, which represented plaintiffs as a branch of their house, and there was reason to think that plaintiffs' agent had allowed defendants to remain under the impression, and that their order would be settled by contra account:—Held plaintiffs could not recover.

Also, to the objection that parol evidence might not be given as to payment of price different from that expressed in the written order:—Held, as the evidence related only to the mode of payment, it was supplementary to and not inconsistent with the written contract, so that evidence thereof might be given.

On appeal the Court was equally divided. Appeal to the Supreme Court of Canada dismissed for the reasons stated by the trial Judge.

Wilson v. Windsor Foundry Co., 33/22, 31 S.C.C. 381.

19. **With whom made—Agency.**] — C. being agent at St. John of the M. Mining Co., and also of defendant, received an order from the latter to purchase certain goods for his personal use to be paid for by the company. C. purchased from plaintiff, ordering goods shipped to defendant, and draft made on the mining company. The plaintiff incorporated the charge into other charges against the company, and made draft on it for the whole amount. The drafts being dishonored, plaintiff recovered judgment against the company. Upon applying to defendant for payment for the goods shipped him, he repudiated having made any contract with plaintiff, representing that he had settled with the company. There was some contradiction between plaintiff's letters to the company and his evidence at trial:—Held (Townshend, J., dissenting), that plaintiff was entitled to recover.

Peters v. Seaman, 22/405.

20. **Rescission of sale—Buying with intention of not paying—Evidence necessary to support.**] — Plaintiff replevied, and sought to rescind the sale of, certain goods to C., which had been by him assigned to defendant as trustee for creditors, on the ground that C. had purchased with a preconceived intention of not paying:—

Held, that it would be unsafe to infer such an intention from evidence showing that C. had bought just prior to making

an assignment more largely than usual, had been extravagant in his personal expenses, had taken a trip, accompanied by his wife and sister, costing nearly $1,200, etc., where C. explained his purchases by saying that he purposed to open another shop and because he could buy unusually low, and his failure, by small sales and inability to borrow money.

Small v. Glassel, 28/245.

See also FRAUD AND MISREPRESENTATION.

21. **Warranty of title implied.**]—In an action for the price of two car loads of scrap iron it appeared that plaintiff had procured the iron, innocently, from a wrongdoer, and that the rightful owner following it up had replevied it out of the hands of the defendant:—Held, affirming the decision of Graham, E.J., on trial, and adopting Benjamin on Sales, 839, as a correct statement of the law, that the plaintiff could not recover. "A sale of a personal chattel implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold."

McFatridge v. Robb, 24/506.

22. **Warranty—Quality.**]—There is no implied warranty as to quality of goods which the buyer has had an opportunity of inspecting and has inspected.

Laurie v. Croucher, 23/293.

23. **Warranty of bicycle.**]—A warranty that a bicycle is sound and strong and will bear the rider's weight can only be enforced if the bicycle had been handled with reasonable care and skill.

Johnson v. Moore, 34/85.

24. **Sale of boiler—Evidence of warranty — Alleged misrepresentation.**] — Plaintiff claimed the return of money paid for a boiler because of alleged misrepresentation and warranty by the vendee to the effect that it would generate enough power to saw 7,000 feet of lumber per day and operate plaintiff's saw and grist mills:—

Held, setting aside the findings on which judgment had been entered for the plaintiff and ordering a new trial, that the alleged representations and warranty being positively denied, in the conflict of evidence it seemed improbable that the defendant had made a warranty connected with the running of a mill which he had never seen and had no description of. That the mere use of the word "warrant" in the course of the negotiations for sale could not be taken to mean that the defendant warranted everything that he said, or more than that the boiler was good and sound, and reasonably fit for the purposes of a boiler of the capacity stated.

Further reason against the finding of a general parol warranty was that there was a written warranty produced, in relation to a subsidiary matter; and that plaintiff had deferred making any claim until he had had the boiler in use five months.

Higgins v. Clish, 31/451.

25. **Implied warranty—Caveat emptor.**]—Plaintiffs sought to recover from defendants a sum of money paid on account of the purchase of a boiler and engine purchased from them for the purpose of operating a grist mill, alleging that the engine and boiler were not reasonably fit for the purpose for which they were sold:—

Held, that the case came within the class of cases mentioned in Jones v. Just (L.R. 3 Q.B. 202), and that the goods being in esse and in a position to be inspected by the buyers, and there being no fraud, the maxim caveat emptor applied even though the defect was latent and could not be discovered by examination.

Higgins v. Clish, 34/135.

26. **Contract to supply tinned lobsters —Warranted free from "smut"—And to keep in Europe nine months—Acceptance —Waiver.** —Defendant, under a written contract, supplied plaintiff, an exporter, a quantity of tinned lobsters. They were warranted to be free from black "smuts"

or inky stains on the inside of tins, and to "keep in Europe at least nine months" from date of delivery.

On delivery in Halifax, plaintiff's agent, in the presence of defendant, opened a few tins from each parcel supplied. Traces of stains and smut were found on the inside of some tins, which subsequently spread to the meat. On complaint by the agent, defendant then and there required him to accept or reject the goods, to which no definite answer was returned, but on advices from the plaintiff, who was then in Europe, that they would be required to fill orders, they were forwarded, and because of quality a reduction in price had to be made to European buyers. On this ground plaintiff claimed damages for breach of warranty. Defendant contended that the plaintiff, by his agent, had waived the warranty, by acceptance of the goods after inspection in Halifax:

Held, that plaintiff might accept the goods, and still preserve his right to claim for damages under the warranty of the contract, which had not been waived by anything done. Also, that defendant had no right to require that plaintiff or his agent should elect to accept or reject the goods, and that the inspection was necessarily ineffective to determine quality.

Also, that there was no misdirection in the Judge's refusing to instruct the jury that the word "keep" in the contract meant keep as a merchantable article of food, the defendant having tendered no evidence in support of that view, in the absence of which the ordinary meaning was, remain free from such deterioration as tinned lobsters are specially liable to.

Also, the jury having found that the goods were "in substantial compliance with the terms of the contract," that there was nothing in this inconsistent with their finding of damages to the plaintiff. They were dealing with the evidence as to the appearance of a small quantity of a large lot, and did not necessarily find against the existence of a hidden defect which afterwards extensively developed.

Wurzburg v. Andrews, 28/387.

SCHEDULE.

1. **Appendix to Judicature Act**—Form of plea at variance with rule as construed, may be followed.

See PLEADING, 46.

2. **Bond set out**—Form, in excess of the requirements of the Act should not be followed.

See BASTARD, 1.

3. **Conviction**—Departure from the exact form given does not invalidate a conviction, if the terms of the Act are followed.

See LIQUOR LICENSE ACT, 15.

4. **Schedule cited**—Form of bond in replevin cited as establishing that there must be two sureties, though the rules are in terms silent. And cf. PLEADING, 46.

See REPLEVIN, 6.

SCHOOL TEACHER.

Salary may be attached.

See PUBLIC INSTRUCTION, 3.

SCIRE FACIAS.

See EXECUTION.

"SCOTT ACT."

See CANADA TEMPERANCE ACT.

SEAL.

1. **Corporate seal.**]—The old rule which required the seal of a corporation to be affixed to all its contracts, has been extensively modified, but except by statute, only in relation to contracts necessary and incidental to the purposes for which the corporation was chartered. The retainer of a solicitor to conduct litigation for an incorporated town must be under seal.

Laurence v. Town of Truro, 26/231.

2. **Seal of town—Appointing recorder.**]—The Towns Incorporation Act, 1888, specially confers on the town council of an incorporated town, power to appoint to the office of recorder. The inhabitants, not the town council, being the "corporation" under that Act, the act of appointment need not be under seal.

Queen ex rel Laurence v. Patterson, 33/425.

3. **Release under** seal—Authority to execute a release under seal must also be under seal—Unless the principal so adopts the act of the agent as to be estopped.

See ASSIGNMENT, 6.

4. **Sealed agreement for sale** of land may be superseded by parol arrangement made in Court—Estoppel.

See LAND, 5.

SEAMEN'S WAGES.

See SHIPPING, 1.

SECURITY FOR COSTS.

See COSTS, 57.

SERVICE.

See PRACTICE, 48, 60.

SET-OFF.

See PLEADING, 23.

SETTING ASIDE.

Appearance.]—See PRACTICE, 1.

Judgment.]—See JUDGMENT, 13.

Pleas.]—See PLEADING, 35.

SEWING MACHINE.

Not "household furniture."]—In an assignment, the words "household furniture" do not include a sewing machine.

Allen v. Wallace, 21/49.

SHEEP.

Dog worrying—His owner liable—Measure of damages.

See DOG, 2.

SHERIFF.

1. **Coroner acting as sheriff**—Entitled to all privileges and immunities, and subject to all obligations and liabilities.

See CORONER.

2. **Fees on sale of land.**]—The sheriff is entitled to his fee or commission on the sale of land where the sale falls through by arrangement between the plaintiff and purchaser at the sale.

Semble, but not where the sale is abortive by the failure of the purchaser to complete.

Freeman v. McLean, 27/324.

3. **Caretaker for attached property.**]—Semble, the sheriff, who has attached a mine at the instance of a creditor of the owner, may employ a caretaker for the property, and very slight evidence of consent or acquiescence in the arrangement by the creditor will be sufficient to fix liability for the caretaker's wages on him.

McDonald v. Curry, 28/305.

4. **Replevin.**] — It is well settled that replevin will lie against the sheriff on execution.

See REPLEVIN, 3.

SHIPPING.

1. **Proceedings for seamen's wages—After sale of vessel.**]—M., who was owner and master of the schooner "Quartette," mortgaged her in September, 1890.

A sale under this mortgage having taken place in December, 1891, plaintiff became purchaser and owner, and appointed C. master of the schooner. Thereafter two seamen who had served under M. on a voyage terminating at Halifax, laid information against M. for wages due, before a stipendiary magistrate at Halifax under R.S.C. c. 74, s. 52. A distress was issued, and in default of goods the vessel was seized and plaintiff brought this action in replevin. On appeal from the decision of Townshend, J., ordering a return of the vessel to the defendant the seizing officer:—

Held (McDonald, C.J., dissenting), that the proceedings should have been against the present master C., not against the former Master M., if it was desired to preserve the recourse against the vessel. The intention of the Legislature was to create a lien for wages, but not to enforce it without notice to the owner or his agent, the master. See also MAGISTRATE, 7.

Grant v. Webber, 25/193.

2. **Seamen's wages—Includes fishermen—Share in catch not attachable.**]—Defendant went on a fishing voyage on a schooner of which H. was master and part owner. He shipped "on the half lay," that is, one-half of the catch goes to the vessel, the other, after certain deductions, to the crew. During the voyage H. agreed in writing with the defendant to buy his share for $125, payable when the fish was marketed. The money due under this agreement was garnisheed in H.'s hands in an action against the defendant, after the termination of the voyage:—

Held, that the defendant being employed in the double capacity of sailor and fisherman, he was clearly a "seaman," under R.S.C. c. 74, s. 2 (g), and the sum due him was to be regarded as "wages" exempt from attachment under ss. 80, 99 of the same Act.

Semble, per Graham, E.P., "a shareman" nevertheless has not all the liens and remedies for the protection of his share in the profits of a voyage which a seaman has for his wages.

Swinehammer v. Sawler, 27/448.

3. **Fishing voyage—"Quarter lay"—Supplies.**]—The owners of a vessel let to captain and crew on the "quarter lay," are not liable for fishing supplies furnished captain and crew, especially after notice that they will not so consider themselves. Semble, they are liable for outfit for ship.

Crowell v. Smith, 32/505.

4. **Custom—Meaning of "drawing freights."**]—Locally, in Nova Scotia at all events, the term in use among shipping men, "drawing against freights" means drawing on consignees on security of freights to be earned; "drawing freights" means drawing freights already earned.

Pitcher v. Bingay, 21/31.

5. **Bill of lading—Claims to be settled in England.**]—Plaintiffs obtained leave to serve the defendants, who were ship owners out of the jurisdiction in an action for non-delivery of goods. A clause of the Bill of Lading read: "that claims, if any, for loss or damage, short delivery or any other cause, shall in the option of the shipowner, be settled direct with the agents of the line in Liverpool, according to British law, with reference to which this contract is made, to the exclusion of proceedings in any other country." The defendants moved the Judge in Chambers, who set aside the action. Plaintiffs appealed:—

Held, that though agreements to oust the jurisdiction of Courts and to refer the settlement of differences to a private forum, and to arbitration, are on grounds of public policy held to be void, yet it is different with an agreement as to which of two jurisdictions shall determine the dispute. But as the wording of the clause of the Bill of Lading made it doubtful whether the jurisdiction of our Court administering "British law," if that term meant the mercantile law of England, was excluded, the matter could be best settled in the action, for which reason it should be restored. And after further argument (Graham, E.J., dissenting), with costs against the respondent.

Stairs v. Allan, 28/410.

6. **Damage to cargo—Transhipment.**]—Defendant undertook by Bill of Lading, containing an exemption from liability for damage caused by perils of the sea, to carry a number of bags of shorts from Boston to Sydney, direct. Finding the shorts overheated when he reached an intermediate port in Cape Breton, he reshipped them by steamer to their destination. There was evidence that the damage to the shorts had been caused by water before reaching the intermediate port:—Held (Weatherbe and Smith, JJ., dissenting), that the defendant not having brought himself within the exception of the Bill of Lading, was liable to the owners of the shorts for the damage.

Harrington v. Boudrot, 21/97.

7. **Charter party—Dispute as to demurrage—Construction of clause—Payment under protest.**]—Defendant's vessel was chartered to R. to carry a cargo of lumber from Annapolis to ports in South America. The charter party contained the following clauses:—

(a) "Bills of lading to be signed at any rate of freight without prejudice to this charter party, but not less than the chartered rate.

"(b) It is agreed that this charter party is entered into by the charterers for account of another party; their responsibility ceases as soon as cargo is on board, the vessel holding an absolute lien for all freight, dead freight and demurrage."

The bill of lading presented to the master for signature contained this provision as to the delivery of the cargo:—"To be delivered unto W. M. F. or to assigns, he or they paying freight for said lumber, and all other conditions as per charter party, etc." The master claiming that the lay days provided by the charter party for loading had been exhausted, and that the ship was entitled to be paid demurrage, refused to sign the bills of lading presented to him, or to give up the cargo, except on payment of the demurrage demanded. Plaintiff having paid the amount under protest:—

Held, that the master was bound to have signed the bills of lading or to give up the cargo and that his action was a breach of the charter party.

Also, that the bills of lading gave the owners a lien on the cargo for all demurrage legally payable under the cesser (b above) clause of the charter party. And that neither plaintiffs nor the consignees were liable to pay demurrage at the port of loading, before the cargo was put on board, and that the only parties the owners could look to were the original charterers, who were not until then, discharged under the cesser clause of the charter party.

Forsyth v. Sutherland, 31/391.

8. **Charter party—Renewal—Notice.**]—A charter party signed by M. K. & Co. as agents for and on behalf of the owners, contained a clause under which charterers should be entitled to an extension of the term, on notice:—

Held, M. K. & Co. not being generally authorized as agents of owners, notice to them requiring an extension was not sufficient. And that the question of agency was for the Judge, not the jury.

Dominion Coal Co. v. Kingswell S.S. Co., 33/499.

9. **Obstructing navigation—Detaining vessel at her berth—Damages.**]—Plaintiff's vessel was lying at an inner, and defendant's vessel at an outer berth of a wharf belonging to B., situate on tidal and navigable waters of the Weymouth river. Plaintiff's vessel being laden, desired to proceed to sea, but was detained three days by the refusal of defendant to shift his position sufficiently to allow of passage. This might have been permitted by a movement easily executed, that of allowing the bow of defendant's vessel to swing a short distance out into the middle of the stream, or by inrigging the bowsprit and jib-boom. Plaintiff sought damages for the delay occasioned:—

Held, that he was entitled to recover for the obstruction of his right to use a navigable highway, no part of which could be lawfully denied him. Also, that the permission of the wharfowner B. to

the defendant to remain where he did was no defence, as any rights B. may have had over the locus were inferior to the paramount public right of free navigation.

Per Townshend, J., dissenting, that plaintiff had voluntarily taken up the disadvantageous position by shifting from the outer to the inner berth, hence could not complain.

McNeil v. Jones, 26/299.

10. **Pilotage charges — Meaning of "ship."**]—Per Johnstone, C.C.J., (Appeal from his decision not considered, the matter having originated in a Magistrate's Court, from which the appeal to the County Court is final), a derelict hulk, towed into Halifax harbor for the sake of her cargo of deals, and to be broken up, is not a ship within the definition of the "Merchants' Shipping Act" and the "Pilotage Act," so as to be liable for pilotage dues. "Ship means every vessel that substantially goes to sea."

Halifax Pilot Commissioners v. Farquhar, 26/333.

11. **Goods sold by captain—Presumption as to ownership.**]—A purchaser of goods ex vessel, from the captain, is not warranted in assuming that they are the property of the captain, and so appropriating the price to the payment of a debt of the captain. He must be on inquiry as to the ownership.

Hickman v. Baker, 31/208.

12. **Vessel attached under absconding debtor process** — Effect of furnishing security for release—Special bail.

See ATTACHMENT, 7.

SIDEWALK.

1. **Liability of property** owner to contribute to cost of laying.—Special legislation.

See HALIFAX, CITY OF, 10.

2. **Defective grating** in sidewalk—Injury caused thereby.—**Liability of Incorporated town.—Defective construction and negligent maintenance.**

See NEGLIGENCE, 21.

SLANDER AND LIBEL.

See also DAMAGES.

1. **Meaning of words—Application for amendment refused.**]—In an action for slander the defendant proposed to ask the following questions of a witness as to the meaning to be attached to certain words complained of. The learned Judge declined permission.

(1) Were there not circumstances surrounding the speaking of the words to lead you to suppose that they were spoken in a sense not intended to impute felony to plaintiff?

(2) Did you understand from the circumstances or from anything which has come to your knowledge, that the words were mere words of abuse?

(3) Were there any words spoken or circumstances existing, which in your opinion would induce a bystander to suppose that something other than a felony was intended to be imputed to plaintiff?

Held, that the defendant had a right to put such questions and there must be a new trial.

Also, per Ritchie, J., that the Judge after all the evidence was concluded and the jury had retired, rightly refused to allow an amendment to the defence setting up privilege, though such an amendment ought to have been granted if applied for in time.

Shea v. O'Connor, 26/205.

2. **Meaning of words — Question for Jury.**]—The plaintiff was a manufacturer of cheese, accustomed to pay those who supplied him with milk at a rate fixed by the price he got for the manufactured product. He brought action against defendant for saying that he had represented such price at less than he had realized. The meaning of the words used being left to the jury, they found for the defendant, which finding was unsatisfactory to the trial Judge:—

Held, that the question was peculiarly one for the jury, and the finding though it might not be satisfactory, was not so perverse or unreasonable as to call for the exercise of the power to order a new trial.

Archibald v. Cummings, 25/555.

3. **Proof of meaning of words.**]—In an action for slander by using words imputing an unnatural offence, it was objected that the words not being actionable per se, the innuendo they were alleged to convey should have been proved:—Held, that where the words are perfectly intelligible English words, and their meaning is obvious this need not be done. And the jury having assigned the obvious meaning to them, the verdict would not be disturbed.

Gates v. Lohnes, 31/221.

4. **Imputation of misappropriation—Libellous letter—Evidence of motive.**]—Defendant who was district or general agent of an insurance company, wrote to a policy-holder in reference to her policy, and also stated that plaintiff, who had been local agent, had been removed for neglect of business, and that he had collected and failed to account for, certain premiums.

On trial of an action for libel the trial Judge excluded evidence offered by defendant as to what his object was in writing the letter, or what operated on his mind as to the policy-holder to whom it was written. The occasion was admittedly privileged and the only question for the jury was actual malice:—

Held, setting aside verdict for plaintiff, there must be a new trial, with costs.

Miller v. Green, 32/129.

5. **Scolding match—Words of general abuse—Costs.**]—Plaintiff sued defendant for slanderous words spoken by the latter's wife in an altercation which was provoked by plaintiff's wife. The defendant denied the publication and attempted to prove that plaintiff had a bad reputation, but failed:—

Held, in view of the latter fact, the Judge who awarded $5 damages, erred in withholding costs.

Semble, under the circumstances if defendant had pleaded that the words were part of an altercation, and of mere general abuse, the trial Judge would have been warranted in dismissing the action.

Croft and Jodrey, 28/78.

6. **Imputation of a crime—Special damage.**]—In an action for slander the words proved to have been used of plaintiff by defendant were "He is a bad man with the women. He drugged Mrs. A. M." Plaintiff proved no special damage:—

Held, that the words were actionable per se as imputing an offense under secs. 245 and 246 of the Criminal Code, and no special damage need be shown; and that as the award of $25 damages was not excessive in any case, the verdict should stand.

Gamble v. Hirschfield, 26/469.

7. **Imputation of theft—Privileged occasion.**]—Defendant accused infant plaintiff (now suing by her next friend) of theft of money from his shop, with a view of procuring its return. Two other persons were charged. Subsequently,on application by them, he repeated the charge to the plaintiff's parents.

On an application to set aside a verdict for plaintiff, and for a new trial:—Held, that the jury had been mislead in that they had not been told that the occasion was privileged. New trial ordered.

Also, per Meagher, J., because evidence was wrongly admitted in aggravation of damages as to plaintiff's good character, that other thefts had been committed in the neighborhood on the same night, and as to a conversation between plaintiff's father and defendant's infant son.

Johnston v. Kidston, 31/283.

8. **Imputation of unchastity—Privilege—Absence of malice.**]—Defendant was a shopkeeper in whose street window an artist had obtained permission to exhibit a portrait of plaintiff, as a specimen of his work. A practical joker informed defendant that the portrait was one of an abandoned woman, and the defendant removed it. He explained his action to the artist by repeating the communication made to him, but in exaggerated terms:—Held, that the mere repetition of the communication by defendant was privileged, and though malice might be inferred from the exagger-

ation, there was no other evidence from which it could be inferred, as defendant did not even know plaintiff. Ritchie, J., dissenting.

Brown v. McCurdy, 21/201.

9. **Imputation of unchastity—During judicial proceeding—Privilege.**]—In an action for slander by imputing unchastity, it appeared that the words were used of plaintiff during a prosecution for assault before a magistrate, either on the stand as a witness or during the cross-examination of plaintiff by defendant acting in person:—Held, that in either case the occasion was absolutely privileged.

Henderson v. Scott, 24/232.

10. **Communication to magistrate not privileged—Qualified privilege—Judicial proceedings.**]—Defendant wrote the following letter to C., a Justice of the Peace, whom he had been in the habit of employing, of and concerning the plaintiff:—"I hereby make a serious charge against L. for taking out of a roll of bills, a $10 bill, then returning me the rest, then borrowing $15 from M. for the purpose of cheating S.C. in a horse trade. He obtained this money, $25, in this way and gave it to A., who made the trade for him. Now sir, he only had my money in his possession about 15 minutes, but I did not count it till I got home. I am prepared to prove my every statement and want you to collect this bill, $10 cash taken out of my money and $5 for the trouble he gave me yesterday. If not I shall expose the whole transaction in Court."

In an action for libel the learned Judge instructed the jury that while he had grave doubts as to whether the communication was privileged at all, he would for the present instruct them that it was a matter of qualified privilege. They found for defendant:—

Held, per Weatherbe and Ritchie, JJ., they were misdirected and the verdict must be set aside. The letter did not relate to judicial proceedings, and was written to the magistrate as a broker or agent for collection, and was not a statement of demand within the meaning of R.S. 5th Series, c. 102, ss. 11, 12, hence it was not privileged.

Per Graham, E.J., dissenting, it was a clear case of qualified privilege.

Quaere, if defendant had intended to lay a criminal charge?

Lowther v. Baxter, 22/372.

11. **Abuse of privilege.**]—"If a party on a privileged occasion speak or write what is untrue to his knowledge, this is evidence of malice sufficient to destroy the privilege of the occasion."

If the Judge instruct the jury that the occasion was privileged, and that if the defendant made the communication believing it to be true he is not liable, there must still be a new trial for non-direction, in that the converse idea was not presented, i.e., if the defendant made the communication knowing it to be untrue he is liable.

Miller v. Green, 33/517, 31 S.C.C. 177.

12. **Imputation of malversation in public office—Fair criticism.**]—Defendant published a letter accusing plaintiff who was Mayor of the town of W., and also a shopkeeper, of improper conduct in withholding pay cheques from town employees until they had contracted debts to him for supplies. The jury having found for defendant:—

Held, that on the evidence the verdict was not one such as reasonable men should have found.

And that the libel was not altered by the fact that the class of persons referred to were not strictly employees of the town, but of contractors with the town.

Also that fair criticism extends to comment on or condemnation of acts admitted to have been done by a public officer, not to the imputation of particular acts of misconduct which he does not admit.

Munro v. Quigley, 30/360.

13. **Imputing professional misconduct—Different words proved—Amendment—Innuendo—Justification.**]—In an action for slander in imputing dishonesty to plaintiff, a solicitor, in the practice of his profession, plaintiff failed to prove

the special allegations of his statement of claim, but did prove that defendant had spoken of him professionally as "a dirty man." The Judge allowed an amendment to conform to the evidence, but plaintiff took no order.

Held, setting aside verdict for plaintiff, the innuendo contained in the statement of claim being inapplicable, plaintiff could not recover without one, the words not being actionable per se, nor could the Court supply one for want of evidence.

Further, defendant having been proved to have stated that plaintiff as a solicitor, had collected money for a client and failed to turn it over until sued, and defendant on trial having proved the truth of the statement, he had fully justified. And the statement having been made to one who had entrusted business to plaintiff, and who thus had an interest in being informed, the communication was privileged.

Tobin v. Gannon, 34/9.

14. **Proof of publication—Identity of two newspapers.**]—In an action for libel plaintiff relied for proof of publication in the "Morning Herald," on an admission contained in a letter in the "Digby Courier," proved to have been written by defendant referring to "my anonomous letter in the 'Halifax Herald' of the 24th signed, etc." Plaintiff tendered a copy of the "Morning Herald" of that date containing the libel, which the Judge refused to receive, and on the ground that there was no proof of publication withdrew the case from the jury and entered judgment for defendant:—

Held, that the Judge should have received the evidence, and that the question of the identity of the "Morning Herald" with the "Halifax Herald," was one of fact for the jury.

Handspiker v. Adams, 21/147.

15. **Name not mentioned—Evidence to identify.**]—Plaintiff complained of a libel published in defendant's newspaper:—"The Telephone Co. is talking of removing the toll office.....Complaints of ill treatment and profanity on the part of the attendants is the principal reason for the change":—

Held, that witnesses who had read the paper were properly allowed to give their opinion as to who was referred to. (Odgers, 567.)

Kirkpatrick v. Mills, 30/426.

SNOW.

Duty of removing snow—Railway employee.]

See HIGHWAY.

SNOW PLOW.

Accident on railway caused by operating defective snow-plow.

See NEGLIGENCE, 19.

SOLICITOR.

See BARRISTER AND SOLICITOR.

SPECIALLY INDORSED WRIT.

Generally.]—See PRACTICE, 60.

Setting aside appearance.]

See PRACTICE, 1.

Setting aside defences.]

See PLEADING, 40.

SPECIFIC PERFORMANCE.

1. **Joinder of parties.**]—In an action claiming specific performance, all parties to the original contract should be made parties defendant. In this case plaintiffs sought to enforce an agreement made between defendant and E., who had assigned his rights to plaintiffs under the Indigent Debtor's Act:—Held, prior judgment creditors to plaintiffs were not necessary defendants, but that E. should

have been joined, also that the case was one suitable for amendment under Judicature Rules O. 16, R. 10, for which applications should have been made.

Harding v. Starr, 21/121.

2. **Contract to sell land—Sufficiency of memorandum — Part payment.**] — April 9th, 1889, negotiations took place between plaintiff and defendant, which resulted in the delivery of two written memoranda, one by either party to the other, as follows:—"I, H.L., owner of the property in the City of Halifax, bounded, etc..... agree to sell to H. M. W. for the sum of $42,500. Terms and deeds, etc., to be arranged by 1st May next. H. L.; and "I, H.M.W. agree to purchase from H.L. all the property contained in the square bounded .....for the sum of $42,500, subject to the encumbrances thereon. Terms and deed to be arranged and signed by the 1st May next. H.M.W."

On the same day the plaintiff, H.M.W. by his solicitor paid the defendant, H. L., the sum of $500, and the defendant added to the memorandum signed by him the following: "Terms, $500 cash this day, $500 on the delivery of the deed of the property, $800 with interest every three months until the $6,500 are paid, when the deed of the entire property will be executed. H.L." and a receipt for $500, "on account of the purchase of the P. property."

It appeared from extrinsic evidence offered by the defendant that all of the property contracted for, together with other property owned by him, was subject to a mortgage for the sum of $36,000, which added to the above mentioned $6,500, made up the sum of $42,500:—

Held, McDonald, C.J., dissenting (and affirmed in the Supreme Court of Canada, Patterson, J., dubitante), that the memoranda in writing were not a complete contract, as there were terms left to be arranged at a future time, consequently specific performance could not be decreed.

Williston v. Lawson, 22/521, 19 S.C.C. 673.

3. **Contract to purchase land—Statute of frauds — Untruthful admission — Weight of evidence.**]—Action to enforce an alleged agreement to purchase a house. Plaintiff's evidence set out a perfect verbal agreement. Defendant denied that an agreement had been reached and claimed that he was to consider the question and convey his acceptance or rejection by letter. Plaintiff's version was supported by a letter written by defendant to X., a family connection, alleging as an excuse for declining to loan money that he was under an engagement to buy the house in question, which letter was the only memorandum tendered to satisfy the Statute of Frauds. Defendant's version was supported by a letter to plaintiff of even date with the above, declining to purchase. Defendant also testified that the representation contained in the letter was untrue and made solely for the purpose of avoiding the loan to X.:—

Held, that the admission relied on not being true it could not operate against defendant, however the untruthfulness might be condemned, and that the weight of evidence was against the contract of sale.

Quaere, was the letter, in itself, a sufficient memorandum to satisfy the Statute of Frauds?

McNeil v. McDonald, 25/306.

4. **Agreement to sell land—Part performance — Sale to another person — Notice—Rights of judgment creditor.**]—Action for specific performance of a contract by which defendant S. had agreed to sell land (which was bound by a judgment recovered against him by defendant K. for $200) to plaintiff for the sum of $80, $10 of which was to be paid to S. and the balance applied by plaintiff to securing a release of the land from K.'s judgment. K. was not a party to the arrangement. Plaintiff paid S. the $10 agreed on, entered into possession, and made improvements.

In the face of this defendant S. conveyed the lands to defendant K., who conveyed them to defendant B. All

parties were affected with notice of the transaction between S. and plaintiff:—

Held, that specific performance should be decreed, defendant B. to be a trustee for plaintiff, and to join in a conveyance, all without prejudice to the rights of defendant K. under his judgment. Plaintiff to pay the balance of purchase money into Court.

Per Henry, J., dissenting, that the sale was conditional on defendant K. releasing his judgment as to the lands.

Snyder v. Kaulbach, 27/251.

5. **Sale of land—Laches—Waiver as to title.**]—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 on him, and has always been ready to carry out the contract 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.

Hesslein v. Wallace, 29/S.C.C. 171.

6. **Oral trust respecting land void—Statute of frauds—Specific performance—Rignt of judgment creditor to take the place of debtor as beneficiary.**]—The defendant by instrument dated September 1st, 1885, agreed to purchase the lands and property of the insolvent firm of D. R. and C. F. Eaton and to hold same in trust for the benefit of the insolvents, and to reconvey it to them or to persons designated by them upon being repaid all his advances and the sum of one thousand dollars. The plaintiff recovered judgment against the insolvents and caused them to be arrested. They took the benefit of the Indigent Debtor Act, under which they made an assignment of all their interests in the lands, etc. Plaintiffs, claiming to take the place of the insolvents, then tendered defendant the amount he was entitled to receive from them, and demanded a conveyance. This the defendant refused, whereupon the plaintiffs brought this action claiming specific performance. To this defendant set up a further parol trust in favor of certain creditors of insolvents who held security on shipping of the estate, which was held to be void under the Statute of Frauds. On September 26, 1885, the defendant sold the lands of the estate:—Held, the plaintiff was entitled to take the place of the insolvents and to demand specific performance of the trust of September 1st, 1885, also that the transferees of the lands from defendant held under the same trust he did. McDonald, C.J., dissenting.

Harding v. Starr, 21/121.

7. **Foreclosure—Purchaser at sale—Specific performance** decreed against defendant to whom property was knocked down on sale by the sheriff on foreclosure, and whose agent paid the deposit required, and signed a memorandum agreeing to be purchaser, notwithstanding the defence that an unencumbered title could not be conveyed.

The transferrence of title depends on statutory provisions (1890 c. 14, ss. 5, 6, 10), as otherwise, the defendant's title having been barred by the order for foreclosure, nothing remains to be transferred, and the advertisement and deed refer only to "all the estate, right, title, interest and equity of redemption of the defendant, at the time of giving of the mortgage," no other reference to title being made, nor any specific estate offered.

Power v. Foster, 34/479.

8. **Performance of a lost agreement.**]

See LEASE, 8.

SPEEDY TRIALS.

See CRIMINAL LAW, 31.

STAKEHOLDER.

See GAMBLING, 2.

STAMP.

Library stamp.]—The Act of 1879, c. 86, s. 2, which requires a twenty-five cent adhesive stamp to be affixed to every writ of summons, does not refer to a summons for Agent issued under absconding debtor process.

Henry v. Curry, 22/152.

STATEMENT OF CLAIM.

See PLEADING, 54.

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STATUTES.

Principles of construction generally, 1.

CROSS-REFERENCE INDEX.

English Acts, 18.

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Revised Statutes of Nova Scotia, 78.

Annual Acts of Nova Scotia, 214.

1. **Adopting words of a judicial decision.**]—(Per Townshend, J.) Where the words of a statute have received a judicial interpretation, and the Legislature subsequently passes an act on the same or a similar subject using the same words, it is to be held that the Legislature approves of the meaning affixed to the words by the judicial decision.

McCurdy v. McRae, 23/43.

Halifax Pilot Commissioners v. Farquhar, 26/333.

2. **Erroneous assumption of Legislature.**]—The County Court having no jurisdiction in certiorari except where specially conferred by statute, an intention to confer such jurisdiction generally will not be drawn from sections by which it appears that the Legislature at the time thought that such jurisidction already existed.

"Writs of certiorari shall issue from the County Court.....in the same manner as writs of certiorari from the Supreme Court."

"In all actions, whether originating in the County Court, or brought into the County Court by way of appeal, or by certiorari, an appeal shall lie....."

Ross v. Blake, 28/543.

3. **Statute affecting private rights.**]—"The Courts will so construe a statute as not to affect private rights where that construction can be given without doing violence to the language of the statute, and where it is unnecessary for the carrying out of its objects. The rule is exactly the opposite when such an interpretation would defeat the evident purpose of the Act, especially when the terms of the Act declare the thing is to be done which plaintiffs claim ought not to be done. Quoties in verbis nulla est ambiguas, ibi nulla expositio contra verba fienda est."

The plaintiffs claiming property in certain debenture stock of the Y. and A. Railway obtained an interim injunction to prevent defendant from cancelling such stock in pursuance of legislation expressly directing such cancelling:—Held, dissolving injunction that their remedy, if any, was not by injunction in restraint of the operation of the legislation.

Kinney v. Plunkett, 26/158.

4. **Interference with private rights.**]—A provision of an Act of the Legislature, incorporating a company and conferring on it powers to manufacture and supply illuminating gas, and "to do any matter or thing necessary to carry out the above objects," is not to be so construed as to do away with the right of an adjoining property owner to be relieved of a nuisance incidental to the company's operations.

See NUISANCE, 5.

5. **Interference with property rights—** Surface rights under Mines Act.—Arbitration.

See MINES AND MINERALS, 15.

6. **Construction of words — County Court Act.**]—The County Court Act provides that whenever a Judge is disqualified from acting "by reason of sickness, disability, absence by leave or other cause," he may call in another Judge:—Held, that the words "other cause" are not to be construed by the strict rule of ejusdem generis, and that a Judge has a right for his own protection, to take judicial notice of matters affecting or involving his jurisdiction, and he may refuse to act if disqualified within his own knowledge, and without evidence from other sources.

Belden v. Chapman, 21/100.

7. **Stay of proceedings—Probate Act—** Order declaring estate insolvent under section 56. The words "plead in bar" are not to be understood in their ordinary technical sense, but as directing a stay of proceedings.

See PROBATE COURT, 7.

8. **Revision of statutes — Repealing Act.**]—A provision appearing in a section of a former revision is not repealed by its mere omission from the corresponding section of a new revision. It must be specially repealed. Replevin bond. Two sureties required.

See REPLEVIN, 6.

9. **Act repealed—Effect on proceedings —Jury.**]—On April 10th plaintiff applied for and obtained a jury under Rev. Stat. 5th Series, c. 105. On April 16th the Legislature passed the "County Court Consolidation Act, 1889," repealing the above Act and substituting another slightly changing the mode of obtaining a jury:—Held, that amending Act did not in any way affect the jurisdiction of the Court to try with a jury, but on the contrary enlarged it, it was impossible to imagine that the Legislature intended the Act to have a retroactive effect, hence the jury was lawfully summoned.

Brown v. Black, 21/349.

10. **Enabling Act—Canada Temperance Act—Bringing into force.**]—Owing to a defect in the Canada Temperance Act it could not be brought into force in any County where no system of license existed. To remedy this cap. 31 Acts of Canada, 1884, was passed under which the Act became operative in the County of Annapolis. Cap. 31 Acts of 1884 was repealed by the Revised Statutes of Canada, 1886:—Held, notwithstanding the Canada Temperance Act remained in force in the County of Annapolis.

Queen v. Freeman, 22/506.

11. **Act incorporated by reference—Subsequent amendments do not apply.**]—The Public Instruction Act, 1895, c. 1, s. 44, provides that in default of payment, the amounts assessed for school purposes, "shall be collected under and by virtue of the provisions of the Municipal Assessment Act, 1895." The latter Act contains no references to arrest for non-payment, but an amendment thereto, 1896, c. 14 does:—

Held, this subsequent amendment cannot be construed as incorporated by the Public Instruction Act, 1895.

McKenzie v. Jackson, 31/70.

12. **Schedules to statutes—Judicature Act.**]—Form of plea at variance with the rule as construed, may be followed.

See PLEADING, 46.

Schedule cited.]—Form of bond in replevin, cited as establishing that there must be two sureties, though the rules are in terms silent.

See REPLEVIN, 6.

Form of bond.]—Form set out in schedule being in excess of the requirements of the Act itself, is bad.

See BASTARD, 1.

Form of conviction.]—Departure from the exact form of conviction does not invalidate, if the terms of the law are followed.

See LIQUOR LICENSE ACT, 15.

13. **Civil and criminal legislation—Fraudulent disposition of property.**]—Quære, to what extent does being a party to a transfer fraudulent under the Statute of Elizabeth make one guilty under the Criminal Code, Sec. 368.

See CRIMINAL LAW, 13.

14. **Barristers' and Solicitors' Act—Not retroactive—"Practising" must be proved.**]—The Acts of 1893, c. 27, require every practising barrister to obtain from the treasurer of the Barrister's Society before the first day of July, a certificate under the seal of the society, to the effect that he has paid the prescribed fees. Sec. 3 of that Act provides that no barrister, not having done so, shall be entitled to recover any charge in a Court of law, or tax any costs, etc.:—

Held, that a defendant raising such a defence must aver and prove that plaintiff seeking to recover costs, etc., was then actually practising. Also that the Act was not retroactive, and did not apply to bills which accrued before its passage.

Gourley v. McAloney, 29/319.

15. **Retroactive legislation**—1899, c. 27, s. 69—**Barristers and solicitors**—Delivery of signed bill.—The section relating to a matter of procedure, has a retroactive effect.

See BARRISTER AND SOLICITOR, 12.

16. **Retroactive Act—Fixing salary—Mandamus.**]—Sometime during the year 1891 the Legislature passed an Act fixing the salary to be paid by the Town of Truro to its recorder at $200, "which provision.....shall apply to the present as well as future years":—

Held, that the provision applied to the whole of 1891 and not only to that portion of it which remained after the passing of the Act.

Quære, might action for salary under the Act, be maintained without first applying for mandamus compelling the Town Council to fix the amount pro forma.

Laurence v. Town of Truro, 26/231.

17. **Laches in enforcing statute.**]—The Provincial Acts of 1883 c. 28, ss. 23 and 24, authorized the City of Halifax to collect an annual license fee of $100 from every company doing business within its limits. The city sought to collect several years' arrearages of this license fee from the defendant. It had rendered an account for the same from year to year, and had from time to time sent letters claiming payment, etc.:—

Held, in the absence of any statutory bar, the city was not by reason of any laches prevented from collecting the arrears—less than six years'—claimed for.

City of Halifax v. Jones, 28/452.

ENGLISH STATUTES.

18. **XXXII. Henry VIII.**, c. 9—Conveyance by owner not seized.—Does not apply to judicial sales.

See EXECUTION, 16.

19. **XIII. Elizabeth**, c. 5.]

See FRAUDULENT CONVEYANCE.

20. **III. & IV. Anne**, c. 9.—Brings negotiable instruments within the law merchant.

See BILLS AND NOTES, 25.

21. **V. George II.**, c. 7.—Execution—Lands in Colonies.—Whether in force.

See CONSTITUTIONAL LAW, 2.

22. **XXIV George II.**, c. 44, s. 6—Notice of action to peace officers.—Application of like enactments.

See ACTION, 7.

23. **LIX. George III.**, c. 38—Convention of 1818.—Three-mile limit.—Confiscation of vessel.

See FISHERIES, 2.

24. **XXVIII. & XXIX Victoria**, c. 63—Colonial Laws Validity Act.—Privileges of House of Assembly.

See ASSEMBLY, HOUSE OF.

25. **XXX. & XXXI. Victoria**, c. 3—British North America Act, 1867.

See CONSTITUTIONAL LAW.

REVISED STATUTES OF CANADA, 1886.

26. C. 9, ss. 32, 33—Election petition—Right to conduct.—Service.
See ELECTION, 2, 3.

27. C. 37, s. 23—Evidence taken abroad—Grand jury.
See CRIMINAL LAW, 1.

28. C. 74, ss. 2 (g), 80, 99—Fisherman's wages.—Not attachable.
See SHIPPING, 2.

29. —— s. 52—Seaman's wages—Attachment of vessel.—Jurisdiction.
See MAGISTRATE, 7.

30. C. 94—Fisheries—Treaty of 1818—Vessel confiscated.
See FISHERIES, 2.

31. C. 95, s. 14—Inland fisheries—Setting nets.—Constitutionality.
See FISHERIES, 1.

32. C. 106—Canada Temperance Act—See also 43, 44 post.
See CANADA TEMPERANCE ACT.

33. C. 106, s. 117—Penalty—Construction.
See DO., 14, 15.

34. —— s. 121—Tampering with witness.
See DO., 33.

35. C. 120, ss. 45, 48, 60—(Consolidated 1890, c. 31). Bank Act.—Security on real estate.
See BANKS AND BANKING, 1.

36. C. 129—Winding-up Act—Liquidator—Parties.
See COMPANY, 33.

37. C. 129, s. 30—Foreign company—Jurisdiction—Attachment.
See ATTACHMENT, 4.

38. C. 135, s. 32—Supreme Court of Canada—Jurisdiction in habeas corpus.
See HABEAS CORPUS, 3.

39. —— ss. 63, 64, 65—Powers of amendment—Pleadings.
See DEED, 5.

40. C. 178, s. 75—(Criminal Code, 866)—Assault—Plea of previous conviction.
See ASSAULT, 3.

41. C. 179, s. 12—(Code 919)—Estreat—Crown Rules apply.
See CRIMINAL LAW, 15.

ANNUAL STATUTES OF CANADA.

42. 1878, c. 16—Canada Temperance Act.
See CANADA TEMPERANCE ACT.

43. 1884, c. 31—Bringing Canada Temperance Act into force—Subsequent repeal—Effect.
See CANADA TEMPERANCE ACT, 34.

44. 1888, c. 34—Amendment—Conviction—Penalty.
See CANADA TEMPERANCE ACT, 4, 25.

45. 1889, c. 40—Enabling Act—Crown Rules—Construction.
See COMMISSIONER, 5.

46. —— c. 47, s. 4—Speedy trials—Charge—Code 764.
See CRIMINAL LAW, 31.

47. —— —— s. 12—Preferring distinct charges—Code 773.
See CRIMINAL LAW, 33.

48. 1890, c. 20, s. 3 (d)—Election petition—Affidavit of verification.
See ELECTION, 1.

49. —— c. 33, s. 45 (7)—Bills of Exchange Act—Place of payment.
See BILLS AND NOTES, 19.

50. 1890, c. 33, s. 59 (3)—Accommodation indorser—Discharge.
See BILLS AND NOTES, 6.

51. —— —— s. 86—Presentment for payment.
See BILLS AND NOTES, 18.

52. —— c. 37, s. 34—Criminal Code, 550)—Juvenile offender—Religion—Reformatory.
See CRIMINAL LAW, 28.

53. 1892, c. 29—The Criminal Code—See also 77 post.
See CRIMINAL LAW.

54. —— —— s. 10, cf. 260—Boy under 14—Capacity for crime.
See Do., 5.

55. —— —— s. 25—Arrest without warrant—Defective warrant in possession.
See Do., 30.

56. —— —— s. 154—Tampering with witness.
See CANADA TEMPERANCE ACT, 33.

57. 1892, c. 29, s. 210—Failure to provide—Construction.
See CRIMINAL LAW, 6.

58. —— —— s. 351—Stealing from railway building—Meaning of "in or from."
See Do., 12.

59. —— —— s. 368—Receiving with intent to defraud—Construction.
See Do., 13.

60. —— —— s. 406—"Offence"—Includes breaches of provincial law.
See Do., 4.

61. —— —— s. 501—Cf. 872—Alternative penalties.
See Do., 29.

62. —— —— s. 550—(1890, c. 37, s. 34)—Juvenile offender—Reformatory—Religion.
See Do., 28.

63. —— —— s. 641—Preferring indictment—Prosecuting attorney.
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64. —— —— s. 645—Indictment—Names of witnesses not indorsed.
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65. —— —— s. 700—Evidence of former statements—Admissibility.
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66. —— —— s. 743—Writ of error—Criminal Appeal.
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67. —— —— s. 746—New trial ordered.
See Do., 25.

68. —— —— s. 700—Indictment—Indorsing witnesses' names.
See Do., 21.

69. —— —— s. 764—(1889, c. 47, s. 4)—Speedy trials—Written charge.
See Do., 31.

70. —— —— s. 765—Applies only to persons "committed."
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71. —— —— s. 773—(1889, c. 47, s. 12)—Speedy trials—Preferring distinct charges.
See Do., 33.

72. —— —— s. 810—Cf. 820—Juvenile offender—Conviction—Construction.
See CRIMINAL LAW, 28.

73. —— —— s. 866—R.S. Can., c. 178, s. 75)—Assault—Plea of previous conviction.
See ASSAULT, 3.

74. —— —— s. 872—Alternative penalties.
See CRIMINAL LAW, 29.

75. —— —— s. 872—Conviction—Costs.
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75a. —— —— 900—Reserving case.
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76. —— —— s. 919—(R.S. Can., c. 179, s. 12)—Estreats—Crown Rules apply.
See Do., 15.

77. 1893, c. 31, s. 4—Canada Evidence Act—Wife failing to testify—Comment thereon—New trial.
See Do., 43.

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Third Series.

78. C. 159, s. 2—Offences against religion—Unrepealed at Confederation—Constitutionality.
See CONSTITUTIONAL LAW, 5.

Fourth Series.

79. C. 29, s. 12—Municipal liability—Ex contractu, and in tort.
See MUNICIPALITY, 3.

80. C. 89—Commissioner—Power to grant certiorari.
See CERTIORARI, 12.

81. C. 94, s. 243—Judgment by default—Clerical error.
See EXECUTION, 4.

82. —— s. 357—Notice of assignment.
See CHOSE IN ACTION, 1.

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Fifth Series.

83. C. 1, s. 7 (r)—(R.S. 1900, c. 1, s. 23 (26))—Interpretation—Bond—Number of sureties.
See REPLEVIN, 6.

84. C. 3 (R.S. 1900, c. 2)—Privileges—Punishment for contempt.
See ASSEMBLY, HOUSE OF.

85. C. 7, s. 19—(Consolidated 1892, c. 1—R.S. 1900, c. 18)—Surface rights—Appointment of arbitrator.
See MINES AND MINERALS, 15.

86. —— ss. 107-113—Forfeiture of areas—Certiorari to Commissioner of Mines.
See DO., 6.

87. —— s. 133—Commissioner—Granting license.
See DO., 3.

88. C. 19, s. 1—R.S. 1900, c. 42, s. 3)—Notice of Action—Constable.
See ACTION, 6, 8.

89. C. 24, s. 26—(1899, c. 32, s. 31; R.S., 1900, c. 103, s. 35)—Illegal practising.
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90. C. 37, ss. 2, 6, 13—(R.S. 1900, c. 51, ss. 6, 13, 14, 15, 29)—Affiliation—Requirements of Bond.
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91. C. 42—(R.S. 1900, c. 66)—Dyke—Liability for maintenance.
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92. C. 50—R.S. 1900, c. 78)—Commissioners of streets—Negligence.
See MUNICIPALITY, 1.

93. C. 53, s. 9 (30)—(R.S. 1900, c. 99, s. 156)—Taxation of railway—Exemptions.
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94. —— s. 22—(R.S. 1900,, c. 99, s. 68)—Liabilities of shareholders—Construction.
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95. C. 56—(Consolidated 1895, c. 3; R.S. 1900, c. 70)—Municipal corporations.
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96. —— s. 11—(1895, c. 3, s. 12; R.S. 1900, c. 70, ss. 24, 25, 26, 27, 63)—Municipal election—Nomination.
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97. —— s. 91—(1895, c. 3, s. 95; R.S. 1900, c. 70, s. 147)—Notice of action—Constable.
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98. C. 57—(R.S. 1900, c. 72)—Municipal election—Costs.
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99. C. 67, ss. 14, 16—(R.S. 1900, c. 93, ss. 21, 26).
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100. C. 78, s. 13—(R.S. 1900, c. 127, s. 11)—Liability of shareholders—Construction.
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101. C. 79—(Not consolidated. Unrepealed)—Joint stock company—Definition.
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102. C. 84, ss. 18, 25—(R.S. 1900, c. 137, ss. 15, 20)—Renewal of lease—Indorsement—Registration.
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104. C. 88—(R.S. 1900, c. 136, s. 5)—Abolishing estates tail.
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105. C. 89, s. 21—(R.S. 1900, c. 139, ss. 24, 33)—Will—Date of execution.
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106. C. 91—(R.S. 1900, c. 141).
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107. C. 92—(Consolidated 1899, c. 28, s. 13; R.S. 1900, c. 142).
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108. C. 94, ss. 3, 4, 5—(R.S. 1900, c. 112)—Property of married woman—Nature of estate.
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109. —— s. 9—Wife ante-nuptial debts.
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110. —— s. 52—Wages and earnings—Construction.
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111. —— s. 53—Separate business—Certificate not filed.
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112. —— s. 66—Estover—Firewood and fencing.
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113. —— s. 81—Contract with husband—Indorsee of note.
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114. —— s. 82—Action—Non-joinder of husband.
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115. C. 95, s. 3—(R.S. 1900, c. 115, s. 9)—Illtreatment of children—Commitment to institution.
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116. C. 100, s. 2—(R.S. 1900, c. 158, ss. 117, 11, 30)—Words "last dwelt"—Jurisdiction.
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117. —— s. 4—(R.S. 1900, c. 158, s. 158)—Surrogate Judge—Jurisdiction.
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118. —— s. 26—(R.S. 1900, c. 158, ss. 42, 43, 44)—Paying debts out of real estate.
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119. —— s. 35—(R.S. 1900, c. 158, ss. 52, 53)—Mortgage by license—Whether debt of deceased.
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120. —— s. 56—(R.S. 1900, c. 158, s. 95)—Matters of insolvency.
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121. —— s. 57—(R.S. 1900, c. 158, ss. 60, 61, 125)—Citation.
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122. —— ss. 57, 60, 65, 66, 68, 70—(R.S. 1900, c. 158, ss. 60, 61, 125, 63, 67, 71)—Jurisdiction—Decreeing payment.
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123. —— s. 64—(R.S. 1900, c. 158, ss. 114, 122)—Execution in Probate Court.
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124. C. 101, ss. 11, 12—(R.S. 1900, c. 38, s. 12; c. 40, s. 2)—Wrongful arrest—Notice of action to magistrate.
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125. —— s. 19—(R.S. 1900, c. 40, ss. 11, 12, 14)—Notice of action to constable.
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126. C. 102—(R.S. 1900, c. 160)—Civil procedure—Magistrate—In fraud.
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127. —— —Jury failing to agree.
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128. —— s. 5—(R.S. 1900, c. 160, ss. 7, 9)—Capias—False arrest—Affidavit.
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129. C. 103, s. 66—(Repealed 1900, c. 44. The Criminal Code substiuted)—Summary conviction—Limit of appeal.
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130. C. 104—(R.S. 1900, c. 155).
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131. C. 105—(R.S. 1900, c. 156)—County Court Act—Effect of repealing a section—Jury.
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132. C. 107, s. 8—(R.S. 1900, c. 163, ss. 20, 21)—Deed—Proof by copy—Affidavit omitted.
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133. —— s. 16—(R.S. 1900, c. 163, s. 35)—Dealing with deceased persons.
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134. —— s. 30—(R.S. 1900, c. 163, s. 2)—"Witness" does not include a party to an action.
See EVIDENCE, 53.

135. C. 112—(R.S. 1900, c. 167).
See LIMITATION OF ACTIONS.

136. —— s. 17—(R.S. 1900, c. 167, s. 26)—Adverse possession—Against tenant in common.
See WILL, 9.

137. —— s. 21—(R.S. 1900, c. 167, s. 22)—Mortgage—No payment in twenty years.
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138. ——s. 29—(R.S. 1900, c. 167, s. 33)—Right of way—Cessation of user.
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141. C. 116, s. 2—(R.S. 1900, c. 171, ss. 1, 2)—Lord Campbell's Act—Distribution of damages.
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143. C. 124—(R.S. 1900, c. 170)—Sale under execution—Writ of possession.
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145. C. 1, s. 23 (26). See 83 ante.

146. C. 2. See 84 ante.

147. C. 14. See 271 post.

148. C. 18. See 246-7 post.

149. ——See 223 post.

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153. C. 38. See 124 ante.

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155. C. 42, s. 3. See 88 ante.

156. C. 51, ss. 6, 13, 14, 15, 29. See 90 ante.

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158. —— ss. 52, 55, 56, 57. See 279 post.

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164. C. 71, s. 54. See 232, 234, 280 post.

165. —— s. 186. See 234 post.

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167. C. 72. See 98 ante.

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169. C. 76, s. 31. See 231 post.

170. C. 78. See 92 ante.

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177. —— See also 225-227 post.

178. C. 101. See 235 post.

179. C. 103, s. 35. See 89 ante.

180. C. 112. See 108-114 ante.

181. —— s. 23. See 288 post.

182. C. 115, s. 9. See 115 ante.

183. C. 124. See 243-246 post.

184. C. 127, s. 11. See 100 ante.

185. C. 136, s. 5. See 104 ante.

186. —— s. 24. See 250-1 post.

187. C. 137, ss. 15, 20. See 102 ante.

188. —— s. 16. See 103 ante.

189. C. 139, ss. 24, 33. See 105 ante.

190. C. 141. See 106 ante.

191. C. 142. See 107 ante.

192. C. 146, s. 3. See 282 post.

193. C. 155.
See JUDICATURE ACT AND RULES.

194. C. 156. See 239, 240, 242 post, 131 ante.

195. C. 158. See 116-123 ante.

196.—— ss. 60, 61, 63, 67. See 285 post.

197. C. 160. See 126 ante.

198. C. 161. See 249 post.

199. C. 162. See 289 post.

200. C. 163. See 132-134 ante.

201. C. 164, s. 7. See 273 post.

202. —— s. 24. See 290 post.

203. C. 165, s. 1. See 230 post.

204. C. 167. See 135-138 ante.

205. C. 170. See 143-144 ante.

206. C. 171, s. 12. See 141 ante.

207. C. 174, s. 3. See 241 post.

208. C. 176, s. 4. See 281 post.

209. C. 177, s. 1. See 139 ante.

210. C. 181. See 142 ante.

211. C. 182, s. 4. See 274 post.

212. C. 187, s. 1. See 237 post.

Annual Statutes of Nova Scotia.

214. 1861, C. 39, s. 13—Construction and maintenance of sidewalks.
See HALIFAX, CITY OF, 10.

215. 1874, C. 1—Commissioner — Granting certiorari.
See CERTIORARI, 12.

216. 1874, C. 6, s. 1—Municipal liability—Ex contractu, and in tort.
See MUNICIPALITY, 3.

217. 1878, C. 29—Firewards, City of Halifax—Powers—Liability of city for acts.

See HALIFAX, CITY OF, 3.

218. 1879, C. 86, s. 2—Library stamp—Not required on summons for agent.

See ABSCONDING DEBTOR, 10.

219. 1881, C. 73, s. 15—Company charter—Lands covered with water—Constitutionality.

See CONSTITUTIONAL LAW, 3.

220. 1883, C. 20—Bridge Act—Municipal liability for maintaining roads.

See MUNICIPALITY, 2.

221. 1883, C. 28, ss. 23, 24—City of Halifax—Taxing Act—License.

See 17 ante.

222. —— —— s. 65—Lien for taxes—Procedure—Construction.

See HALIFAX, CITY OF, 8.

223. 1885, C. 3, s. 1.—(Repealed 1892, c. 1, s. 43; R.S. 1900, c. 18)—Registration of transfers.

See MINES AND MINERALS, 22.

224. 1885, C. 36—(R.S. 1900, c. 32, s. 1)—Taxing Master—Appeal.

See COSTS, 71.

225. 1886, C. 3—(Consolidated 1895, c. 2; R.S. 1900, c. 100).

See LIQUOR LICENSE ACT.

226. —— —— ss. 74, 83—(R.S. 1900, c. 100, ss. 112, 172)—Form of conviction.

See DO., 15.

227. —— —— s. 87—(R.S. 1900, c. 100, s. 118)—Information—Jurisdiction.

See DO., 24.

228. —— —— s. 96—(R.S. 1900, c. 100, s. 134)—Amending conviction.

See DO., 19.

229. —— —— s. 104 (2)—(R.S. 1900, c. 100 ss. 150, 151, 152)—Summons to Inspector—Mandatory section.

See DO., 7.

230. 1887, C. 6, s. 2—(R.S. 1900, c. 165, s. 1) — Prosecuting attorney — Powers.

See CRIMINAL LAW, 22.

231. —— C. 23—(R.S. 1900, c. 76, s. 31)—Title to streets and highways.

See STREET, 5.

232. 1888, C. 1, s. 50 (c)—(Consolidated 1895, c. 4, s. 59 (c); R.S. 1900, c. 71, s. 54 (c))—Town councillor—Disqualified as a contractor with town.

See INCORPORATED TOWN, 1.

233. —— —— ss. 111, 117—(R.S. 1900, c. 73, ss. 45, 50)—Incorporated town—Appeal from assessment.

See TAXATION, 5.

234. —— —— s. 144—(R.S. 1900, c. 71, s. 186)—Width of street—Construction.

See INCORPORATED TOWN, 7.

235. —— C. 28—(R.S. 1900, c. 101)—Amending Probate Act—Debts payable out of real estate.

See PROBATE COURT, 17.

236. —— C. 45—(Spent)—Incorporating company—Powers.

See COMPANY, 11.

237. 1889, C. 5—(R.S. 1900, c. 187, s. 1)—Sunday observance—Constitutionality.

See CONSTITUTIONAL LAW, 5.

238. —— C. 6—(R.S. 1900, c. 155, s. 42)—Amending Judicature Act—Jury—Construction.

See JURY, 4.

239. —— C. 9, ss. 20, 22, 26, 28, 29—(R. S. 1900, c. 156, ss. 29, 31, 32, 40, 48, 49)—Equitable execution in County Courts.

See COUNTY COURT, 15.

240. —— —— s. 54—(R.S. 1900, c. 156, ss. 70, 72, 73)—County Court—Trial ex parte.

See COUNTY COURT, 25.

241. —— —— s. 62—(R.S. 1900, c. 174, s. 3)—Overholding proceedings—No appeal.

See COUNTY COURT, 19.

242. —— —— s. 64—(R.S. 1900, c. 156, s. 87)—County Court—Appeals.

See APPEAL, 2, 3, 8.

243. —— C. 17, s. 2—(R.S. 1900, c. 124; repealed 1895, c. 2)—Entry on suspicion—Search for liquor—Construction.

See LIQUOR LICENSE ACT, 28.

244. —— —— s. 4—(R.S. 1900, c. 124)—Amending Act—Affidavit for appeal.

See LIQUOR LICENSE ACT, 11.

245. —— —— s. 7—Affidavit on appeal.

See Do., 8.

246. —— —— s. 15—Appeal—Summons to inspector must be signed and sealed.

See Do., 13.

247. — C. 23, s. 5—(R.S. 1900, c. 18)—Amending Mines Act—Payments in lieu of working.

See MINES AND MINERALS, 10, 11.

248. —— —— ss. 6, 7, 8—Payments in lieu of working.

See MINES AND MINERALS, 13.

249. —— C. 36—(R.S. 1900, c. 161)—Amending Summary Convictions Act—Jurisdiction—One Justice.

See MAGISTRATE, 2.

250. 1890, C. 14—(R.S. 1900, c. 136, s. 24)—Foreclosure—Transfer of title.

See EJECTMENT, 4.

251. —— —— ss. 5, 6, 10—(R.S. 1900, c. 136, ss. 15, 16, 20)—Sales of land under foreclosure.

See SPECIFIC PERFORMANCE, 7.

252. —— C. 17—(Repealed 1893, c. 6)—Arrest for debt—Constitutionality.

See COLLECTION ACT, 1.

253. —— —— ss. 2, 3, 4—Imprisonment for fraud—Invalid order.

See COLLECTION ACT, 2, 3.

254. —— C. 18, s. 9—(Repealed 1895, c. 2; R.S. 1900, c. 100)—Costs—Municipal charge.

See LIQUOR LICENSE ACT, 27.

255. —— —— s. 11—(Repealed 1895, c. 2; R.S. 1900, c. 100)—Proximity to church.

See Do., 33.

256. —— —— s. 12—(Repealed 1895, c. 2; R.S. 1900, c. 100)—Internal communication.

See Do., 32.

257. —— C. 22—(R.S. 1900, reprinted Vol. II. p. 861)—Sunday observance—Constitutionality.

See CONSTITUTIONAL LAW, 5.

258. —— C. 60, s. 13—City of Halifax—Paving sidewalks—Liability of property owner.

See HALIFAX, CITY OF, 10.

259. —— —— s. 35—Maintaining street—Notice of non-repair.

See NEGLIGENCE, 23.

260. 1891, C. 15, s. 2—(Repealed 1894, c. 12)—County Court—Practice—Setting aside verdict.

See JURY, 32.

261. —— C. 19—Special Act—Recorder Town of Truro.

See INCORPORATED TOWN, 4.

262. —— C. 22, s. 4—(Repealed 1899, c. 27)—Admission to bar.

See BARRISTER, 5.

263. —— C. 34—(Reprinted R.S. 1900, Vol. II. p. 861)—Sunday observance—Constitutionality.

See CONSTITUTIONAL LAW, 5.

264. —— C. 58, s. 341—City of Halifax—Assessment—Court of Appeal.

See TAXATION, 8.

265. —— —— ss. 362, 366—City of Halifax—Taxes, when due?

See HALIFAX, CITY OF, 6.

266. —— —— s. 439—City of Halifax—Duty of lighting streets—Negligence of contractor.
See NEGLIGENCE, 28.

267. —— —— s. 454—Encroachment on street.
See HALIFAX, CITY OF, 15.

268. 1892, C. 1, ss. 91, 92, 98—(R.S. 1900, c. 18, ss. 12, 193, 187, 196)—License to search—Second rights.
See MINES AND MINERALS, 12.

269. —— —— s. 98—(R.S. 1900, c. 18, s. 196)—Second rights.
See MINES AND MINERALS, 7.

270. —— —— s. 103—(R.S. 1900, c. 18, s. 27)—Applications for lease.
See MINES AND MINERALS, 12.

271. —— C. 6—(R. S. 1900, c. 14)—Succession duties.
See SUCCESSION DUTY.

272. —— C. 66, s. 38—Town of Dartmouth—Water supply.
See ARBITRATION, 4.

273. 1893, C. 27, s. 3—(R.S. 1900, c. 164, s. 7)—Certificate to practice.
See BARRISTER, 13.

274. 1894, C. 4, s. 1.—(R.S. 1900, c. 182, s. 4)—Contempt—Costs.
See COLLECTION ACT, 4.

275. 1895, C. 1—(R.S. 1900, c. 52)—Powers of school trustees.
See PUBLIC INSTRUCTION, 1, 4.

276. —— —— s. 44—(R.S. 1900, c. 52, s. 77, etc.)—Arrest for school rates—Municipal Assessment Act.
See 11 ante.

277. —— C. 2, s. 39—(R.S. 1900, c. 100, ss. 58, 60, 70, 71, 72)—Consolidated Liquor License Act—Screen clause.
See LIQUOR LICENSE ACT, 37.

278. —— C. 3, ss. 1, 2—(R.S. 1900, c. 70, ss. 3, 4)—Municipality—County of Pictou—Police districts.
See MAGISTRATE, 9.

279. —— C. 4, s. 28 (8)—(R.S. 1900 c. 52, ss. 55, 56, 57)—Public instruction—Assessment roll—Name omitted.
See TAXATION, 10.

280. —— —— s. 295—(R.S. 1900, c. 71, s. 274)—Limitation of action—Continuing nuisance.
See INCORPORATED TOWN, 8.

281. —— C. 7, s. 2 (e)—(R.S. 1900, c. 176, s. 4)—Arbitration.
See ARBITRATION, 8.

282. —— C. 11, s. 2—(R.S. 1900, c. 146, s. 3)—Factor's Act—Tortious sale by agent.
See PRINCIPAL AND AGENT, 28.

283. —— C. 89, s. 1—Police division—County of Pictou.
See MAGISTRATE, 9.

284. 1896, C. 25, s. 6—(R.S. 1900, c. 100, s. 40)—Proximity to railway.
See LIQUOR LICENSE ACT, 34.

285. 1897, C. 2, ss. 74, 77, 85—(R.S. 1900, c. 158, ss. 60, 61, 63, 67)—Adjustment of disputes.
See PROBATE COURT, 6.

286. —— C. 10, s. 3—(R.S. 1900, c. 100, s. 40)—Proximity to railway.
See LIQUOR LICENSE ACT, 34.

287. —— C. 44, s. 22—Taxation—Discount—Construction.
See HALIFAX, CITY OF, 6.

288. 1898, C. 22, s. 12—(R.S. 1900, c. 112, s. 23)—Married woman—Contract with husband—May be indorsee of his note.
See MARRIED WOMAN'S PROPERTY ACT, 10.

289. —— C. 38—(R.S. 1900, c. 162)—Grand jury—Composition—Constitutionality.
See CRIMINAL LAW, 3.

290. 1899, C. 27, s. 27—(R.S. 1900, c. 164, s. 24)—Certificate of payment of dues—Client's rights.
See BARRISTER, 9.

291.—— —— s. 69—(Repealed 1900, c. 44. Not consolidated)—Rendering signed bill.

See BARRISTER, 12.

292. 1901, C. 16—Detention under civil arrest.

See CAPIAS, 14.

STAY OF PROCEEDINGS.

See PRACTICE, 51, PROBATE COURT, 7.

STEAM.

Nuisance from steam from exhaust pipe. Injury to goods.

See NEGLIGENCE, 11.

Personal injury caused by steam.

See NEGLIGENCE, 16.

STIPENDIARY MAGISTRATE.

See MAGISTRATE.

STREET.

1. **Duty of lighting**—City of Halifax—Injury attributed to darkness of street—City not liable for default of contractor for lighting—Respondent superior.

See NEGLIGENCE, 28.

2. **Negligent maintenance**—Occasioning injury. Extent of municipal responsibility.

See NEGLIGENCE, 20.

3. **Encroachment**—Beginning to build "on or near" street line without permit. Charter City of Halifax. Duty of city to define line.

See HALIFAX, CITY OF, 15.

4. **Opening new street.**]—An extension of an existing street is a new street within the meaning of the statute requiring new streets to be of a certain width.

Partridge v. Town of North Sydney, 25/557.

5. **Ownership of street,** in City of Halifax. Property owner. The Act of the Nova Scotia Legislature, 1887, c. 23, vesting the title to public highways in the Crown, does not apply to the streets of the City of Halifax. Per Graham, E.J., "A street is not a highway, either technically or in common parlance, so judicially decided."

The doctrine that a person whose property abuts on a public highway is owner ad medium filum viae, is but a presumption, which may be rebutted.

O'Connor v. Nova Scotia Telephone Co., 23/509, 22 S.C.C. 276.

STREET RAILWAY.

See also ELECTRIC STREET RAILWAY.

1. **Term of charter—Evidence of compliance with.**]—Section 5 of the Act to incorporate the Halifax Street Ry. Co. required that, "the rails shall be of a weight and pattern to be approved by the City Engineer." The City Engineer submitted a report to the "Board of Works," (a committee of the City Council), described three styles of rail proposed and stating of the one now in question, "its adoption is almost compulsory as scarcely any other style of rail will answer the purpose":—Held, that this amounted to approval sufficient to satisfy the section. Weatherbe, J., dissenting. (Appeal to Supreme Court of Canada not heard on the merits.)

Joyce v. Halifax Street Ry. Co., 21/531, 17 S.C.C. 709.

2. **Non-compliance with charter—Accident caused thereby.**]—The charter of defendant company required it to keep the roadway between, and for two feet on each side of its rails, constantly in repair and on a level with the rails. Plaintiff's horse in crossing the track caught the caulk of its shoe in a grooved rail standing above the required level, and tore off its hoof, etc.:—Held, (affirmed in Supreme Court of Canada), that the rail not being in compliance

with the charter, was a nuisance for the maintenance of which defendant company was liable.

Joyce v. Halifax Street Ry. Co., 24/113,, 22 S.C.C. 258.

SUCCESSION DUTY.

1. **Income of life estate liable.**]—D. C. by his will bequeathed certain portions of his estate, in trust to pay the income to certain persons mentioned, for life, and thereafter the principal to be distributed among certain other persons.

The question was whether the life interest was liable to the payment of the succession duties fixed by statute.

The Act (1892, c. 6, s. 2) defines "property" as including "real and personal property of every kind and description, and every estate and interest therein, capable of being devised or bequeathed by will ,etc." By sec. 6 all property with the exception of certain classes mentioned in sec. 5, was made liable to succession duties to be paid for the use of the province.

By sec. 12 the Registrar of Probate upon receiving the inventory provided by the Probate Act is required to "forthwith proceed and fix the cash value of all estates, or terms of years growing out of such estate, and the duty to which the same is liable, etc."

By sec. 19 it is provided that where there has been a devise of property liable to succession duty to take effect in possession after the expiration of one or more life estates, the duty on such future estate shall not be payable until the person taking such future estate shall come into possession.

By sec. 20 it is provided, that the duties imposed by the Act unless otherwise provided for shall be due and payable at the death of the deceased, or within 18 months thereafter:—

Held, that the income for life was within the definition of the word "property" in sec. 2, and as such was liable to the payment of duty.

Re Estate Cronan, 27/436.

2. **Construction of Act, ss. 5, 7—Power of appointment—Vesting.**]—M. by his will directed his executors and trustees to invest a portion of his estate, and to pay the income to C., and in their discretion, to pay him a certain portion of the principal, and after C.'s death to pay the principal to such uses and purposes as C. should appoint by will or deed, or in default to pay to M.'s next of kin. M. died before C. after the passing of the Succession Duties Act (1895, c. 8), having shortly before exercised his power of appointment by will:—

Held, construing ss. 5, 7 of the Act, that whether the estate vested in C. at the death of the testator M. or upon C.'s exercise of his power of appointment the property passed under the will of M. which created the power of appointment, and was not liable to pay succession duty.

Attorney-General v. Parker, 31/202.

SUMMARY CONVICTIONS ACT.

(Note.—Repealed by 1900, c. 44—The corresponding provisions of the Criminal Code now apply.)

1. **Appeal to County Court final.**]—Where an appeal in the matter of a summary conviction has been taken to the County Court, under the Summary Convictions Act, sec. 66, the decision of the County Court is final.

Queen v. Leslie, 25/163.

2. **One justice—Jurisdiction.**]—There is no jurisdiction in one magistrate under the "Summary Convictions Act," R.S. c. 103, as amended by the Acts of 1889, c. 36, to convict for using abusive language on a highway contrary to R. S. c. 162, s. 12. On quashing such a conviction the Court imposed a condition that no action should be brought by defendant.

Queen v. McLeod, 30/191.

SUMMONS FOR AGENT.

See Absent or Absconding Debtor.

SUNDAY.

Lord's day observance—Powers of Province to regulate. Unrepealed legislation.

See CONSTITUTIONAL LAW, 5.

SUPREME COURT OF CANADA.

1. **Habeas corpus—Limits of jurisdiction.**]—The jurisdiction of a Judge of the Supreme Court of Canada in matters of habeas corpus in criminal cases, is limited to an enquiry into the cause of imprisonment as disclosed by the warrant of commitment.

Ex parte James W. Macdonald, 27 S.C.C. 683.

2. **Original jurisdiction—Habeas corpus.**]—The jurisdiction does not extend to hearing an application which has been passed on by the Supreme Court of Nova Scotia.

See HABEAS CORPUS, 3.

3. **Amendment**—Jurisdiction to make necessary amendments to determine the real matter at issue.

See DEED, 5.

SUPREME COURT OF NOVA SCOTIA.

See JUDGE, JURISDICTION, CRIMINAL LAW.

SURETY.

See BOND, PRINCIPAL AND SURETY.

TAXATION.

1. **Taxation of costs**—Length of notice to be given. Construction of O. 63, R. 13, and O. 68, R. 8.

See COSTS, 70.

2. **Covenant to pay taxes**—Executory agreement for sale of land. Construction of covenant.

See LAND, 6.

3. **Covenant to pay taxes.**]—A covenant in a lease on the part of the lessee, to pay taxes, which are assessed to the lessor, is not a covenant running with the land.

McDuff v. McDougall, 21/250.

4. **Railway—Exemption.**]—The road bed, rolling stock, etc., of a railway built and operated by a coal company, is entitled to be considered exempt from taxation under c. 53 R.S. 5th Series, though the chief object of incorporation is the mining of coal.

International Coal Co. v. Municipality of Cape Breton, 24/496, 22 S.C.C. 305.

5. **Towns Incorporation Act—Appeal from assessment.**]—Appeal from the order of the Chambers Judge refusing certiorari to remove the matter of an assessment from the Court of Assessment Appeals of the Town of Dartmouth. The grounds were that there was no evidence before the said Appeal Court to support the assessment:—

Held, that inasmuch as the Towns Incorporation Act, secs. 111 and 117, provided that the Court of Appeal should not be confined, as a basis for its conclusions, to evidence given before it on oath, and having regard to the fact that the assessors before making the assessment complained of, had been sworn, it might give some weight to the assessment without calling the assessors, also that the Court itself being composed of selected men they might legally regard their own special knowledge as part of the material on which they might base their decisions.

Re Assessment Consumers Cordage Co., 27/317.

6. **School trustees** constituted and acting illegally. One who seeks to prevent an illegal application of funds must do so otherwise than by resisting payment of his taxes.

See PUBLIC INSTRUCTION, 1.

7. **Incorporated town—Widow's exemption.**]—A widow claiming exemption from taxation under the Towns Incorporation Act, should establish her right by going

before the Court of Appeal established by that Act, not by defending the action when sued by the town for the amount of taxes levied.

Town of Westville v. Munro, 32/511.

8. **Charter city of Halifax.**]—Following the above, a Court of Appeal as to assessments, being provided by Acts of 1891, c. 58, s. 341, recourse must be had through it, not by resisting the action of the city for taxes.

City of Halifax v. Farquhar, 33/209.

9. **City of Halifax**—Taxing Acts relating to City of Halifax. Lien for taxes, etc.

See HALIFAX, CITY OF, 6.

10. **Assessment roll.**]—The accidental omission of a name from the roll does not vitiate the assessment for school purposes.

Nor does the fact that the mode prescribed by sec. 28 (8) of the Public Instruction Act, 1895, was not exactly followed, the section being directory.

Meisner v. Meisner, 32/320.

11. **Validity of assessment — School rates.**]—A magistrate before proceeding to enforce payment of rates under the Public Instruction Act 1895, is not bound to inquire into the validity of the assessment, in order to have jurisdiction.

See MAGISTRATE, 21.

TENANT FOR LIFE.

Not bound to insure against fire. If he does so it is for his own benefit and a loss is payable to him.

See LAND, 20.

TENANT IN COMMON.

1. **Joint tenancy — Tenancy in common.**]—A will devised certain property to the testator's two sons, their heirs, etc., and provided that the devisees should jointly and in equal shares pay the testator's debts and the legacies in the will. There were six legacies of £50 each to the other children of the testator and these were to be paid by the devisees at the expiration of 2, 3, 4, 5, 6 and 7 years, respectively. The estate vested before the statute abolishing joint tenancies was repealed in Nova Scotia.

Held, a joint tenancy was created. Though slight words of the instrument of creation would be construed as an intention to create a tenancy in common, yet the above provisions regarding payment of debts and legacies ,and the direction that the devisees should "jointly and in equal shares pay, etc.," indicated an intention to create a joint tenancy.

But on appeal to the Supreme Court of Canada:—Held, reversing the above, Taschereau and Gwynne, JJ., dissenting, that there was evidence of an intention on the part of the testator to effect a severence of the devise, and that the devisees took as tenants in common.

Clark v. Clark, 21/379, 17 S.C.C. 376.

2. **Devise by will — Contingency — Whether to happen in testator's life.**]—A clause in the will in question read, "I give, devise and bequeath the lots and stores....unto my sons J. and T. equally; but in the event of the death of my son T., unmarried, or without leaving issue, then his interest in....shall go to and be the property of my said son J. or his children." There was also a codicil; "I do hereby give, devise and bequeath unto my son R. providing he returns to New Glasgow to live, an equal interest with J. and T. in the said lots and stores...." R. died in the United States shortly after the death of the testator, without having returned. This action was by T. for a declaration as to the nature and extent of his interest:—

Held, that the codicil must be read with the will and being of later date must be preferred in construction, and to give effect to both, the testator in qualifying the estate to be taken by T. must be held to have had in mind the contingency of T.'s death before the will took effect. McDonald, C.J., dissenting.

In the Supreme Court of Canada:—Held, reversing the above, that R. having died without complying with the

condition of the codicil, it did not take effect, nor affect the construction to be put on the will. That T. and J. took as tenants in common in equal moieties, the estate of J. being absolute, and that of T. being subject to an executory devise over, in case of death at any time, and not merely in the lifetime of the testator. Also, that the word "equally" referred to the area of the property devised, not to the character of the estates to be taken by the tenants in Common.

Fraser v. Fraser, 28/172, 26 S.C.C. 316.

3. **Partition of land—Protecting rights of third person.**]—Where one of two or more tenants in common, has conveyed, by metes and bounds, a portion of the land held in common, and improvements have been made by the grantee upon the portion of the land so conveyed, the Court in decreeing partition at the instance of other tenants, will protect the interests of the grantee, by setting apart the land conveyed to him as of the share of his grantor, if such can be done without detriment to the interest of the other tenants in common.

McNeil v. McDougall, 28/296.

4. **Trover against tenant in common.**]—Plaintiffs were owners as tenants in common with M., of certain hay, grain and straw. The property was taken by the sheriff in execution against M., and sold to defendant who re-sold a portion and used the balance:—

Held, there was such a taking and carrying away as deprived the plaintiffs of the use and benefit of the property, and that they might therefore maintain an action for conversion against the purchaser of the interest of the tenant in common.

McLellan v. McDougall, 28/237.

5. **Ouster of co-tenant — Building wharf.**]—Defendant erected a wharf on a portion of a water lot in the town of L. of which plaintiff was found to be his tenant in common:—

Held, the wharf was a permanent structure, and by erecting it defendant had ousted his co-tenant, which would enable the latter to recover in trespass.

Zwicker v. Morash, 34/555.

6. **Title by adverse possession—Son living with father** does not share as tenant in common in title acquired. Nor will the deed of the owner not seized help him. Notice by registry of deed.

See TRESPASS, 5.

7. **Trustee becoming tenant in common.**]—Whether a person occupying the position of trustee for one of two tenants in common, may on his own account purchase the interest of the other tenant in common, and thus become tenant with his cestui que trust?

See TRUST, 8.

TENDER.

See DEED, 11.

TERM.

Of Court—Motion on first day]

See NEW TRIAL, 1.

Order made out of term.]

See CRIMINAL LAW, 24.

Legal terms, etc., defined and commented on.

See WORDS.

THIRD PARTY PROCEDURE.

See PARTIES, 27.

THREATENING LETTER.

See CRIMINAL LAW, 14.

TIME.

Time for appealing—Runs from date of judgment rendered, not from date of order granted in pursuance thereof.

See APPEAL, 34.

2. **Time for appearance**—Interlocutory judgment. Where no appearance. O. 20, R. 2.

See JUDGMENT, 20, 21.

3. **Extension of time**—For reply accepting payment into Court. Question of costs.

See PLEADING, 34.

4. **To furnish security for costs** after failure to do so within time fixed by order requiring security. The action is not ipso facto dead, and such an application for indulgence may be made.

See COSTS, 62.

5. **Notice of taxation.**]—O. 63, R. 13, which requires one day's notice of taxation of costs does not mean one clear day. Notice given before 7 p.m. is good for 11 o'clock next morning. And O. 68, R. 8 as to estimating time applies, notwithstanding the term "any particular number of days."

Barrowman v. Fader, 31/ 29.

6. **Order dated nunc pro tunc.**]—The delay being attributable to the Court: —Semble an order is properly so made, if there is jurisdiction. (Per Meagher, J., Ritchie, J., concurring.)

See CRIMINAL LAW, 24.

7. **Tenancy.**] — Where an instrument creating a tenancy reads "from the 30th day of April," the tenancy begins on the first day of May ,and if that day be Sunday, on the 2nd day of May.

Gray v. Shields, 20/363.

TITLE.

1. **Auction sale of land.**]—A warranty that the title is good, means that the fee is to pass clear of all incumbrance.

Wrayton v. Naylor, 24 S.C.C. 295.

2. **Mining rights.**]—But on a sale of privileges under a mining lease a warranty does not refer to the fee, but to the unincumbered right of the vendor under his lease.

Van Meter v. Matheson, 21/56.

3. **Sale of goods.**]—There is an implied warranty of title, on a sale of goods

McFatridge v. Robb, 24/506.

4. **Covenants for title**—Construction of deed.

See DEED, 1.

TOWNS INCORPORATION ACT.

See INCORPORATED TOWN.

TRADE MARK.

Assignment of.]—Held, that the following words contained in a general assignment for the benefit of creditors are sufficient to pass the property in a registered trade mark to the assignee without registration. "Of and in all that concern or business carried on under the style of C. R. & Co., as aforesaid, and all....merchandise, effects and premises, and all and whatever may appertain or belong to the same or any part thereof."

Robin v. Hart, 23/316.

TREATY.

Foreign vessel—Convention of 1818—Three mile limit.]—Where fish had been enclosed in a seine more than 3 miles from the coast of Nova Scotia and the seine pursed up and secured to a foreign vessel, and the vessel was afterwards seized with the seine still so attached, within the three mile limit, her crew engaged in the act of bailing the fish out of the seine:—

Held (in the Supreme Court of Canada, Strong, C.J., and Gwynne, J., dissenting. Not reported below). affirming the decision of the Court below, that the vessel when so seized, was "fishing"

in violation of the convention of 1818 between Great Britain and the United States, and of the Imperial Act, 59 Geo. III. c. 38, and of R.S. Canada ,c. 94, and was consequently liable with her cargo, tackle, rigging, apparel, furniture and stores to be condemned and forfeited.

Ship "Frederick Gerring" v. Queen, 27 S.C.C. 271.

TRESPASS.

1. **Abatement — Trespass — Death of plaintiff.**] — Held, construing R.S. 5th Series, c. 113, s. 1, that an action for acts of trespass within 6 months next preceding the death of a testator, may not only be begun by an executor, but as to that period an action begun by the testator may be continued (on application to be added as plaintiff) by the executor. And if the trespass be a continuing one, applying O. 34, R. 46, damages may be assessed down to the date of assessment.

Miller v. Corkum, 32/358.

Grant v. Wolfe, 32/444.

2. **Possession sufficient.**] — Plaintiff brought an action for trespass to beach lands. Defendant asserted ownership and counterclaimed also for trespass. Both failed to establish a documentary title, but plaintiff showed user for the purpose of piling lumber and other materials, and there was some evidence as to user for the purpose of drying fish. The defendant showed user by his predecessor for the purpose of hauling up one or two boats during the fishing season:—Held, that the acts of plaintiff were of a better character than those of defendant, and were sufficient to sustain an action for trespass. (Townshend, J., dubitante.)

McDougall v. McNeil, 24/322.

3. **Color of title — Title sufficient to maintain trespass.**]—J. V., sr., a squatter on land more than 50 years previously, mortgaged to plaintiff, then deeded to his son, J. V. Jr., who went into possession, paid interest for several years, then abandoned the property, when plaintiff foreclosed against him:—Held, that the above acts constituting color of title, taken together with the foreclosure proceedings, and the statutes of the province, gave plaintiff title quite sufficient to enable him to maintain action against a wrongdoer.

Payzant v. Hawbold, 29/66.

4. **Possession sufficient as against wrongdoer — Cutting ornamental street trees — Title to streets in Halifax — Ownership of street by abutting property owner.**] — The defendant company had the right under its charter to erect poles in the streets of Halifax and to string its wires, etc., etc., provided they did not in so doing cut or injure any trees. To an action for damages for cutting and injuring trees in the street in front of plaintiff's residence which had been planted and cared for by plaintiff's predecessor in title, the plaintiff contended that he was owner of the street, ad medium filum viae, notwithstanding that the description in his deed bounded his property by the street.

On appeal from the judgment of Meagher, J., for defendant company, the Court was equally divided.

Per McDonald, C.J. (dismissing appeal), that the deed did not show any title beyond the southern line of the street, and title to anything further must depend on the construction of the title deed. Also that title to the streets of the City of Halifax, being comprehended in the words "all highways" were vested in the Crown by 50 Victoria c. 23.

Per Weatherbe, J., that absolute title to land taken or dedicated for a street does not pass. That an adjacent property owner has no right to plant trees in the street, or to use the street for growing them. That in the absence of express legislation the title to the streets vests in the civic corporation affording the right to authorize the operations of defendant company.

Per Graham, E.J., allowing appeal, (Ritchie, J., concurring,) that the statute 50 Victoria, c. 23, relating to "laying out roads other than great roads," refers only to roads outside of the City

of Halifax, and not to its streets which have long been separately dealt with. "A highway is not a common street either technically or in common parlance, so judicially settled." That the defendant company, not being authorized to cut trees by its charter, was a wrongdoer, and that plaintiff had sufficient property or possession to enable him to maintain trespass against a wrongdoer.

On appeal, by the plaintiff, to the Supreme Court of Canada:—

Held, that the statute 50 Victoria c. 23 does not refer to the streets of Halifax.

And (Taschereau and Gwynne, JJ., dissenting), that the doctrine that an abutting owner owns ad medium filum viae is a presumption which had not been rebutted by defendant company by showing that title had been divested by Act of expropriation or by dedication to the public for a street.

O'Connor v. Nova Scotia Telephone Co., 23/509, 22 S.C.C. 276.

5. **Title by adverse possession — As against deed of owner not seized.**]—Trespass for entry on plaintiff's land and cutting grass. The defence was tenancy in common. It appeared that about 40 years previously, B.C., of whom plaintiff was the second wife, entered into possession of lands in Lunenburg County, which were proved to have been at that time the property of X. B.C. continued to reside thereon until his death in 1888, and plaintiff since then continuously until action brought.

When B.C. established himself on the property his son, L., an infant accompanied him and remained with him until his marriage to female defendant in 1868. On his marriage he removed to a new house on a portion of the lands of X. which were in the adjoining county of Queens, where he continued to reside until his death in 1872.

On his death his widow and children went back to live with B.C., and remained there until the widow married male defendant in 1875, when she resumed occupation of the house in Queen's county.

In 1886 Y., who was the grantee of X. had conveyed all the property by deed to L.Y. was not in possession, and the deed was recorded in Queens, but not in Lunenburg county. In 1871 L. had conveyed an undivided two-thirds interest in the same to his mother the first wife of B.C.

In 1881 B.C. conveyed the property occupied by him to S., who conveyed it to plaintiff the second wife of B.C.

The female defendant claimed tenancy in common as the widow of L., and the male defendant as guardian of the infant children of L. in respect to their inheritance from their grandmother, the first wife of B.C.:—

Held, Meagher, J., dissenting (and affirmed by the Supreme Court of Canada), that the plaintiff's title by adverse possession was sufficient to satisfy the Statute of Limitations which requires that a person claiming by adverse possession shall be in occupation and user for 20 years. That L. gained no title by possession, during the time that he lived with his father. That there was no evidence that B.C. ever had knowledge of the deed of Y. and even if that deed had been recorded in the county in which he resided it would not have been constructive notice to him. And as a matter of law where two parties are in joint occupation, the one having title and the other none, the latter acquires no rights as against the other.

Per Graham, E.J., "It is the law of this province that the deed of a disseizee, during the continuance of disseizin, is inoperative to convey a title as against the disseizor."

Cahoon v. Parks, 25/1, 23 S.C.C. 92.

6. **Adverse possession as defence — Statute of Limitations—Need not be pleaded—New trial.**]—Plaintiff brought trespass to lands, to which defendant pleaded, (1) denying the acts; (2) setting up ownership. On trial defendant, who had entered originally as tenant to plaintiff, produced evidence to show that he had been in adverse possession upwards of twenty years, thereby acquiring title under R.S. 5th Series, c. 112, s. 11.

Plaintiff objected that the statute not having been pleaded (O. 19, R. 15), the evidence was not admissible.

The jury returned answers to the questions:—

1. "Did defendant continuously occupy the lot after plaintiff refused to rent it to him in 1867?" "Yes."

2. "Did he pay plaintiff rent within twenty years?" "No."

Held, that where, as in this case, the Statute of Limitations not merely bars the action, but divests the title to the land, or vests it in another person, that person need not plead the statute as a defence.

But the defendant must negative the payment of rent for a period of twenty years next before the trespass alleged, and the questions above might refer to the twenty years next before either trial, or action brought, and did not cover every possibility of plaintiff, though disseized, having still possession enough to maintain trespass. For which reasons a new trial was ordered.

Miller v. Wolfe, 30/277.

7. **Grant as a defence — User larger than justified by grant.**]—To an action for continuing a trespass in maintaining a water tank on plaintiff's lands, the defence was a grant of a privilege or easement in 1835. The original tank, however, was replaced in 1884 by one of larger dimensions:—Held, that the grant did not justify the maintenance of a tank of larger dimensions than the original one, thus imposing a greater burden on the land.

Corbitt v. Digby Water Co., 24/25.

8. **Consequently** plaintiff recovered damages against the defendant for having closed up plaintiff's drains in connection with the supply of the tank.

Corbitt v. Wilson, 24/25.

9. **Possession under color of title** as against grant—Acts of possession necessary—Notice to Crown—Registry Act.

See POSSESSION, 10.

10. **Title by possession—Tenants in common.**]—J. G., the father of plaintiff, and one of the defendants, had title by possession to an island in Cole harbor. After his death in 1861, a dispute arose over a division of his lands, and being referred to arbitration, a portion, not including the island, was awarded to the defendant, and "all the remaining portion" to plaintiff. There was no evidence that the arbitrators meant to deal with the island. Thereafter both plaintiff and defendant exercised slight acts of ownership over it, and in 1866 defendant obtained a deed to the whole property from a son of J.G., not bound by the award:—Held, that "acts of possession" such as cutting wood, gathering driftwood, etc., were not sufficient to establish enough title in plaintiff to enable him to maintain trespass; and that plaintiff and defendants were to be considered as tenants in common.

Woods v. Gammon, 22/362.

11. **Tenants in Common—Ouster.**]—Defendant erected a wharf on a portion of a water lot in the town of L., of which plaintiff was found to be his tenant in common:—

Held, the wharf was a permanent structure, and that by erecting it defendant had ousted his co-tenant, which would enable the latter to recover in trespass.

Zwicker v. Morash, 34/555.

12. **Ejectment—Deed—Parol evidence as to consideration—Successful defence not pleaded—Costs—Statute of Frauds.**]—The plaintiff sought to recover possession of a barn in the use of the defendant for the storage of hay. He claimed it under a deed from his brother S. The evidence showed an oral agreement between plaintiff and S. forming the consideration for the deed, that certain improvements were to be made by plaintiff, and that S. was to have the possession and use during life, also that defendant held under S. The oral agreement had not been pleaded, but the Judge allowed an amendment necessary to permit evidence of it to be given, and found for defendant, but as the pleadings were defective, without costs. On appeal by plaintiff:—Held, dismissing appeal, that the trial Judge was right in admitting the evidence and making the amendment,

that both the form of the action and the facts showed that the plaintiff's claim was for trespass, not in ejectment, and not being in possession trespass could not be maintained.

Per Graham, E.J., that there should be a new trial.

Per Weatherbe, J., that the amendment could not be sustained.

Hart v. Scott, 23/369.

13. **Encroachment on street**—Beginning to build without permit—City charter of Halifax—Duty of city to define line.

See HALIFAX, CITY OF, 15.

14. **Land formed by river shifting channel**—Title to—And to land formed by gradual action of water.

See ACCRETION.

15. **Right of mortgagee** out of possession to maintain trespass—And of the holder of the equity of redemption.

See MORTGAGE, 14.

TRIAL, NOTICE OF.

See PRACTICE, 34.

TROVER.

See CONVERSION.

TRUST.

See also ASSIGNMENT, WILL.

1. **Trustee may not delegate his duties.**]—The defendant C. allowed M. to have the entire management of a property of which they were co-trustees, and beyond signing releases when requested to do so and casually enquiring what was being done with the proceeds, did not interfere in any way. M. having misappropriated funds:—

Held, that C. was personally liable therefor. A trustee cannot delegate his trust, or throw his responsibility on another person, not even a co-trustee.

Crowe v. Craig, 29/394.

2. **Compensation to trustees.**]—Though the general rule in England, where the instrument creating the trust does not deal with the matter of compensation to a trustee, is to allow no compensation on the ground that the estate might become loaded and of little value, yet the rule has never been judicially adopted in this Province, because unsuitable to conditions where it would be difficult to get proper persons to act. Where appointments have been made by the Court, a commission has always been allowed, and where the Legislature has dealt with like functionaries such as executors, administrators, etc., a commission has been fixed by statute. Therefore, a trustee sued by the cestui que trust for money appropriated as commission, was held to be entitled to judgment, but under the circumstances, without costs. (Weatherbe and Townshend, JJ., dissenting.)

The Supreme Court of Canada, however, reversed the above decision, holding that the English rule does apply.

Power v. Meagher, 21/184, 17 S.C.C. 287.

3. **Appointment of trustee to vacancy—Relationship—Interest.**]—One of two executors and trustees under a will having died, J. M. was, with the concurrence of cestuis que trust representing a large majority in value of the trust estate, appointed to the vacancy, on filing a sufficient bond. The appointment was objected to on the ground that J. M. was contingently interested in right of his wife, that differences had arisen and were likely to arise between the interests, etc., which was denied:—

Held, that the matter was largely in the discretion of the Judge who heard and decided it, and there was no reason to say that the rules which should guide the Court had been unduly infringed.

Townshend and Henry, JJ., dubitantibus. Per Meagher, J., the appointment of relatives is undesirable.

Re Estate of Daniel Cronan, 31/477.

4. **Guardian—Appointment by parent—Naked trust.**]—Plaintiff's deceased parent had verbally requested defendant to act as trustee for his daughter in case of his death. The duties were

chiefly in connection with $5,000, to be derived from a policy of life insurance which was payable to the defendant "in trust for G. G. L." (plaintiff). After the death of the parent, defendant applied to the Probate Court and was appointed guardian. A year later, the plaintiff having reached the age of 14, petitioned the Probate Court to revoke the defendant's appointment, and to substitute O. A. B., her grandfather, which was granted.

This action was to have the defendant declared a bare trustee, and not entitled to withhold the above monies from the plaintiff or her guardian:—

Held, to be effective, the appointment by the parent should have been in writing, as also any trust he may have intended to create for the plaintiff during her minority. That the provision of the insurance policy was a bare trust under which the money was payable to the cestui que trust, if of age, otherwise to her guardian. Meagher, J., dubitante, expressed no opinion.

Loasby v. Egan, 27/349.

5. **Resulting trust—Advancing money.**]—The mere fact that a certain person advanced money to his son-in-law with which property was purchased and improvements made, where the evidence showed that he had otherwise nothing to do with the transaction, and the advances were repaid, does not cause a resulting trust in favor of that person, to be availed of by his creditors in an action for a declaration against the son-in-law.

McKenzie v. Ross, 33/252.

6. **Winding up company—Director may purchase.**]—As soon as a company is in the hands of the Court in liquidation, the trusteeship of a director ceases, and he may become purchaser of property of the company. (Iron Clay Brick Co., 19 Ont. 120, distinguished.)

Re Mabou Coal and Gypsum Co., 27/305.

7. **Mortgage to trustee individually—Rights of cestui que trust — Judgment creditors.**]—D., who was trustee for his sister, invested trust funds in a mortgage, taking and registering it in his own name, with nothing to show the trust. Judgments having been recovered against him in his individual capacity, it was contended that a fund which had been realized on foreclosure of the mortgage was bound thereby:—

Held, that the rights of the cestui que trust had priority. Per Townshend and Graham, JJ., because equitable interests not being registrable, the Registry Act does not refer to them.

Oxley v. Culton, 32/256.

8. **Trustee becoming tenant in common in trust property—Resulting trust—Partition—Amendment.**]—Action for partition of lands. Plaintiff was executor, trustee and solicitor for the estate of S., and during the time he so acted became purchaser in his own name, but for the benefit of the estate, of four undivided ninths interest in certain lands. Then on his own personal behalf he purchased four other undivided ninths in the same lands from outsiders. He was removed from his office of trustee, and now brought partition against his successors in the trust. Their defence was that plaintiff had made the purchase out of trust funds and therefore constructively for the benefit of the estate. On trial it was found that he had made the purchase with his own monies, but held, that he must convey his interest to defendants on being repaid his outlay.

Though the defendants had failed in their allegation that the purchase was made out of trust funds, yet it was perfectly competent for the trial Judge to make the amendment necessary to afford them relief as above, on other grounds. Decree to pass, to be varied by deducting from the amount to be paid by defendants the profits received by plaintiff while in possession.

But, per Graham, E.J., delivering the judgment of the Court, "I think the plaintiff had good ground for contending that he was not incapacitated from purchasing this interest which was not the trust estate, nor a claim against the trust estate. No authority was cited for the position that a person occupying a fiduciary relation to tenants in common, could not purchase a share which would

make him a tenant in common with them. However, I do not express any opinion at variance with the judgment. There might be a case of a person occupying such a relation, purchasing an interest from a third party which would be very like an encumbrance on the estate of his cestuis que trust having ascertained its value, by reason of his position."

McDonnell v. Smyth, 26/259.

9. **Trust for payment of debts—Cannot be invoked by third persons.**]—Certain heirs at law of a deceased person made a conveyance to W. R. "in consideration of W. R. paying all debts due and owing by the late G. R., and discharging all debts against the estate of the late A. R." At the suit of a creditor against W. R.:—Held, that the provision was one entirely "res inter alios" as regarded him, that it created no trust for the creditors of G.R. and A.R., but was a mere contract between the parties to the deed, enuring exclusively to the benefit of the party from whom the consideration moved.

Burris v. Rhind, 29 S.C.C. 498.

10. **Improper investment by trustee—Acquiescence by cestui and settlor—Liability of surety—Parties.**]—F. withdrew from deposit in a chartered bank and deposited with and loaned to the unchartered firm of F. & Co., of which he was a member, certain trust funds, which were lost in that firm's insolvency. This action was by F.'s successor in the trusteeship against his sureties. The defence was acquiescence by the cestui que trust (a feme sole who was also the settlor), in the course of F., without notifying the sureties:—

Held, that such acquiescence was not shown as against a lady ignorant of business matters, by the fact that F. had communicated to her that some portion of the funds was held by F. & Co. until he could get good securities, as she might have supposed that this meant that it was simply placed in their vault as were the trust papers. Nor by the fact that she drew a cheque on F. & Co., as this might relate only to income.

Also, under O. 16, R. 8 (1888, c. 11, s. 67 to the same effect) the matter may be inquired of without joining the cestui que trust, but.

Semble, but ought not to be found against her without adding her as a party according to the rule.

(Appeal dismissed in the Supreme Court of Canada.)

Eastern Trust Co. v. Forrest, 30/173.

Eastern Trust Co. v. Bayne, 28 S.C.C. 565.

11. **Absolute transfer — Oral trust — Construction.**]—Plaintiff transferred his interest in an option to purchase mining areas to defendant. Attached to the transfer was a verbal understanding, the nature of which was disputed, but which was found to be, (1) that defendant should reimubrse himself certain advances out of the proceeds when the areas were disposed of; (2) pay the balance to the M. Co., to which plaintiff was indebted, and in respect of which indebtedness he was then being sued, defendant being the M. Co.'s solicitor in the action.

Defendant, against plaintiff's protest, disposed of the rights to W., also made a defendant:—

Held, in the Supreme Court of Canada, revising to some extent the decree of the Supreme Court of Nova Scotia, that in any view, the transfer to W. was legitimate.

As to the amount received therefor from W., it should be applied, (1) to reimbursing defendant M.'s advances; (2) the balance to belong either to the M. Co. or to the plaintiff. It being doubtful whether the M. Co. had not forfeited its rights by repudiating all connection with the transaction and refusing to advance money, it should be allowed a hearing before a special referee on thirty days notice, as to its right to participate.

Oland v. McNeil, 34/453, 32 S.C.C. 23.

12. **Construction of document—Church endowment fund—Participation in.**]—By a declaration or prospectus issued under an Act of the Legislature, a large sum of money, raised by subscription, was administered in trust for the support of

the ministry of the Church of England in Nova Scotia. There was no doubt as to the right of the plaintiff, the rector of Annapolis, to participate in this fund but for the following section of the prospectus:—

"13. As this fund is raised with a view to the support of the ministry in places where a sufficient provision for the clergyman cannot be secured, it is to be understood that no clergyman receiving an income of £250 currency ($1,000), and upwards per annum, from any of the sources mentioned in the note to clause 9, shall be entitled to any payment from this fund."

The parish of Annapolis paid its rector a salary of $840, made up of $740 from parish endowments, and $100 paid by the congregation. It also paid an assistant appointed by the rector $600, making a total of $1,440, as provision for clergymen. The work of the parish could not be carried on without an assistant.

In 1887 the committee having the fund in charge declined to continue further assistance to the parish of Annapolis, and a case as to the propriety of its action was stated for the opinion of the Court. The potential ability of the parish to raise a larger amount of money was not stated:—

Held, that the plaintiff was entitled to continue to participate.

Ritchie v. Diocesan Synod of Nova Scotia, 21/309, 18 S.C.C. 705.

13. **Constuction of deed—Life estate and gift over—Vesting.**]—T. C. K. by deed dated January 2nd, 1879, conveyed a number of securities to trustees upon trust to pay the interest and dividends to himself during life, and after his death to his wife, until the younger of two of his daughters, Beatrice and Theodora, should attain the age of 21 years, and upon such attaining, to hold the said securities to the sole and absolute use of the said Beatrice and Theodora, share and share alike, and of the survivor of them in case of the death of either of them. Provided that in the event of the said Beatrice and Theodora dying, leaving children, then and in such case, upon trust to transfer and assign such securities unto such child or children, etc.

T. C. K. died in 1889, his younger daughter, Theodora, February, 1882, his wife, September, 1882. The surviving daughter, Beatrice, attained her majority 1896, and subsequently married:—

Held, that she was entitled to receive the whole fund absolutely, not only a life estate, and that the gift over to her children, referred only to the event of her having died leaving children, before she attained the age of 21 years.

Jones v. Smythe, 32/95.

(NOTE.—In the two cases of Jones v. Smythe which stand together in the report, the judgments were inadvertently interchanged in the press. The references of the Digest have been altered accordingly.)

14. **Construction of deed—Intention of settlor—Vesting.**]—By the terms of a trust deed made by T. C. K., 23rd October, 1879, a sum of money was given to trustees, the interest or income to be applied, after the death of the settlor, for the benefit of his wife Emily and his two children, Theodora and Beatrice, that is to say, one-half to his wife for life, and the other half to her to be used for the support, maintenance and education of his two children. After providing for certain contingencies, the deed proceeded as follows:—

"And upon the further trust that in case the said Theodora shall depart this life in the lifetime of the said Beatrice after the decease of the said Emily, without leaving any issue her surviving, then that the said trustees, or the survivor of them, shall pay the whole of the interest dividends and annual income derived from such trust fund to the said Beatrice for her life upon her receipt for her separate use."

Theodora died in the lifetime of her mother Emily, before Beatrice attained 21 years of age:—

Held, that on the death of Theodora her share became vested in Beatrice subject to the right of her mother to receive

same until Beatrice attained 21 or married, and that Beatrice was entitled to the whole income after the death of her mother.

Jones v. Smythe, 32/66.

(NOTE.—See note to last case above.)

14a. **Infant—Separate funds for maintenance—Least beneficial must be exhausted first.**]—By the will of T. C. K. the income of certain funds bequeathed to his infant daughters was to be applied to their maintenance until they should reach full age or marry, in such manner as his executors should think proper and reasonable.

By a codicil testator provided that if such income should prove more than sufficient to reasonable requirements, the surplus should be added to and form part of the principal sum.

By the terms of an existing deed in trust made by testator, each infant was already entitled absolutely to the income of a fund thereby set apart:—

Held, the executors were bound to exhaust the income derivable under the will, in the support and maintenance of the infants before resorting to that arising under the trust deed, on the principle that where there are two funds to be drawn from, recourse must first be had to that which will ultimately be least beneficial to the infant.

Jones v. Smythe, 32/95.

(NOTE.—See note to 13 above.)

15. **Trust fund in hands of executor—Arrears of interest—Citation by legatee—Legacy having been separated he is not a creditor—Jurisdiction.**]—A testator bequeathed to certain of his children the income on certain sums named. The executors appropriated the principal sums to that purpose and separated them from the rest of the estate. The income having fallen into arrears the beneficiaries cited the executors into the Probate Court, which found certain sums to be due and ordered them paid out of the body of the estate. The executors appealed:—

Held, that after separation by the executors of the above sums from the body of the estate it was not liable for any claims arising in connection with them, and the beneficiaries not being interested as creditors or otherwise in the estate, had no right of citation, and the Judge of probate in making the decree appealed from was without jurisdiction. The funds not having been dissipated, and being in the hands of persons liable for their administration, the proper recourse of the beneficiaries was against these persons in another Court.

In re Estate of David Morse, 31/416.

16. **Assignment for creditors—For benefit of insolvents—Trust follows lands**—Specific performance at suit of judgment creditors—Oral trust void—Statute of Frauds.

See SPECIFIC PERFORMANCE, 6.

17. **Conveyance of land to third person—Action by real owner for declaration of trust—Fraud on creditors—Relief decreed.**]—The parties held not to be in pari delictu, and the plaintiff entitled to relief as the less culpable of the two.

See FRAUD, 15.

18. **Joint undertaking—Quasi trust.**]—The adventure of a former associate relates back to the benefit of both, unless there has been notice terminating their relations.

See PARTNERSHIP, 5.

19. **Dealings between surviving partner** and widow of deceased partner—Fraud and undue influence—Acquiescence and laches for seventeen years—No bar as against a trustee—Release set aside.

See PARTNERSHIP, 6.

20. **Railway company—Deposit** of bonds as security—First and second mortgagees—Right of second to purchase at sale by first—Obligation as trustee for the company.

See MORTGAGE, 12.

21. **Unincorporated benefit society—**Oddfellows, Manchester Unity—Trustees may maintain action against a defaulting officer—O. 16, R. 9.

See ODDFELLOWS.

UNDUE INFLUENCE.

See DEED, 11, PARTNERSHIP, 6, WILL, 1.

USAGE.

See CUSTOM.

USURY.

See INTEREST, 3.

VENDOR AND PURCHASER.

See LAND, SALES.

VENUE, CHANGE OF.

See PRACTICE, 58.

VERDICT.

See JURY.

WAGER.

See GAMBLING.

WAGES.

Fisherman, seaman, etc.]
See SHIPPING, 1.

WAIVER.

1. **Of service by appearing to writ—** And of right to move against attachment of vessel, by furnishing an undertaking which induces the attacher to abandon his levy.
See PRACTICE, 4.

2. **By appearing by counsel.**]—Canada Temperance Act prosecution.
See PRACTICE, 5.

3. **Security on arrest** under O. 44 R. 1.]—A defendant by voluntarily giving bail does not lose his right to move against the proceedings. DeWolf v. Pineo, 1 N.S. Dec. 26, overruled.
See CAPIAS, 15.

4. **By pleading.**]—A party does not lose his right to apply to strike out pleas, by replying thereto.
Mahon v. Lawrence, 21/284.
Bank of British North America v. Yetman, 26/481.

5. **Notice of trial—Waiver.**]—Defendant, after giving notice of trial, accepted service of a reply:—Held, that by so doing he had waived his notice, by admitting that the cause was not at issue.
Cummings v. Pickles, 32/489.

6. **Recognizing what is null.**]—The award of an arbitrator was held to be null and void, because made out of time:—Held, that a party moving to set it aside had not waived his right by corresponding with the arbitrator in reference to his award, because it was not shown that at the time he had notice of the error, because the award was in itself null and void, and because the other party could not set up as a waiver, what had passed between his opponent and the arbitrator.
McKay v. Nicol, 28/43.

7. **Marine insurance application—Failure to answer.**]—Where all the surrounding circumstances as to ownership, interest, etc., are known to the underwriters, the acceptance of an application wherein no answer is returned to the question "On whose account," will be taken to amount to a waiver.
See INSURANCE, 20.

8. **Conditions in policies.**]—Authority of agents to waive.
See INSURANCE, 2, 3, 4.

9. **Right of forfeiture** in building contract.]—Time limit. Acquiescence in the other parties' default.

See CONTRACT, 21.

WAREHOUSEMAN.

Liability of railway as warehouseman of goods carried, after arrival at destination.

See RAILWAY, 9.

WARRANT.

See also CANADA TEMPERANCE ACT, CONSTABLE, CRIMINAL LAW, LIQUOR LICENSE ACT, ETC.

1. **General warrant.**]—A search warrant issued by a justice of the peace and addressed to any constable, directed search to be made of the houses of R.M. and others named, "or any other house at Glace Bay, if there is suspicion that such goods and wares may be in such house," and the arrest of R.M. and others named "or any other person in whose possession the goods may be found, etc."

In an action by R.M. against the constable for entering under the warrant:—Held, that it was bad as being a general warrant, and as delegating the discretion of the magistrate to act on suspicion.

McLeod v. Campbell, 26/458.

2. **Arrest without warrant—Code 25.**]—In an action for illegal arrest and imprisonment under a warrant which was bad because not indorsed for execution in the County in which the arrest was made, it is open for the defendant to show, and for the jury to consider, whether he did not act under Code 25, the offence charged being one for which an arrest might be made without a warrant.

Jordan v. McDonald, 31/129.

WARRANT TO CONFESS.

See PRACTICE, 59.

WARRANTY.

See DEED, 1, INSURANCE, SALES, 4, 21.

WAY.

See RIGHT OF WAY.

WIFE.

See DOWER, HUSBAND AND WIFE, MARRIED WOMAN'S PROPERTY ACT.

WILL.

See also EXECUTORS AND ADMINISTRATORS, SUCCESSION DUTY, TRUST.

Testamentary capacity, 1.
Conditions, Restrictions, etc., 6.
Miscellaneous, 25.

1. **Testamentary Capacity—Burden of proof—Undue influence.**]—Where the circumstances which attended the execution of a codicil to a will shortly before the testator's death are such as to arouse the suspicion of the Court, it is on a person taking a benefit, and who was concerned with the preparation and execution of the codicil to dispel that suspicion, and the credibility of that person is a matter fairly open to the Judge of Probate.

In re Estate E. P. Archbold, 34/254.

2. **But there is no undue influence** in the mere fact that that person, a niece of testator's deceased wife, who had lived with her uncle, the testator, for many years, and in the latter years of his life as his housekeeper, may have persuaded him that he should make some better provision for her than was contained in the original will.

And though there is ground for holding that a testator at the time of executing a codicil had not sufficient mental capacity, yet if he was competent at the time he gave instructions for its drafting, the act is valid.

Kaulbach v. Archbold, 31 S.C.C. 387.

3. **Undue influence.**]—Deceased, on her death bed, made a will bestowing four-fifths of her property on her step-daughter, and appointing the husband of her stepdaughter sole executor. The will was executed in the presence of the solicitor by whom it was drawn, and of the attending physicians. It was closely similar in terms to a former will, but reduced certain legacies. There was evidence that the deceased understood its terms and was of sound mind.

Held, reversing the decree of the Judge of Probate, that under the circumstances the burden of showing undue influence was on those attacking the will. That it would be unreasonable to assume that the deceased in making a new will wished to duplicate the provisions of a former one.

Re Estate Annie Fitch, 26/195.

4. **Competency of testator—Expert witness.**]—The will of M. was attacked on the ground of mental incapacity, owing to weakness resulting from illness. The evidence showed that notwithstanding the illness from which he was suffering at the time his instructions for the will were given, his answers to all questions asked were coherent and sensible, and, in the opinion of the person who took the instructions, he comprehended the questions, and the will as a whole. At the time the will was executed he was in a drowsy condition as the result of his disease (pneumonia), and had to be aroused from time to time:—Held, he had made a valid will.

Held, also, per Henry, J., that the following question was beyond the scope of any that might be asked of a medical expert witness, who had seen the deceased, because it presupposed a knowledge of law as well as medicine: "Would you say that the deceased, in his condition, at the time the notes of his will were being taken by Mr. F., was in a condition of sufficient mental intelligence to dispose of his estate?"

Also, per McDonald, C.J., that a son might have suggested claims which testator had recognized in his will, without illegality, provided he did nothing to coerce the will or bias the judgment of the deceased.

Re Estate John A. P. McLellan, 28/226.

McLaughlin v. McLellan, 26 S.C.C. 646.

5. **Insane delusion—Lucid interval—Burden of proof.**]—The will of a testator, revoking one made some seven years before, materially reduced bequests to his wife and son, and bestowed substantial portions of his large property on collateral relatives. It was shown that before and after the making of this last will, the testator was laboring under a wholly groundless and insane delusion to the effect that his wife and son were maintaining improper relations to one another, amounting to monomania. Otherwise he appeared perfectly rational.

Held, rejecting the will, that where an insane delusion of sufficient intensity to cause suspicion and aversion to take the place of natural affection, is shown to have existed before the making of a will, it is on the person supporting it to show that at the time of its execution the delusion was inoperative.

Re Estate John Farquharson, 33/261.

6. **On further appeal,** the Supreme Court of Canada, Sedgwick, J., dissenting, reversed the above result, holding that the fact that the testator in making his will had made provision for his wife and son at all, was proof that he was not at the time laboring under such a delusion with regard to them.

Skinner v. Farquharson, 32 S.C.C. 58.

7. **Charge for maintenance of widow.**]—Action for declaration.

See CHARGE, 1.

8. **Not a personal obligation** of devisee of the fee.

See CHARGE, 2.

9. **Conditional devise—Religion of devisee—Statute of Limitations.**]—A testator devised an undivided one-third interest in land to A.M., an infant grandson, who was to become seized on arriving at the age of 26, except "in the event of the said A.M. embracing the

doctrines of the Church of Rome, and at any time after attaining his majority, acknowledging himself in connection with that Church, then all his interest in such land should pass, etc."

Action for the possession of the above interest by the grantee of the administrator of A.M., against the owners under the will above, of the remaining portions, brought in 1890.

The evidence showed that A.M. "had a crucifix and holy water, observed Catholic fasts, said it was the true religion, approved the doctrine of extreme unction, argued that the foundation of that Church was in St. Peter, and that he had the keys of Heaven. Attended Roman Catholic chapel, married a Catholic, had his children christened by a Catholic priest, used holy water and worshiped a crucifix."

Held, that A.M. had "embraced the doctrines of the Church of Rome," but there was no evidence that he ever "acknowledged himself in connection with that Church," which was necessary to be proved to defeat his right of seizin, or that of those claiming under him.

But neither A.M. nor any one claiming under him having ever had possession, though he had become entitled in 1862, the remaining heirs might set up adverse possession, their possession not being that of A.M. under R.S. c. 112, s. 17.

Laurence v. McQuarrie, 26/164.

10. **Condition of making no claim.**]—Deceased, by a codicil to his will released his daughter, the defendant, from any indebtedness in case her share of the estate should not cancel it, "on condition of in no way making any claim, or causing any dispute in regard to the management by my executor." By a subsequent codicil, she was substituted as executrix. She did make a claim for services rendered deceased:—Held, that as the carrying out of the above condition would prevent her from taking or defending proceedings to protect her rights as executrix, it was void. (Weatherbe, J., dissented.)

Townshend v. Brown, 22/423.

11. **Contingency—Whether to happen in testator's life.**]—A clause in the will in question read as follows: "I give, devise and bequeath the lots and stores . . . unto my sons J. and T. equally; but in the event of the death of my son T., unmarried, or without leaving issue, then his interest in . . . shall go to and be the property of my said son J., or his children." There was also a codicil: "I do hereby give, devise and bequeath unto my son R., providing he returns to New Glasgow to live, an equal interest with J. and T. in the said lots and stores . . ." R. died in the United States shortly after the death of the testator, without having reurned. This action was by T., for a declaration as to the nature and extent of his interest.

Held, that the codicil must be read with the will, and being of later date must be preferred in construction, and to give effect to both, the testator in qualifying the estate to be taken by T., must be held to have had in mind the contingency of T.'s death before the will took effect. McDonald, C.J., dissenting.

In the Supreme Court of Canada:—Held, reversing the above, that R. having died without complying with the condition of the codicil, it did not take effect, nor affect the construction of the will. That T. and J. took as tenants in common in equal moities, the estate of J. being absolute, and that of T. being subject to an executory devise over, in case of death at any time, and not merely in the lifetime of the testator. Also, that the word, "equally," referred to the area of the property devised, not to the character of the estates to be taken by the tenants in common.

Fraser v. Fraser, 28/172. 26 S.C.C. 316.

12. **Devolution—Devise in fee—Proviso for reversion held void.**]—By his last will C.B.B. devised and bequeathed all his real and personal estate to his wife "her heirs, executors and administrators for her own use and benefit" with full power of disposing of the same. "Provided always that in the event of my said wife not having fully disposed of said property, real and personal, dur-

ing her lifetime, or by her last will and testament, then, as to so much thereof as shall remain at the time of her death, in respect of which she shall die intestate, my will is that my trustees, afternamed, shall stand possessed thereof, and that the same shall vest in them, etc."

The widow died intestate, leaving a large amount of property undisposed of, and a case was stated for the opinion of the Court as to whether it descended to her representatives or to the trustees of the will of C.B.B.

Held, that the widow had taken the property absolutely, and that the proviso above was void as repugnant to law, amounting to an attempt to make a will for her; or to provide for a devolution of her estate upon intestacy otherwise than as the law directs.

Bowman v. Oram, 26/318.

13. **Estate tail—Act abolishing—Executory devise over.**]—A testator who died in 1859, devised certain real estate to his grandson E., and in the event (which happened) of his not returning from sea, to his son J. But should J. die "without leaving any lawful heirs, then I order that all my real estate . . revert and fall back to my great-grandson P., and should my great-grandson P. die before my son J. (as he did), . . . or without any heirs, then . . . to S.Z."

J. became seized and held the real estate until 1891, when he sold in fee to defendant, and this action was by S.Z. against J.'s grantee, claiming under the will on the death of J.

Held, that the devise to J. was in fee simple, either under the Wills Act (R.S. 5th Series, c. 89), or under the Act of 1851, abolishing estates tail, but that there was a valid devise over to plaintiff in the event of J.'s dying without issue, the expression "lawful heirs" meaning children or issue, to which defendant's estate derived from J. was subject.

Defendant appealed to the Supreme Court of Canada:—Held, that the expression "lawful heirs" was equivalent to "heirs of his body," and that there was created an estate tail within the prohibition of the Act of 1851 abolishing estates tail, after the passing of which there could be no valid devise over expectant, where there was no estate tail to support the remainder.

Per Gwynne and Girouard, JJ., that this result was accomplished not by the Act of 1851, but by the Act as amended in 1865, during the time that J. stood seized.

Zwicker v. Ernst, 29/258, 27 S.C.C. 594.

14. **Joint tenancy—Tenancy in common.**]—A will devised certain property to the testator's two sons, their heirs, etc., and provided that the devisees should jointly and in equal shares pay the 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 2, 3, 4, 5, 6 and 7 years respectively. The estate vested before the statute abolishing joint tenancies was repealed in Nova Scotia.

Held, a joint tenancy was created. Though slight words of the instrument of creation would be construed as an intention to create a tenancy in common, yet the above provisions regarding payment of debts and legacies, and the direction that the devisees should "jointly and in equal shares pay, etc.," clearly indicated an intention to create a joint tenancy.

But on appeal to the Supreme Court of Canada:—Held, reversing the above, Taschereau and Gwynne, JJ., dissenting, that there was evidence of an intention on the part of the testator to effect a severance of the devise, and that the devisees took as tenants in common.

Clark v. Clark, 21/379, 17 S.C.C. 376.

15. **Vested and contingent interest—Protection against waste.**]—By his will a testator provided as follows: "I give, devise and bequeath unto my dear wife J. all my real and personal estate, etc., to have and to hold the same to my said wife J., her heirs, executors, etc., forever." . . . "And my will is further that in case there should be any child or children of my deceased brother Maurice living at the time of the decease of

my said wife, that such child or children should receive out of the proceeds of the said property, at her decease, the sum of £3,000." The plaintiff, an only son of Maurice, brought suit to protect his expectancy against waste or dissipation by the widow:—Held, the estate did not vest in plaintiff until he had survived the widow, a contingency which might not happen, and this being the case, he could not maintain action against her. On appeal to the Supreme Court of Canada:—Held, reversing the above, that plaintiff had a vested contingent interest, and was entitled to have the estate preserved, so that the legacy might be paid in case of the happening of the contingency on which it depended.

Duggan v. Duggan, 22/20, 17 S.C.C. 343.

16. **Trust—Directions—Vested interest.**]—The testator died in 1875, leaving M., a daughter by a first wife, a second wife, and her daughter, E. He devised and bequeathed all his estate to his executors upon trusts as follows: (a) his farm to the use and occupation of his wife during life or widowhood, then to be conveyed to E. (b) a sum of $1,600 to be invested for the support of E. during life (with an allowance of $50 per year out of principal, if necessary because of sickness), then to wife during life or widowhood. (c) the residue to be invested for the benefit of the wife during life or widowhood, then to E.

E. died April, 1887. Her mother died May, 1887, and a case was stated for the opinion of the Court between M. and the infant children of E., as to the distribution to be made:—Held, (a) where there is no gift, except by direction to transfer, from and after a stated event (i.e., the death of testator's wife), the vesting is postponed until after the happening of the event, unless from particular circumstances a contrary intention can be inferred, consequently no estate in the farm vested in E., and her infant children could not inherit from her; M. was therefore entitled to share equally with them; (b) that E. took an interest in the fund which entitled the children to inherit from her, to the exclusion of M.; (c) that the residue was in the same position and subject to the same doctrine as the farm, and M. was entitled to share in it equally with the children.

Williams v. Thurston, 21/363.

17. **Vested or contingent interest—Repugnant restrictions.**]—A testator directed his executors to appropriate and invest ". . . the sum of $20,000, and to pay and apply the income therefrom, half yearly, to and for the use of my son A., until he shall have arrived at the full age of 28 years, and upon his attaining said age, to pay said sum, and its accumulations and unpaid income, if any, or deliver the securities representing the same to him." The will proceeded to give A. a power of disposition by will, or in default thereof, that the whole should go to his children, if any, or revert in failure of issue to testator's estate.

Held, that inasmuch as the fund was separated from the rest of testator's estate, and as A. was entitled absolutely to all income, and had a power of disposition by will, he took a present and absolute vested interest in the principal sum, to which the subsequent deferring of payment until he should be 28 years old was repugnant and void. And that A. having attained the age of 21 years, was entitled to receive the whole bequest.

Butler v, Butler, 29/145.

18. **Similar bequest — Dying during minority.**]—The testator made an exactly similar provision for his son J., who survived him, but died at the age of 12 years:—Held, that J.'s interest was not divested by death during his minority, and that his administrator was immediately entitled to the whole.

Butler v. Butler, 29/145.

19. **Vested or contingent interest—Deferred payment.**]—A testator directed as to the residue of his estate, including legacies, which might lapse, that his executors and trustees should "hold the same and keep it invested in safe securities and to re-invest and add thereto from time to time the income therefrom, until my youngest surviving child shall

attain the full age of 21 years, and thereupon to divide such residue and its accumulations, and unapplied income, if any, share and share alike . . (among certain named children). . . and the issue of any one or more of my children last above named who may have died before such distribution is actually made . . ."

Held, that the children named took a present vested interest in the residue, which was liable in each case to become divested in the contingency of dying without issue, and that the time for distribution was lawfully deferred until the youngest child should be 21 years of age.

One of the children named having died, after the testator, unmarried, and without issue, but leaving a will in which she devised her interest in the said residue.

Held, that when the time came for distribution, her devisees would be entitled, and that her interest on her death did not vest in the surviving residuary legatees of her father.

Another of the children named, having survived the testator, and died at the age of 12 years:—Held, similarly, that the estate in the residue having vested in him, his administrator was entitled, and that a provision of the testator's will providing for a lapse in such a case was repugnant and void.

Butler v. Butler, 29/145.

20. **Power of appointment—Vesting of estate.**]—Succession duties. Construction of Act.

See SUCCESSION DUTIES, 2.

21. **Devise of residue—Construction.**]—A testatrix directed her executor to convert her estate into money, and out of the income arising therefrom, first to pay her sister C. annually for life $300, the balance equally between the wives and children of her sons R. and J. Another clause provided ". . . that the whole of the principal sum of the residue of my estate, subject only to the annuity of my sister C. . . shall be paid and applied and the income thereof shall be paid and applied to the use and benefit of the wives, etc. . . ."

The sixth clause of the will was as follows: "As to all the rest, residue and remainder of my estate, real as well as personal, and wherever situate, I dispose of the same as follows . . . to the wives, etc."

Held, that she had disposed of her whole estate, including the portion from which the annuity to her sister C. was derived.

Re Estate Mary Watt, Mitchell v. Watt, 29/100.

22. **Vested estate—Residuary legatee with power of appointment—Insane without making will.**]—Special case stated between the trustees under the will of J. T., and the persons entitled thereunder, as to the disposition to be made of the share of E., one of the testator's daughters, married to M., and domiciled in England.

The trusts of the will were: (1) to invest, and keep invested, all the estate; (2) to pay the income, in equal shares, to testator's four children; (3) in case of the death of any child before reaching the age of 21, and unmarried, to divide his or her share among the survivors; (4) on the death of any child after reaching 21, to pay over his or her share as by his or her last will directed.

After reaching the age of 21 and being married, E. became insane, but without making a will.

The Court was unanimously of the opinion that the interest of E. was vested, under the terms of the will, and would not revert in the case of her dying without appointing, also that it was not subject to the Married Woman's Property Act, also that M., as husband of E., was entitled to receive and reduce into possession the share of the principal moneys belonging to E., subject to a settlement for herself and her children, a scheme for which should be reported to the Court by a Master, after hearing the parties.

Dwyer v. Mapother, 26/294.

23. **Ambiguity—Life estate.**]—The will of C. divided his estate into two parts, one of which was to go to his son absolutely; "The other one of such parts to be invested by my executors and the

proceeds thereof paid to my daughter, A.M.C., from time to time, as the same accrue. On the death of my daughter, my executors shall take such steps as are necessary to secure to her children, free from each other's control, their mother's interest in my estate, and for that purpose, may pay them share and share alike, the money invested as herein provided, or may give them the proceeds as may best serve the interests of the said children . . . and should my daughter die before this trust becomes dischargeable, steps are to be taken to secure her interest to her children, in both instances free from each other's control . . ."

Held, that the word "proceeds" as used by the testator meant "income," and though a gift of income carries the corpus of the devise, yet there were words sufficient to indicate the purpose of the testator that A.M.C. should take only a life estate. Also, the will being evidently the drafting of an incompetent person, the words "interest" and "dischargeable" were not used in their ordinary technical sense.

Chubbock v. Murray, 30/23.

24. **Special discretion to executor—Does not continue to one substituted.**]—Deceased appointed plaintiff (his son-in-law) executor of his will to carry into effect certain dispositions of his property. By a codicil he gave him a discretion, if he thought fit, to pay certain legacies in land at a valuation to be fixed by himself. Subsequently he conveyed all his estate to his daughter, the defendant, upon certain trusts during his life, thereafter to dispose of his estate according to the conditions of his will. By a last codicil he appointed her his sole executrix, in substitution for plaintiff.

Held, that defendant, not plaintiff, was trustee for carrying out the provisions of the will, but that the discretion as to paying legacies in land "at a valuation to be fixed by himself" was of a personal nature, and did not continue to defendant, but that the Court might take over the function, and order a sale for the purpose of paying the legacies.

Townshend v. Brown, 22/423.

25. **Abatement of legacies.**]—Where there proves to be an insufficiency of assets to pay all bequests, and the will contains no direction as to which are to abate, the burden of proof as to the intention of the testator rests on those claiming preference; and appropriations of specific sums, the interest to be paid to certain children during life, abate with the rest; even though one of these be in favor of a son addicted to drink, qualified by the words: "I do not wish them to pay said son any money, nor pay anything for liquor supplied him, but only for necessary articles of living," which seemed to favor the idea that the testator had intended to adjust the sum to the purpose with nicety.

Re Estate Waddell, 29/19.

26. **Alterations — When considered made—Property afterwards acquired.**]—The will of C.M.L. contained five interlineations on one page, duly attested as required by statute, and at the bottom of the same page in the handwriting of the testatrix, the words: "I do this remembering that my brothers and sisters will inherit among them all that my father would have left me had I lived." Notwithstanding she survived her father, and inherited from him a large sum of money, and these words became important as bearing on her intention as to disposing of such inheritance.

Held, that the words standing at the foot of the page were an interlineation not properly attested, and that the burden was on the person seeking to incorporate them into the will, to show by some evidence that they were written prior to its execution, which not having been done, they were not to be considered as part thereof.

The will was made in 1886 when the testatrix was in a critical condition of health and looked forward to the likelihood of not surviving a dangerous surgical operation which she was about to submit to. Her father died in 1887; she in 1890. Before her father's death her estate was worth about $40,000, afterwards about $100,000.

The present application was to determine the disposition to be made of the amount the testatrix had acquired from

her father after the making of her will, the surviving heirs of her father asserting as against her residuary legatee, that such amount reverted back under a clause of her father's will: "should any of my children die without issue and without a lawful will, then their shares shall revert back to my estate, and shall be equally divided among my surviving children."

By R.S. 5th Series c. 89, s 21, every will is to be construed as if made immediately before the death of the maker, unless a contrary intention shall appear by the will.

Held, that C.M.L. had made a valid disposition of her whole estate. That apart from the interlineation held supra to be invalid, no intention to dispose only of the estate which she had at the date of the will, could be gathered from a reference therein to her estate as "worth $40,000," or a direction that her estate was to "continue as at present invested."

Per Ritchie, J., if circumstances outside the will can be considered, the intention that it should dispose of the whole is shown by the fact that she made no new will after the death of her father.

Semble, words in a will showing intention must be unequivocal, to work an intestacy, in the face of a statute meant to obviate such a result.

Re Caroline Lawson, Jordan v. Fairie, 25/454.

27. **Annuity—Apportionment — Power of sale.**]—A testator devised his real estate to executors in trust to pay an annuity to his wife, and to permit two parcels to be occupied by two children, and further permitted the executors to apportion the contributions of these parcels to the annuity in any way they saw fit. They apportioned the contributions in unequal sums based on respective values:—Held, under the will they were justified in doing so, it being an administrative, not a judicial act. Also, if the contribution of one of the parcels could not be provided for by the power of mortgage or leasing given by the will, the Court had power to order a sale.

Roche v. Roche, 22/211.

See also CHARGE.

28. **Letter—Whether testamentary.**]—Action by administrator for money of deceased. Defence gift inter vivos.

See GIFT, 1.

29. **Lost or destroyed codicil—Whether revoked—Surrounding circumstances.**]—Appeal from the decree of the Probate Court in favor of the validity of the will of A.M., dated 17th July, 1880, and two codicils, dated July 21st, 1882, and December, 1882, and refusing to admit to probate a codicil dated June, 1882, proved to have been destroyed in the presence of the testator, by the solicitor who drew the codicil of July 21st. The only evidence of the contents of the destroyed codicil was that of this solicitor, which went to show that it revoked the residuary bequest of the original will to D. College, substituting a specific legacy (amount not remembered), for the purpose of founding scholarships, also that it made a bequest (amount not remembered), to "some Presbyterian body," and left the residue undevised. This codicil was not specially revoked by the later ones, and the petitioner, in right of the next-of-kin, claimed that it was entitled to probate:—Held, that as there was nothing definite as to the contents of the codicil, either as to the names of legatees or amounts of legacies, there was not enough of substance remaining to justify its admission to probate. That so doing would be effectually to frustrate what could be known of the designs of the testator, by delivering the whole residue to persons in whose favor he had never manifested any testamentary intentions.

Re Estate Alex. McLeod, 23/154.

30. **On appeal to the Privy Council:**—Held, that though the reference in the codicil of July 21st, 1882 (which confirmed the original will and did not mention the codicils), was to the date of the will only, that was not sufficient in itself to restrict the confirmation to that document, yet other words and surrounding circumstances could and did convey such an intention with reasonable certainty, and accordingly the will after confirma-

tion, was no longer affected by the partial revocation made by the codicil of June.

McLeod v. McNab, 1891, A.C. 471.

31. **Proof in solemn form—Weight of evidence—Persons interested.**]—In 1877 the will of H. was proved in common form on the oath of K., one of the witnesses, who swore that it was signed by the testator in his presence, and in the presence of M.H., the other witness, and that the witnesses signed in the presence of each other. The will was probated and remained unquestioned for 24 years, when, after the death of the witness K., it was set aside by the Judge of Probate on the evidence of the other witness, M. H., and his brother, to the effect that the witnesses did not sign until after the testator's death.

Held, restoring the will, that in view of all circumstances, the high character borne by the deceased witness, K., etc., it was impossible to credit the evidence of the witness M.H. and his brother, both interested parties.

The devisee of a portion of the property under the will conveyed his interest to a third party, and by several intermediate conveyances it came to M., who opposed the setting aside of the will:—Held, that M., as "a party interested," was clearly entitled to be heard, though not specifically cited. And the naming specifically of heirs, devisees, legatees and next of kin in the Statute (R.S., 1900, c. 158, s. 34), was merely a matter of direction, leaving it open to those having an interest, to intervene for the purpose of protecting their rights.

Re Estate Ranna W. Hill, 34/494.

32. **Promise to provide by will.**]—Remuneration for services. Implied contract. Locus parentis.

See CONTRACT, 14, 15.

33. **As an inducement held out.**]—Fraudulent dealings. Undue influence.

See PARTNERSHIP, 6.

34. **Testamentary intentions,** at variance with will. Evidence rejected.

See EVIDENCE, 29.

WINDING UP.

See COMPANY, 33. PARTNERSHIP, 10.

WITNESS.

1. **Disobeying subpoena.**]—Semble, in civil, but not in criminal matters (e.g., liquor selling prosecutions), if a witness is not tendered his fees, he is not bound to attend.

See LIQUOR LICENSE ACT, 25.

2. **Tampering with witness.**]—

See CANADA TEMPERANCE ACT, 33.

3. **Generally.**]—

See EVIDENCE, 47.

WITNESSES AND EVIDENCE ACT.

See EVIDENCE, 47.

WORDS.

Defined, construed, referred to, etc.]—

"**Abide by the decision.**" See Appeal, 6.

"**Action.**" See Action, 1.

"**Adjust,**" "**Adjustment**"—of claims. See Probate Court, 15.

"**Advances.**" See Insurance, 19.

"**Against the form**" omitted. Indictment. Criminal Law, 19.

"**All the estate, etc.**". See Deed, 2.

"**British Law.**" See Shipping, 5.

"**By the Court.**" Order. See Practice, 38.

"**Decision.**" See Decision.

"**Drawing freights.**" See Shipping, 4.

"**Effectually prosecute.**" Bond. See Appeal, 33.

"**Faith.**" Juvenile offender. Reformatory. See Criminal Law, 28.

"**Feloniously**" omitted. Indictment. See Criminal Law, 9.

"**Grade**" in construction work. See Evidence, 43.

"**Horton's Sash Patent.**" See Patent.

"**In or from.**" See Criminal Law, 12.

"**In or near.**". Jurisdiction. See Magistrate, 7.

"**Information.**" See Information.

"**In front of.**" See Deed, 4.

"**In the County Court.**" See Affidavit, 2.

"**Joint Stock Company.**" See Company, 1.

"**Last dwelt.**" See Probate Court, 11.

"**Lawful heirs.**" See Will, 13.

"**Likely to be permanently injured.**" See Criminal Law, 6.

"**Nearest recurring anniversary.**" See Mines and Minerals, 10.

"**Offence,**" includes breaches of Provincial law. See Criminal Law, 4.

"**Owner**" of ship. See Criminal Law, 11.

"**Penalty.**" See Canada Temperance Act, 15.

"**Plead in bar.**" See Probate Court, 7.

"**Proceeds,**" "**Interest,**" "**Dischargeable.**" See Will, 23.

"**Ship.**" See Shipping, 10.

"**Street.**" "**Highway.**" See Trespass, 4.

"**Sureties,**" number required. See Replevin, 6.

"**Three most public places in settlement.**" See Impounding of Cattle, 1.

"**Vouchers.**" See Probate Court, 2.

"**Wages and earnings.**" See Married Woman's Property Act, 6.

"**Warranty,**" "**Warrant.**" See Sales, 24.

"**Within one year,**" "**In one year.**" See Interest, 4.

WRIT.

Of error.]—See CRIMINAL LAW, 16.

Of possession.]—See POSSESSION, 17.

Of summons, generally.]—See PRACTICE, 60.

Specially indorsed—Setting aside appearance.]—See PRACTICE, 1.

Specially indorsed—Setting aside pleas.]—See PLEADING, 40.

WRONGFUL DISMISSAL.

1. **Construction of contract of hiring.**]—Action by general agent for N.S. of the defendant company for wrongful dismissal of plaintiff from his office held under a written agreement, a term of which was as follows: "Each party hereto may terminate this agreement by giving the other written notice to that effect, and the agent shall not be entitled to any commission upon premiums collected or received after the expiration of such notice. . . ." The defendant company treminated the contract instanter, by written notice, and the defendant claimed damages, contending that the uso of the words "after the expiration," implied that a reasonable time was to elapse before the contract should terminate. The jury having found for plaintiff for $1,700 damages (which upon appeal the plaintiff offered to reduce), the defendant company appealed.

Held, allowing appeal, that the contract might be terminated at any time instantly, and that even admiting plaintiff's contention, the verdict could not stand, because the jury had not been instructed as to what was a reasonable time and thus made the error of awarding excessive damages.

Doyle v. Phœnix Ins. Co., 25/436.

2. **Hiring by provisional directors—Authority to bind.**]—Plaintiff brought action against defendant company for wrongful dismissal from its employ under a special agreement in writing, as follows:—

"We, the undersigned, jointly and severally agree to engage and hire C.M.O., engineer, for the period of one year from this date at a salary of $250 per month. The services to be performed to be in connection with railway and other surveys.

"A. C. R.,
"W. J. F.,
"J. McK.

"May 8th, 1893."

These persons were named with others as provisional directors of defendant company, in its act of incorporation,

passed 28th April, 1893, but the company was not organized until August, 1893.

Up to October, 1893, plaintiff was directed and paid by the above-named R., thereafter and until the end of June, 1894, the date of the dismissal, by defendant company.

Held, there being no resolution of the board of directors either in relation to his employment or dismissal, that the above contract was not made, and did not purport to be made, on behalf of defendant company, and even if so intended, was beyond the powers of three out of eight provisional directors before organization. (McDonald, C.J., dissented.)

Quære, had plaintiff chosen to bring action in respect to a general contract of yearly hiring, evidenced by the recognition by defendant company of the existence of an arrangement similar to that of May 8th, instead of relying solely on that contract, might he have recovered, at least a month's salary in lieu of notice. (And cf. FRAUDS, STATUTE OF, 9.)

O'Dell v. Boston and Nova Scotia Coal Co., Ltd., 29/385.

3. **Hiring in writing—Clause regarding dismissal.**]—Defendant and plaintiff had entered into a contract in writing, under which defendant agreed to employ plaintiff for the season, services to begin April 20th. It contained a clause under which defendant reserved the right to dismiss for cause. Afterwards defendant wrote plaintiff stating that operations would begin earlier than anticipated, and asking him to report for duty April 12th, which he did. Next day defendant dismissed him, tendering him enough to pay him to date.

Held, that plaintiff was at that date employed under the written contract, and was subject to the clause regarding dismissal for cause. And that drunkenness, alleged and proved by defendant, was sufficient cause.

Doyle v. Wurtzburg, 32/107.

4. **Contract of hiring—Not to be performed within one year.**]—Whether on a change of circumstances, a contract may be implied notwithstanding the Statute of Frauds.

See FRAUDS, STATUTE OF, 9.

5. **Board of Health—Employing physician.**]—The municipality liable ex contractu, but not for damages for wrongful dismissal. Construction of statutes.

See MUNICIPALITY, 3.

6. **Town Clerk.**]—Remuneration fixed from time to time by resolution of Council. No evidence of contract. No right to retain town moneys to meet supposed claim.

See INCORPORATED TOWN, 3.

7. **Recorder of incorporated town.**]—Under the Towns Incorporation Act, 1888, the Town Council not being the "corporation," and not being specially empowered by statute, may not dismiss a town officer for cause.

See INCORPORATED TOWN, 4.

8. **Right to better particulars.**]—The plaintiff claimed damages for wrongful dismissal from the position of manager. The defence set up in terms of general description, incompetency, acting beyond his authority, disrespect to his superiors, injury to defendant's business, etc., etc. The plaintiff applied on affidavit of his solicitor to the effect that it was impossible to draw a reply to such a pleading, for better particulars:—Held, in actions of this kind he was entitled to them to prevent being taken by surprise on trial, and though the Chambers Judge in refusing the application acted in a matter left to his discretion, yet his exercise of that discretion was subject to review on appeal.

Ashton v. Nova Scotia Cotton Co., 22/309.

9. **Erroneous deduction by Judge—Reversed on appeal.**]—In an action for wrongful dismissal, the plaintiff having been dismissed by defendant with one week's wages in lieu of notice, plaintiff contended that the contract had been one of yearly hiring. The County Court

Judge found that there was a weekly hiring, but that plaintiff was entitled to more than one week's notice. Both parties appealed.

Held, that the finding of the Judge as to notice required was wrong and should be set aside, but that substantial grounds must appear for setting aside his finding as to the nature of the hiring. There being no other witnesses but plaintiff and defendant, who contradicted each other directly, the preponderance was in favor of defendant.

Holloway v. Lindberg, 29/462.

10. **On a re-trial** it developed that the business of defendant had been taken over by the H.B. Co., with whom plaintiff continued during the term of employment agreed on:—Held, that it might be concluded that the contract of hiring between plaintiff and defendant thereupon came to an end by mutual consent.

Holloway v. Lindberg, 30/421.

11. **Burden of proof shifting.**]—Plaintiff, suing for wrongful dismissal, proved a yearly hiring by production of a written agreement and swore that he was dismissed by defendant. The only defence was that plaintiff had left the employ voluntarily. The parties being in direct conflict, and the weight of evidence appearing to be little, if any, in favor of defendant.

Held, plaintiff should recover, the burden of establishing his defence resting on defendant. Meagher, J., dissenting.

McInnes v. Ferguson, 32/516.

TABLE OF CASES DIGESTED.